



AMERICAN
CONSTITUTION
SOCIETY

SUPREME COURT REVIEW

2016-2017

First Edition

Edited by
Steven D. Schwinn

Foreword by
Erwin Chemerinsky

FEATURING
Case Analysis by:

Samuel R. Bagenstos

Amanda Frost

Brianne J. Gorod

Richard L. Hasen

**Ira C. Lupu &
Robert W. Tuttle**

Steve Sanders

Stephen I. Vladeck

TABLE OF CONTENTS

Introduction	1
<i>Steven D. Schwinn</i>	
Foreword	5
<i>Erwin Chemerinsky</i>	
Educational Equality for Children with Disabilities: The 2016 Term Cases	17
<i>Samuel R. Bagenstos</i>	
<i>Maslenjak v. United States:</i> Immigration, Expatriation, and the Plenary Power Doctrine	49
<i>Amanda Frost</i>	
<i>Bank of America v. Miami:</i> An Important Progressive Victory Due to a Surprising Fifth Vote	77
<i>Brianne J. Gorod</i>	
Resurrection: <i>Cooper v. Harris</i> and the Transformation of Racial Gerrymandering into a Voting Rights Tool	105
<i>Richard L. Hasen</i>	
<i>Trinity Lutheran Church v. Comer:</i> Paradigm Lost?	131
<i>Ira C. Lupu and Robert W. Tuttle</i>	
<i>Pavan v. Smith:</i> Equality for Gays and Lesbians in Being Married, Not Just in Getting Married	161
<i>Steve Sanders</i>	
Implied Constitutional Remedies After <i>Abbasi</i>	179
<i>Stephen I. Vladeck</i>	

Introduction

Steven D. Schwinn*

We are thrilled to bring you this inaugural edition of the *American Constitution Society Supreme Court Term Review*. In these pages, you'll find a series of outstanding critical essays, penned by the nation's top legal scholars and practitioners, on the most important cases and themes from the Supreme Court's October 2016 Term. You'll also find a splendid Foreword, written by Dean Erwin Chemerinsky, that puts these cases and themes in the broader context of key happenings and trends at the Court.

In the many panels and reviews of the Court's October 2016 Term, we sometimes heard that the Term was unremarkable, with no Big Blockbuster cases, no significant changes in the law, and no notable impacts on major political issues—at least as compared to so many other recent Terms. Many said that this was the direct result of an eight-member, equally divided Bench for most of the Term. That is: the Court was reluctant to take on major controversial cases without a full staffing.

But I think you'll find in these pages that this description of the Term is not exactly right. Indeed, I think you'll find that there were several quite significant rulings, even if they did not receive the kind of attention that the Blockbusters received in other prior Terms. And while these cases may not hit with the same immediate impact of some other major recent rulings, as our authors explain, their full impacts will unfold slowly, over time.

* Professor of Law, the John Marshall Law School (Chicago).

ACS Supreme Court Review

So here is perhaps a better way to summarize the October 2016 Term: The Court dealt with somewhat lower profile cases that often flew below the radar (at least comparatively speaking), but nevertheless resulted in significant changes in the law that we'll see over the next several years and decades.

Moreover, the major cases last Term split between conservative constitutional rulings and progressive ones. As you'll read in the following pages, on the one hand, the Court gave progressive constitutionalists plenty to worry about, from much enlarged religious liberty claims,¹ to sharply curtailed *Bivens* claims,² to (yet further) restraints on access to justice.³ On the other hand, the Court gave progressive constitutionalists some important reasons to celebrate. The Court handed victories to progressive causes in a consolidated pair of fair housing cases,⁴ election-law cases,⁵ a pair of IDEA cases,⁶ an immigration case,⁷ criminal procedure cases,⁸

¹ *Trinity Lutheran Church of Columbia v. Comer*, 137 S. Ct. 2012 (2017) (holding that a state's express policy of denying public grants to any applicant owned or controlled by a church violates the Free Exercise Clause).

² *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017) (severely limiting the *Bivens* doctrine).

³ *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773 (2017) (holding that state courts lacked specific jurisdiction to hear claims brought by plaintiffs who were not state residents, because there was not a sufficient connection between the forum and the specific claims at issue).

⁴ *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296 (2017) (holding that the City of Miami had standing to sue under the Fair Housing Act).

⁵ *Cooper v. Harris*, 137 S. Ct. 1455 (2017) (holding that the district court did not err in finding that race predominated in drawing legislative districts); *Bethune-Hill v. Virginia St. Bd. of Elections*, 137 S. Ct. 788 (2017) (holding that the district court used an incorrect legal standing in determining that race did not predominate in drawing certain legislative districts).

⁶ *Fry v. Napoleon Community Schools*, 137 S. Ct. 743 (2017) (holding that exhaustion under the Individuals with Disability Education Act is unnecessary when the basis of the plaintiff's suit is something other than the denial of the IDEA's core guarantee of a "free appropriate public education"); *Andrew F. v. Douglas County School District*, 137 S. Ct. 988 (2017) (holding that under the IDEA a school must offer an "individualized education program" reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances).

⁷ *Maslenjak v. U.S.*, 137 S. Ct. 1918, 1923 (2017) (holding that the government must establish that a defendant's illegal act played a role in her acquisition of citizenship in order to convict for "procur[ing], contrary to the law, the naturalization of any person").

⁸ *Buck v. Davis*, 137 S. Ct. 759 (2017) (holding that a criminal defendant demonstrated ineffective assistance of counsel when his attorney put on testimony that the defendant's race predisposed him to violent conduct); *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017) (holding that the Sixth Amendment requires that the no-impeachment rule give way in order to allow the trial court to consider

and a marriage-equality case.⁹ And the Court ruled in favor of free-speech rights in three First Amendment cases.¹⁰

Along with the cases and trends, as Dean Chemerinsky reminds us, no analysis of the Term would be complete without at least mentioning Justice Gorsuch, the Court's newest member. Although he participated in only a handful of cases last Term, he has already staked his territory on the Court, aligning squarely with the Court's most conservative wing. He also relished in his active participation, and did not shy away from sharing his opinions, even taking on the Chief (in a concurrence, no less).¹¹ In short, Justice Gorsuch proved himself to be quite conservative. And he was no wallflower. If this trend continues, he will be a major conservative force on the Court for decades to come.

Still, we can't but compare Justice Gorsuch's track record with the expected record of an imagined Justice Merrick Garland, whose nomination the Senate railroaded in the dishonest name of "leaving Justice Scalia's replacement to the voters." (And we can't but compare the *Court's* track record, now and in the future, with Justice Gorsuch instead of a Justice Garland.) We'll see soon enough the impact of the Senate's infamous and unprecedented take-down of Chief Judge Garland when the Court starts issuing major 5-4 rulings this current Term. (We'll report back on this in next year's edition.)

evidence of a juror's statement that he relied on racial stereotypes to convict a criminal defendant).

⁹ *Pavan v. Smith*, 137 S. Ct. 2075 (2017) (holding that a state may not deny married same-sex couples recognition on a child's birth certificate).

¹⁰ *Matal v. Tam*, 137 S. Ct. 1744 (2017) (holding that the "disparagement clause" in patent law violates free speech); *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017) (holding that a law that makes it a felony for a registered sex offender "to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages" violates free speech); *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017) (remanding the case and ordering the lower court to analyze a pricing regulation under the First Amendment).

¹¹ *See, e.g., Trinity Lutheran Church of Columbia v. Comer*, 137 S. Ct. 2012, 2025-26 (Gorsuch, J., dissenting) (criticizing the Court's distinction between religious *status* and religious *use*).

ACS Supreme Court Review

This inaugural Review would not have been possible without the support and effort of a number of individuals. First, I'd like to thank ACS President Caroline Fredrickson and the entire staff at the ACS for supporting this project. Next, special thanks go to Kara Stein, the Vice President for Policy Development and Programming. Without Kara's vision, support, and patience, this project could not have happened. Special thanks also go to Melissa Wasser, Law Fellow, whose tireless efforts ensured that our copy came out clean. (All editorial errors, of course, remain my own.) Finally, I'd like to thank our authors. These are national leaders in constitutional thinking, writing, and practice, and they graciously took time from their already-too-busy schedules to contribute to this publication. Thank you all.

I hope you enjoy reading this volume as much as I've enjoyed editing it.

Foreword:

October Term 2016

Erwin Chemerinsky*

This wonderful collection of essays captures the Supreme Court's October 2016 Term. Some of the essays are about constitutional issues, such as Richard Hasen's article on *Cooper v. Harris* and racial gerrymandering, and Steve Sanders's about *Pavan v. Smith* and the meaning of marriage equality. Some are about important statutory issues such as Samuel Bagenstos's on the cases involving the Individuals with Disabilities Education Act and Brianne Gorod's on the Court's Fair Housing Act decision in *Bank of America v. City of Miami*.

Some of the essays are very critical of decisions, such as Stephen Vladeck's scathing critique of *Ziglar v. Abbasi*, which dramatically limits the ability to sue federal officers, and the article by Ira C. Lupu and Robert W. Tuttle pointing to the very troubling implications of *Trinity Lutheran Church of Columbia, Inc. v. Comer* in requiring government aid to religious institutions. Some, though, are praising of the Court, such as Amanda Frost's examination of *Maslenjak v. United States* and what it says about how the Court now regards United States citizenship.

Each article is excellent, and together they provide a sense of the Court's work in the October Term 2016. Yet, by focusing on specific cases, I worry that there is not a sense of the whole term,

* Dean and Jesse H. Choper Distinguished Professor of Law, University of California Berkeley School of Law

ACS Supreme Court Review

and that inevitably there are important gaps.

By focusing on the individual cases, a crucial aspect of the term gets missed. From the first Monday in October until the April argument calendar, there were only eight justices on the bench. This affected every aspect of the Court's work, causing them to take and decide fewer cases and to avoid matters that were likely to lead to ideologically divided 5-4 rulings. There were no cases about the most controversial issues, like abortion, affirmative action, or gun rights. In fact, the Court was unanimous in over 50% of the decisions. This is not because the justices have suddenly found great consensus, but because of the types of matters on the docket.

Also, having only eight justices affected how many cases were decided. Many cases were decided narrowly with major questions left unanswered. For example, in *Bank of America v. City of Miami*,¹ the focus of Brianne Gorod's essay, the Court decided that the City of Miami was injured by the predatory lending practices of Bank of America and Wells Fargo and that these harms were sufficient for standing. But the Court reversed the Eleventh Circuit on the question of whether the harms were proximately caused by the discriminatory practices. The Court pointedly did not attempt to define the standard for "proximate cause."

Also, by focusing on a set of individual cases, it is easy to lose sight of how much this remains the Anthony Kennedy Court. Justice Anthony Kennedy was in the majority in 97% of the decisions, more than any other justice. Even focusing just on the non-unanimous cases, Kennedy was in the majority in 93% of all of the cases, far more than any other justice.

Of course, the most important development during the term

¹ *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296 (2017).

was the nomination and confirmation of Justice Neil Gorsuch. In Justice Gorsuch's few months on the bench, he was consistently with the most conservative justices, including voting 100% of the time with Justice Clarence Thomas. The term began with many expecting Hillary Clinton to be President and Chief Judge Merrick Garland, or perhaps someone even more liberal, replacing Justice Antonin Scalia. It ended on Monday, June 26, with Justice Gorsuch authoring a number of very conservative opinions that left no doubt that he will be on the far right of the Court.

The confirmation of Justice Gorsuch will have a long-term effect on the Court. At the time of his confirmation, Neil Gorsuch was 49 years old. If he remains on the Court until he is 90 years old—the age at which Justice John Paul Stevens retired—he will be a justice for 41 years.

Also, the significance of what occurred with regard to the nomination and confirmation process should not be lost. Prior to 2016, 24 times in American history there had been a vacancy during the last year of a President's term. In 21 instances, the Senate confirmed the nominee. In three instances, the Senate did not. But never before had the Senate held no hearings and no vote on a nominee. This will have long-term consequences for the Court. From now on when the President and the majority of the Senate are of different political parties, the President is not going to get anyone confirmed during the last two years of a term. Given the electoral map it looks unlikely that the Democrats can take control of the Senate in 2018, but if they do, no one President Trump nominates will get confirmed.

Prior to 2017, there never before had been an actual filibuster of a Supreme Court nomination. In 1991, there were 48 votes against the confirmation of Clarence Thomas, but the Democrats did not filibuster. In 2006, there were 42 votes against the

ACS Supreme Court Review

confirmation of Samuel Alito, but the Democrats did not filibuster. The Democrats, though, did filibuster the nomination of Neil Gorsuch, likely to express the message that they regard this as a stolen seat on the Court. The Republicans changed Senate rules to eliminate the possibility of a filibuster for a Supreme Court nomination.

I think these changes will have long-term consequences. It always has been that meaningful confirmation fights occur only when the President and the Senate are of different political parties. But no longer does a President whose party controls the Senate need to worry at all about picking a nominee palatable to the minority party. I think this will allow Republicans to pick more conservative justices and Democrats to pick more liberal justices. Conversely, when the President and the majority of the Senate are of different political parties, it is going to be very difficult (and sometimes impossible) to get any nominee confirmed.

A collection of essays on particular cases obviously only can cover a handful of the 60 cases that were decided after briefing and oral argument. What do I regard as some of the most important other cases not covered in these essays?

The most important free speech case of the year was *Matal v. Tam*.² The case involved a dance-rock group, comprised of Asian-Americans, that wanted to call themselves “The Slants.” “Slants” is a derogatory term often directed at Asian-Americans. Simon Tam, the leader of the band, said the goal was to appropriate this term back to the Asian community.

They were denied registration of the trademark on the ground that this is a term disparaging to Asians. The Lanham Act, the statute governing registration of trademarks, prohibits registration

² *Matal v. Tam*, 137 S. Ct. 1744 (2017).

of a trademark that “[c]onsists of . . . matter which may disparage . . . persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute.”³

The Court unanimously held that this provision of the Lanham Act was unconstitutional on the ground that it was viewpoint discrimination. The Court was emphatic that the government cannot regulate speech or deny benefits for speech on the ground that it is offensive, even deeply offensive. Although there were separate opinions by Justice Alito and Justice Kennedy, each joined by three other justices, all eight participating justices found that the law was impermissible viewpoint discrimination: the Slants could have registered a trademark for a name of a band that was favorable to Asian-Americans, but not derogatory.

Besides meaning that the Washington Redskins can register that as the trademark for their football team, the case likely will lead to challenges to other provisions of intellectual property law that can be seen as viewpoint discrimination. For instance, there is a provision of the Lanham Act that prohibits registration of trademarks that are “scandalous.”⁴ And the Court was clear that the government never can attempt to regulate speech based on its offensiveness. Justice Alito, quoting Justice Oliver Wendell Holmes, declared: “Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express ‘the thought that we hate.’”⁵

I thought the most important criminal law case of the term was

³ 15 U.S.C. § 1052(a) (2016).

⁴ *Id.*

⁵ *Tam*, 137 S. Ct. at 1764 (quoting *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting)).

ACS Supreme Court Review

Peña-Rodriguez v. Colorado,⁶ where the Court held that a jury verdict can be impeached based on alleged racist statements by a juror during jury deliberations. Miguel Angel Peña-Rodriguez was convicted of sexually assaulting two teenage sisters. After the trial was over and the jury was dismissed, two of the jurors described a number of biased statements made by another juror. According to these jurors, the other juror said that he “believed the defendant was guilty because, in [his] experience as an ex-law enforcement officer, Mexican men had a bravado that caused them to believe they could do whatever they wanted with women.”⁷ The jurors reported that this juror stated, “I think he did it because he’s Mexican and Mexican men take whatever they want.”⁸ This juror said that, in his experience, “nine times out of ten Mexican men were guilty of being aggressive toward women and young girls.”⁹ Finally, the jurors recounted that the juror said that he did not find the defendant’s alibi witness credible because, among other things, the witness was “an illegal,” even though the witness testified that he was legally in the United States.¹⁰

Armed with these affidavits, the defense counsel moved for a new trial. The court denied the motion because under Colorado law, like federal law, the actual deliberations that occur among the jurors are protected from inquiry. The Colorado Supreme Court affirmed.

The United States Supreme Court, in a 5-3 decision, reversed. Justice Kennedy wrote for the majority, joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan. Justice Kennedy powerfully declared the need to eradicate considerations of race

⁶ *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017).

⁷ *Id.* at 862.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

from the criminal justice system and concluded that a hearing should be held when there is evidence of racial bias in jury deliberations. Justice Kennedy declared: “[T]he Court now holds that where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror’s statement and any resulting denial of the jury trial guarantee.”¹¹

But this raises as many questions as it answers. The Court says that a trial judge should hold a hearing. Then what? When should the verdict be overturned? *Peña-Rodriguez* was a criminal case. Is there any reason to treat civil cases differently? *Peña-Rodriguez* involved racist statements. What about sexist or anti-Semitic or homophobic statements?

Finally, I think the most important case about civil procedure was *Bristol-Myers Squibb Co. v. Superior Court of California*.¹² This case, and a few recent earlier rulings, have made it much more difficult for a plaintiff to sue an out-of-state defendant, even when the defendant is a corporation that has extensive business contacts in a state.

This is going to create a significant impediment to holding corporations accountable, particularly in mass tort situations and where there are many people who each lose a relatively small amount from a corporation’s wrongdoing. There is no way to understand this change in the law except as a major victory for corporations at the expense of injured consumers, patients, and employees.

¹¹ *Id.* at 869.

¹² *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773 (2017).

ACS Supreme Court Review

For decades, the Supreme Court has held that due process limits the ability of courts in a state to exercise jurisdiction over out of state defendants. In *International Shoe Co. v. Washington*,¹³ the Court held that unless a defendant consents to litigation in a state, a court can exercise personal jurisdiction only if the defendant has “minimum contacts” with that state.

In subsequent cases, the Court identified two different ways of finding minimum contacts: general jurisdiction and specific jurisdiction. General jurisdiction was thought to exist when the defendant had systematic and continuous contacts with the state. Specific jurisdiction was based on the defendant’s contacts with the state giving rise to the cause of action.

But over the last several years, the Court has significantly narrowed the availability of both general and specific jurisdiction. As to general jurisdiction, in *Goodyear Dunlop Tires Operations, S.A. v. Brown*,¹⁴ the Court said that a court may assert jurisdiction over a foreign corporation only when the corporation’s affiliations with the State in which suit is brought are so constant and pervasive “as to render [it] essentially at home in the forum State.”¹⁵

In *Daimler AG v. Bauman*,¹⁶ the Court reaffirmed that general jurisdiction exists only over a defendant who is “home” within a state. There the Court said that there was not personal jurisdiction over a large international corporation that extensively marketed and sold cars in California for the actions of its subsidiary in another country. The Court, in an opinion by Justice Ginsburg, unanimously declared that “Daimler’s slim contacts with the State

¹³ *Int’l Shoe Co. v. State of Washington*, 326 U.S. 310 (1945).

¹⁴ *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011).

¹⁵ *Id.* at 919.

¹⁶ *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014).

hardly render it at home there.”¹⁷

At the same time, the Court has limited specific jurisdiction. In *Walden v. Fiore*,¹⁸ the Court held that specific jurisdiction exists based only on contacts the defendant creates with the forum state. Gina Fiore and Keith Gipson, Nevada residents, were stopped by a DEA agent in Atlanta and found to have \$97,000 in cash. Fiore and Gipson explained that they were professional gamblers and the money was their stake and winnings. Anthony Walden, the DEA agent, seized the cash and advised Fiore and Gipson that their funds would be returned if they proved a legitimate source for the cash. Fiore and Gipson returned home to Nevada without their money. After eight months, their money was returned to them.

Fiore and Gipson sued Walden in federal court in Nevada. Walden moved to dismiss for lack of personal jurisdiction, but the Ninth Circuit found that there was specific jurisdiction over him because it was foreseeable that the effects of his actions would be felt in Nevada, the place where Fiore and Gipson lived.

The Supreme Court, in an opinion by Justice Clarence Thomas, unanimously reversed the Court of Appeals decision. The Court explained: “our ‘minimum contacts’ analysis looks to the defendant’s contacts with the forum State itself, not the defendant’s contacts with persons who reside there.”¹⁹ The Court said: “But the plaintiff cannot be the only link between the defendant and the forum. Rather, it is the defendant’s conduct that must form the necessary connection with the forum State that is the basis for its jurisdiction over him.”²⁰

Bristol-Myers Squibb Co. was sued in California Superior

¹⁷ *Id.* at 760.

¹⁸ *Walden v. Fiore*, 134 S. Ct. 1115 (2014).

¹⁹ *Id.* at 1122.

²⁰ *Id.*

ACS Supreme Court Review

Court by several hundred individuals from 33 states (including 86 from California) for injuries from the Bristol-Myers drug Plavix, a drug used to prevent heart attacks and strokes in people who are at high risk of these events.²¹ There is no dispute that Bristol-Myers has extensive contacts with California: it regularly markets and promotes its drugs in California and distributes them to pharmacies in California to fill prescriptions.

But Bristol-Myers is incorporated in Delaware and has its principal place of business in New York and New Jersey. The parties and the lower courts agreed that there is not general jurisdiction in California, because it is not “home” in that state. This shows how much the law of personal jurisdiction has changed: until recently this would have been enough to show systematic and continuous contacts with California and would have established general jurisdiction.

There is no dispute that Bristol-Myers can be sued in California by those who reside there and took Plavix there. Bristol-Myers, though, objected to non-California residents being able to sue in that state for the injuries they incurred elsewhere. The California Supreme Court found specific jurisdiction, emphasizing that there would be little inconvenience to Bristol-Myers Squibb because it already was defending a lawsuit for the same claims in California.

The Supreme Court held, 8-1, that jurisdiction did not exist for the out-of-state plaintiffs to sue in California. Justice Alito wrote for the Court and said that the out-of-state plaintiffs could not sue in California because there was not an “adequate link between the State and the nonresidents’ claims.”²² Justice Alito wrote: “The relevant plaintiffs are not California residents and do

²¹ *Bristol-Myers Squibb*, 137 S. Ct. at 1778.

²² *Id.* at 1781.

not claim to have suffered harm in that State. In addition . . . all the conduct giving rise to the nonresidents' claims occurred elsewhere. It follows that the California courts cannot claim specific jurisdiction."²³ Justice Alito stressed that personal jurisdiction is not, as it always had been thought, primarily about fairness to a defendant; it is about limits on the territorial reach of a state court.

Justice Sotomayor wrote a forceful dissent and declared:

The majority's rule will make it difficult to aggregate the claims of plaintiffs across the country whose claims may be worth little alone. It will make it impossible to bring a nationwide mass action in state court against defendants who are 'at home' in different States. And it will result in piecemeal litigation and the bifurcation of claims. None of this is necessary. A core concern in this Court's personal jurisdiction cases is fairness. And there is nothing unfair about subjecting a massive corporation to suit in a State for a nationwide course of conduct that injures both forum residents and nonresidents alike.²⁴

Justice Alito offered three alternatives to the plaintiffs: they could sue together in the state where the defendant is "home"; they could file separate suits in each of their state courts; or perhaps they can sue in federal court. But all of these are problematic. Suing in the defendant's home state may not be convenient to the plaintiffs or a desirable forum. It also is of no use when the defendant is a foreign corporation. Having plaintiffs sue in their

²³ *Id.* at 1782.

²⁴ *Id.* at 1784 (Sotomayor, J., dissenting).

ACS Supreme Court Review

own home state assumes there are enough plaintiffs there to make litigation viable.

It is notable that Justice Alito said that personal jurisdiction might be different in a federal court, because until now personal jurisdiction in a state always has been deemed to be the same in the federal and state courts. This may suggest an even larger change to come in the law of personal jurisdiction, with it being different in a federal court compared to the state where it sits. This could be crucial for the future viability of multidistrict litigation or of nationwide class action suits.

The conclusion is inescapable that the Court has provided substantial protection for corporations—even a corporation like Bristol-Myers Squibb that engaged in a nationwide marketing campaign for its product—at the expense of injured plaintiffs.

Not long ago, I was on a panel and one of the speakers described October Term 2016 as being filled with “nothing burger” decisions. I have heard others describe it as a “ho-hum” term. I think the collection of essays that follow show that this characterization was wrong. There were many major rulings, some of which are going to have an enormous effect on people’s lives and on the law in the future.

Educational Equality for Children with Disabilities: The 2016 Term Cases

Samuel R. Bagenstos*

I. Introduction: Equality versus Adequacy in the Education of Disabled Children

One of the most longstanding debates in educational policy pits the goal of equality against the goal of adequacy: Should we aim to guarantee that all children receive an equal education? Or simply that they all receive an adequate education?

The debate is vexing in part because there are many ways to specify “equality” and “adequacy.” Are we talking about equality of inputs (which inputs?), equality of opportunity (to achieve what?), or equality of results (which results?)? Douglas Rae and his colleagues famously argued that there are no fewer than 108 structurally distinct conceptions of equality.¹ And how do we determine what is adequate? To do so, we need some normative understanding of what education is for: Economic independence? Democratic citizenship? Self-actualization? Something else?

The general equality-versus-adequacy debate replicates itself at a more specific level when we focus on the educational

* Frank G. Millard Professor of Law, University of Michigan Law School. A very preliminary version of this essay was presented as the 2017 Ken Campbell Lecture on Disability Law and Policy at The Ohio State University. The author was counsel for Petitioners in *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743 (2017), one of the principal cases discussed in this piece, and counsel for amici in *Andrew F. v. Douglas County Sch. Dist. RE-1*, 137 S. Ct. 988 (2017), the other principal case discussed in this piece. The views expressed here are those of the author only.

¹ See DOUGLAS W. RAE, EQUALITIES 133 (1983).

ACS Supreme Court Review

services provided to students with disabilities. When Congress adopted the Education for All Handicapped Children Act in 1975 (the “EAHCA,” the statute now known as the Individuals with Disabilities Education Act, or “IDEA”), it estimated that a million disabled children “were ‘excluded entirely from the public school system’” with millions more “receiving an inappropriate education.”² The EAHCA required that every child with a disability receive a “free appropriate public education.”³ That mandate plainly barred schools from excluding disabled children, but what kind of education was required? What was “appropriate”?

In its earliest case under the EAHCA—the *Rowley* case, decided in 1982—the Court refused to read the requirement of an “appropriate” education for children with disabilities as guaranteeing that they receive “‘equal’ educational opportunities.”⁴ It instead adopted a variant of an adequacy standard: “We therefore conclude that the ‘basic floor of opportunity’ provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.”⁵ But the Court declined to “establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act.”⁶

In the years since *Rowley*, at least three developments have pushed education policy generally—and disability education policy specifically—towards a greater focus on equality. First, in 1990, Congress adopted the Americans with Disabilities Act

² *Bd. of Educ. v. Rowley*, 458 U.S. 176, 189 (1982) (quoting Act of Nov. 29, 1975, § 3(b)(3), 89 Stat. 774 (“Statement of Legislative Findings and Purpose”)).

³ 20 U.S.C. § 1412(a)(1) (2015).

⁴ *Rowley*, 458 U.S. at 198-201.

⁵ *Id.* at 201.

⁶ *Id.* at 202.

(“ADA”), which aimed “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”⁷ The ADA applies its requirements of nondiscrimination and reasonable accommodation to every state and local government entity, as well as every seller of goods and services in the United States economy. It thus covers both public and private schools, from pre-kindergarten through graduate school.

Second, in 2002 President George W. Bush signed the No Child Left Behind Act (“NCLB”). Among its many controversial provisions, No Child Left Behind sought to hold states accountable for achievement gaps between demographic groups. The law expressly stated that students with disabilities would presumptively be served in the general education curriculum and be measured by the same achievement standards as their nondisabled peers.⁸

Third, in a series of reauthorizations through the years, Congress amended the IDEA to give added emphasis to the statute’s equal opportunity goals. When it reauthorized the statute after the enactment of No Child Left Behind, Congress added provisions that explicitly referred to the results-oriented accountability standards of NCLB.⁹

In light of these developments, a number of scholars and activists urged that the courts should give the IDEA’s free appropriate public education requirement a more robust reading than *Rowley* had placed on it.¹⁰ The lower courts consistently rebuffed those efforts, however. If anything, they took the law in

⁷ 42 U.S.C. § 12101(b)(1) (2015).

⁸ For a discussion of the NCLB provisions regarding disabled students, see Stephen A. Rosenbaum, *Aligning or Maligning? Getting Inside A New IDEA, Getting Behind No Child Left Behind and Getting Outside of It All*, 15 HASTINGS WOMEN’S L.J. 1, 26-30 (2004).

⁹ See generally Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (2004) (codified at 20 U.S.C. §§ 1400-1475 (2015)).

¹⁰ See, e.g., Maureen A. MacFarlane, *The Shifting Floor of Educational Opportunity: The Impact*

ACS Supreme Court Review

the opposite direction—they read *Rowley* as holding that virtually any educational benefit received by a disabled student, even an incredibly minimal one, was sufficient to provide a free appropriate public education.

This past Term, the Court revisited *Rowley* for the first time since that case was decided 35 years earlier. In *Andrew F. v. Douglas County School District RE-1*,¹¹ the Court rejected the “merely more than *de minimis*” test that the Tenth Circuit had applied to determine what educational benefit was sufficient for a free appropriate public education. But it specifically rejected the Petitioner’s argument that the IDEA required schools to aim to provide an equal educational opportunity.

By rejecting an equal-opportunity standard for determining compliance with the free appropriate public education requirement, *Andrew F.*, like *Rowley* before it, responded to the difficulty in specifying equal opportunity in a way that courts can implement. In some respects, I will argue, that decision was understandable and perhaps sensible. But equal opportunity concerns still lie below the surface of the Court’s opinion in *Andrew F.*, and they remain a crucial foundation of the IDEA’s requirements.

And, exactly one month before it decided *Andrew F.*, the Court made clear that children with disabilities are entitled to an equal educational opportunity. That entitlement rests, not on the IDEA, but on the ADA. In *Fry v. Napoleon Community Schools*,¹² the Court held that a disabled child could enforce the ADA’s requirements of equal participation in education independently of the IDEA—and could do so without first going through the IDEA’s

of Educational Reform on Rowley, 41 J.L. & EDUC. 45, 46-47 (2012) (citing articles and cases in which this argument was made).

¹¹ *Andrew F. v. Douglas County Sch. Dist. RE-1*, 137 S. Ct. 988 (2017).

¹² *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743 (2017).

complex administrative procedures, so long as she was not seeking relief for the denial of a free appropriate public education. When *Fry* and *Endrew F.* are read together, they establish that children with disabilities do have federal rights to equal opportunity in education—but that the ADA, not the IDEA, is the key vehicle for enforcing those rights. The equality right under the ADA is different in important ways from the one that the *Endrew F.* petitioner asked the Court to read into the IDEA, though.

II. *Endrew F.*: The Equality Claim the Court Rejected

A. The Endrew F. Decision

When the Court granted *certiorari* in *Endrew F.*, advocates had high hopes that its decision would give more robust content to the free appropriate public education requirement than it had in *Rowley*. At the same time, though, they feared that the Court would freeze into place the very lenient standards adopted by the lower courts. In the end, neither advocates' greatest hopes nor their greatest fears were realized.

Endrew F. is an autistic child.¹³ He attended public school in Douglas County, Colorado, from preschool through the fourth grade, pursuant to Individualized Education Programs (“IEPs”) drafted for him each year as the IDEA requires. When it came time to draft his fifth grade IEP, however, Endrew’s parents believed that a change was necessary. They believed that “his academic and functional progress had essentially stalled: Endrew’s IEPs largely carried over the same basic goals and objectives from one year to the next, indicating that he was failing to make meaningful progress toward his aims.”¹⁴ When the school district did not agree

¹³ Facts in this paragraph are taken from the Court’s opinion in *Endrew F.*, 137 S. Ct. at 996-997.

¹⁴ *Id.* at 996.

ACS Supreme Court Review

to make any changes to the IEP, Endrew’s parents decided to enroll him in a private school for autistic children.

Under longstanding IDEA case law, parents whose disabled children do not receive a free appropriate public education in their local school district are entitled to receive reimbursement of private school tuition from that district.¹⁵ Accordingly, Endrew’s parents filed an administrative complaint under the IDEA seeking tuition reimbursement. (The IDEA requires parents first to file their cases before a state administrative law judge before raising a claim under the statute in court.¹⁶) They argued that the school district had denied Endrew a free appropriate public education, because its IEPs were insufficiently ambitious. But the ALJ disagreed. The parents sought review in federal district court, but that court affirmed the decision, as did the Tenth Circuit Court of Appeals. The appellate court read *Rowley* “to mean that a child’s IEP is adequate as long as it is calculated to confer an ‘educational benefit [that is] merely . . . more than *de minimis*.’”¹⁷ And it held that the school district had satisfied that standard, because “Endrew’s IEP had been ‘reasonably calculated to enable [him] to make *some* progress.’”¹⁸

The Supreme Court held that the lower courts had applied too lenient a standard. “When all is said and done,” the Court explained, “a student offered an educational program providing ‘merely more than *de minimis*’ progress from year to year can hardly be said to have been offered an education at all.”¹⁹ It held that “[t]he IDEA demands more. It requires an educational

¹⁵ See *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230 (2009).

¹⁶ See 20 U.S.C. § 1415 (2015).

¹⁷ *Endrew F.*, 137 S. Ct. at 997 (quoting *Endrew F. ex rel. Joseph F. v. Douglas County Sch. Dist. RE-1*, 798 F.3d 1329, 1338 (10th Cir. 2015) (internal quotation marks omitted by Supreme Court)).

¹⁸ *Id.* (quoting *Endrew F.*, 798 F.3d at 1342 (internal quotation marks omitted by Supreme Court)).

¹⁹ *Id.* at 1001.

program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.”²⁰

But although both Endrew’s parents and various amici argued that the IDEA should be read as imposing an equal-educational-opportunity standard, the Court rejected those arguments. The Court relied entirely on *Rowley*, which had said that “[t]he requirement that States provide ‘equal’ educational opportunities would . . . seem to present an entirely unworkable standard requiring impossible measurements and comparisons.”²¹ The *Endrew F.* Court concluded that “Congress (despite several intervening amendments to the IDEA) ha[d] not materially changed the statutory definition of a FAPE [a free appropriate public education] since *Rowley* was decided,” and it “decline[d] to interpret the FAPE provision in a manner so plainly at odds with the Court’s analysis in that case.”²²

B. The Difficulties With an Equality Standard Under the IDEA

What, precisely, was the equal opportunity standard Endrew’s parents proposed? They asked the Court to hold that the IDEA requires “‘an education that aims to provide a child with a disability opportunities to achieve academic success, attain self-sufficiency, and contribute to society that are substantially equal to the opportunities afforded children without disabilities.’”²³ It is hardly surprising that the Court refused to adopt this formulation as the standard school districts were required to follow, because every piece of it is vague.

There are several distinct ways of cashing out the idea of

²⁰ *Id.*

²¹ *Endrew F.*, 137 S. Ct. at 1001 (quoting *Rowley*, 458 U.S. at 198)).

²² *Id.*

²³ *Id.* (quoting Brief for Petitioner at 40, *Endrew F.*, 137 S. Ct. 988 (2017) (No. 15-827)).

ACS Supreme Court Review

educational equality. Nearly all of these would be plausibly consistent with the standard proposed by Andrew’s parents. Yet each presents significant difficulties.

One way of assessing educational equality is to look to outcomes. To take the terms used by Andrew’s parents, perhaps we should say that equality requires that all children achieve a “substantially equal” level of “academic success,” “self-sufficiency” or “contribut[ions] to society” as each other. This sort of outcome-oriented equality might make sense when we are focusing on particular basic competencies. As Michael Walzer notes, the job of a teacher of reading is to teach her students to read—not to give them an equal opportunity to learn to read.²⁴ But as we focus on broader educational outcomes, the equal-achievement goal seems increasingly unreasonable. In any world we can realistically imagine, children will be different, and to expect schools to bring every child to the same level of achievement seems utopian at best, dystopian (the stuff of the Kurt Vonnegut story *Harrison Bergeron*²⁵) at worst.²⁶

If an equal-achievement standard seems unworkable and extreme, the obvious place to turn is to some notion of equal *opportunity*.²⁷ Every child can’t be expected to achieve at the same level, but surely we can give every child the same *chance* to achieve.

But what does this mean? Perhaps it simply means that we should devote the same resources to each child’s education as we

²⁴ MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 203 (1983).

²⁵ Kurt Vonnegut, *Harrison Bergeron*, in WELCOME TO THE MONKEY HOUSE 7 (1968).

²⁶ For a theoretical defense of an equal-outcomes standard in education, see Tammy Harel Ben-Shahar, *Equality in Education – Why We Must Go All the Way*, 19 ETHICAL THEORY & MORAL PRAC. 83 (2016).

²⁷ For some appropriate skepticism that the distinction between equality of opportunity and equality of result is meaningful normatively, see David A. Strauss, *The Illusory Distinction Between Equality of Opportunity and Equality of Result*, 34 WM. & MARY L. REV. 171 (1992). But the distinction is useful for purposes of my discussion.

devote to each other child's education. Christopher Jencks calls this conception of equal opportunity "democratic equality."²⁸ He dismisses this conception quickly—though he allows that it has the distinct advantage of being more administrable than other instantiations of equal opportunity and thus might be a default that could garner broad support.²⁹

As a pure normative matter, the narrow and formal "democratic equality" principle seems quite insufficient. Students will differ from one another for a variety of reasons. As a result, different students will need different resource inputs to learn the same material as their classmates, have the same chance to learn the same material as their classmates, have the same chance to achieve their potential as their classmates, and so forth. If we care about equal educational opportunity because we want to give all children equal chances to learn, then allocating the same resources to each student seems both over- and under-inclusive—it gives some more than they need, and others less.

The problem is particularly acute in the disability context. Accommodations for students with disabilities often cost money. Even if the cost of those accommodations is often exaggerated—as it is—the cost still exists. At least for many students with disabilities, then, the "democratic equality" principle will deny them equal opportunities to learn as are enjoyed by their classmates.

So we need a more robust conception of equal educational opportunity. Responding to the limitations of the input-oriented "democratic equality" view, and the over-ambitiousness of the equal-outcomes view, many advocates have sought to define

²⁸ Christopher Jencks, *Whom Must We Treat Equally for Educational Opportunity to be Equal?*, 98 *ETHICS* 518, 520 (1988).

²⁹ See *id.* at 532.

ACS Supreme Court Review

educational equality by reference to a child’s potential. In the *Rowley* case, the lower courts interpreted the EAHCA to require that a disabled child receive “an opportunity to achieve [her] full potential commensurate with the opportunity provided to other children.”³⁰ The Supreme Court, as we have seen, rejected that interpretation, both in *Rowley* and in *Andrew F.*

Was the Court wrong to do so? There is something very attractive in saying that the point of public education is to give each child the same opportunity to achieve her potential. But can equal-opportunity-to-achieve-potential work as an operative legal standard that governs decisions regarding what services to give individual children? There are a number of reasons for skepticism.

First, how do we measure a child’s potential? When we are deciding what educational interventions to provide a child *ex ante*, all we can do is predict, based on generalizations that are sure to be overbroad, what developmental path a particular child will take. And when we are judging the sufficiency of those educational interventions *ex post*, our counterfactuals about what the child would have achieved if she had received different interventions are likely to rely on similarly overbroad generalizations.

Because of the difficulty of prediction, the application of an equal-opportunity-to-achieve-potential standard in practice is likely to turn on—and thus reinforce—existing stereotypes about what individuals with particular diagnoses and conditions can achieve. But, as the *Andrew F.* Court noted, “[a] focus on the particular child is at the core of the IDEA. The instruction offered must be ‘*specially designed*’ to meet a child’s ‘*unique needs*’ through an ‘*[i]ndividualized*’ education program.”³¹ Although on-the-ground

³⁰ *Rowley*, 458 U.S. at 186 (internal quotation marks omitted).

³¹ *Andrew F.*, 137 S. Ct. at 999 (quoting 20 U.S.C. §§ 1401(29) & (14) (2015)) (emphasis in the Court’s opinion).

practice under the statute does not always live up to this guarantee of individualization,³² an effort to focus on an individual child's potential would, perhaps perversely, exacerbate the problem.

Relatedly, making a child's entitlements turn purely on an assessment of that child's potential would provide a ready avenue for stigma and prejudice against disabled children to enter the decisionmaking process—and effectively ratchet down the rights guaranteed by the IDEA. There is a longstanding pattern—among teachers, school administrators, courts, and even sometimes parents—of underestimating the potential of children with disabilities. A legal requirement that is built around an assessment of potential may simply entrench the existing low expectations for disabled children.

Finally, despite its initial appeal, there are serious normative questions about a guarantee that all children should have the same opportunity to achieve their potential. First, even considered in the abstract, it is unclear why one's potential is a normatively valuable referent. Many people are drawn to a potential-maximizing standard based on the casual utilitarian assumption that society benefits when people achieve the most that they can. But a utilitarian would have to consider costs along with those benefits. And once we take costs into account, utilitarianism does not seem to suggest that we should provide children an equal opportunity to achieve their potential.³³

Consider two children. Emily has the potential to learn to

³² See, e.g., Karen Syma Czapanskiy, *Special Kids, Special Parents, Special Education*, 47 U. MICH. J.L. REFORM 733, 767 (2014).

³³ The discussion in text assumes that potential is static, or at least is unaffected by our decisions about where to invest educational resources. But if a child's potential is responsive to those investment decisions—such as, if investing resources in children with more potential encourages children to take actions that expand their potential—then the calculus gets even more complicated. For this reason Jencks argues persuasively that a utilitarian approach to equal educational opportunity is indeterminate. See Jencks, *supra* note 28, at 529.

ACS Supreme Court Review

care for herself, and perhaps to learn to perform certain repetitive tasks, but due to a disability she has no potential to learn to engage in more complex intellectual and social tasks. (Leave aside for a moment the questions of how we know her true potential, and of whether we are underestimating her.) But educating her to her full potential will be cheap and easy; it will require the investment of very few resources.

Felicia, by contrast, has the potential to learn everything Emily can learn, plus the potential to understand and advance knowledge in cutting-edge scientific fields, and the potential to learn to navigate complex social situations. For Felicia to achieve that potential, however, will require an extensive investment of resources—orders of magnitude greater than the investment that is required to enable Emily to achieve her full potential. If we give Emily all the resources she needs, are we bound to give Felicia the many more resources she needs to have a commensurate opportunity to achieve her full potential?

A utilitarian would likely say no. To a utilitarian, the question would be which allocation of marginal resources has the greatest marginal effect on the relevant achievement measure. At the point at which the marginal cost of investing resources in a particular child exceeds the marginal benefit, a utilitarian would say that we should invest additional resources in someone else. So, perhaps at some point Felicia will be able to achieve enough of her potential that the benefits of her achieving more of that potential are less than the cost of the resources that it will take to enable her to make the next leap. And perhaps the marginal benefits of giving Emily the relatively small allocation of resources she needs to achieve her full potential always exceed the marginal costs. If that is right, then perhaps Emily is normatively entitled to *more* than an equal opportunity to achieve her potential, and Felicia is entitled to less.

But a utilitarian calculus will not always be beneficial to children with disabilities. If the costs in my hypothetical were flipped, it would be the nondisabled Felicia, rather than the disabled Emily, who would be entitled to a more-than-equal opportunity. Either way, utilitarianism does not seem to offer a persuasive grounding for an equal-opportunity-to-achieve-potential principle.

A focus on potential poses still a deeper problem for egalitarians. Where does potential come from, after all? Potential depends, in the first instance, on the physical and mental attributes with which a child is born (and their degree of compatibility with the physical and social environment in which she is born). But that is, of course, simply a matter of brute luck—the lottery of birth. By the time the child gets to school, her potential will have been significantly affected by the physical, social, and economic environment in which she has been raised for her first few years. That, too, is a matter of luck. Children with higher potential, then, are likely to be children who were lucky enough to have been born and raised in circumstances that increased their potential—and it should not at all surprise us if those children are also the children who experience more socioeconomic advantages generally. A principle that requires us to give every child the same opportunity to achieve his or her potential thus will likely replicate, reinforce, and retransmit existing inequalities. It will, on average, give more to the children who are already more advantaged—reversing those egalitarian principles that enjoin us to give more priority to those who are less advantaged.³⁴ One might, therefore, say that

³⁴ See Gina Schouten, *Fair Educational Opportunity and the Distribution of Natural Ability: Toward a Prioritarian Principle of Educational Justice*, 46 J. PHIL. EDUC. 472 (2012); see generally Derek Parfit, *Equality and Priority*, 10 RATIO 202, 213 (1997) (describing and defending the view that “[b]enefiting people matters more the worse off these people are”).

ACS Supreme Court Review

the equal-opportunity-to-achieve-potential rule gets things exactly backwards from an egalitarian perspective—that the state has an obligation to intervene to give *more* to those children who have less potential, in part because it is the state’s failure to intervene earlier that created the social and economic conditions that limited their potential.³⁵

In principle, we could try to solve this problem by “purifying” the concept of potential. We could attempt to strip away all of the ways that society—by acting and failing to act—limited a child’s ability to achieve, and then require the state to give every child the same opportunity to reach that pure form of potential. Once we strip away all of the social contributions to potential, though, there may be very little left to distinguish among children. This is true even for children with disabilities. It is a basic tenet of the “social model” underlying modern disability rights advocacy that disability is not a condition that is inherent to the physical body of an individual but that it instead results from an interaction between her body and social decisions.³⁶ What makes an inability to walk disabling, the argument goes, is not merely the physical condition (say, quadriplegia) that creates the inability, but instead the decisions to create buildings with stairs instead of elevators, to fail to invest in accessible public transit, and so forth.

But if the lion’s share of the difference in different children’s “potential” results from social decisions, that means that the equal-opportunity-to-achieve-potential principle comes close to collapsing into a requirement of equal outcomes—a requirement

³⁵ Jencks calls this an argument for “strong humane justice,” which he finds normatively appealing but impractical to achieve. See Jencks, *supra* note 27, at 527. Schouten argues that Jencks’s principle of “weak humane justice” must be supplemented with a “prioritarian principle of educational justice” to reduce inequalities that result from natural and social disadvantages. See Schouten, *supra* note 34, at 483-487.

³⁶ See, e.g., Samuel R. Bagenstos, *Subordination, Stigma, and “Disability,”* 86 VA. L. REV. 397, 428-429 (2000).

we have already determined to be too ambitious. As Jencks says, “if equal opportunity means that children raised in different families must have equal probabilities of success, we can never fully achieve it.”³⁷

C. A Robust Adequacy Standard Driven by Equality Concerns

The foregoing discussion should make clear the difficulties in crafting an equal-educational-opportunity standard that both is normatively appealing and can be applied by courts and school districts. In light of these difficulties, it is hardly surprising that *Rowley* and *Endrew F.* refused to impose such a standard. But that does not mean that *Endrew F.* disregarded the principles of equal educational opportunity. To the contrary, I submit, the best way to understand the rules adopted by the Court is to see them as a way of implementing equal educational opportunity, without requiring an impractical case-by-case equality analysis.

Endrew F. held that “[w]hen a child is fully integrated in the regular classroom, as the Act prefers, what [meeting the child’s unique needs] typically means is providing a level of instruction reasonably calculated to permit advancement through the general curriculum.”³⁸ In his unanimous opinion for the Court, Chief Justice Roberts described the IDEA as an “ambitious” piece of legislation,³⁹ and that the educational program provided to a

³⁷ Jencks, *supra* note 27, at 527. John Roemer attempts to address this problem by suggesting that equal educational opportunity cannot be achieved on an individual basis. Rather, he suggests that “the equal-opportunity policy must equalize, in some average sense . . . the educational achievements of all types [*i.e.*, social groupings], but not equalize the achievements within types, which differ according to effort.” JOHN E. ROEMER, *EQUALITY OF OPPORTUNITY* 7 (2000). But Debra Satz persuasively suggests that “the equalization of children’s potentials (on average) across social types” is not “even plausible as a guiding principle for educational policy, particularly in a society marked by inequalities outside education.” Debra Satz, *Equality, Adequacy, and Educational Policy*, 3 *EDUC. FIN. & POL’Y* 424, 430 (2008).

³⁸ *Endrew F.*, 137 S. Ct. at 1000.

³⁹ *Id.* at 999.

ACS Supreme Court Review

disabled child must accordingly “be appropriately ambitious.”⁴⁰ He explained that the statute’s substantive standard must “focus[] on student progress.”⁴¹ And he said that “every child should have the chance to meet challenging objectives.”⁴²

This language, combined with the Court’s rejection of the merely-more-than-*de-minimis* standard, imposes a robust adequacy requirement on school districts in their education of disabled children. Understood in the light of the IDEA’s strong presumption toward serving children with disabilities alongside nondisabled children⁴³—a presumption to which the Court specifically referred (“as the Act prefers”)—that standard significantly advances the equality interests of disabled children.

In the equality-versus-adequacy debate in education policy generally, a number of scholars have argued that adequacy rules are best understood as serving equality.⁴⁴ Debra Satz, for example, emphasizes the importance of an adequate education in promoting civic equality by giving everyone the tools to engage in political self-governance and to earn income in the market.⁴⁵ The robust education required by the *Andrew F.* standard is well suited to preparing individuals with disabilities to engage in these activities. Elizabeth Anderson focuses specifically on the role of educational integration in promoting civic equality.⁴⁶ By recognizing the statute’s background preference for integration, *Andrew F.* fits

⁴⁰ *Id.* at 1000.

⁴¹ *Id.* at 999.

⁴² *Id.* at 1000.

⁴³ For a discussion of the IDEA’s integration presumption, see Samuel R. Bagenstos, *Abolish the Integration Presumption? Not Yet*, 156 U. PA. L. REV. PENNUMBRA 157 (2007).

⁴⁴ See, e.g., Joshua E. Weishart, *Transcending Equality Versus Adequacy*, 66 STAN. L. REV. 477, 480 (2014); see generally Derrick Darby & Richard E. Levy, *Slaying the Inequality Villain in School Finance: Is the Right to Education the Silver Bullet?*, 20 KAN. J.L. & PUB. POL’Y 351 (2011).

⁴⁵ See Satz, *supra* note 37.

⁴⁶ Elizabeth Anderson, *Fair Opportunity in Education: A Democratic Equality Perspective*, 117 ETHICS 595 (2007).

Anderson's argument well. It also fits Martha Nussbaum's argument that the IDEA serves the interest in equal protection of disabled children by requiring extensive educational interventions to enable those children to enter society as full participants. As Nussbaum argues, even if the statute does not require equal outcomes, it demonstrates equal concern for children with disabilities by insisting on those extensive interventions.⁴⁷

Does *Andrew F.* adopt an equality standard? Not directly. The Court specifically rejected a test under which a school district's responsibilities to a particular child would depend on an assessment of what would give that child an opportunity that was equal to that enjoyed by her classmates. But the Court adopted a robust adequacy standard that plainly serves the interest in achieving educational equality—and that makes no sense absent an underlying commitment to educational equality. Although *Andrew F.* rejected the parents' equality claim, I submit that it is still best understood as a case about equality.

III. *Fry*: The Equality Claim the Court Embraced

A. The Fry Decision

On its face, *Fry v. Napoleon Community Schools*⁴⁸ was not a case about educational equality. Indeed, it was not even a case about the substance of the Individuals with Disabilities Education Act. Rather, the case involved the relationship between the IDEA and other statutes, notably the Americans with Disabilities Act. The question before the court was whether a disabled child could enforce rights under those other statutes without first exhausting the administrative proceedings required by the IDEA. The Court

⁴⁷ Martha Nussbaum, *The Capabilities of People with Cognitive Disabilities*, 40 METAPHILOSOPHY 331, 341-343 (2009).

⁴⁸ *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743 (2017).

ACS Supreme Court Review

held that such a child need not go through proceedings under the IDEA so long as the “gravamen” of her suit under another statute “is something other than the denial of the IDEA’s core guarantee” of a “free appropriate public education.”⁴⁹ Although the Court’s decision does not embrace any particular substantive standard, it opens the way to meaningful enforcement of an equality principle under the ADA that is very similar to the one the plaintiff in *Rowley* unsuccessfully sought to interject into the IDEA.

Ehlana Fry (referred to in the Court’s decision as “E.F.”) has cerebral palsy.⁵⁰ At her doctor’s suggestion, Ehlana’s parents obtained a service dog for her when she was a young child. The parents chose for the job a goldendoodle (a species that is often used for service animals, because few people are allergic to it). The family named the dog “Wonder.” Wonder assisted Ehlana with such activities as “retrieving dropped items, helping her balance when she uses her walker, opening and closing doors, turning on and off lights, helping her take off her coat, [and] helping her transfer to and from the toilet.”⁵¹

When Ehlana enrolled in her local public school’s kindergarten, the school refused to allow Wonder to accompany her. Instead, it offered the services of a one-on-one human aide, who would perform all of the tasks that the dog would. When, by the end of the year, the principal decided to stick with the refusal to permit Wonder to work as a service dog, Ehlana’s parents pulled her out of school and filed a complaint with the United States Department of Education’s Office for Civil Rights. That complaint alleged that the school had violated Ehlana’s rights under the ADA by denying

⁴⁹ *Id.* at 748.

⁵⁰ Facts in this paragraph and the next are taken from the Court’s opinion. See *Fry*, 137 S. Ct. at 750-51.

⁵¹ *Id.* at 751 (quoting Complaint at ¶ 27, *Fry*, 137 S. Ct. 743 (No. 15-497)).

her the chance to use her service dog. It did *not* allege a violation of the IDEA.

School officials defended against the administrative complaint by arguing that “that they [w]ere not required to permit the service animal to accompany and assist [Ehlana], because they [we]re meeting all of [her] *educational* needs through the provision of an aide.”⁵² But the Department of Education rejected the defense and concluded that the school district had violated the ADA. Ehlana alleged a violation of the ADA’s requirement that a state or local government entity must provide “reasonable modifications to rules, policies, or practices” where necessary to avoid discrimination on the basis of disability⁵³—a requirement that has long been interpreted to demand that such entities permit disabled users of their facilities to be assisted by service dogs.⁵⁴ Because Ehlana argued that the school had denied her the equal access to its facilities that the ADA guaranteed, rather than that the school had denied her a free appropriate public education, the Department of Education concluded that a “FAPE analysis” was beside the point.⁵⁵ The Department “analogized the school’s conduct to ‘requir[ing] a student who uses a wheelchair to be carried’ by an aide or ‘requir[ing] a blind student to be led [around by a] teacher’ instead of permitting him to use a guide dog or cane.”⁵⁶ Those examples, like the school’s denial of a service dog, did not deny a free appropriate public education, but they did violate the ADA “by discriminating against children with disabilities.”⁵⁷

The Department of Education ordered the school district to

⁵² Joint Appx. at 28, *Fry*, 137 S. Ct. 743 (No. 15-497) (emphasis added).

⁵³ 42 U.S.C. § 12131(2) (2015).

⁵⁴ 28 C.F.R. § 35.136(g) (2016).

⁵⁵ Joint Appx. at 35, *Fry*, 137 S. Ct. 743 (No. 15-497) (emphasis added).

⁵⁶ *Fry*, 137 S. Ct. at 751 (quoting Joint Appx. at 35, *Fry*, 137 S. Ct. 743 (No. 15-497)).

⁵⁷ *Id.*

ACS Supreme Court Review

readmit Ehlena (who had been homeschooled during the two years during which her complaint was pending) and to permit her to use her service dog. But Ehlena’s parents became concerned, after meeting with the principal, that the school would “resent” being required to allow Wonder to attend and, as a result, would make Ehlena’s “return to school difficult.”⁵⁸ They decided to enroll Ehlena in a neighboring district, and to file a lawsuit against her original school for violating the ADA by refusing to allow her to use her service dog.⁵⁹ Because the case focused entirely on the school district’s past conduct, and neither Ehlena nor her parents had any desire to re-enroll her in the district, the lawsuit sought only retrospective relief—damages for Ehlena’s emotional distress in being denied the use of her dog and the corresponding ability to participate independently in the classroom.⁶⁰

The lower courts dismissed the ADA suit, because they concluded that Ehlena’s parents should first have exhausted administrative remedies under the IDEA.⁶¹ Unlike the federal Department of Education complaint process in which Ehlena’s parents originally pursued their ADA claims, the IDEA’s administrative scheme requires parents to proceed before a state-appointed hearing officer or administrative law judge, who will hold a trial-type hearing and issue a decision that will then be subject to judicial review in federal district court.⁶² Although Ehlena’s parents did not allege that the school violated the IDEA, the lower courts concluded that exhaustion of the statute’s procedures was required anyway, because of a provision Congress added to the IDEA in 1986. That provision, in its current form, reads:

⁵⁸ *Id.* (internal quotation marks omitted).

⁵⁹ *Id.*

⁶⁰ *Id.* at 751-752.

⁶¹ *Id.* at 752.

⁶² 20 U.S.C. § 1415 (2015).

Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the [administrative] procedures under [the IDEA] shall be exhausted to the same extent as would be required had the action been brought under this subchapter.⁶³

Congress added that provision to overturn the Supreme Court's 1984 decision in *Smith v. Robinson*.⁶⁴ *Smith* held that the IDEA implicitly barred disabled children from enforcing education rights under other federal statutes, such as the Rehabilitation Act and Section 1983.⁶⁵ Rejecting *Smith*, the new text made clear that the IDEA did not foreclose parents from bringing suit under "other Federal laws protecting the rights of children with disabilities." But it required parents first to pursue IDEA remedies if their complaints were ones "seeking relief that is also available under" the IDEA.

The Frys' suit challenged the refusal to permit Ehlena to be accompanied by her service dog—a challenge that would have been essentially identical if Ehlena had been seeking access to a public library or recreation facility rather than a school, and one that would have been identical if a disabled *parent* had been denied the chance to bring the parent's service dog to watch a child at

⁶³ 20 U.S.C. § 1415(l).

⁶⁴ *Smith v. Robinson*, 468 U.S. 992 (1984).

⁶⁵ *See id.* at 1009-1016.

ACS Supreme Court Review

a school play. The educational setting, and Ehlena’s status as a student, thus were simply the *occasion* for the controversy; they played no substantive role in it. The Frys were seeking relief for a pure ADA violation, not a violation of the IDEA. Moreover, they sought only emotional distress damages—a remedy that is not available under the IDEA.⁶⁶ For these two reasons, they argued that exhaustion of the IDEA processes was not required. But the lower courts read the exhaustion requirement more broadly. Following the overwhelmingly dominant view in the circuits, the Sixth Circuit held that exhaustion of IDEA proceedings was required whenever it appeared possible that those proceedings could provide some remedy for the injuries of which the child complained—even if the remedy was a different one than the child sought in her lawsuit.⁶⁷

The Sixth Circuit’s decision conflicted with the Ninth Circuit’s 2011 *en banc* holding in *Payne v. Peninsula School District*.⁶⁸ In contrast to the “injury-centered” rule employed by the Sixth Circuit and other courts of appeals, *Payne* adopted what it called a “relief-centered” rule governing IDEA exhaustion: If the relief the plaintiff actually sought was, in form or substance, relief that was available under the IDEA, exhaustion was required; but if the plaintiff did not actually seek relief that was available under the IDEA—even if such relief might have been available—the non-IDEA case could proceed directly to court.⁶⁹

The Supreme Court granted *certiorari* in *Fry*, presumably to resolve that conflict. But the Court ultimately punted on the issue. In a footnote, the Court explained that it was “leav[ing] for another

⁶⁶ *Fry*, 137 S. Ct. at 752 n.4.

⁶⁷ See *Fry v. Napoleon Cmty. Sch.*, 788 F.3d 622, 625 (6th Cir. 2015).

⁶⁸ *Payne v. Peninsula Sch. Dist.*, 653 F.3d 863 (9th Cir. 2011) (*en banc*), *cert. denied*, 565 U.S. 1196 (2012).

⁶⁹ *Id.* at 874.

day” the question whether “exhaustion [is] required when the plaintiff complains of the denial of a FAPE, but the specific remedy she requests—here, money damages for emotional distress—is not one that an IDEA hearing officer may award.”⁷⁰ Instead, the Court resolved the case on a more fundamental ground. Regardless of the particular relief the plaintiff requests, the Court unanimously held, exhaustion is not required in a non-IDEA case if the “substance, or gravamen, of the plaintiff’s complaint” is not “seek[ing] relief for the denial of a FAPE.”⁷¹ If the plaintiff is not seeking relief for the denial of a FAPE, the Court held, her complaint is necessarily not “seeking relief that is also available under” the IDEA.⁷²

The Court remanded to the lower courts to determine whether the “gravamen” of Fry’s complaint was seeking relief for the denial of a FAPE. But Justice Kagan’s opinion for the Court offered a couple of guideposts for resolving that question, in *Fry* and in other cases. The opinion suggested, first, that courts should “ask[] a pair of hypothetical questions” about the complaint:

First, could the plaintiff have brought essentially the same claim if the alleged conduct had occurred at a public facility that was *not* a school—say, a public theater or library? And second, could an *adult* at the school—say, an employee or visitor—have pressed essentially the same grievance?⁷³

“When the answer to those questions is yes,” the Court explained, “a complaint that does not expressly allege the denial of

⁷⁰ *Fry*, 137 S. Ct. at 752 n.4.

⁷¹ *Id.* at 752.

⁷² *Id.* at 754.

⁷³ *Id.* at 756.

ACS Supreme Court Review

a FAPE is also unlikely to be truly about that subject; after all, in those other situations there is no FAPE obligation and yet the same basic suit could go forward.”⁷⁴ The Court also said that parents’ prior decision to invoke the formal IDEA proceedings to resolve a particular dispute “will often”—but not always—“provide strong evidence that the substance of a plaintiff’s claim concerns the denial of a FAPE, even if the complaint never explicitly uses that term.”⁷⁵ Justice Alito, joined by Justice Thomas, joined all of Justice Kagan’s opinion for the Court except for the discussion of the guideposts for resolving the gravamen-of-the-complaint question.⁷⁶

B. Fry as an Equality Case

The *Fry* decision is important on its own terms. Even as questions remain regarding how the lower courts will interpret the new gravamen-of-the-complaint standard, the decision marks a major shift from prior lower-court cases. In those cases, the courts asked a hypothetical question: Could the plaintiffs have sought any relief for their injuries under the IDEA? Because it is nearly always possible for IDEA proceedings to provide *some* relief for injuries received at school—even in the form of counseling to address emotional harms—the hypothetical-question approach meant that parents were required to exhaust IDEA administrative proceedings in a wide range of cases that did not at all involve the substance of the educational program, or the choice of educational setting, offered to their children. Cases involving denial of access to service dogs (like Ehlens Fry’s suit) and those involving abusive

⁷⁴ *Id.* at 756.

⁷⁵ *Id.* at 757.

⁷⁶ *Fry*, 137 S. Ct. at 759 (Alito, J., concurring in part and concurring in the judgment).

mistreatment of disabled children at school were prime examples.⁷⁷ Most if not all of these cases will now be able to proceed directly to court under the ADA or Section 1983; the plaintiffs will thus be able to avoid burdensome and unavailing IDEA proceedings.

As I have said, nothing in the *Fry* decision is formally about equality. *Fry* was a case about administrative exhaustion, not the substantive requirements that apply to schools' treatment of children with disabilities. But the decision has great importance for educational equality. The ADA, unlike the IDEA, formally incorporates an equal-opportunity standard. The state and local government entities covered by the ADA—including public schools—must not discriminate against individuals with disabilities, and they must “make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.”⁷⁸

Ehlana Fry's suit alleged that her school had violated this equal-opportunity standard: By refusing to make a “reasonable modification” to its no-dogs rule to permit her to use her service dog, the school denied Ehlana the same independence that her fellow students had. If her fellow students dropped something, they would not have to ask an adult to pick it up for them. Wonder allowed Ehlana to achieve the same kind of independence. By barring the dog, and requiring her to rely on a one-on-one human

⁷⁷ See, e.g., *Cave v. East Meadow Union Free Sch. Dist.*, 514 F.3d 240 (2d Cir. 2008) (requiring exhaustion of IDEA proceedings in case alleging refusal to admit service dog); *Charlie F. v. Bd. of Educ. of Skokie Sch. Dist.* 68, 98 F.3d 989 (7th Cir. 1996) (requiring exhaustion of IDEA proceedings in case alleging that teacher orchestrated disability-based harassment of a fourth grader).

⁷⁸ 28 C.F.R. § 35.130(b)(7)(i) (2015).

ACS Supreme Court Review

aide, the school denied her equal independence.

That equality claim was entirely distinct from any possible IDEA claim that Ehlena's education was substantively inadequate and thus denied a FAPE. By making clear that the ADA-based claim could proceed—and could avoid administrative exhaustion if it was sufficiently distinct from an IDEA claim—the Court highlighted the continued significance of the ADA's equality requirements in the education setting.

It is important to appreciate, however, that the ADA's equality requirements are quite different from the equality requirements the Court rejected in *Rowley* and *Endrew F.* In those cases, the Court considered whether the IDEA incorporated a requirement that disabled children receive an equal opportunity *to achieve certain educational outcomes*—notably, to achieve their potential. As I argued above, the equal-opportunity-to-achieve-potential standard is difficult to operationalize and raises troubling normative questions.⁷⁹

But the equality standard as it has been applied under the ADA is more grounded. Rather than asking whether persons with a disability have an equal opportunity to achieve some ultimate outcome, ADA cases focus on whether the refusal to modify a government entity's practices denies disabled persons some more precisely defined opportunity that nondisabled persons receive. For Ehlena Fry, that more precisely defined opportunity was independence in performing physical tasks. But in other education cases the opportunity might touch much more closely on the content of a student's lessons.

Consider the facts of *Rowley*. Amy Rowley was a deaf student, who asked her school to provide a sign-language interpreter during

⁷⁹ See *supra* text accompanying notes 30-37.

class. The school refused and instead provide her an FM hearing aid.⁸⁰ Even with the hearing aid, she could make out “less than half of what [was] said in the classroom.”⁸¹ Her nondisabled fellow students, by contrast, could hear essentially everything. The Court concluded that there was no IDEA violation, because she was benefiting sufficiently from the education to “perform[] better than the average child in her class” and “advanc[e] easily from grade to grade.”⁸² And, as we have seen, the Court rejected the argument that the IDEA required schools to give disabled students an equal opportunity to achieve their potential.

But what if we applied the ADA’s equality standard to the facts of *Rowley*? Just as Ehlena Fry argued that the ADA required her school to permit her to use a service dog so she could have the same opportunity as her nondisabled classmates to be physically independent within the school, a student in Amy Rowley’s position could argue today that the ADA requires her school to use a sign-language interpreter so she can have the same opportunity as her nondisabled classmates to hear the words spoken in the classroom. The interpreter might in fact help provide the student an equal opportunity, vis-à-vis her nondisabled classmates, to achieve her potential, but equal opportunity to achieve potential is not the standard. Equal opportunity to comprehend the words spoken in class is. Applying that equal-opportunity-to-comprehend standard could flip the result in *Rowley*.⁸³

The ADA’s equality standard is far more administrable than is the potential-based standard that the Court rejected under the

⁸⁰ *Rowley*, 458 U.S. at 184-85.

⁸¹ *Rowley*, 458 U.S. at 215 (White, J., dissenting).

⁸² *Rowley*, 458 U.S. at 209-10.

⁸³ See K.M. ex rel. Bright v. Tustin Unified Sch. Dist., 725 F.3d 1088, 1100–01 (9th Cir. 2013) (holding that hard-of-hearing students could proceed on their ADA claim to require their schools to provide them real-time transcription of class discussions, even though *Rowley* doomed such a claim under the IDEA), cert. denied, 134 S. Ct. 1493 (2014).

ACS Supreme Court Review

IDEA. Under the ADA standard, the plaintiff needs only to: (1) identify the particular task or benefit that her nondisabled fellow students enjoy but she does not (physical independence, perceiving all of the words in the classroom, etc.); (2) point to a reasonable modification to school rules or policies that would rectify that inequality (a service dog, a sign-language interpreter); and if necessary (3) defend against the school's claim that the modification would be so burdensome as to "fundamentally alter the nature of" the school's activities.⁸⁴ We don't have to guess at what a student's potential is or would be, or at how often other students get to achieve their full potential.

Is the ADA's equality standard normatively attractive? The ADA, of course, has been an incredibly controversial law—and educational accommodations for students with disabilities have been particularly controversial.⁸⁵ We want schools to give everyone the same chance to learn, but resources are limited. At some point, giving to one student takes from another student. What, we might ask, makes disabled students more worthy than others?

Outside of the education context, I have argued that the ADA's accommodation requirement is justified by the systematic disadvantage that society attaches to disability.⁸⁶ When a relatively small change in an institution's practices can keep the institution from contributing to that disadvantage by denying an opportunity to a person with a disability, it is appropriate to require the change. I have argued that this is basically the justification for classic antidiscrimination laws, which—even when they don't mandate

⁸⁴ 28 C.F.R. § 35.130(b)(7)(i) (2015).

⁸⁵ See BACKLASH AGAINST THE ADA: REINTERPRETING DISABILITY RIGHTS (Linda Hamilton Krieger ed., 2003).

⁸⁶ See Samuel R. Bagenstos, "Rational Discrimination," *Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825 (2003).

reasonable accommodations—require employers and others to bear some costs to avoid contributing to systematic disadvantage. Employers, for example, are barred from discriminating against women and minorities even if customers refuse to be served by them and instead choose to patronize competing businesses.⁸⁷ And employers are barred from discriminating against pregnant women, even if it is “more expensive or less convenient to” give pregnant workers the same accommodations that other employees receive.⁸⁸ We impose these requirements, not to prevent employers from being individually irrational, but to prevent them from contributing to the systematic disadvantage experienced by minorities and women in the workforce.

Inside of the public education context, the normative argument for accommodations to achieve equal opportunity is even stronger. Although there is a robust debate over the purpose of public education, at the core is opportunity for all—to participate in economic and/or civic life. An institution with the mission of providing opportunity is in less of a position to deny accommodations like this than is an institution (like an employer) with the mission of making money.⁸⁹ The equality standard to which *Fry* opens the way is thus a far more tractable and defensible equality standard than the one *Andrew F.* rejected.

IV. Conclusion: The Equality Question the Court Did Not Ask

To this point, I have focused on the equality questions in *Andrew F.* and *Fry* from the perspective of students with disabilities. I have asked how the Court’s decisions in these cases

⁸⁷ See *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273 (9th Cir. 1981).

⁸⁸ See *Young v. United Parcel Service, Inc.*, 135 S. Ct. 1338, 1354 (2015).

⁸⁹ See WALZER, *supra* note 24, at 197-226.

ACS Supreme Court Review

might affect the degree to which disabled students are treated equally to their nondisabled peers along various axes. And I have examined the administrability of, and normative arguments for, the Court's approach to these equality questions. As I show in Part II, the Court in *Endrew F.* rejected an equality standard for defining a free appropriate public education under the IDEA, but the robust adequacy standard the Court adopted is one that is necessarily based on a broader concern with equality. And, as I show in Part III, the Court in *Fry* opened the door to the independent application of an equal-opportunity standard under the ADA—a standard that could well reverse the result in the *Rowley* case. Each of these holdings seems to me quite defensible.

When one takes a different perspective, though, one can see another equality question in the background of these cases—one to which the Court did not explicitly advert, but one that plays an important role in broader debates regarding the education of disabled students. That question is this: Does a special focus on the rights of students with disabilities inherently discriminate against all, or some subset of, nondisabled children?

In Part III.B., I argued that accommodation of students with disabilities is appropriate because of the systematic disadvantage that disabled people experience in our society. But there are, of course, other groups that experience systematic disadvantage. The overlapping categories of poor people, African-Americans, and Latinos are obvious examples. If giving enforceable rights to educational accommodations to disabled children comes at the expense of these groups, we have reason to worry that the IDEA and ADA are impeding equality, at least along some important dimensions. A recent decision by a state trial court in Connecticut seemed to suggest that the IDEA was having just such a troubling effect, by diverting resources from children in poorer school

districts.⁹⁰ Some years ago, Professors Mark Kelman and Gillian Lester argued that our disability laws, as applied to education, attempted to avoid the difficult tradeoffs that were necessary here by elevating to the status of a “right” something that is more properly understood as a mere redistributive “claim” that should be resolved as part of pluralist political bargaining.⁹¹ Underlying both of these arguments is the concern that richer, white parents are better able than poorer, minority parents to navigate the disability laws to obtain accommodations for their children.⁹²

These are extremely important issues that I cannot resolve in this essay. But there are good reasons for caution before fully accepting the narrative that gains for children with disabilities come at the expense of poor and minority children. For one thing, many poor and minority children themselves have disabilities. Rates of disability are higher in poor communities, for all sorts of unsurprising reasons.⁹³ Indeed, some of the strongest supporters of the Education for All Handicapped Children Act—the law that became the IDEA—were established civil rights groups that had traditionally focused on racial equality. In the late 1960s and early 1970s, they saw that many children who were poor and members of racial minority groups were denied access to educational opportunities because school districts labeled those children as disabled.⁹⁴ Those groups thus concluded that any response

⁹⁰ Connecticut Coal. for Justice in Educ. Funding, Inc. v. Rell, 2016 WL 4922730 at *27-*32 (Conn. Super. Ct. Sept. 7, 2016).

⁹¹ See MARK KELMAN & GILLIAN LESTER, JUMPING THE QUEUE: AN INQUIRY INTO THE LEGAL TREATMENT OF STUDENTS WITH LEARNING DISABILITIES 195-226 (1997). Kelman elaborates on the “right”/“claim” distinction in Mark Kelman, *Market Discrimination and Groups*, 53 STAN. L. REV. 833 (2001).

⁹² See, e.g., KELMAN & LESTER, *supra* note 91, at 76-78.

⁹³ For a nice, accessible discussion, see Rebecca Vallas & Shawn Fremstad, *Disability Is a Cause and Consequence of Poverty*, TALKPOVERTY (Sept. 19, 2014), <https://talkpoverty.org/2014/09/19/disability-cause-consequence-poverty/>.

⁹⁴ JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT 165-166 (1993).

ACS Supreme Court Review

to educational inequality would have to address disability—a conclusion that continues to seem valid today.

Still, there are lingering concerns. There is a longstanding concern that school districts over-identify certain, more stigmatizing, disabilities (notably emotional disturbance and developmental disabilities) among minority children, while over-identify other, less stigmatizing, disabilities (notably autism) among whites.⁹⁵ These disparate patterns of identification can divert minority students into much more limiting and stigmatizing educational programs than are experienced by similarly situated white students. Any effort to promote educational equality must address that problem. It must also address the barriers that poor and working-class parents face in taking advantage of the IDEA or the ADA.⁹⁶ Although there is no particular reason to believe that these barriers are any greater for poor people in the education context than in many others, the IDEA and ADA will not provide true equality until we address them.

The *Endrew F.* and *Fry* cases, in other words, represent important steps toward achieving educational inequality. But many key steps remain.

⁹⁵ RUTH COLKER, *DISABLED EDUCATION: A CRITICAL ANALYSIS OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT 6-8* (2013). For a recent discussion of racial disparities in special education, see BETH HARRY & JANETTE KLINGNER, *WHY ARE SO MANY MINORITY STUDENTS IN SPECIAL EDUCATION? UNDERSTANDING RACE AND DISABILITY IN SCHOOLS* (2014).

⁹⁶ See Elisa Hyman, Dean Hill Rivkin & Stephen A. Rosenbaum, *How IDEA Fails Families Without Means: Causes and Corrections from the Frontlines of Special Education Lawyering*, 20 AM. U. J. GENDER SOC. POL'Y & L. 107 (2011).

Maslenjak v. United States: Immigration, Expatriation, and the Plenary Power Doctrine

Amanda Frost*

No one was surprised by the Supreme Court's unanimous decision in *Maslenjak v. United States*, which held that the government cannot revoke citizenship based on an immaterial false statement in a naturalization application. Indeed, the lower court's decision was so obviously wrong that commentators speculated about why the government chose to defend it rather than concede error.¹ *Maslenjak* is significant not for its result, but rather because all nine members of the Court assumed that Congress would not revoke citizenship lightly. Before relegating *Maslenjak* to the dust bin of Supreme Court history, we should take a moment to remember that for much of the Twentieth Century, the opposite was true—and that it took the U.S. Supreme Court to change not only the law, but also the public's perception of the value of citizenship. In short, *Maslenjak* is the quiet culmination of a Supreme Court revolution.

This history is relevant to the current debate over the federal judiciary's role in reviewing immigration policy—a question that

* Professor of Law, American University Washington College of Law. I received valuable comments from Jennifer Daskal, Engin Isin, and Steven Schwinn. Special thanks to Ann Garcia for her research assistance.

¹ See, e.g., Pamela S. Karlan, *When the Solicitor General Has To Defend the Indefensible*, SLATE (Jun. 22, 2017, 7:20 PM), http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2017/supreme_court_june_2017/when_the_solicitor_general_has_to_defend_the_indefensible.html.

ACS Supreme Court Review

was fiercely litigated over this past year in response to President Trump’s executive order temporarily banning citizens from six predominantly Muslim countries from entering the United States. For over a century, courts have routinely granted the political branches great deference when reviewing their choices about whom to admit or exclude from the United States under the so-called plenary power doctrine. As a result, immigration law is akin to a constitution-free zone in which the government can discriminate on grounds that would be illegal in any other context.² Although courts have appeared leery of the plenary power doctrine in recent years, they have yet to disavow it, and both Democratic and Republican administrations cite that doctrine as a bulwark against searching judicial review of their immigration policies. Commentators have long urged the Court to inter the plenary power doctrine, and some argue that the constitutional challenge to the Trump Administration’s travel ban is the perfect vehicle in which to do so.³

If the Court is considering such a move, it should look to the history of forced expatriation for inspiration. For many decades, the government argued that it had broad, nearly unfettered power over expatriation. Despite the lack of any textual support in the Constitution, the government claimed that expatriation was an inherent sovereign power essential to protect national security

² See, e.g., Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 255 (“In an undeviating line of cases spanning almost one hundred years, the Court has declared itself powerless to review even those immigration provisions that explicitly classify on such disfavored bases as race, gender, and legitimacy.”); Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 MINN. L. REV. 1625, 1642 (2007) (stating that “[a]s a result of the plenary power doctrine, the Supreme Court has upheld immigration laws that discriminate based on race, sex, and illegitimacy—laws that might be unconstitutional in a nonimmigration context”).

³ See, e.g., Adam Chilton & Genevieve Lakier, *The Potential Silver Lining in Trump’s Travel Ban*, OP-ED, WASH. POST (July 5, 2017), https://www.washingtonpost.com/opinions/the-potential-silver-lining-in-trumps-travel-ban/2017/07/05/fe913a54-61a0-11e7-84a1-a26b75ad39fe_story.html?utm_term=.36a3ec069d52.

and control foreign policy, as well as a necessary corollary to Congress's constitutional authority over naturalization—the same arguments that are used to defend the plenary power doctrine in immigration law today.⁴ At first, courts accepted these arguments, allowing the government to revoke the citizenship of more than 22,000 Americans—more than any other democracy.⁵ But as Congress expanded the categories of persons eligible for expatriation, and as the executive vigorously pursued expatriation through constitutionally questionable means, the Court grew increasingly uneasy. Finally, after curbing the practice in a number of narrowly reasoned cases, the Court declared in its 1967 decision in *Afroyim v. Rusk* that the government has no constitutional authority to revoke citizenship without the consent of the citizen, absent fraud in the naturalization process.⁶ The history of expatriation illustrates the judiciary's essential role in policing constitutional limits on government conduct, as well as its power to transform the ordinary into the unthinkable. These are lessons that the courts may find useful as they consider their authority to review the executive's immigration choices.

I. Maslenjak and Contemporaneous Conceptions of Citizenship

Divna Maslenjak and her family came to the United States

⁴ See also John P. Roche, *The Loss of American Nationality—The Development of Statutory Expatriation*, 99 U. PA. L. REV. 25, 27 (1950) (arguing that the government has the inherent sovereign power to expatriate its citizens); Comment, *The Expatriation Act of 1954*, 64 YALE L. J. 1164, 1176-77 (1955) (arguing that “Congress ha[s] the power to take away citizenship, with or without the . . . citizen’s consent, as a ‘necessary and proper’ incident to its ‘sovereign’ power in the area of foreign affairs”).

⁵ See PATRICK WEIL, *THE SOVEREIGN CITIZEN: DENATURALIZATION AND THE ORIGINS OF THE AMERICAN REPUBLIC* 2, 11 (2013). Weil’s book is focused on denaturalization, and thus his calculations do not include revocation of native-born Americans’ citizenship. See generally BEN HERZOG, *REVOKING CITIZENSHIP: EXPATRIATION IN AMERICA FROM THE COLONIAL ERA TO THE WAR ON TERROR* (2015) (describing the prevalence of citizenship stripping throughout American history).

⁶ *Afroyim v. Rusk*, 387 U.S. 253 (1967).

ACS Supreme Court Review

as refugees from the former Yugoslavia, fleeing the Civil War between the Bosnians and the Serbs. Maslenjak had told U.S. immigration officials that her husband could not return to Serbian-controlled areas in Bosnia because he would be persecuted for his refusal to serve in the Bosnian Serb army. She also explained that the family was Christian, and they were afraid that the Muslim population would harm them if they stayed. She and her family were admitted to the United States as refugees, and Maslenjak then naturalized in 2007. During those naturalization proceedings, she swore that she had never given false information to a government official when applying for an immigration benefit.⁷

As Maslenjak now admits, she lied, and she lied about not having lied. Her husband not only served in the army, he had been a member of the brigade that had participated in the infamous 1995 massacre in Srebrenica of 8,000 Bosnian Muslims.⁸ After the government learned the truth, she was prosecuted under 18 U.S.C. § 1425(a), which makes it a federal crime to “knowingly procure[]” naturalization in a manner “contrary to law.” The government argued that Maslenjak violated section 1425(a) because she had knowingly made a false statement under oath in a naturalization proceeding, which is “contrary to law.” Maslenjak was convicted, and as a consequence was automatically stripped of her citizenship.⁹

During her jury trial, the government argued that it need only prove that Maslenjak made a false statement in the course of her naturalization proceedings, and not that the statement was material to the government’s decision to grant her citizenship. The jury was instructed accordingly. That ruling created a circuit split, and the

⁷ Maslenjak v. United States, 137 S. Ct. 1918, 1923 (2017).

⁸ *Id.*

⁹ *Id.* at 1923-24.

Supreme Court granted Maslenjak's petition for a writ of certiorari.

In her brief to the Supreme Court, Maslenjak drew upon the Court's expatriation jurisprudence to support her case. The opening sentence of her brief declared, "This Court has long recognized that American citizenship is a 'precious right,'" quoting *Schneiderman v. United States*, one of the first cases in which the Court limited the government's power to expatriate its citizens.¹⁰ The brief's introduction quoted *Afroyim v. Rusk*'s conclusion that "[i]n our country the people are sovereign and the Government cannot sever its relationship to the people by taking away their citizenship."¹¹ Maslenjak explained that the only exception is when citizenship was "unlawfully procured," and the principle of constitutional avoidance requires this exception be read narrowly.¹² "Given that Congress has no constitutional power to strip a naturalized American of citizenship," she argued that the exception "must be strictly construed to fit within that limited constitutional power."¹³ The government's answering brief did not contest Maslenjak's description of the Court's expatriation jurisprudence, but rather argued that the statute permitted revoking citizenship for any false statement in a naturalization application, regardless of whether it was material to the government's decision to grant that application.

Oral argument did not go well for the government. The key moment came a few minutes after Assistant Solicitor General Robert Parker took the podium. Chief Justice Roberts observed that one of the questions on the naturalization form asked "Have you EVER committed . . . a crime or offense for which you were

¹⁰ Brief for the Petitioner at 1, *Maslenjak*, 137 S. Ct. 1918 (No. 16-309) (quoting *Schneiderman v. United States*, 320 U.S. 118, 122 (1943)).

¹¹ *Id.* (quoting *Afroyim*, 387 U.S. at 257).

¹² *Id.* (quoting *Afroyim*, 387 U.S. at 267 n.23).

¹³ *Id.* at 29.

ACS Supreme Court Review

NOT arrested?” To the amusement of the audience, the Chief Justice then admitted, “[s]ome time ago, outside the statute of limitations, I drove 60 miles an hour in a 55-mile-an-hour zone.” He asked the government whether a failure to list that “offense” on a naturalization form would allow the government to seek his denaturalization years later. After some hemming and hawing, it became clear that the answer was “yes.” And with that, the government lost its case.¹⁴

Writing for the majority, Justice Kagan addressed the question as one of straightforward statutory interpretation. The Court concluded that the crime of “knowingly procur[ing]” naturalization “contrary to law” in 18 U.S.C. 1425(a) is most naturally understood to mean that “the illegal act must have somehow contributed to the obtaining of citizenship.”¹⁵ In other words, any old lie is not good enough, because section 1425(a) requires a causal connection between the legal violation—here, Maslenjak’s false statement—and the grant of citizenship. The government’s reading was also inconsistent with the broader statutory context, which does not bar applicants from naturalizing solely on the basis of an immaterial false statement in their applications. As the Court put it, “[o]n the Government’s theory, some legal violations that do not justify *denying* citizenship . . . would nonetheless justify *revoking* it later”—an anomalous result.¹⁶

¹⁴ Transcript of Oral Argument at 27, *Maslenjak*, 137 S. Ct. 1918 (No. 16-309).

¹⁵ *Maslenjak*, 137 S. Ct. at 1925.

¹⁶ Kagan then went on to explain that a jury must find *either* that the false statement concerned a legally disqualifying fact, *or* that the lie prevented investigators from exploring further to uncover disqualifying facts. In the latter circumstance, the government must show both that the misrepresented fact would have prompted officials to investigate further, and that if they had investigated they would have uncovered disqualifying information. However, the government need not provide definitive proof that the individual would have been disqualified from naturalization, but rather need only establish that the investigation “would predictively have disclosed” a disqualifying fact. *Id.* at 1929.

Justice Gorsuch and Justice Thomas concurred in the result, and agreed with the majority that the illegal conduct must in some way have caused her naturalization before her citizenship could

The Court never cited the Fourteenth Amendment’s citizenship clause, or the many Supreme Court precedents describing the sanctity of citizenship and sharply limiting the government’s power to revoke it. Nonetheless, its opinion was grounded in these sources, which established a principle now so broadly accepted that it need not be articulated. The Court alluded to this history when it observed that the Government’s broad interpretation of the denaturalization statute “opens the door to a world of disquieting consequences.”¹⁷ Under the government’s reading, federal prosecutors would have an incentive to “scour” naturalized citizens’ paperwork to find some false statement—however minor and irrelevant—and then prosecute and revoke citizenship on that “meager basis, even many years after she became a citizen.”¹⁸ The result would be to give prosecutors “nearly limitless leverage—and afford newly naturalized Americans precious little security.”¹⁹ All nine members of the Court could not believe that this is what Congress intended.²⁰

And yet, not so long ago, Congress deliberately made American citizenship contingent and revocable, giving government officials broad powers to pick and choose who to exclude from citizenship, and possibly banish from the United States as well. In the first half of the Twentieth Century, Congress passed a

be revoked. But they refused to join the portions of the majority’s opinion describing how the causation requirement would work in practice, because that issue had not been addressed by the parties. *Id.* at 1931-32 (Gorsuch, J., concurring). Justice Alito concurred only in the judgment after concluding that a naturalized citizen cannot be stripped of her citizenship based on an immaterial false statement, but he would not require proof that the false statement be shown to have had a demonstrable effect on the naturalization proceedings. *Id.* at 1932-33 (Alito, J., concurring).

¹⁷ *Id.* at 1927.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Although Maslenjak won the battle, she may well lose the war. The Court remanded Maslenjak’s case for a new trial, and a jury may find that she lied about a material fact that would have disqualified her from naturalizing.

ACS Supreme Court Review

series of expatriation statutes that stripped tens of thousands of Americans of their citizenship, often targeting individuals for their political activities or anti-government speech. Many others were expatriated on the ground that something they did—such as a political affiliation, a marriage, or a sojourn abroad—suggested they lacked sufficient “attachment” to the Constitution or allegiance to the United States. Just as *Maslenjak* warned, when citizenship is easy to revoke, prosecutors will “scour” the record of disfavored Americans to find a way to denaturalize and deport them. In short, *Maslenjak* is noteworthy because only fifty years from those events, all nine Justices find it unthinkable that Congress would lightly take away anyone’s citizenship again. Less clear is whether the Justices realize that conclusion was not inevitable, but rather the result of a hard-fought battle within the Court.

The history of expatriation, and the Court’s reaction to it, is worth recounting for two reasons. First, it is a reminder of the difference the Court can make, not just in curbing the political branches, but in changing public perceptions. As legal scholars have shown, the American public’s view of citizenship was profoundly affected by the Court’s decisions protecting that status from government interference.²¹ Second, the history of expatriation is relevant to the current debate over the role of the courts in reviewing the government’s immigration decisions—a question that may come before the Supreme Court this Term if it addresses challenges to the Trump Administration’s ban on travel.

²¹ See, e.g., WEIL, *supra* note 5; Peter J. Spiro, *Afroyim: Vaunting Citizenship; Presaging Transnationality*, in IMMIGRATION STORIES 163-65 (David Martin, ed., 2005).

II. A Brief History of Forced Expatriation in the United States

Forced expatriation is most often associated with totalitarian regimes: Nazi Germany expatriated 80,000 people, including 40,000 native born citizens; the Soviet Union revoked the citizenship of 1.5 million people; the Vichy government in France terminated the citizenship of over 15,000 people between 1940 and 1944; South Africa's apartheid regime attempted to strip all black South Africans of their citizenship. But democracies can expatriate their citizens as well. Between 1906 and 1967, the United States stripped citizenship from tens of thousands of people—more than any other democracy.²² The practice died out in the last quarter of the century, not because Congress or the executive lost enthusiasm for that project—to the contrary, both branches embraced and expanded the practice throughout the first half of the Twentieth Century—but rather because the Supreme Court of the United States declared it unconstitutional.

In the United States, citizenship can be acquired in different ways. Under the Fourteenth Amendment, all persons born in the United States automatically are U.S. citizens. By statute, children born outside the United States can sometimes also acquire citizenship at birth from a U.S. citizen parent. The Constitution also gives Congress the power to “establish a uniform rule of naturalization.” Since 1790, Congress has by statute permitted immigrants to naturalize after a period of residency in the United States.²³

Although Congress long assumed its powers to control naturalization also allowed it to revoke citizenship, it did not do so

²² See WEIL, *supra* note 5, at 179.

²³ See generally STEPHEN H. LEGOMSKY & CRISTINA M. RODRIGUEZ, *IMMIGRATION AND REFUGEE LAW AND POLICY* 1289-1336 (5th ed. 2009).

ACS Supreme Court Review

in earnest until the Twentieth Century. Widespread expatriation began in 1906, when Congress authorized the denaturalization of anyone whose citizenship had been illegally or fraudulently procured. For the next sixty years, the government used this denaturalization provision to revoke citizenship from suspected anarchists, communists, and others whose ideological beliefs were arguably at odds with a constitutional democracy, asserting that they had lacked the requisite “attachment to the Constitution” and allegiance to the United States at the time of their naturalization.²⁴

For example, in 1918 Carl Swelgin was denaturalized as a result of his membership in the Industrial Workers of the World (“IWW”). The government argued that because the IWW opposed organized government, Swelgin’s membership proved he lacked the requisite allegiance to the United States.²⁵ Likewise, the government moved to cancel Michael Stuppiello’s naturalization because he professed to be a “philosophical anarchist”—that is, to use his own words, he believed in “evolution by education, in order to reach a state of education of mind that it won’t be necessary to have government.”²⁶ Stuppiello disavowed violence and testified that he believed that government was necessary in the United States under then-current conditions. Nonetheless, the government argued that a philosophical anarchist is no less dangerous than an anarchist who advocates for the violent overthrow of government, and a district court agreed.²⁷ Using the same rationale, the government denaturalized German Americans during World War I for making statements sympathetic to Germany.²⁸

²⁴ See generally WEIL, *supra* note 5; HERZOG, *supra* note 5; I-MEIN TSIANG, THE QUESTION OF EXPATRIATION IN AMERICA PRIOR TO 1907 (1942).

²⁵ United States v. Swelgin, 254 F. 884 (D. Or. 1918).

²⁶ See WEIL, *supra* note 5, at 74-75.

²⁷ United States v. Stuppiello, 260 F. 483, 484 (W.D.N.Y. 1919).

²⁸ See, e.g., United States v. Darmer, 249 F. 989 (W.D. Wash. 1918).

The Expatriation Act of 1907 went further, providing that even native-born Americans could be stripped of their citizenship for taking an oath of allegiance to a foreign government, which was treated as a renunciation of their U.S. citizenship.²⁹ The 1907 law also automatically revoked the citizenship of all American women married to foreigners. Colloquially known as the “Gigolo Act,” this provision was in part intended to prevent foreign men from marrying American women for the purpose of immigrating to the United States. The law also reflected the contemporaneous view that women had no independent legal identity, but instead acquired derivative social and political status through their marriages.³⁰

After vigorous criticism from women’s groups, Congress amended the law in 1922 to allow many American women to keep their citizenship, and consequently to exercise their newfound right to vote. But the law continued to strip citizenship from women who married foreigners ineligible to naturalize—that is, Asian men—until 1931, when the law was finally changed to allow all American women to retain their citizenship upon marriage.³¹

The Nationality Act of 1940, enacted on the eve of the United States’ entrance into the Second World War, further expanded the activities that could justify forced expatriation. The Act provided that both native-born and naturalized U.S. citizens could be stripped of their citizenship for serving in a foreign military, taking foreign employment, voting in a foreign election, being convicted of treason, deserting during wartime, or attempting to overthrow the government by force. The law also provided that naturalized citizens would lose American citizenship if they lived in their

²⁹ Expatriation Act, Pub. L. No. 59-193, ch. 2534, 34 Stat. 1228 (1907).

³⁰ See generally CANDICE LEWIS BREDBENNER, *A NATIONALITY OF HER OWN: WOMEN, MARRIAGE, AND THE LAW OF CITIZENSHIP* (1998).

³¹ Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 *UCLA L. REV.* 405, 443 (2005).

ACS Supreme Court Review

home country for at least three years, or lived abroad for at least five years.³²

The Cold War brought in a new wave of such legislation. The Expatriation Act of 1954 automatically stripped the citizenship of any American convicted of violating the Smith Act, which was the law used to prosecute Communist Party members. President Eisenhower approved, declaring: “[W]hen a citizen knowingly participates in the Communist conspiracy he no longer holds allegiance to the United States.”³³ During the Red Scare, the government used this new legislation, together with the longstanding authority to denaturalize anyone whose conduct showed a lack of attachment to the U.S. Constitution or allegiance to the United States, to target suspected communists and communist sympathizers.

At the height of the government’s denaturalization campaign, immigration officials were combing through the files of naturalized citizens, searching for evidence that could be used to strip them of their citizenship. Anthony Scariano, a former Assistant U.S. Attorney in Illinois, described how immigration officials tried to pressure him to bring denaturalization proceedings against a prominent member of a labor union because the man subscribed to left wing publications. When Scariano asked immigration officials how they had learned this, they explained that they regularly searched the man’s mail, steaming open envelopes to check on the contents. Describing these events to an interviewer in the 1980s, Scariano said “you can’t imagine this today The climate [then] was a lot different. It was the McCarthy era.”³⁴

³² Nationality Act of 1940, Pub. L. 76-853, 54 Stat. 1137 (1940).

³³ Annual Message to the Congress on the State of the Union, 3 Pub. Papers 6-23 (Jan. 7, 1954).

³⁴ Audio transcript: Anthony Scariano Memoir, vol. 1, at 77, held by the University of Illinois at Springfield (1984), available at <http://www.idaillinois.org/cdm/ref/collection/uis/id/3837>.

By the middle of the twentieth century, both Congress and the executive fully supported widespread expatriation of citizens at home and abroad. Congress enacted multiple statutes allowing it, and the Department of Justice established a special unit specifically devoted to searching out those whose conduct justified terminating citizenship. At times, the government approached the task backwards; that is, it first identified a citizen it wanted to exclude or deport, and then looked to see if that person's citizenship could legally be revoked.³⁵ Using these methods, the political branches stripped tens of thousands of Americans of their citizenship, and in the process transformed citizenship from an immutable condition into a fragile status revocable by the government.

III. The Judiciary's Response to Forced Expatriation

The targets of the government's forced expatriation programs fought back in court, arguing that the expatriation laws violated the Fourteenth Amendment's citizenship clause, which provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside." Alternatively, they argued that the government's methods of stripping them of citizenship violated the Due Process Clause and other constitutional protections. In defense, the government asserted that a sovereign nation has an inherent right to control access to citizenship, which it viewed as essential to protect national security and regulate foreign affairs. Although the government acknowledged that the Fourteenth Amendment's citizenship clause established rights to *acquire* citizenship, it argued that provision did not restrict the government

³⁵ See, e.g. WEL, *supra* note 5, at 55-64 (describing how the government aggressively pursued denaturalization of anarchist Emma Goldman).

ACS Supreme Court Review

from taking citizenship away. Accordingly, the government insisted that courts should defer to the political branches and review revocations of citizenship only to determine whether the government's decision to do so had a rational basis.

At first, the courts accepted the government's argument that it had the power to deprive both naturalized and native-born Americans of their citizenship, and that the courts should be deferential when reviewing such decisions. One of the first such cases, *MacKenzie v. Hare*, challenged the law stripping women of their U.S. citizenship upon marriage to a foreigner.³⁶ Ethel MacKenzie lived in California, where women obtained the right to vote in 1911—a right that MacKenzie had helped to win as a member of the Club Woman's Franchise League.³⁷ But MacKenzie was disenfranchised as a result of her marriage to British citizen Gordon MacKenzie, which automatically terminated her U.S. citizenship under the Expatriation Act of 1907. MacKenzie challenged the law as a violation of the Fourteenth Amendment's citizenship clause and the Due Process Clause, arguing that “[n]o act of the legislature can denationalize a citizen without his concurrence,” and that the “power of naturalization vested in Congress by the Constitution is a power to confer citizenship, not a power to take it away. . . .”³⁸ The Supreme Court disagreed, explaining that the government is “invested with all the attributes of sovereignty,” which includes “the powers of nationality, especially those which concern its relations and intercourse with other countries.”³⁹ The Court concluded that its role in reviewing the government's power to expatriate is

³⁶ *MacKenzie v. Hare*, 239 U.S. 299 (1915).

³⁷ BREDBENNER, *supra* note 30, at 65.

³⁸ *MacKenzie*, 239 U.S. at 310 (internal citations omitted).

³⁹ *Id.* at 311.

limited, declaring “[w]e should hesitate long before limiting or embarrassing such powers.”⁴⁰

In *Schneiderman v. United States*, decided in 1943, the Court began to scrutinize forced expatriation more closely, albeit without declaring that the Constitution limited the practice.⁴¹ The government had sought to denaturalize William Schneiderman twelve years after he became a citizen on the ground that his membership in the Communist Party was evidence that he lacked attachment to the U.S. Constitution at the time of his naturalization. Schneiderman argued that revoking citizenship based on his political beliefs was a violation of his First Amendment rights. The government responded that Congress has broad authority to set the rules for naturalization, which includes the authority to rescind a grant of citizenship to an individual who was subsequently shown not to have satisfied the criteria, asserting that “every certificate [of naturalization] is deemed to be granted on the condition that the Government may subsequently challenge it”⁴² The government also argued that “[n]o constitutional issue of free speech or free political thought is raised by cancellation of petitioner’s citizenship,” because “Congress may make, as it always has, political beliefs, affiliations and activities the touchstone of qualification of aliens for citizenship.”⁴³

The Court ruled against the government in a 5-3 vote, but did so on narrow grounds. The majority explained that the government bears the burden of proof in denaturalization proceedings and must provide clear and convincing evidence that citizenship had

⁴⁰ *Id.* at 312. See also *Abrams*, *supra* note 2, at 1642 (describing how the Court’s decision in *Mackenzie v. Hare* “further entrenched the plenary power doctrine”).

⁴¹ *Schneiderman v. United States*, 320 U.S. 118 (1943).

⁴² Brief for Respondent at 21, *Schneiderman*, 320 U.S. 118 (No. 2).

⁴³ *Id.* at 17.

ACS Supreme Court Review

been erroneously conferred.⁴⁴ Even assuming that naturalization is a privilege that can be given or withheld as Congress allows—a question the Court did not decide—the Court held that it “will not presume . . . that Congress meant to circumscribe the liberty of political thought” by allowing denaturalization based on membership in a political organization.⁴⁵ In short, the Court narrowly interpreted the denaturalization statute to avoid constitutional concerns, but did not go so far as to declare that the Constitution barred denaturalization based on political beliefs alone.

Schneiderman was a serious road bump in the government’s denaturalization campaign, and also suggested the Court was having second thoughts about whether broad denaturalization statutes were constitutionally permissible. But it did not put an end to the practice. During the cold war, the government continued to pursue denaturalization of members of the Communist party, often succeeding. The Supreme Court repeatedly refused to review such cases, denying petitions for writs of certiorari filed by the targets of the denaturalization campaign through the first half of the 1950s. Although the Court did grant and reverse denaturalization in a handful of cases in the second half of that decade, it decided the cases on narrow or technical grounds, without addressing the constitutional concerns.⁴⁶

A trio of rulings issued on the same day in 1958 confused more than they clarified. In *Nishikawa v. Dulles*, the Court held that the government could not revoke the citizenship of a native-born American of Japanese descent, who was drafted into the Japanese army in 1941 while living in Japan, unless it first proved

⁴⁴ *Schneiderman*, 320 U.S. at 123.

⁴⁵ *Id.* at 132.

⁴⁶ See WEIL, *supra* note 5, at 139-140.

his military service was voluntary. The Court acknowledged some confusion over the type of conduct that, as a constitutional matter, may result in a loss of citizenship, but stated that it was “settled that no conduct results in expatriation unless the conduct is engaged in voluntarily,” and placed the burden on the government to prove voluntariness by clear and convincing evidence.⁴⁷ In *Trop v. Dulles*, the Court invalidated a provision in the Nationality Act of 1940 that automatically revoked citizenship upon conviction for desertion followed by a dishonorable discharge.⁴⁸ Four Justices concluded it violated the Eighth Amendment’s prohibition against cruel and unusual punishment by leaving Trop stateless; Justice Brennan concurred on the ground that expatriation as a punishment for desertion was too far removed from Congress’s war powers, and thus “falls beyond the domain of Congress.”⁴⁹ In *Perez v. Brownell*, however, Justice Brennan provided the fifth vote to uphold the provision permitting revocation of citizenship of a native-born American who had voted in a Mexican election. Justice Frankfurter’s majority opinion explained that Congress has the authority to terminate citizenship in the course of regulating foreign affairs to prevent the “embarrassments to the government” that would result from allowing citizens to vote in foreign elections.⁵⁰

Nishikawa and *Trop* were both narrow decisions that constrained, but did not undermine, the government’s general claim of authority to revoke citizenship, while *Perez* affirmed the government’s authority to do so. All three were fractured decisions in which the Court struggled to articulate a principled

⁴⁷ *Nishikawa v. Dulles*, 356 U.S. 129, 133 (1958).

⁴⁸ *Trop v. Dulles*, 356 U.S. 86 (1958).

⁴⁹ *Id.* at 114 (Brennan, J., concurring).

⁵⁰ *Perez v. Brownell*, 356 U.S. 44, 59 (1958).

ACS Supreme Court Review

limit on Congress's power to expatriate. The anomaly of restoring citizenship to a man convicted of the crime of desertion in *Trop*, while simultaneously taking away the citizenship of a man who engaged in the legal act of voting in *Perez*, suggested that the Court was struggling with the boundaries of Congress's power to regulate citizenship.

The mixed messages from the Court allowed the federal government to continue to claim broad authority to revoke the citizenship of both naturalized and native-born citizens. In *Kennedy v. Mendoza-Martinez*, which came before the Court in 1963, the government defended the constitutionality of statutes stripping citizenship of the native born who evaded the draft during a time of war or national emergency, arguing that Congress has broad authority to enact such laws as an exercise of its power over foreign affairs and war, and additionally claiming such laws are “an inherent attribute of sovereignty.”⁵¹ The Court struck down these statutes as unconstitutional, but once again on technical grounds. The Court held that because denaturalization was intended as a punishment, the government must provide the procedural protections of the Constitution's Fifth and Sixth Amendments before imposing it.⁵² In short, the Court still accepted the premise that the government had wide latitude to control access to citizenship, and the Court was closely divided even in issuing narrow rulings that required the government to clear higher procedural burdens before doing so.

The Court did not definitively resolve the issue until 1967, in *Afroyim v. Rusk*. Beys Afroyim had moved to the United States in 1912 and was naturalized in 1925. In 1950, Afroyim moved

⁵¹ Brief for Appellant at 29, *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) (Nos. 2, 3).

⁵² *Mendoza-Martinez*, 372 U.S. at 165-166.

to Israel, and the following year he voted in an election for the Israeli Knesset—an Act that automatically cost him his U.S. citizenship under the 1940 Nationality Act. Afroyim challenged that provision, even though only nine years earlier the Court had upheld its constitutionality in *Perez v. Brownell* after finding that Congress had a broad power to expatriate its citizens in the course of regulating foreign affairs.

A bare majority of the Court reversed *Perez* in a sweeping ruling that held, for the first time, that Congress lacked the power to strip Americans of their citizenship. Writing for the majority, Justice Black first “reject[ed] the idea . . . that Congress has any general power, express or implied, to take away an American citizen’s citizenship without his assent.”⁵³ Furthermore, Justice Black explained that “[a]ny doubt” about the limits on Congress’s power to revoke citizenship was put to rest by the Fourteenth Amendment, which “put citizenship beyond the power of any governmental unit to destroy.”⁵⁴ In a key passage in the case, the Court declared:

Citizenship is no light trifle to be jeopardized any moment Congress decides to do so under the name of one of its general or implied grants of power. . . . The very nature of our free government makes it completely incongruous to have a rule of law under which a group of citizens temporarily in office can deprive another group of citizens of their citizenship. We hold that the Fourteenth Amendment was designed to, and does, protect every citizen of this Nation against a congressional forcible

⁵³ *Afroyim*, 387 U.S. at 257.

⁵⁴ *Id.* at 262-63

ACS Supreme Court Review

destruction of his citizenship, whatever his creed, color, or race. Our holding does no more than to give to this citizen that which is his own, a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship.⁵⁵

The majority decision in *Afroyim* began by rejecting the government's broad assertion of power to revoke citizenship as part of its "implied power" over national security and foreign affairs, asserting that no such constitutional authority exists. But the Court ended its opinion by relying on the text of the citizenship clause in the Fourteenth Amendment, which it read to bar revocation of citizenship. In subsequent years, *Afroyim*'s broader claim that Congress lacked affirmative authority to revoke citizenship faded into the background. As a result, *Afroyim* did not serve as a source of authority for rejecting the plenary power doctrine in the sphere of immigration—even though that doctrine is also premised on the government's amorphous authority to regulate foreign relations and national security—and its holding was instead viewed as limited to the expatriation context.

After *Afroyim*, the government could no longer revoke citizenship absent the citizen's voluntary renunciation of that status. However, uncertainty remained about what constituted such an act, and the government continued to expatriate citizens during this period, albeit at a slower rate.⁵⁶ In *Vance v. Terrazas*,⁵⁷ the Court held the government must show that the individual had a specific intent to relinquish citizenship, and in 1990 the

⁵⁵ *Id.* at 267-68.

⁵⁶ Peter J. Spiro, *Afroyim: Vaunting Citizenship; Presaging Transnationality*, in *IMMIGRATION STORIES* 160-61 (David Martin, ed., 2005).

⁵⁷ *Vance v. Terrazas*, 444 U.S. 252, 259 (1980).

Department of Justice adopted a presumption that acts that had once led to loss of citizenship—such as naturalizing in a foreign country, or voting in a foreign election—did not by themselves express an intent to relinquish citizenship. The era of forced expatriation came to an end. Today, the only people at risk of losing their citizenship against their will are naturalized citizens who the government claims obtained their citizenship illegally—that is, people such as Divna Maslenjak.⁵⁸

IV. Expatriation and Immigration

A. Lesson Learned from Expatriation

The trajectory of expatriation in the United States demonstrates both how far government will go when its power is unchecked, and how judicial review can rein in the government and transform the routine into the unthinkable. These are lessons that the federal courts may want to apply to the immigration context.

Expatriation and immigration share common attributes. The government has long claimed plenary power over both access to citizenship and the right of noncitizens to enter the United States, arguing that as sovereign it has inherent power to make such choices. Both subjects concern national security and foreign affairs—historically areas in which the political branches of the federal government have greater leeway than over purely domestic matters. And both raise existential questions: choices about who can enter the United States or remain within its borders, or who can be citizens, are ultimately questions that define the nation. Finally, in both immigration and expatriation cases, the Court initially accepted that the Court had limited powers to review the government's choices, which were largely unconstrained by

⁵⁸ Spiro, *supra* note 56, at 147.

ACS Supreme Court Review

the Constitution, and allowed the government to discriminate or impinge on constitutional rights in ways that would be unacceptable in any other area of law.⁵⁹

Admittedly, the analogy between the Court's role in regulating immigration and expatriation cannot be taken too far. *Afroyim* established that the citizenship clause of the Fourteenth Amendment bars the government from expatriating its citizens without their consent, but no one claims that the government lacks the authority to regulate immigration. Rather, the question in the immigration context is whether that power is limited or restrained by other constitutional provisions—such as the Equal Protection Clause, or the First Amendment—and, additionally, whether the courts can review such regulation as it would any other government action. Those doctrinal differences should not bar the courts from borrowing from the precedent in the expatriation context to find that constitutional limits should also apply to the government's regulation of immigration.

As we have seen, however, the Court eventually established clear limits on the government's expatriation power—limits that have yet to be applied to the government's regulation of immigration. After decades of allowing the government free rein to revoke citizenship, followed by several more decades of narrowly-drawn decisions constraining that power, the Court finally declared in 1967 that the Constitution prohibits the government from expatriating its citizens against their will, and that courts would police the boundaries of the limited power to revoke naturalization for fraud. Moreover, *Afroyim v. Rusk* did not simply end the practice; it changed the public's perception of what

⁵⁹ *Cf. Abrams*, *supra* note 2, at 1641 (drawing a connection between the plenary power doctrine's role in immigration and expatriation).

it means to be a citizen, as illustrated by the *Maslenjak* decision. When *Maslenjak* came before the Court this past Term, all nine of the Justices rejected the idea that Congress intended to revoke citizenship lightly, noting the danger of giving government officials the power to “scour” naturalization records, giving them “nearly limitless leverage—and afford[ing] newly naturalized Americans precious little security.” The Court did not cite *Afroyim*, *Trop*, *Schneiderman*, or any of its expatriation cases establishing constitutional limits on Congress’s power to strip citizenship. Apparently, the Court did not feel it necessary to remind the government that it had very limited constitutional authority to take away citizenship, but instead assumed that Congress did not intend to come close to the constitutional line.

B. Plenary Power and Immigration

Immigration law today resembles the state of expatriation jurisprudence sixty years ago. Both Democratic and Republican Administrations continue to claim plenary power over immigration—that is, authority to regulate immigration with minimal judicial scrutiny and few constitutional restraints. In *Kerry v. Din*, decided in 2015, a U.S. citizen argued that the government’s refusal to grant a visa to her non-citizen spouse violated her liberty interest in living together with him in the United States.⁶⁰ The Obama Administration’s brief was a full-throated assertion of the government’s plenary power to grant or deny visas—power that excludes virtually all judicial review. The Administration explained that there “is a long history of recognizing that alien spouses (and other family members) of U.S. citizens may be denied admission to the United States

⁶⁰ *Kerry v. Din*, 135 S. Ct. 2128 (2015).

ACS Supreme Court Review

in Congress’s complete discretion, as an exercise of Congress’s plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.”⁶¹ The government has the “sovereign power to admit or exclude foreigners in accordance with perceived national interests,”⁶² and accordingly “the alien cannot assert any right to review” those decisions.⁶³ The Obama Administration won the case, but only by a slim 5-4 majority, and with only three justices supporting the government’s broadest articulation of its plenary power to control the admission of noncitizens into the United States.

Although the Supreme Court has appeared reluctant to endorse the plenary power doctrine in its recent decisions, it has yet to disavow it, and courts remain highly deferential to the government in immigration cases.⁶⁴ Commentators have long argued that the Court should retire the plenary power doctrine once and for all. They point out that the doctrine is an anachronism: It originated in the late 1800s in *Chae Chan Ping* (also known as the Chinese Exclusion Case), in an atmosphere in which the courts as well as the political branches expressed overt racism toward the Chinese. (Justice Field’s majority opinion described how this “Oriental invasion” was viewed as “a menace to our civilization.”⁶⁵) These critics further argue that the very concept of a Constitution-

⁶¹ Brief for the Petitioners at 25, *Din*, 135 S. Ct. 2128 (No. 13-1402).

⁶² *Id.* at 20 (quoting *Fiallo v. Bell*, 430 U.S. 787, 795 n.6 (1977)).

⁶³ *Id.* at 7.

⁶⁴ *See Sessions v. Morales-Santana*, 137 S. Ct. 1678 (2017) (noting that Congress’s “exceptionally broad powers” over immigration justify rational basis review of laws governing entry to the United States, but rejecting that lower standard of review in the citizenship acquisition context); *see also* Kevin R. Johnson, *Immigration in the Supreme Court, 2009-13: A New Era of Immigration Law Unexceptionalism*, 68 OKLA. L. REV. 57 (2015) (arguing that “the trend in the Supreme Court’s contemporary immigration decisions suggests that the plenary power doctrine—the bedrock of immigration exceptionalism—is once again heading toward its ultimate demise”).

⁶⁵ *Chae Chan Ping v. United States*, 130 U.S. 581, 596 (1889).

free zone in which the political branches can make choices to discriminate on the basis of race, religious, ethnicity, or ideology, is unacceptable in the twenty-first century. The drumbeat of criticism has reached a crescendo in response to President Trump's travel ban.

Plenary power's future is now squarely before the federal courts. Multiple cases have challenged the constitutionality of President Trump's travel ban, and the issue may be decided by the U.S. Supreme Court this term.⁶⁶ Among other arguments, the ban's challengers claim that it is motivated by animus against Muslims in violation of the First Amendment's Establishment Clause, citing in support statements made by President Trump leading up to and after his election. In all contexts other than immigration, a government policy directed against a particular religion would be unconstitutional. But the Trump Administration argues that the courts do not have the power to review its choices about who can be excluded from the United States, and in particular that the courts cannot look for evidence of the government's purpose beyond the four corners of the executive order. If true, that would mean that courts are barred from considering statements by President Trump and others in the Administration when determining whether the executive order expresses an impermissible animus against Muslims.

In its motion for a stay of the lower court's injunction, the Trump Administration relied heavily on the government's plenary power over immigration, recycling the same arguments Obama

⁶⁶ The Supreme Court granted the government's petition for review of lower decisions enjoining the executive order, and scheduled the case for oral argument on October 10, 2017. On September 24, 2017, President Trump issued a new executive order modifying the order under review. The Supreme Court then removed the case from the October Calendar and directed the two sides to brief the question of whether the disputes are now moot. *See Trump v. Int'l Refugee Assistance*, No. 16-1436, 2017 WL 2405595 (Sept. 25, 2017); *Trump v. Hawai'i*, No. 16-1540, 2017 WL 2734554 (Sept. 25, 2017).

ACS Supreme Court Review

Administration made in *Kerry v. Din*. The Trump Administration asserts that the “‘power to expel or exclude aliens’ is ‘a fundamental sovereign attribute exercised by the government’s political departments’ and ‘largely immune from judicial control.’”⁶⁷ Under the “consular nonreviewability” doctrine, the Trump Administration explained that courts are not permitted to review consular officials’ decisions for illegal motive or other violations of the law. Furthermore, even if the question were justiciable, the Administration argues that because the Constitution delegates “‘exclusive[]’ power over the exclusion of aliens to Congress and the Executive,” the Court must defer to its judgment.⁶⁸ As long as the exclusion was based on a “‘facially legitimate and bona fide reason,’” the courts are not to “‘look behind the exercise of that discretion, nor test it by balancing its justifications against the’ asserted constitutional rights of U.S. citizens.”⁶⁹ In other words, although the Trump Administration denies that the travel ban is motivated by religious animus, its first defense is that under the plenary power doctrine, the federal courts lack the power to review that claim.

The history of expatriation demonstrates that when the government is permitted to regulate without constitutional constraint, it is likely to use that power to target disfavored individuals, and to use ideology, gender, ethnicity, and race as a basis for its decisions. Throughout the first half of the twentieth century, the government sought to expatriate those who it perceived as its political enemies, such as members of labor unions and the communist party, as well as women (especially those

⁶⁷ Application for a Stay Pending Appeal to the United States Court of Appeals for the Ninth Circuit at 20, *Hawai’i v. Trump*, No. 16-1540 (U.S. June 1, 2017) (quoting *Fiallo*, 430 U.S. at 792).

⁶⁸ *Id.* at 26 (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972)).

⁶⁹ *Id.* at 25-26 (quoting *Mandel*, 408 U.S. at 770).

married to Asians), German-Americans, Japanese-Americans, and other naturalized citizens the government perceived as having divided loyalties.

That history also illustrates the value of judicial review. During the first half of the Twentieth Century, when courts were highly deferential to government decisions in expatriation cases, Congress expanded the grounds of expatriation, and the Department of Justice created a special expatriation unit devoted to revoking citizenship, which at times targeted disfavored citizens for expatriation and expulsion. The Court's slow about-turn in expatriation cases put an end to the government's campaign to revoke citizenship, and also changed the public's understanding of citizenship. Today, citizenship is viewed as both unconditional and sacrosanct, but that perception was the result, and not the cause, of the Supreme Court's protection.⁷⁰ Had the Court not stepped in to stop the practice, the public might well view citizenship as uniquely within the political branches' unconstrained control, just as some view immigration today.

This fall, the Court may have another chance to reconsider its role in reviewing the government's immigration choices, and in particular the executive's unilateral decisions regarding who can enter the United States. No one claims the government lacks the power to regulate the entry of non-citizens into the United States. Rather, the question is whether the government is constrained by the Constitution when deciding who may obtain a visa to enter the United States and who can be excluded, and whether the courts can police those bounds. The Trump Administration argues that

⁷⁰ Peter J. Spiro, *Expatriating Terrorists*, 82 *FORDHAM L. REV.* 2169, 2170 (2014) (describing the "robust conception of citizenship" in which citizenship is viewed as "sacrosanct" and perhaps "even more precious than life itself"); see also *id.* at 2183 (describing the perception of loss of citizenship as "akin to death").

ACS Supreme Court Review

the federal courts have no power to review its executive order, and alternatively that they cannot look beyond the face of the executive order when deciding whether it is motivated by animus against Muslims. Both positions would give the government free rein to ban anyone from entering the United States on the basis of race, religion, sex, ethnicity, and political beliefs, despite the Constitution's prohibition against discrimination on these grounds, and regardless of the lack of a relationship between these categories and the nation's security.

If the travel ban does reach the Supreme Court this Term, the Court may use it as an opportunity to put an end to the plenary power doctrine, declaring that the government's power over immigration is constrained by the Constitution and subject to review in court. If so, it is not hard to imagine the Court issuing a unanimous decision years from now declaring that Congress could never have intended to give the executive power to exclude noncitizens based on their religion. Commentators discussing the case would declare it a dud, and suggest the government should have conceded error rather than defend a misguided lower court decision. The world will shrug and move on—just as it did in response to the Court's decision in *Maslenjak*. If that happens, however, it will be because the Supreme Court insisted that the government's power over immigration is both constitutionally constrained and subject to searching judicial review, not because the political branches discarded such practices of their own volition. If nothing else, the history of expatriation shows that the government is very unlikely to constrain itself.

Bank of America v. Miami: An Important Progressive Victory Due to a Surprising Fifth Vote

Brianne J. Gorod*

It was a banner year at the Supreme Court for the U.S. Chamber of Commerce, which had “one of its highest success rates ever,” winning 80% of the merits cases in which it filed *amicus* briefs.¹ As my colleague Brian Frazelle put it, “[t]hose wins allowed the Chamber to consolidate and expand upon earlier landmark victories, quash attempts to carve out exceptions to recent pro-business rulings, and secure important new precedents making it harder for workers, consumers, and others to hold corporations accountable.”²

But the Chamber had an important loss, too, amidst all the victories. In *Bank of America v. City of Miami*, a case about whether Miami could sue Bank of America and Wells Fargo for allegedly engaging in a practice of predatory lending that lasted over a decade, the Court rejected the banks’ argument that Miami could not sue to enforce the Fair Housing Act’s protections because it was not an “aggrieved person” within the meaning of that law.³ The Court’s decision was exactly right on that point. Consistent

* Chief Counsel for the Constitutional Accountability Center.

¹ Brian R. Frazelle, *Corporate Clout: As the Roberts Court Transforms, the Chamber Has Another Big Term*, CONST. ACCOUNTABILITY CTR.: TEXT & HISTORY BLOG (July 26, 2017), <https://www.theusconstitution.org/text-history/4543/corporate-clout-roberts-court-transforms-chamber-has-another-big-term>.

² *Id.*

³ *Bank of America Corp. v. City of Miami*, 137 S. Ct. 1296 (2017).

ACS Supreme Court Review

with the broad access to the federal courts that our nation's Framers enshrined in Article III of the Constitution, Congress has long relied on private parties to enforce federal laws, particularly civil rights laws. And Congress continued that tradition in the FHA, as its text and legislative history make clear.⁴

The Court's decision in *Bank of America Corp. v. City of Miami* is a big deal not only for Miami, but also for the millions of Americans whose lives were shattered by the 2008 financial crisis. But while the case was definitely a loss for those who were trying to stop this lawsuit in its tracks, it wasn't a total win for Miami either. The Supreme Court concluded that the lower court had applied the wrong standard in determining whether the banks' lending practices were the "proximate cause" of the City's injuries, and thus remanded the case back to that court to reconsider that issue under the proper legal standard.⁵ Thus, whether Miami is ultimately able to hold these banks accountable for their alleged violations of the Fair Housing Act remains to be seen.

As we wait to see how the rest of this case unfolds, we will also have to wait to see how much it tells us about what we can expect from the Supreme Court going forward. In this 5-3 decision, Chief Justice John Roberts was Miami's lone vote from a conservative Justice, a result that surely surprised many (including me) when the Court's decision was handed down. As I've written previously, Chief Justice Roberts, while very conservative, is not invariably so.⁶ But his consistent votes to limit access to the courts during his first decade as Chief Justice made this an exceptionally

⁴ See *infra* Part II.

⁵ *Bank of America Corp.*, 137 S. Ct. at 1305-06.

⁶ BRIANNE GOROD, ROBERTS AT 10: A VERY CONSERVATIVE CHIEF JUSTICE WHO OCCASIONALLY SURPRISES 8, available at https://www.theconstitution.org/sites/default/files/briefs/Roberts_at_10_12_Capstone.pdf (last visited Oct. 1, 2017) [hereinafter Gorod, *A Very Conservative Chief Justice*].

surprising vote.⁷ What accounts for it? Perhaps Roberts was simply persuaded that the Court’s prior precedents, and Congress’s affirmation of those precedents, compelled this result. But perhaps the Chief Justice, who appears to care deeply about the institutional legitimacy of the Court, was also moved, at least in part, by the desire to avoid the 4-4 split decision that would have otherwise resulted.

Whatever the cause of the Chief Justice’s vote in this case, there’s little reason to think that his decision in *Bank of America* is a harbinger of a broader change in his votes in access-to-courts cases. After all, he has consistently sided with big business over those who are trying to use the courts to vindicate federal rights. But even so, *Bank of America* remains an important decision in its own right—and an important reminder that progressives should hesitate before counting out Chief Justice Roberts’s vote, even in the most unlikely of cases.

I. Background

In 2008, the nation faced one of the greatest economic downturns in its history—millions of Americans lost their jobs and their homes, and millions of American families lost trillions of dollars in net worth.⁸ Indeed, the scope of the crisis was so great that it has become known as the “Great Recession.”⁹ Among the causes of this economic crisis was a practice of pervasive predatory lending in which banks made high-risk, costly loans

⁷ See generally BRIANNE GOROD, ROBERTS AT 10: ROBERTS’S CONSISTENT VOTES TO CLOSE THE COURTHOUSE DOORS, available at https://www.theconstitution.org/sites/default/files/briefs/Roberts_at_10_04_Access_to_Courts.pdf (last visited Oct. 1, 2017) [hereinafter Gorod, *Roberts’s Consistent Votes*].

⁸ BRIANNE J. GOROD, BRIAN R. FRAZELLE & SIMON LAZARUS, CONSTITUTIONAL AND ACCOUNTABLE: THE CONSUMER FINANCIAL PROTECTION BUREAU 4 (2016) (citing S. REP. NO. 111-176, at 9 (2010)), https://www.theconstitution.org/sites/default/files/20161020_White_Paper_CFPB.pdf.

⁹ *Id.*

ACS Supreme Court Review

to homeowners without regard to whether the homeowners would likely be able to repay the loans.¹⁰ As William Brennan, the Director of the Home Defense Program at the Atlanta Legal Aid Society, put it in 1998, this practice of predatory lending—coupled with “investors buying up these shaky mortgages by the thousands”—produced a “house of cards.”¹¹ And in 2008, the entire house of cards came tumbling down. In addition to the millions of individuals who were harmed, so too were cities which not only lost tax revenue, but also had to spend more on municipal services to address blight in neighborhoods affected by the dramatic increase in foreclosures.

One of those cities, Miami, sued both Bank of America and Wells Fargo under the Fair Housing Act (“FHA”) for allegedly engaging in a decade-long practice of discriminatory and predatory lending. The FHA makes it unlawful “[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling . . . because of race,”¹² and “for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race.”¹³ The FHA also provides that “[a]n aggrieved person may commence a civil action . . . to obtain appropriate relief with respect to such discriminatory housing practice or breach,”¹⁴ defining “aggrieved person” broadly to include anyone who “claims to have been injured by

¹⁰ Nick Carey, *Racial Predatory Loans Fueled U.S. Housing Crisis: Study*, REUTERS (Oct. 4, 2010, 12:19 AM), <http://www.reuters.com/article/us-usa-foreclosures-race-idUSTRE6930K520101004>.

¹¹ KAT AARON, CTR. FOR PUB. INTEGRITY, *PREDATORY LENDING: A DECADE OF WARNINGS* (2009), <https://www.publicintegrity.org/2009/05/06/5452/predatory-lending-decade-warnings>.

¹² 42 U.S.C. § 3604(b) (2015).

¹³ 42 U.S.C. § 3605(a) (2015).

¹⁴ 42 U.S.C. § 3613(a)(1)(A) (2015).

a discriminatory housing practice.”¹⁵ According to the City’s complaints in these two cases, the banks’ targeting of minority borrowers for high-risk, costly loans—and their refusal to extend credit to minorities on equal terms with white borrowers—led to unnecessary and premature foreclosures, which in turn cost the City tax revenue and forced it to spend more on municipal services.

The district court dismissed Miami’s complaints against both banks. Most significantly, the district court held that Miami did not have standing to sue under the FHA because it was not included within the statute’s “zone of interests.” It also concluded that Miami could not establish that the banks were the proximate cause of the City’s injuries.¹⁶ The Eleventh Circuit reversed. According to that court, Miami had “constitutional standing to pursue its FHA claims,” and “the ‘zone of interests’ for the Fair Housing Act extends as broadly as permitted under Article III of the Constitution.”¹⁷ The Eleventh Circuit also concluded that Miami had “adequately alleged proximate cause” because the proper test was whether the defendant could have reasonably foreseen the kind of harm the plaintiff suffered.¹⁸ The Eleventh Circuit held that Miami had satisfied that standard because, among other things, “[t]he complaint alleges that the Bank had access to analytical tools as well as published reports drawing the link between predatory lending practices ‘and their attendant harm,’ such as premature foreclosure and the resulting costs to the City, including, most notably, a reduction in property tax revenues.”¹⁹ The banks

¹⁵ 42 U.S.C. § 3602(i)(1) (2015).

¹⁶ *City of Miami v. Bank of America Corp.*, No. 13-24506, 2014 WL 3362348, at *4-*5 (S.D. Fla. July 9, 2014).

¹⁷ *City of Miami v. Bank of America Corp.*, 800 F.3d 1262, 1266 (11th Cir. 2015).

¹⁸ *Id.* at 1266, 1278-83.

¹⁹ *Id.* at 1282.

ACS Supreme Court Review

asked the Supreme Court to hear the case, and it agreed to do so.

On May 1, 2017, the Court issued a 5-3 decision, handing Miami a partial win. Importantly, the Court concluded that Miami was within the FHA’s “zone of interests” because it was an “aggrieved person” within the meaning of the FHA. Writing for the Court, Justice Breyer explained that the Supreme Court “has repeatedly written that the FHA’s definition of person ‘aggrieved’ reflects a congressional intent to confer standing broadly,”²⁰ and “in 1988, when Congress amended the FHA, it retained without significant change the definition of ‘person aggrieved’ that this Court had broadly construed.”²¹ Although the Court left open the possibility that the reach of “aggrieved person” under the FHA may not be as broad as Article III allows, the Court concluded that it did not matter because “the City’s financial injuries fall within the zone of interests that the FHA protects.”²² Tracing the allegations in Miami’s complaint—the predatory lending practices that led to a “concentration” of “foreclosures and vacancies,” which in turn led to a “decline in African-American and Latino neighborhoods,” which in turn “reduced property values, diminishing the City’s property-tax revenue and increasing demand for municipal services”—the Court concluded that “[t]hose claims are similar in kind to the claims” the Court had previously recognized were sufficient to confer standing.²³ In reaching this result, the Court emphasized that it was relying on its past precedents: “The upshot is that the City alleges economic injuries that arguably fall within the FHA’s zone of interests, as we have previously interpreted that statute. Principles of *stare decisis* compel our adherence

²⁰ *Bank of America Corp.*, 137 S. Ct. at 1303.

²¹ *Id.*

²² *Id.* at 1304.

²³ *Id.*

to those precedents in this context. And principles of statutory interpretation require us to respect Congress' decision to ratify those precedents when it reenacted the relevant statutory text."²⁴

The Court then turned to the proximate cause question. With respect to that question, the Court concluded that "foreseeability alone is not sufficient to establish proximate cause under the FHA" because "foreseeability alone does not ensure the close connection [between a defendant's unlawful conduct and a plaintiff's harm] that proximate cause requires."²⁵ According to the Court, "[t]he housing market is interconnected with economic and social life. A violation of the FHA may, therefore, 'be expected to cause ripples of harm to flow' far beyond the defendant's misconduct. Nothing in the statute suggests that Congress intended to provide a remedy wherever those ripples travel."²⁶ Thus, the Court concluded, "proximate cause under the FHA requires 'some direct relation between the injury asserted and the injurious conduct alleged.'"²⁷ Rather than try to determine whether such a direct relationship existed in this case, the Court remanded to the Eleventh Circuit to "define, in the first instance, the contours of proximate cause under the FHA and decide how that standard applies to the City's claims for lost property-tax revenue and increased municipal expenses."²⁸

In dissent, Justice Thomas, joined by Justices Kennedy and Alito, would have ruled against Miami on both questions in the case. With respect to the first question, Justice Thomas concluded that "Miami's asserted injuries are 'so marginally related to or inconsistent with the purposes' of the FHA that they fall outside

²⁴ *Id.* at 1305.

²⁵ *Id.* at 1305, 1306.

²⁶ *Id.* at 1306.

²⁷ *Id.*

²⁸ *Id.*

ACS Supreme Court Review

the zone of interests . . . that the statute protects.”²⁹ In Justice Thomas’s view, “nothing in the text of the FHA suggests that Congress was concerned about decreased property values, foreclosures, and urban blight, much less about strains on municipal budgets that might follow.”³⁰ With respect to the second, Justice Thomas “agree[d] with the Court’s conclusions about proximate cause, as far as they go,”³¹ but he would have gone much farther. To Thomas, “the majority opinion leaves little doubt that neither Miami nor any similarly situated plaintiff can satisfy the rigorous standard for proximate cause that the Court adopts.”³²

II. Vindicating the FHA

The Court’s decision to allow this case to go forward was plainly the right one. Although Bank of America and Wells Fargo argued that Miami could not sue under the FHA because its rights were not “violated directly,” that is, it did not “assert it was deprived of equal treatment on the basis of race or ethnicity, and it alleges no loss or damage arising from segregation tied to discriminatory conduct,”³³ that argument fundamentally misunderstands the FHA and the background against which it was enacted, as my colleagues at the Constitutional Accountability Center and I argued in an *amicus* brief we filed in the case.³⁴

²⁹ *Id.* at 1308 (Thomas, J., dissenting).

³⁰ *Id.* at 1309.

³¹ *Id.* at 1311.

³² *See id.* (“Miami’s own account of causation shows that the link between the alleged FHA violation and its asserted injuries is exceedingly attenuated.”).

³³ Brief for Petitioners, *Bank of America Corp.*, 137 S. Ct. 1296 (No. 15-1111), 2016 WL 4473463, at *17; see Brief for Petitioners, *Wells Fargo & Co.*, 137 S. Ct. 1296 (No. 15-1112), 2016 WL 4446486, at *9 (“the City has not asserted any injury to an interest in non-discrimination”).

³⁴ Brief of Constitutional Accountability Center as Amicus Curiae in Support of Respondent, *Bank of America*, 137 S. Ct. 1296 (No. 15-1111) (Oct. 7, 2016), available at https://www.theconstitution.org/sites/default/files/briefs/Bank_of_America_v_City_of_Miami_Amicus_Final.pdf. The discussion in this part, as well as in *infra* Part III.A. is substantially drawn from this *amicus* brief.

A. Broad Access to the Courts and the Role of Private Parties

When the Framers adopted our enduring charter, they conferred broad power on the federal courts established by Article III of the Constitution,³⁵ empowering the “judicial department” to “decide all cases of every description, arising under the constitution or laws of the United States.”³⁶ The decision to confer this broad power on the federal courts was a direct response to the federal government’s inability to enforce its decrees under the Articles of Confederation, which established a single branch of the federal government and no independent court system.³⁷ Under the dysfunctional government of the Articles, individuals could not go to court to enforce federal legal protections, leading Alexander Hamilton to lament “the extraordinary spectacle of a government destitute even of the shadow of constitutional power to enforce the execution of its own laws.”³⁸

When the Framers gathered in Philadelphia to draft the new national charter, they made sure to address this problem, creating a new federal judiciary that would have the power to enforce federal legal protections. The Framers understood that “[n]o government ought to be so defective in its organization, as not to contain within itself the means of securing the execution of its own laws,” and gave to the federal courts “the power of construing the constitution and laws of the Union . . . and of preserving them from

³⁵ U.S. CONST. art. III, § 2, cl. 1 (extending the “judicial Power” to “all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority”).

³⁶ *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 382, 384 (1821).

³⁷ See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1443 (1987) (explaining that Confederation courts were “pitiful creatures of Congress, dependent on its pleasure for their place, tenure, salary, and power”).

³⁸ THE FEDERALIST NO. 21, at 107 (Alexander Hamilton) (Clinton Rossiter ed., Signet Classics 2003) (1788); THE FEDERALIST NO. 22, at 118 (Alexander Hamilton) (“[I]aws are a dead letter without courts to expound and define their true meaning and operation”).

ACS Supreme Court Review

all violation from every quarter[.]”³⁹ James Madison explained that “[a]n effective Judiciary establishment commensurate to the legislative authority, was essential.”⁴⁰

To ensure that courts can function “as a forum for vindicating rights,”⁴¹ Congress has long enacted laws that give private parties an important role in the enforcement of federal law. Indeed, since the very first Congress, lawmakers have given persons a right to sue to redress violations of the nation’s laws in the federal courts. Empowerment of these private litigants promotes robust enforcement of the law, securing “important social benefits” that include “deterrence of . . . violations in the future.”⁴²

Most pertinent here, private litigation is one of the “primary mechanisms” that Congress has used to enforce civil rights legislation,⁴³ recognizing that enabling private litigation offers an essential supplement to the federal government’s enforcement efforts.⁴⁴ In numerous statutes, therefore, Congress has “harnessed private plaintiffs to pursue a broader purpose of obtaining equal treatment for the public at large.”⁴⁵ This approach “supplements

³⁹ *Cohens*, 19 U.S. at 387-88.

⁴⁰ 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 124 (Max Farrand ed., 1911).

⁴¹ Olatunde C.A. Johnson, *Beyond the Private Attorney General: Equality Directives in American Law*, 87 N.Y.U. L. REV. 1339, 1354 (2012) [hereinafter Johnson, *Equality Directives*].

⁴² *City of Riverside v. Rivera*, 477 U.S. 561, 574-75 (1986).

⁴³ Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 186; see Johnson, *Equality Directives*, *supra* note 41, at 1346 (“Congress enacts civil rights statutes to promote antidiscrimination and equity goals, and to empower private individuals to enforce those goals through private litigation.”).

⁴⁴ See, e.g., *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 401-02 (1968) (“When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law. . . . Congress therefore enacted the provision for counsel fees . . . to encourage individuals injured by racial discrimination to seek judicial relief under Title II.”); *Allen v. State Bd. of Elections*, 393 U.S. 544, 556-57 (1969) (“The achievement of the [Voting Rights] Act’s laudable goal could be severely hampered, however, if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General. . . . It is consistent with the broad purpose of the Act to allow the individual citizen standing to insure that his city or county government complies with the [Section] 5 approval requirements.”).

⁴⁵ Karlan, *supra* note 43, at 186.

what even an ideally constituted, well-funded, and vigorous public enforcement agency could do,” by “engag[ing] the resources of a multitude of private actors in rooting out discrimination.”⁴⁶ In short, “Congress can vindicate important public policy goals by empowering private individuals to bring suit.”⁴⁷ The FHA continued the tradition of enlisting private parties in the enforcement of federal law, recognizing that vigorous enforcement by private parties would be necessary to achieve the law’s ambitious goals, as the remainder of this Part discusses.

B. The Original Fair Housing Act

The Fair Housing Act was enacted in 1968, following an extended debate about fair housing that was precipitated the previous year by a series of “devastating urban riots that left vast areas of major cities in flames.”⁴⁸ After the assassination of Martin Luther King, Jr., and “jolted by the repeated civil disturbances virtually outside its door,”⁴⁹ Congress responded with ambitious legislation, which declared it “the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.”⁵⁰ Indeed, the FHA was enacted not

⁴⁶ Johnson, *Equality Directives*, *supra* note 41, at 1347; see *City of Riverside*, 477 U.S. at 574-75 (“[W]e reject the notion that a civil rights action for damages constitutes nothing more than a private tort suit benefiting only the individual plaintiffs whose rights were violated. . . . [A] successful civil rights plaintiff often secures important social benefits In addition, the damages a plaintiff recovers contributes significantly to the deterrence of civil rights violations in the future.”).

⁴⁷ Karlan, *supra* note 43, at 186.

⁴⁸ Leland B. Ware, *New Weapons for an Old Battle: The Enforcement Provisions of the 1988 Amendments to the Fair Housing Act*, 7 ADMIN. L.J. AM. U. 59, 70 (1993).

⁴⁹ Charles McC. Mathias, Jr. & Marion Morris, *Fair Housing Legislation: Not an Easy Row To Hoe*, 4 CITYSCAPE: A J. OF POL’Y DEV. AND RESEARCH 21, 26 (1999), available at <https://www.huduser.gov/portal/Periodicals/CITYSCPE/VOL4NUM3/mathias.pdf>.

⁵⁰ Pub. L. No. 90-284, § 801, 82 Stat. 73, 81 (1968); see Mathias & Morris, *supra* note 49, at 26 (“The Fair Housing Act was to provide not only greater housing choice but also to promote racial integration for the benefit of all Americans.”); 114 CONG. REC. S3422 (Feb. 20, 1968) (statement of Sen. Mondale) (“America’s goal must be that of an integrated society, a stable society free of the conditions which spawn riots [T]he best way for this Congress to start on the true

ACS Supreme Court Review

simply to ensure that individual victims of housing discrimination could sue. Rather, as its supporters explained, it was enacted to promote “an integrated society” and end “the explosive concentration of Negroes in the urban ghettos.”⁵¹

Despite the FHA’s ambitious goal of ending housing segregation in America, the Act relied “primarily . . . on private litigation” for its enforcement.⁵² To facilitate this private enforcement, the Act opened the courthouse doors to as wide a range of “aggrieved” plaintiffs as possible—“Any person who claims to have been injured by a discriminatory housing practice or who believes that he will be irrevocably injured by a discriminatory housing practice that is about to occur.”⁵³

Just a few years after the law’s passage, the Supreme Court acknowledged both the ambitious goal of the FHA and the means it made available to realize that goal,⁵⁴ concluding that “the main generating force must be private suits in which . . . the complainants act not only on their own behalf but also as private attorneys general in vindicating a policy that Congress considered to be of the highest priority.”⁵⁵

Indeed, the Supreme Court’s first FHA decision recognized that the need to “give vitality” to the Act required allowing all injured parties to help enforce the FHA’s promise of fair housing,

road to integration is by enacting fair housing legislation.”); 114 CONG. REC. H9959 (Apr. 10, 1968) (statement of Rep. Celler) (referring to the aim of “eliminat[ing] the blight of segregated housing”).

⁵¹ 114 CONG. REC. S3422 (Feb. 20, 1968) (statement of Sen. Mondale); 114 CONG. REC. H9589 (Apr. 10, 1968) (statement of Rep. Ryan).

⁵² Robert G. Schwemm, *Private Enforcement and the Fair Housing Act*, 6 YALE L. & POL’Y REV. 375, 378 (1988).

⁵³ Pub. L. No. 90-284, § 810(a), 82 Stat. at 73.

⁵⁴ See *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209, 211 (1972) (stating that “the reach of the proposed law was to replace the ghettos by truly integrated and balanced living patterns,” but that “complaints by private persons are the primary method of obtaining compliance with the Act” (quotation marks omitted)).

⁵⁵ *Id.* at 211 (quotation marks omitted); see *Newman*, 390 U.S. at 402.

consistent with its “broad” definition of “person aggrieved.”⁵⁶ “In light of the clear congressional purpose in enacting the 1968 Act, and the broad definition of ‘person aggrieved,’” the Supreme Court determined that Congress had provided the plaintiffs with “an actionable right to be free from the adverse consequences to them of racially discriminatory practices directed at and immediately harmful to others.”⁵⁷

In the years that followed, the Court repeatedly adhered to that principle, holding that an array of plaintiffs with diverse indirect injuries could sue to enforce the FHA. For example, the Court allowed white tenants of an apartment complex to sue when, as a result of the owner’s discrimination against non-whites, the white tenants lost “the social benefits of living in an integrated community,” as well as the “business and professional advantages which would have accrued if they had lived with members of minority groups.”⁵⁸ The Court also concluded that neighborhood residents who lost “social and professional benefits” due to racial steering committed against others, and who also suffered the “economic injury” of a “diminution of value” of their homes, could sue.⁵⁹ Similarly, the Court concluded that a nonprofit fair housing organization that experienced a “drain on [its] resources” and impairment of its “ability to provide counseling and referral services” because of the need to counteract racial steering practices of a realty company was also a proper plaintiff under the FHA.⁶⁰

Finally, the Court concluded that a municipality could sue when racial steering had “manipulate[d] the housing market”

⁵⁶ *Trafficante*, 409 U.S. at 212.

⁵⁷ *Warth v. Seldin*, 422 U.S. 490, 512-13 (1975) (emphasis added).

⁵⁸ *Trafficante*, 409 U.S. at 208 (noting that plaintiffs also “suffered embarrassment and economic damage in social, business, and professional activities from being ‘stigmatized’ as residents of a ‘white ghetto’”).

⁵⁹ *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 115 (1979).

⁶⁰ *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982).

ACS Supreme Court Review

and altered its racial make-up, “replacing what [was] an integrated neighborhood with a segregated one.”⁶¹ In describing the potentially “profound” and “adverse” consequences to a municipality of such discrimination, the Court explained that “reduc[ing] the total number of buyers” could cause prices to “be deflected downward,” especially “if perceptible increases in the minority population directly attributable to racial steering precipitate an exodus of white residents.”⁶² As the Court explained, “[a] significant reduction in property values directly injures a municipality by diminishing its tax base, thus threatening its ability to bear the costs of local government and to provide services.”⁶³ By the early 1980s, therefore, the Supreme Court had permitted a diverse array of plaintiffs who were not themselves discriminated against to seek relief under the FHA, making clear each time that “the only requirement for standing to sue” under the Act was “the Art. III requirement of injury in fact.”⁶⁴

C. Amending the FHA

Despite the breadth of the FHA’s private cause of action, the original Act proved inadequate to meet the law’s ambitious goals because other provisions of the law, including “a short statute of limitations” and “disadvantageous limitations on punitive damages and attorney’s fees,” ultimately discouraged private actions.⁶⁵ As a result, “relatively few fair housing cases [were] filed,” with “[t]he number of reported employment discrimination decisions run[nin]g

⁶¹ *Gladstone*, 441 U.S. at 109-10.

⁶² *Id.* at 110.

⁶³ *Id.* at 110-11.

⁶⁴ *Havens Realty Corp.*, 455 U.S. at 375-76; accord *Gladstone*, 441 U.S. at 109; *Trafficante*, 409 U.S. at 209.

⁶⁵ H.R. Rep. No. 100-711, at 16 (1988); see *id.* at 15 (noting that “the primary weakness” that Congress sought to fix by amending the Act was the “limited means for enforcing the law”).

five to ten times th[e] amount” of housing discrimination cases.⁶⁶

In light of those problems with the original Act, Congress ultimately responded, “[a]fter nearly a decade of abortive efforts,” with “a comprehensive overhaul of the [FHA’s] enforcement mechanism,”⁶⁷ acknowledging that “[t]wenty years after the passage of the Fair Housing Act, discrimination and segregation in housing continue to be pervasive.”⁶⁸ In amending the law to address its failure “to provide an effective enforcement system,” Congress sought “to fill that void” not only by “creating an administrative enforcement system,” but also “by removing barriers to the use of court enforcement by private litigants,” thereby establishing “an improved system for civil action by private parties.”⁶⁹ In doing so, lawmakers explained that their purpose was to remove “disincentive[s] for private persons to bring suits under existing law,” in order to create “an effective deterrent on violators.”⁷⁰

In attempting to encourage more robust private enforcement, Congress deliberately preserved the language on which the Supreme Court had relied in concluding that the Act’s private cause of action extends to all parties injured by illegal housing practices—including municipalities and others indirectly injured by discrimination. Indeed, as early as 1979, the leading bills to amend the FHA added a formal definition of “aggrieved person” identical to the one that ultimately prevailed in 1988, and which replicated the language on which the Supreme Court had previously relied.⁷¹ From the start, fair housing advocates

⁶⁶ Schwemm, *supra* note 52, at 381.

⁶⁷ Ware, *supra* note 48, at 62.

⁶⁸ H.R. Report No. 100-711, at 15.

⁶⁹ *Id.* at 13, 33.

⁷⁰ *Id.* at 40.

⁷¹ Compare 42 U.S.C. § 3602(i), with H.R. 5200, 96th Cong. § 4(b) (1979) (“‘Aggrieved person’ includes any person who claims to have been injured by a discriminatory housing practice or who

ACS Supreme Court Review

supported this definition precisely because—as they explained to Congress—they understood it to preserve and ratify the Supreme Court’s interpretation of the term.⁷² Opponents of this definition understood the definition in the same way, and opposed it for that reason.⁷³

By the time the Act was amended in 1988, everyone understood what the Supreme Court’s FHA decisions meant and what Congress’s ratification of those decisions would indicate. As one commentator had noted earlier that year, “the Court . . . has made clear that proper plaintiffs under the Act include not only direct victims of housing discrimination, but virtually anyone who is injured in any way by conduct that violates the statute.”⁷⁴ When lawmakers debated the bill that ultimately passed in 1988, opponents urged Congress not to ratify the Court’s interpretation of “aggrieved” persons by reinscribing the statutory language on which it was based. As they warned, “the definition found in the Kennedy/Specter bill, which adopts existing Supreme Court precedent, effectively eliminates any limits on who can sue a real estate broker for an alleged discriminatory housing practice.”⁷⁵

believes that such person will be irrevocably injured by a discriminatory housing practice that is about to occur.”).

⁷² See, e.g., *Fair Housing Amendments Act of 1979: Hearings on S. 506 before the Subcomm. on the Constitution of the Comm. on the Judiciary*, 96th CONG. 107 (1979) (National Committee Against Discrimination in Housing Memorandum) (“The amendments propose a definition of ‘aggrieved person’ which essentially tracks the current language of section 810. This definition, which includes ‘any person’ who has been, or will be, adversely affected by a discriminatory housing practice, adopts the Supreme Court’s formulation in *Trafficante*[.]”).

⁷³ See, e.g., *id.* at 433 (Prepared Statement of the National Association of Realtors) (“[T]he National Association vigorously opposes the concept that a person who neither seeks nor has been denied access to housing or the means of acquiring housing should be deemed an ‘aggrieved person’ under Title VIII. The extension of ‘standing’ contemplated by the definition of ‘aggrieved person’ is an invitation for abuse[.]”); *id.* (“The Supreme Court has presented the Congress with an ideal opportunity to aid it in defining the limits of ‘standing to sue’ under Title VIII The National Association submits that Congress should amend Section 4(b) of S. 506 to provide that an ‘aggrieved person’ shall be defined as ‘any person who is directly and adversely affected by a discriminatory housing practice.’”).

⁷⁴ Schwemm, *supra* note 52, at 382.

⁷⁵ *Fair Housing Amendments Act of 1987: Hearings on S. 558 before the Subcomm. on the*

Legislators rejected those requests. Congress not only kept that language, but also formalized it in a new stand-alone definition.⁷⁶

To be sure, one purpose of adding “aggrieved person” to the FHA’s overarching definitions section was to make explicit that “precisely the same class of plaintiffs” may choose to pursue either administrative or judicial remedies, which the Act addressed in separate places.⁷⁷ There is no reason, however, to think that when Congress made sure that a single set of “standing requirements” would apply across the entire Act, it was oblivious to what the Supreme Court had repeatedly concluded those “standing requirements” were.

Because lawmakers clearly were aware of how the Supreme Court had construed the term “person aggrieved” under the FHA, “Congress’ decision in 1988 to amend the [Act] while still adhering to the operative language . . . is convincing support for the conclusion that Congress accepted and ratified” that interpretation.⁷⁸ Indeed, Congress enacted the FHA amendments after rejecting an alternative bill that would have eliminated the definition of an “aggrieved” person previously adopted by the Court, replacing it with a narrower definition restricted to persons who were discriminated against while seeking housing.⁷⁹

Thus, in concluding that cities like Miami are “aggrieved

Constitution of the Comm. on the Judiciary, 100th CONG. 124-25 (1987) [hereinafter “1987 Hearings”] (Prepared Statement of Robert Butters, on Behalf of the National Association of Realtors).

⁷⁶ See Pub. L. No. 100-430, § 5(b), 102 Stat. 1619, 1619-20 (1988).

⁷⁷ *Gladstone*, 441 U.S. at 100-01; see H.R. Report No. 100-711, at 23 (noting that in *Gladstone* “the Supreme Court affirmed that standing requirements for judicial and administrative review are identical” and explaining that the bill’s new definition was intended “to reaffirm the broad holdings” of *Gladstone* and *Havens*).

⁷⁸ *Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2520 (2015).

⁷⁹ See 1987 Hearings, *supra* note 75, at 110 (referring to “the provision contained in Senator Hatch’s bill that defines an aggrieved person under the act as one whose bona fide attempt to purchase, sell or lease real estate has been frustrated by a discriminatory housing practice”).

ACS Supreme Court Review

persons” within the meaning of the FHA, the Court in *Bank of America* was exactly right, correctly interpreting its past decisions and correctly drawing the proper inference from Congress’ affirmation of those decisions.

III. Looking Ahead

A. Practical Importance

While the Court’s decision in *Bank of America* did not break significant new legal ground, it is nonetheless quite important. It ensures that cities will be able to continue to sue to enforce the provisions of the FHA, and this is no small thing. Despite advancements that followed the strengthening of the FHA in 1988, “[m]uch progress remains to be made in our Nation’s continuing struggle against racial isolation.”⁸⁰ While “some White neighborhoods have become less homogenous, Black neighborhoods remain largely unchanged.”⁸¹

Much of this stagnation is attributable to the persistence of racial discrimination in “the sale, rental, and occupancy of housing,”⁸² and cities like Miami are acutely harmed by this persistence of racial housing discrimination. After all, “[t]he person on the landlord’s blacklist is not the only victim of discriminatory housing practices,” and, as the Supreme Court has observed, “[t]here can be no question about the importance’ to a

⁸⁰ *Inclusive Cmty.*, 135 S. Ct. at 2525.

⁸¹ Austin W. King, *Affirmatively Further: Reviving the Fair Housing Act’s Integrationist Purpose*, 88 N.Y.U. L. Rev. 2182, 2193 (2013) (citing statistics).

⁸² Florence Wagman Roisman, *Living Together: Ending Racial Discrimination and Segregation in Housing*, 41 IND. L. REV. 507, 508 (2008); see Olatunde Johnson, *The Last Plank: Rethinking Public and Private Power To Advance Fair Housing*, 13 U. PA. J. CONST. L. 1191, 1196-97 (2011) (“The most comprehensive tests of U.S. metropolitan markets reveal that blacks and Latinos seeking housing encounter discrimination nearly a quarter of the time. . . . [T]he FHA has proven to be a less successful mechanism for remedying housing discrimination than Title VII of the Civil Rights Act of 1964 has in addressing employment discrimination.”).

community of ‘promoting stable, racially integrated housing.’”⁸³ Residential segregation and racially biased predatory lending meaningfully affect the cities in which they occur in countless ways: depressing tax revenues, requiring additional municipal services, increasing crime, encouraging flight to the suburbs, and entrenching poverty, to name just a few.⁸⁴

Thus, continued aggressive enforcement of the FHA remains as critical today as it was nearly 50 years ago when the law was enacted. And because the amended FHA “retained the individual cause of action as the primary means of correcting the evils caused by [FHA] violations,”⁸⁵ the Act still “depends heavily on requiring private individuals to self-identify as victims of discrimination and bring complaints.”⁸⁶ In fact, private enforcement remains particularly critical because the “enhanced public enforcement capacity” that was one goal of the 1988 amendments “has not produced greater results,” as HUD’s “administrative complaint system has historically been plagued by staffing problems and delays,”⁸⁷ while the robustness of Department of Justice enforcement has varied over time. And, of course, reliance on government enforcement means that enforcement will likely wane during periods when fair housing is not a priority of the federal government.⁸⁸

⁸³ *Gladstone*, 441 U.S. at 111 (quoting *Linmark Assocs., Inc. v. Willingboro Tp.*, 431 U.S. 85, 94 (1977)); cf. *Trafficante*, 409 U.S. at 210-11 (noting that the FHA’s proponents had “emphasized that those who were not the direct objects of discrimination had an interest in ensuring fair housing, as they too suffered”).

⁸⁴ See generally Brief for the City and County of San Francisco, the City of Los Angeles, and 24 Other Jurisdictions as Amici Curiae in Support of Respondent City of Miami, Florida, *Bank of America*, 137 S. Ct. 1296 (No. 15-1111), 2016 WL 5940646.

⁸⁵ Margalynne Armstrong, *Desegregation Through Private Litigation: Using Equitable Remedies To Achieve the Purposes of the Fair Housing Act*, 64 TEMP. L. REV. 909, 915 (1991).

⁸⁶ Johnson, *supra* note 82, at 1204.

⁸⁷ *Id.* at 1207.

⁸⁸ Cf. Jennifer C. Kerr, *Carson Pledges To Fight Homelessness, Despite Deep Proposed Budget Cuts*, *The Rundown* (July 18, 2017), <http://www.pbs.org/newshour/rundown/carson-pledges-fight->

ACS Supreme Court Review

The ability of cities like Miami to bring FHA enforcement actions is particularly critical because despite the law’s reliance on private enforcement, it is difficult to “incentiviz[e] individuals to bring complaints.”⁸⁹ One problem is that “victims of housing discrimination often do not even realize that they have been treated unfairly.”⁹⁰ Today, “persons who engage in housing discrimination are increasingly unlikely to do so in an overt manner,” and “victims generally [are] not trained to detect violations.”⁹¹ Moreover, even when individual victims are aware of the discrimination, “the prospect of hiring a lawyer and filing a lawsuit is not appealing to many people, and this problem is especially acute in the housing field,” because the “very fact that an individual or a family is in the market for new housing often means that their lives are in a state of flux that makes pausing to file a federal lawsuit a practical impossibility.”⁹² Furthermore, “as several studies reveal, damages in housing cases are on average too inconsistent and generally too low to alter the behavior of potential discriminators.”⁹³ In many cases, moreover, “the relief that would actually achieve the goal of integration—provision of the denied housing—is of no use to the plaintiff,” who “has already found a substitute unit because the need for housing cannot await the litigation’s final outcome.”⁹⁴

Given these challenges, it is essential that indirectly injured parties like cities be able to sue over “the adverse consequences

homelessness-despite-deep-proposed-budget-cuts/ (noting that Trump’s proposed budget “calls for cutting about \$7 billion from the \$48 billion HUD budget”).

⁸⁹ Johnson, *supra* note 82, at 1202-03 (“By all estimates, only a small number of potential victims of housing discrimination make use of the enforcement system.”).

⁹⁰ Schwemm, *supra* note 52, at 379-80.

⁹¹ Armstrong, *supra* note 85, at 919.

⁹² Schwemm, *supra* note 52, at 380.

⁹³ Johnson, *supra* note 82, at 1203.

⁹⁴ Armstrong, *supra* note 85, at 918-19.

to them” of “racially discriminatory practices directed at and immediately harmful to others.”⁹⁵ When banks engage in widespread but difficult-to-detect discrimination, such as steering minorities toward predatory loans, cities, with their institutional resources, can be effective prosecutors of these systemic abuses. After all, “thwarting discrimination requires a significant threat of complaints and substantial penalties for discrimination,”⁹⁶ and cities are well positioned to supply that needed threat—as well as to obtain injunctions protecting individual victims from future harm.⁹⁷

Vigorous enforcement of the FHA is critical because when the prospect of enforcement is weak, chances increase that violators will flout the fair housing laws and perpetuate the racial segregation that has plagued the nation for far too long. Promoting the certainty and adequacy of fair housing enforcement is precisely why Congress opted to open the courthouse doors to “[a]ny person who claims to have been injured by a discriminatory housing practice” when it first passed the FHA in 1968.⁹⁸ It is also why Congress in 1988 ramped up the inducements to private enforcement, at the same time that it reinscribed statutory language that the Supreme Court had repeatedly described as extending the right to sue “as broadly as is permitted by Article III of the Constitution.”⁹⁹

Thus, the Court’s decision in *Bank of America* was clearly important, notwithstanding the fact that it did not break real new legal ground. It made clear that not only cities, but also other

⁹⁵ *Warth*, 422 U.S. at 512-13.

⁹⁶ *Johnson*, *supra* note 82, at 1203.

⁹⁷ *Cf. Inclusive Cmty.*, 135 S. Ct. at 2522 (noting that disparate-impact liability “has allowed private developers to vindicate the FHA’s objectives and to protect their property rights” by challenging discriminatory measures).

⁹⁸ Pub. L. No. 90-284, § 810(a), 82 Stat. at 85.

⁹⁹ *Gladstone*, 441 U.S. at 98.

ACS Supreme Court Review

private parties, must be able to enforce the Fair Housing Act to vindicate its important goals. And even though the Court did not adopt as liberal a standard for proximate cause as the Eleventh Circuit did, there is every reason to think that cities like Miami and other private parties will be able to satisfy the standards that lower courts impose to apply that test.

B. A Harbinger of Things To Come?

Although *Bank of America* is clearly an important decision in its own right given its practical consequences for enforcement of a significant federal civil rights law, no one should mistake it as a harbinger for what one can expect from the Roberts Court—and, in particular, its Chief Justice—going forward. As I noted at the outset, this Term was generally a very successful one for big business at the Court and, indeed, big business has enjoyed a very successful decade under the Roberts Court. My organization, the Constitutional Accountability Center, has been tracking the success of the Chamber of Commerce in merits cases at the Court, and the results have been stunning: “since Justice Samuel Alito joined Chief Justice John Roberts on the bench in 2006, the Court has ruled for the Chamber in fully 70% of its cases,” “mark[ing] a drastic swing in favor of business compared with earlier decades.”¹⁰⁰

When it comes to access to the courts, the story is largely the same—good for business, but not for those trying to hold businesses accountable in court. As I’ve written previously, the Roberts Court’s track record on access to the courts is “largely, but not entirely, negative.”¹⁰¹ And even as “the record of the

¹⁰⁰ Frazelle, *supra* note 1.

¹⁰¹ Gorod, *Roberts’s Consistent Votes*, *supra* note 7, at 1.

Roberts Court may be mixed on access to the courts, the record of John Roberts is not.”¹⁰² As of the time of that writing, Roberts had dissented in “every . . . significant case during his tenure as Chief Justice in which the Court ha[d] refused to limit access to the courts, and he ha[d] always been in the majority when it ha[d] decided to limit such access.”¹⁰³

The Chief Justice’s votes in this area of law have not been surprising. Even before joining the Court, Roberts’s views on access to the courts were well-known. In 1992, John Roberts “wrote an article defending a then-recent Supreme Court decision that limited the ability to sue to prevent injury to the environment.”¹⁰⁴ In defending the Court’s decision in *Lujan v. Defenders of Wildlife*,¹⁰⁵ Roberts emphasized that he believes standing plays a critical role in defining the proper sphere of the federal courts’ operation. To Roberts, standing doctrine “bolster[s]” the “legitimacy of an unelected, life-tenured judiciary in our democratic republic.”¹⁰⁶ As he explained it, “[t]he need to resolve such an actual case or controversy provides the justification . . . for the exercise of judicial power itself, ‘which can so profoundly affect the lives, liberty, and property of those to whom it extends.’”¹⁰⁷ Over a decade later at his confirmation hearing to become Chief Justice, it was clear that his views on this topic had not changed. “[J]udges,” he said, “should be very careful to make sure they’ve got a real case or controversy before them, because that is the sole basis for the

¹⁰² *Id.* at 1-2.

¹⁰³ *Id.* at 2.

¹⁰⁴ *Id.* (discussing John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219 (1993)).

¹⁰⁵ *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

¹⁰⁶ Roberts, *supra* note 104, at 1220.

¹⁰⁷ *Id.* (quoting *Valley Forge Christian Coll. V. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 473 (1982)).

ACS Supreme Court Review

legitimacy of them acting in the manner they do in a democratic republic.”¹⁰⁸

In his first decade on the Court, Roberts repeatedly voted to limit access to the courts across a range of issue areas. In *Massachusetts v. EPA*, for example, he dissented from Justice John Paul Stevens’s 5-4 opinion for the Court holding that Massachusetts had standing to challenge EPA’s refusal to regulate greenhouse gas emissions under the Clean Air Act.¹⁰⁹ In his dissent, in language that echoed his earlier statements about the important role that standing doctrine plays in limiting the sphere of judicial authority, Roberts emphasized that demonstrating “particularized injury” was key to showing that there is a “real need to exercise the power of judicial review.”¹¹⁰ Thus, in Roberts’s view, the very scope of the danger presented by global warming meant that no one could bring a claim in court to address that danger: “Global warming is a phenomenon ‘harmful to humanity at large,’ and the redress petitioners seek is focused no more on them than on the public generally—it is literally to change the atmosphere around the world.”¹¹¹

Roberts also voted with the Court’s majority in a series of decisions that “channel[ed] more claims into arbitration and [made] it more difficult for injured individuals to use the class action device in the arbitral forum,”¹¹² and in other decisions that made it more difficult for plaintiffs to sufficiently plead a claim

¹⁰⁸ *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 342 (2005) [hereinafter Confirmation Hearing], available at <https://www.judiciary.senate.gov/imo/media/doc/GPO-CHRG-ROBERTS.pdf>.

¹⁰⁹ *Massachusetts v. EPA*, 549 U.S. 497 (2007).

¹¹⁰ *Id.* at 541 (Roberts, C.J., dissenting) (quoting *Warth*, 422 U.S. at 508).

¹¹¹ *Id.* (internal citation omitted) (quoting *Massachusetts v. EPA*, 415 F.3d 50, 60 (D.C. Cir. 2005) (Sentelle, J., dissenting in part and concurring in part)).

¹¹² Gorod, *Roberts’s Consistent Votes*, *supra* note 7, at 9.

for relief.¹¹³ He also dissented in cases involving suits against states, making clear his view that “the exception to state sovereign immunity should be an exceedingly narrow one, even if that means individuals are unable to access the federal courts to prevent unconstitutional state action.”¹¹⁴ All of this led me to conclude that “[u]nless there is a marked change in the years to come, Chief Justice Roberts’s legacy when it comes to access-to-courts issues will be one of closing the courthouse doors as much as possible.”¹¹⁵ Indeed, even as I elsewhere praised Roberts for sometimes putting “law over ideology,” I pointed to “access to the courts” as one area in which “it is often easy to predict his vote, no matter how strongly the law might point in the opposite direction.”¹¹⁶

What then to make of the Chief Justice’s vote in *Bank of America*? As I have also written before, Roberts cares deeply “about the institutional legitimacy of the Court and his reputation as its Chief Justice”¹¹⁷—he has expressed concern that the Court not be seen as a “political body”¹¹⁸—and those concerns can lead him, at least occasionally, to put “law over ideology.”¹¹⁹ Indeed, while Roberts “remains unquestionably conservative . . . he is becoming less invariably so,” and there have been a number of “significant, divided cases in which Roberts parted ways with at least some of his conservative colleagues to vote with the Court’s more progressive members.”¹²⁰

As the Court decided *Bank of America*, it was beginning a new Term, short one justice, the result of Senate Republicans’

¹¹³ *Id.* at 12-13.

¹¹⁴ *Id.* at 15.

¹¹⁵ *Id.* at 15-16.

¹¹⁶ Gorod, *A Very Conservative Chief Justice*, *supra* note 6, at 1.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 8.

¹¹⁹ *Id.* at 1.

¹²⁰ *Id.* at 8.

ACS Supreme Court Review

unprecedented refusal to even hold confirmation hearings on President Obama's nominee to fill Justice Antonin Scalia's seat. In doing so, Republicans in the Senate were sending exactly the message the Chief Justice had repeatedly said he didn't want sent: that judges are nothing more than politicians in robes. And 4-4 decisions breaking down purely on lines defined by the party of the president who appointed the justice would not only amplify that message, but also underscore the extent to which the Court was unable to fully function while its ninth seat remained vacant.¹²¹ Against that background, it seems conceivable that the Chief Justice was eager to find a resolution in *Bank of America* that could garner a majority of the Court.

And, significantly, the Court's decision in *Bank of America* was, in some ways, tailor-made for the Chief Justice. As I described earlier, it was, although significant in its practical implications, narrow in its legal analysis, relying on past Supreme Court precedents and Congress's decision to ratify those decisions. In that way, it actually echoed Chief Justice Roberts's comments in a slightly different context at his confirmation hearing. In discussing when a court should conclude that a statute provides a cause of action that allows individuals with standing to sue, Chief Justice Roberts repeatedly stated that "[a]ll of these issues go to the question of what Congress intended to do."¹²² Thus, while Chief Justice Roberts deserves praise for reaching the correct decision in *Bank of America*, it is unlikely that this case will prove to be a turning point in the Chief Justice's views on access to the courts.

¹²¹ CONSTITUTIONAL ACCOUNTABILITY CTR. & PEOPLE FOR THE AM. WAY FOUND., MATERIAL HARM TO OUR SYSTEM OF JUSTICE: THE CONSEQUENCES OF AN EIGHT-MEMBER SUPREME COURT 3-6 (2016), available at https://www.theconstitution.org/sites/default/files/briefs/20160521_Issue_Brief_CAC_PFAW_Material_Harm_to_Our_System_of_Justice.pdf.

¹²² Gorod, *Roberts's Consistent Votes*, *supra* note 7, at 4.

Nonetheless it is a reminder: even when it might seem most reasonable to count the Chief Justice out, he can still surprise you.

Conclusion

Some cases make a lasting impact in the pages of the U.S. Reports by announcing major shifts in legal doctrine. But a case doesn't need to do that to be significant. The Court's decision in *Bank of America & Wells Fargo v. City of Miami* didn't break significant new legal ground, but it was nonetheless important, making clear that cities can continue to bring suit to try to vindicate the goals of the Fair Housing Act. Given how important that law is, this is no small thing. It was also an important reminder that Chief Justice Roberts, as conservative as he is, will occasionally surprise, even in areas where one might least expect it. But when it comes to access to the courts and business cases more generally, there's little reason to think that progressive votes from the Chief Justice will become less surprising and more common in the near future. After all, while this Term's progressive victory in *Bank of America* was a loss for big business, it came amidst many other votes by the Chief Justice for big business—this past Term and in the many that preceded it.

This page intentionally blank.

Resurrection: *Cooper v. Harris* and the Transformation of Racial Gerrymandering into a Voting Rights Tool

Richard L. Hasen*

The United States Supreme Court, like the Lord, sometimes works in mysterious ways.

Back in the 1990s, a group of conservative activists convinced a majority of conservative Justices on the United States Supreme Court to create a new cause of action under the Fourteenth Amendment’s Equal Protection Clause for “racial gerrymandering.” Unlike claims of “vote dilution”—where redistricting authorities draw lines for electing members of Congress, or state or local legislators in order to diminish someone’s political power—“racial gerrymandering” was said to be about an “expressive harm,” or the message sent by government action. In the 1993 case, *Shaw v. Reno*,¹ the Court held that the “bizarre” shape of two North Carolina congressional districts sent a message to the public that the government was separating voters on the basis of race without adequate justification. The Court later refined the claim to focus less on a district’s shape and more on a legislature’s “predominant motive” in taking race into account in

*Chancellor’s Professor of Law and Political Science, UC Irvine School of Law. Thanks to Erwin Chemerinsky and Rick Pildes for useful comments and suggestions.

¹ *Shaw v. Reno*, 509 U.S. 630 (1993).

ACS Supreme Court Review

constructing districts. Some liberals and others objected that the racial gerrymandering claim made no sense either as an empirical matter, because people did not get any “message” from the shape of district lines in these racially integrated districts, or normatively, because “expressive harms” were not real harms. For a variety of reasons, racial gerrymandering claims mostly disappeared after the early 2000s.

More than two decades after *Shaw*, the racial gerrymandering claim has been resurrected, but in a form almost beyond recognition. By the 2016 Supreme Court term, minority voters and Democrats regularly used the racial gerrymandering cause of action to attack Republican gerrymanders in states with large minority populations. It had become another tool for voting rights activists. The transformation became complete in the Supreme Court case of *Cooper v. Harris*,² where the Court recognized that a state’s strong use of race in districting to achieve partisan ends or suppress minority voters’ power violated the Constitution.

Harris reveals the malleability of Supreme Court constitutional doctrine, especially in the area of election law. But again, like the Lord, what the Supreme Court giveth, it could also taketh away, and it would not be surprising to see a new, more conservative Supreme Court revert to its original treatment of the gerrymandering claim as a tool to limit minority voting power.

In the Beginning³

The use of race in drawing district lines is nothing new.

² *Cooper v. Harris*, 137 S. Ct. 1455 (2017).

³ Parts of this section are drawn from Richard L. Hasen, *Racial Gerrymandering’s Questionable Revival*, 67 ALA. L. REV. 365, 369-72 (2015) [hereinafter Hasen, *Racial Gerrymandering*] and Richard L. Hasen, *Race or Party, Race as Party, or Party All the Time: Three Uneasy Approaches to Conjoined Polarization in Redistricting and Voting Cases*, 59 WM. & MARY L. REV. ____ (forthcoming 2018) [hereinafter Hasen, *Three Uneasy Approaches*].

Redistricting authorities (such as state legislatures) sometimes “pack” or “crack” a group of voters to minimize the number of districts in which they can elect representatives of their choice.⁴ When white voters and minority voters prefer different sets of candidates (a condition called “racially polarized voting”) and there are enough minority voters living closely enough together that it is possible to draw another district where minority voters can elect a candidate of their choice (a “majority-minority” or “minority opportunity” district), redistricting authorities can violate Section 2 of the Voting Rights by failing to draw that district.⁵ And if redistricting authorities pack or crack minority voters intentionally, such conduct also may violate the Equal Protection Clause of the Fourteenth Amendment.⁶ Whether it is about intent or effect, these “vote dilution” claims affect how much political power groups of voters have in a system of representatives elected through districts.

In *Shaw v. Reno*, the Supreme Court explained that the “racial gerrymandering” claim it created in that case is “analytically distinct” from vote dilution claims.⁷ The case arose from the 1990s-round of state legislative redistricting by the Democratic-controlled legislature in North Carolina, a jurisdiction then partially covered by Section 5 of the Voting Rights Act. Section 5 of the Act (which the Supreme Court later effectively killed in the 2013 case, *Shelby County v. Holder*⁸) required jurisdictions with

⁴ See DANIEL H. LOWENSTEIN, RICHARD L. HASEN, DANIEL P. TOKAJI, & NICHOLAS S. STEPHANOPOULOS, *ELECTION LAW—CASES AND MATERIALS* 144 (6th ed. 2017) (“[A]ll partisan gerrymandering takes place either by cracking the opposing party’s voters among a large number of districts in which their preferred candidates lose by relatively narrow margins, or by *packing* these voters in a few districts in which their preferred candidates win overwhelming majorities.”).

⁵ See *generally id.*, ch. 5 (describing and analyzing in detail minority vote dilution claims under the Voting Rights Act and the U.S. Constitution).

⁶ *Rogers v. Lodge*, 458 U.S. 613 (1982).

⁷ *Shaw*, 509 U.S. at 652.

⁸ *Shelby County v. Holder*, 133 S. Ct. 2612 (2013).

ACS Supreme Court Review

a history of racial discrimination in voting to get approval from the United States Department of Justice or a three-judge court in Washington, D.C., before making changes to any voting rules. The jurisdiction bore the burden of proving that the change would not make protected minority voters worse off; but at the time of *Shaw*, the Department of Justice was reading Section 5 to require the creation of more majority-minority districts when it was possible to do so.⁹

The Department of Justice demanded that North Carolina create another majority-minority district to gain preclearance. Democrats responded by passing a plan that created the required number of such districts, protected Democratic incumbents, and maximized the number of Democratic seats.¹⁰ Its plan included some “bizarre”-shaped districts, including a new Congressional District 12 that tied together disparate populations of African-American voters along the I-85 freeway corridor. Republicans initially challenged the plan as a partisan gerrymander, claiming that district lines discriminated against Republican voters. The claim failed, following the fate of other partisan gerrymandering claims.¹¹ Opponents then argued that the redistricting was an unconstitutional racial gerrymander.¹² Importantly, the claim was not that the plan diluted the white vote or anyone else’s vote.¹³ The claim instead was that the *consideration* of race in drawing lines is

⁹ Hasen, *Racial Gerrymandering*, *supra* note 3, at 368-69.

¹⁰ LOWENSTEIN, HASEN, TOKAJI, & STEPHANOPOULOS, *supra* note 4, at 337-38.

¹¹ *Pope v. Blue*, 809 F. Supp. 392, 399 (W.D.N.C. 1992), *aff’d*, 506 U.S. 801 (1992).

¹² *Shaw*, 509 U.S. at 636.

¹³ *Id.* at 641. On the motivations of Duke Law School professor Robinson O. Everett to bring the first racial gerrymandering lawsuit, see Daniel P. Tokaji, *The Story of Shaw v. Reno: Representation and Raceblindness*, in RACE LAW STORIES ch. 14 (Rachel F. Moran & Devon W. Carbado eds., 2008); Robinson O. Everett, *Redistricting in North Carolina – A Personal Perspective*, 79 N.C. L. REV. 1301, 1310 (2001) (“My own motivation for initiating a court action to overturn the gerrymander was my firm belief that use of data about the racial composition of census blocks in the creation of congressional districts appeared to give governmental approval to the use of racial stereotypes and racial quotas.”).

constitutionally suspect and sometimes outright unconstitutional, despite the fact that the Voting Rights Act *required* such consideration of race, and even if the line drawing had no effect on anyone’s political power.

In *Shaw v. Reno*, the Supreme Court agreed with the challengers, creating a cause of action for an unconstitutional racial gerrymander.¹⁴ Justice Sandra Day O’Connor’s decision held that the odd shape showed voters being separated on the basis of race, in violation of the Constitution’s Equal Protection Clause of the Fourteenth Amendment.¹⁵ The Court held such separation, which the Court analogized to “political apartheid,”¹⁶ could not be sustained unless it showed that the division was justified by a compelling interest and narrowly tailored to meet that interest under the “strict scrutiny” standard of review that the Court applied to many race-based classifications.¹⁷ Justice O’Connor explained in a later case that the new claim protected against “expressive harms” in which the government sends an unconstitutional message by separating voters on the basis of race without adequate justification.¹⁸

¹⁴ *Shaw*, 509 U.S. at 647-49.

¹⁵ *Id.* at 647-48.

Put differently, we believe that reapportionment is one area in which appearances do matter. A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes. By perpetuating such notions, a racial gerrymander may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract.

The message that such districting sends to elected representatives is equally pernicious. When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole. This is altogether antithetical to our system of representative democracy.

Id. (citations omitted).

¹⁶ *Id.* at 647.

¹⁷ *Id.* at 657-58.

¹⁸ See *Bush v. Vera*, 517 U.S. 952, 984 (1996) (“We are aware of the difficulties faced by the States,

ACS Supreme Court Review

Cases in the 1990s fleshed out the theory and workings of the new racial gerrymandering claim. Although Justice O'Connor continued to focus on the shape of these challenged districts, other Court conservatives shifted the focus of the new cause of action to legislative motive. In *Miller v. Johnson*,¹⁹ the Court held that race could not be the “predominant factor” in redistricting without compelling justification. The *Miller* Court concluded that the Democratic-led Georgia legislature had an impermissible predominant racial motive, and it remanded under the strict scrutiny standard to determine whether the state’s apparent decision to make race predominate the redistricting process was justified by a compelling state interest.²⁰ The harm in *Miller* appeared to be the same as in *Shaw*, but the proof of a racial gerrymander moved from district shape to legislative motive.

The Georgia legislature’s real “predominant” motive, however, appeared to be not separating voters on the basis of race but complying with the demands of the Department of Justice to obtain preclearance while still maximizing partisan advantage.²¹ The Court found race to be the predominant factor. In these and other cases, the Court assumed that complying with the dictates of the Voting Rights Act could serve as a compelling interest, but it generally interpreted the Voting Rights Act as not requiring the creation of these districts.

Some liberals and others attacked the racial gerrymandering cause of action as being neither empirically nor theoretically

and by the district courts, in confronting new constitutional precedents, and we also know that the nature of the expressive harms with which we are dealing, and the complexity of the districting process, are such that bright-line rules are not available.”). The idea originated with Richard H. Pildes & Richard G. Niemi, *Expressive Harms, “Bizarre Districts,” and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 506–16 (1993).

¹⁹ *Miller v. Johnson*, 515 U.S. 900 (1995).

²⁰ *Id.* at 923-28.

²¹ For an excellent analysis on these points, see Daniel Hays Lowenstein, *You Don’t Have to Be Liberal to Hate the Racial Gerrymandering Cases*, 50 STAN. L. REV. 779, 798-801 (1998).

well-grounded. First, the Supreme Court's search for predominant motivations in redistricting without proof of vote dilution is nonsensical.²² Legislators engaged in redistricting face constraints, such as the Voting Rights Act and one-person, one-vote requirements, and they then design plans conforming to these constraints to reach their political goals. Naked self-interest may fairly be said to predominate in most legislative redistricting exercises, subject to legal and political constraints.²³ Further, far from being reminiscent of "political apartheid," as Justice O'Connor put it in *Shaw*, these districts were among the most integrated in the country.²⁴ Third, the Court never justified why "expressive harms" were worth protecting by judicial intervention, when the claims concededly had no effect on political power within these states.²⁵

Racial gerrymandering cases continued throughout the 1990s. One of the key cases arose again out of a fight over North Carolina's congressional District 12. In the 2001 case, *Easley v. Cromartie*,²⁶ Justice O'Connor and the four more liberal members of the Court, in an opinion by Justice Stephen Breyer, rejected a challenge to North Carolina's latest redistricting plan for District 12 after concluding that party dominance, not race, was the predominant factor in drawing the challenged district lines. (In all of the cases before *Easley*, the conservatives on the Court voted in favor of racial gerrymandering holdings and all the liberals opposed.) The issue was especially tricky given "conjoined polarization," the huge overlap of race and party, especially in the

²² *Id.* at 802.

²³ *Id.* at 806-07.

²⁴ Pamela S. Karlan, *All Over the Map: The Supreme Court's Voting Rights Trilogy*, 1993 SUP. CT. REV. 245, 282; see also A. Leon Higginbotham, Jr. et al., *Shaw v. Reno: A Mirage of Good Intentions with Devastating Racial Consequences*, 62 FORDHAM L. REV. 1593, 1603 (1994).

²⁵ Hasen, *Racial Gerrymandering*, *supra* note 3, at 384.

²⁶ *Easley v. Cromartie*, 532 U.S. 234 (2001).

ACS Supreme Court Review

American South.²⁷ When over 90 percent of African-American voters support the Democratic Party, and about two-thirds of white voters support the Republican Party, saying whether race or party “predominated” in the drawing of district lines appeared an impossible exercise.²⁸

After *Easley*, racial gerrymandering cases became far less frequent. Likely, redistricting authorities got smart and started drawing more compact majority-minority districts (and hiding any evidence in emails or other discoverable correspondence of a predominant motive in using race in redistricting). The Department of Justice also no longer pressured jurisdictions to create more of them.²⁹ Jurisdictions therefore more easily could avoid both Department of Justice objections as well as potential problems in the courts through the creation of too many of these districts.³⁰

Born Again

In the Supreme Court’s 2016 term, the Court in *Cooper v. Harris* considered whether two North Carolina congressional districts were unconstitutional racial gerrymanders. One of the districts, District 12, remarkably made its fifth appearance before the Supreme Court since the 1993 *Shaw v. Reno* decision. But while the Court in *Shaw* used the racial gerrymandering cause of action to limit the creation of too many majority-minority districts, by *Harris* the Court had transformed racial gerrymandering into a tool to limit Republican gerrymanders in states with conjoined

²⁷ See generally Hasen, *Three Uneasy Approaches*, *supra* note 3; Bruce E. Cain & Emily R. Zhang, *Blurred Lines: Conjoined Polarization and Voting Rights*, 77 OHIO ST. L.J. 867, 869 (2016).

²⁸ See generally Hasen, *Three Uneasy Approaches*, *supra* note 3.

²⁹ Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 200 n. 105 (2007).

³⁰ Hasen, *Racial Gerrymandering*, *supra* note 3, at 372.

polarization.

To understand *Harris*, analysis must begin with the 2010 round of redistricting. With Republicans in charge of redistricting in many state legislatures, it became a common tactic to pack or crack reliably Democratic African-American or Latino voters in congressional and state legislative districts. The aim was to gain political advantage while not overstepping the line so much as to create a viable vote dilution claim under Section 2 of the Voting Rights Act. This strategy minimized voting strength of likely Democratic voters while attempting to avoid Section 2 liability, and it depended greatly upon (perhaps intentional) misreading of the Voting Rights Act to require the concentration of minority voters in fewer districts.³¹

In response, Democrats and groups representing minority voters sued these jurisdictions claiming that the use of race in drawing district lines constituted an unconstitutional racial gerrymander. (Some of these suits also raised Section 2 vote dilution claims, but these claims were mainly unsuccessful.) States then defended their district lines either by claiming the districts had to be drawn the way they were in order to comply with Section 2 or Section 5 of the Voting Rights Act, or that they were political, not racial, gerrymanders under *Easley*.

Two significant cases in this line preceded *Harris* at the Supreme Court. In a 2015 case, *Alabama Legislative Black Caucus v. Alabama*,³² the four liberals on the Court and Justice Anthony Kennedy agreed with Democrats and minority voters that Alabama could not justify its concentration of Black voters in districts under set quotas as required by Section 5 of the Voting Rights Act (which

³¹ For a careful and detailed analysis, see Justin Levitt, *Quick and Dirty: The New Misreading of the Voting Rights Act*, 43 FLA. ST. U. L. REV. 573 (2016).

³² *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015).

ACS Supreme Court Review

was still operative against Alabama at the time of its redistricting). The Court remanded the Alabama case to determine which districts were unconstitutional racial gerrymanders. The Court's opinion by Justice Kennedy strongly suggested that the Alabama legislature's heavy focus on racial data in drawing district lines for some districts constituted an unconstitutional racial gerrymander.³³

In the 2017 case, *Bethune-Hill v. Virginia State Board of Elections*,³⁴ the Court majority considered whether a Virginia state redistricting plan included racial gerrymanders. The same five-Justice majority as in *Alabama* rejected a lower court determination that a challenger must show that there was an actual conflict with traditional redistricting principles (such as adherence to municipal boundaries) to establish a racial gerrymander; such a conflict likely would be persuasive evidence of a racial gerrymander, but it is not strictly required.³⁵ The Court remanded the case to the trial court to reconsider claims of racial gerrymandering in eleven of twelve districts,³⁶ instructing that the district court should focus on the shape of each district as a whole, and not just a portion of district lines.³⁷

Harris raised racial gerrymandering challenges to two of North Carolina's congressional districts redrawn after the 2010 census,

³³ *Id.* at 1264-68, 1274. On remand, the trial court found that 14 of the challenged districts were racial gerrymanders, but upheld two under strict scrutiny. The partially dissenting judge found an additional 12 districts were racial gerrymanders. *Alabama Legislative Black Caucus v. Alabama*, 231 F. Supp. 3d 1026 (M.D. Ala. 2017); 231 F. Supp. 3d at 1355 (Thompson, District Judge, concurring in part and dissenting in part).

³⁴ *Bethune-Hill v. Virginia State Bd. of Elections*, 37 S. Ct. 788 (2017).

³⁵ *Id.* at 798-99.

³⁶ However, as to one state legislative district, District 75, the Court held the use of a 55 percent black voting age population in the district was justified by the state's interpretation of Section 5 of the Voting Rights Act. *Id.* at 800-02. The state's interpretation of Section 5 must be based on a "good reason" and have a "strong basis in evidence," but need not be a correct interpretation. Importantly, the challengers conceded that compliance with Section 5 of the Voting Rights Act would be a compelling interest justifying racial predominance in districting, disagreeing only on the question of narrow tailoring. *See id.* at 801, 803 (Alito, J., concurring).

³⁷ *Id.* at 799-802.

District 1 and District 12, each with substantial African-American populations.³⁸ The Court, in an opinion by Justice Elena Kagan for herself, the Court's other liberals, and conservative Justice Clarence Thomas (but not Justice Kennedy, who had joined the liberals in *Alabama* and *Bethune-Hill*, but who partially dissented here), recounted the Court's repeated examinations of earlier versions of these districts, beginning in the 1993 *Shaw* case.³⁹ In the 2010 round of redistricting, North Carolina shifted large numbers of African-American voters into each of the districts:

The new map (among other things) significantly altered both District 1 and District 12. The 2010 census had revealed District 1 to be substantially underpopulated: To comply with the Constitution's one-person-one-vote principle, the State needed to place almost 100,000 new people within the district's boundaries. [Republican state legislative leaders Robert Rucho and David] Lewis, and [their expert, Dr. Thomas] Hofeller chose to take most of those people from heavily black areas of Durham, requiring a finger-like extension of the district's western line. With that addition, District 1's BVAP [black voting age population] rose from 48.6% to 52.7%. District 12, for its part, had no need for significant total-population changes: It was overpopulated by fewer than 3,000 people out of over 730,000. Still, Rucho, Lewis, and Hofeller decided to reconfigure the district, further narrowing its

³⁸ *Harris*, 137 S. Ct. at 1465.

In its current incarnation, District 1 is anchored in the northeastern part of the State, with appendages stretching both south and west (the latter into Durham). District 12 begins in the south-central part of the State (where it takes in a large part of Charlotte) and then travels northeast, zig-zagging much of the way to the State's northern border.

Id.

³⁹ *Id.* at 1465-66.

ACS Supreme Court Review

already snakelike body while adding areas at either end—most relevantly here, in Guilford County. Those changes appreciably shifted the racial composition of District 12: As the district gained some 35,000 African-Americans of voting age and lost some 50,000 whites of that age, its BVAP increased from 43.8% to 50.7%.⁴⁰

Plaintiffs challenged the two districts as racial gerrymanders. A three-judge district court held that both districts were unconstitutional, with one district court judge dissenting on the question whether race or party predominated in drawing District 12.⁴¹

After disposing of the argument that a ruling for plaintiffs was somehow precluded by a contrary state court ruling on the same issue,⁴² the Supreme Court turned to the merits, beginning with District 1. Noting uncontested evidence that the state established a “racial target” so that African-American voters “should make up no less than a majority of the voting-age population” of the district,⁴³ and that this target was the top instruction to the state’s redistricting expert, the Court concluded that the lower court did not clearly err in finding that race predominated in the drawing of District 1.⁴⁴

That finding of racial predominance triggered strict scrutiny. And although the Court continued its policy of assuming that compliance with the Voting Rights Act could be a compelling

⁴⁰ *Id.* at 1466 (citations omitted).

⁴¹ *Id.* (discussing *Harris v. McCrory*, 159 F. Supp. 3d 600 (M.D.N.C. 2016)).

⁴² *Id.* at 1467-68.

⁴³ *Id.* at 1468.

⁴⁴ *Id.* at 1469 (“Faced with this body of evidence—showing an announced racial target that subordinated other districting criteria and produced boundaries amplifying divisions between blacks and whites—the District Court did not clearly err in finding that race predominated in drawing District 1. Indeed, as all three judges recognized, the court could hardly have concluded anything but. See 159 F.Supp.3d, at 611 (calling District 1 a ‘textbook example’ of race-based districting).”).

reason to justify using race as the predominant factor in drawing district lines,⁴⁵ it held that Section 2 of the Act did not require North Carolina's packing of African-American voters into District 1. The reasons are complex,⁴⁶ but to simplify slightly, a challenge to the old District 1 arguing that the district had to be drawn with a larger Black voting age population would have failed. In the old District 1, there were enough white voters "crossing over" to vote for the African-American preferred candidate so that there would be no Section 2 liability for failure to redraw the district. Given the absence of sufficient racially polarized voting in the old District 1, thanks to this crossover voting, the new District 1 could not be justified as necessary to remedy a Voting Rights Act violation.⁴⁷ The Court was unanimous in concluding that District 1 was unconstitutional.⁴⁸

The Court's unanimity as to District 1 contrasted sharply with its bitter divisions over District 12. North Carolina did not argue that the changes to District 12 were compelled by the Voting Rights Act. Instead, it argued that District 12 was a partisan, not racial, gerrymander, meaning that political considerations, not race, predominated. The state claimed it was a "strictly" partisan gerrymander.⁴⁹ While partisan gerrymandering sounds bad, the Supreme Court has repeatedly decided not to police it, making claims of partisan intent in redistricting a defense.⁵⁰

⁴⁵ *Id.*

⁴⁶ For more in-depth analysis, see LOWENSTEIN, HASEN, TOKAJI, & STEPHANOPOULOS, *supra* note 4, at 373; Nicholas Stephanopoulos, *Further Thoughts on Cooper*, ELECTION LAW BLOG (May 22, 2017), <http://electionlawblog.org/?p=92717>.

⁴⁷ *Harris*, 137 S. Ct. at 1470-72.

⁴⁸ *Id.* at 1487 n. 1 (Alito, J., concurring in the judgment in part and dissenting in part) ("I concur in the judgment of the Court regarding Congressional District 1. The State concedes that the district was intentionally created as a majority-minority district. And appellants have not satisfied strict scrutiny.") (citation omitted).

⁴⁹ *Id.* at 1473.

⁵⁰ *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (plurality opinion).

ACS Supreme Court Review

Harris thus posed the same question—and about a later incarnation of the same district—as the Supreme Court first faced in *Easley v. Cromartie*.⁵¹ In *Easley*, the trial court had found that race, not party, predominated when the Democratic-controlled legislature drew that version of District 12.⁵² The Court in *Easley* held that such a conclusion could be overturned only if it was clearly erroneous, a very hard standard to meet.⁵³ Nonetheless, in an opinion offering a lengthy examination of the evidence, Justice Breyer for the Court majority held that the trial court’s finding was clearly erroneous, and that politics, not race, had predominated.⁵⁴

The opinion further offered a test to distinguish racial from partisan intent under conditions of conjoined polarization:

We can put the matter more generally as follows: In a case such as this one where majority-minority districts (or the approximate equivalent) are at issue and where racial identification correlates highly with political affiliation, the party attacking the legislatively drawn boundaries must show at the least that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles. That party must also show that those districting alternatives would have brought about significantly greater racial balance.⁵⁵

Justice Thomas dissented in *Easley*, for himself, Chief Justice Rehnquist, and Justices Scalia and Kennedy, arguing that under the

⁵¹ *Easley v. Cromartie*, 532 U.S. 234 (2001).

⁵² *Id.* at 243.

⁵³ *Id.*

⁵⁴ *Id.* at 243-58.

⁵⁵ *Id.* at 258.

deferential clearly erroneous standard, the Supreme Court should have sustained the trial court's conclusion that race predominated.⁵⁶

In *Harris*, Justice Kagan noted the difficulty in ferreting racial from partisan motivation in areas of conjoined polarization, and that this difficulty necessitated a "sensitive inquiry" for the trial court.⁵⁷ But the task was "generally easier" for the Supreme Court because the clearly erroneous standard of review meant that the Court had to be very deferential in reviewing the trial court's finding that race, rather than politics, predominated in drawing the current version of District 12.⁵⁸

Justice Kagan recounted the facts that led the trial court to conclude that race predominated: the movement of 35,000 African-American voters in, and 50,000 white voters out, of District 12;⁵⁹ the public statements of legislative leaders Rucho and Lewis that "racial considerations lay behind District 12's augmented BVAP";⁶⁰ expert Hofeller's statements that he was concerned with voting rights issues in drawing the district;⁶¹ the state's racial explanations for the district in materials submitted to the Department of Justice in favor of preclearance;⁶² and the testimony of Congressman Mel Watt (who had represented the district) about a conversation with Rucho in which Rucho said that the plan was to get District 12 above 50 percent BVAP to purportedly comply with the Voting Rights Act.⁶³ The Court noted that the trial court found the state's

⁵⁶ *Id.* at 259-67 (Thomas, J., dissenting).

⁵⁷ *Harris*, 137 S. Ct. at 1473 (quoting *Easley v. Cromartie*). As I discuss below, Justice Kagan made it considerably easier to prove racial, as opposed to political, motive in gerrymandering in jurisdictions with conjoined polarization.

⁵⁸ *Id.* at 1474.

⁵⁹ *Id.*

⁶⁰ *Id.* at 1475.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 1476; *see also id.* at n. 10 ("Watt recalled that he laughed in response because the VRA required no such target. And he told Rucho that 'the African-American community will laugh at you' too. Watt explained to Rucho: 'I'm getting 65 percent of the vote in a 40 percent black

ACS Supreme Court Review

contrary explanations, and the explanations of Hofeller’s motives and actions, less credible.⁶⁴

Finally, the Court rejected North Carolina’s argument that under *Easley* the challengers were required to produce an alternative map showing how the state’s political aims could have been achieved, but with greater racial balance.⁶⁵ While conceding that such an alternative map could provide “key evidence” in a “race-versus-politics dispute,”⁶⁶ the Court held such evidence was not required where, as here, there was more direct evidence of a racial gerrymander.⁶⁷

Justice Thomas, while joining in the majority opinion, also wrote three separate paragraphs. As to District 1, he noted his longstanding view that the drawing of any majority-minority district triggered strict scrutiny, and that Section 2 of the Voting Rights Act did not apply to redistricting and therefore could not justify the drawing of such a district.⁶⁸ As to District 12, Justice Thomas agreed with the result given the considerable deference afforded to the trial court’s factual finding under the clearly erroneous standard. He noted that the *Harris* majority opinion “does not repeat” the error the Court made in failing to defer in *Easley*.⁶⁹

Justice Samuel Alito, while agreeing with the majority’s conclusion on District 1,⁷⁰ vehemently dissented as to the Court’s

district. If you ramp my [BVAP] to over 50 percent, I’ll probably get 80 percent of the vote, and [] that’s not what the Voting Rights Act was designed to do.” (citations omitted)) Justice Alito’s dissent not only tried to explain away this testimony. *Id.* at 1499-1500 (Alito, J., concurring in the judgment in part and dissenting in part). The dissent also dismissed it as “double hearsay.” *Id.* at 1499 n. 18.

⁶⁴ *Id.* at 1477.

⁶⁵ *Id.* at 1478-80; *see supra* note 55 and accompanying text.

⁶⁶ *Id.* at 1479.

⁶⁷ *Id.* at 1479-82.

⁶⁸ *Id.* at 1485 (Thomas, J., concurring).

⁶⁹ *Id.* at 1486 (Thomas, J., concurring).

⁷⁰ *Id.* at 1487 n. 1 (Alito, J., concurring in the judgment in part and dissenting in part).

conclusion in District 12. To begin with, Justice Alito believed the Court was bound by its earlier statement in *Easley* requiring the plaintiffs to produce an alternative map to show that race not party predominated. “A precedent of this Court should not be treated like a disposable household item—say, a paper plate or napkin—to be used once and then tossed in the trash. But that is what the Court does today in its decision regarding North Carolina’s 12th Congressional District: The Court junks a rule adopted in a prior, remarkably similar challenge to this very same congressional district.”⁷¹ To the dissenters, the *Harris* plaintiffs’ failure to produce an alternative map should have been fatal to their claim.⁷²

Like the majority, Justice Alito noted the extreme difficulty in ferreting out race and party motivation given the Court’s decision not to police partisan gerrymanders⁷³ and the fact of conjoined polarization: “If around 90% of African–American voters cast their ballots for the Democratic candidate, as they have in recent elections, a plan that packs Democratic voters will look very much like a plan that packs African–American voters.”⁷⁴ He also stressed the considerable leeway the Constitution grants states to redistrict⁷⁵ and a presumption of good faith he believed should apply to a state’s redistricting decisions.⁷⁶

Given these presumptions and levels of deference, which the *Harris* majority derided as “a kind of super-charged, pro-State presumption on appeal, trumping clear-error review,”⁷⁷ the dissenters concluded that the trial court’s determination that race not party predominated was clearly erroneous. “The State

⁷¹ *Id.* at 1486.

⁷² *Id.* at 1488–91.

⁷³ *Id.* at 1488.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 1488, 1503–04.

⁷⁷ *Id.* at 1474 n.8.

ACS Supreme Court Review

offered strong and coherent evidence that politics, not race, was the legislature’s predominant aim, and the evidence supporting the District Court’s contrary finding is weak and manifestly inadequate in light of the high evidentiary standard that our cases require challengers to meet in order to prove racial predominance.’⁷⁸ Echoing Justice Breyer’s plodding review of the evidence in *Easley* to overturn the trial court’s race/party findings under the clearly erroneous standard, Justice Alito’s *Harris* dissent offered a lengthy review of the state’s evidence, explaining why the dissenters believed it showed the only reasonable explanation for the creation of District 12 was partisan politics, pure and simple.⁷⁹

To Every Thing There is a Season

The technical aspects of the racial gerrymandering cause of action, and its complex interactions with the Voting Rights Act, make it easy to miss the fundamental political significance of the recent resurrection of the racial gerrymandering cause of action. A cause of action that was once used to limit minority voting power is now being used to protect it, and, following *Harris*, to do so in increasingly powerful ways.

Already before *Harris*, in the 2015 *Alabama* case⁸⁰ and the 2017 *Bethune-Hill* case,⁸¹ the Court had allowed minority plaintiffs and Democrats—who once derided these *Shaw* claims as illogical and indefensible—to use racial gerrymandering to police Republican overreach in redistricting. The Court would not allow Republican legislatures to hide behind adherence to the Voting

⁷⁸ *Id.* at 1491-92 (Alito, J., concurring in the judgment in part and dissenting in part).

⁷⁹ *Id.* at 1491-1503.

⁸⁰ *Alabama Legislative Black Caucus*, 135 S. Ct. 1257 (2015).

⁸¹ *Bethune-Hill*, 137 S. Ct. 788 (2017).

Rights Act to justify attempts to squeeze minority voters and Democrats out of power.

One way to understand this transformation of the racial gerrymandering claim is that it allows minority plaintiffs to bring vote dilution claims which are not strong enough to satisfy the demands of Section 2 of the Voting Rights Act. Indeed, at oral argument in the *Bethune-Hill* case, attorney Paul Clement, who was defending Virginia's redistricting against a racial gerrymandering charge, argued that "People are bringing junior varsity dilution claims under the guise of calling them *Shaw* claims, and I think it's really distorted the law."⁸² He saw the plaintiffs in Virginia as pursuing an opportunistic action to force a new redistricting now that Virginia's governor is a Democrat.⁸³

Another way of understanding the transformation of the racial gerrymandering cause of action, as expressed by ACLU attorney Dale Ho at a recent redistricting symposium at the William and Mary Law School, is that the Court in these cases is holding that it is an Equal Protection violation for states to intentionally dilute the influence of minority voters in non-majority-minority districts.⁸⁴

At this point, the Court has not clarified whether either or neither of these understandings comports with the Court's reasoning. And there is no reason to expect the Court to make things clearer, which would only reveal how much the cause of action has strayed from its origins. Although it is impossible to say what the racial gerrymandering cause of

⁸² Transcript of Oral Argument at 43, *Bethune-Hill*, 137 S. Ct. 788 (2017) (No. 16-680).

⁸³ *Id.* at 54.

⁸⁴ Dale E. Ho, *Something Old, Something New, or Something Really Old? Understanding Second Generation Racial Gerrymandering Litigation as Intentional Racial Discrimination Cases*, 59 WM. & MARY L. REV. ____ (forthcoming 2018). Dilution as to majority-minority districts can violate Section 2 of the Voting Rights Act as well.

ACS Supreme Court Review

action stands for today, it does not appear to be any longer about the “expressive harm” that purportedly comes from separating voters on the basis of race. None of the recent racial gerrymandering decisions discusses the nature of the harm in terms of messages being sent;⁸⁵ instead the language is more about harm to minority voters.

Whatever the explanation for the shift and its scope, it appears that *Cooper v. Harris* has greatly expanded the scope of the racial gerrymandering cause of action as a voting rights tool by helping minority plaintiffs in “race or party” cases like ones involving North Carolina’s congressional District 12. Indeed, as I argue more fully elsewhere,⁸⁶ in three footnotes of great significance, Justice Kagan in *Harris* moved racial gerrymandering law significantly in the direction of collapsing the distinction between race and party under conditions of conjoined polarization, allowing a “race as party” proxy argument. Under this argument, if a state uses racial information to achieve partisan ends, it is engaged in an act of racial discrimination or predominance.

In one *Harris* footnote, the Court declared that a plaintiff can show racial predominance “even if the evidence reveals that a legislature elevated race to the predominant criterion in order to advance other political goals.”⁸⁷ The Court explained in the second

⁸⁵ The harm gets no mention in Justice Kagan’s exceptionally clear exposition of the racial gerrymandering cause of action at the beginning of *Harris*. *Harris*, 137 S. Ct. at 1463-65.

⁸⁶ See Hasen, *Racial Gerrymandering*, *supra* note 3, Part IV. The next few paragraphs draw from that discussion. For more on the variety of proxy arguments, see Michael Parsons, *Cooper v. Harris: Proxy Battles and Partisan War*, MODERN DEMOCRACY (May 23, 2017), <https://moderndemocracyblog.com/2017/05/23/cooper-v-harris-proxy-battles-partisan-war/>.

⁸⁷ *Harris*, 137 S. Ct. at 1464 n. 1. The full footnote reads:

A plaintiff succeeds at this stage even if the evidence reveals that a legislature elevated race to the predominant criterion in order to advance other goals, including political ones. See *Bush v. Vera* (plurality opinion) (holding that race predominated when a legislature deliberately “spread[] the Black population” among several districts in an effort to “protect[] Democratic incumbents”); *Miller v. Johnson* (stating that the “use of race as a proxy” for “political interest[s]” is “prohibit[ed]”).

Id. (Citations partially omitted.)

footnote that “the sorting of voters on the grounds of their race remains suspect even if race is meant to function as a proxy for other (including political) characteristics.”⁸⁸ Finally, the court in the third footnote described reasons why redistricting authorities might choose to employ race as a predominant redistricting factor. Justice Kagan offered two reasons aside from misunderstanding Voting Rights Act requirements: “[Authorities] may resort to race-based districting for ultimately political reasons, leveraging the strong correlation between race and political behavior to advance their partisan interests. Or, finally—though we hope less commonly—they may simply seek to suppress the electoral power of minority voters.”⁸⁹

Things have come a long way in the racial gerrymandering cases from *Shaw*’s “political apartheid” to the Court expressing deep concern about minority voter suppression. With courts recognizing that race can be a “proxy” to advance “political goals,” based on “leveraging” conjoined polarization, then it will be much easier to argue that race, rather than party, predominates in these cases. Partisanship will be no safe harbor, and race *consciousness* seems easier to equate with racial *predominance* even when the underlying motivation is partisan.

Finally, Justice Kagan’s jettisoning of the requirement that plaintiffs in “race or party” racial gerrymandering cases produce alternative maps also helps minority plaintiffs win these cases. Justice Alito seemed to have the stronger argument that *Easley* required plaintiffs in a case like *Harris* to produce such maps (and perhaps this is why Justice Kagan did not have Justice Kennedy’s vote in *Harris*). But the alternative map requirement from *Easley*

⁸⁸ *Id.* 1473 n. 7.

⁸⁹ *Id.* 1480 n. 15.

ACS Supreme Court Review

would have doomed the claim in *Harris* and in many other “race or party” cases, because there are not enough white voters to go around to be able to create such an alternative map.

Justice Alito misleadingly cast the debate over alternative maps as simply about litigation resources and effort. He claimed that the “sophisticated litigants” in these cases could bring in experts to produce the alternative maps,⁹⁰ and that the problem in *Harris* was simply a failure to offer proof.

But the real problem in *Harris* was not lazy or cheap plaintiffs. It is that the alternative-map test does not work well when there are not enough white Democrats to go around. Imagine a part of the state where nearly 100% of African-American voters voted for Democrats and nearly 100% of white voters voted for Republicans. If a Republican-dominated state legislature moves only African-American voters across districts to achieve its aims, it would be impossible to produce an alternative map with “greater racial balance.” But it could well be reasonable, based upon all the facts, to conclude that race, rather than party, predominated.⁹¹

End Times

The Court’s transformation of the racial gerrymandering claim appears to be on a collision course with the Court’s conservatives, and given expected future changes in Court personnel which could bring the Court a solid and reliable conservative majority, what began as dust for voting rights plaintiffs may well return to dust.

To begin with, Justice Alito’s dissent in *Harris* appears to reject the “race as party” proxy argument that Justice Kagan offered in

⁹⁰ *Id.* at 1491 (Alito, J., concurring in the judgment in part and dissenting in part).

⁹¹ The best conclusion, as I have argued, is that the entire exercise to choose one or the other is nonsensical, but that’s beside the point for a court instructed to choose one or the other.

her *Harris* footnotes. Justice Alito cited to contrary statements in *Hunt v. Cromartie*⁹² and *Bush v. Vera*⁹³ indicating “that a jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were conscious of that fact.”⁹⁴ *Harris*’s footnotes could easily be explained away with a conservative Court majority granting renewed leeway for states to gerrymander.

Justice Alito’s opinion also seems to indicate his belief that any creation of a majority-minority district (for whatever reason) triggers strict scrutiny.⁹⁵ And there’s no reason to believe that, when faced with the question head-on, he would agree (as the Court has been assuming without deciding in these cases) that strict scrutiny would be satisfied by a jurisdiction’s compliance with Section 2 of the Voting Rights Act. Section 2 could well fall.

Not only does Justice Alito appear reticent to rein in gerrymandering efforts by Republican legislatures on racial grounds. He also appears unwilling to police partisan gerrymandering directly. Indeed, Justice Alito’s opinion oddly stresses the “good faith” of the North Carolina legislature in drawing its district lines when the state, far from applying traditional districting principles, engaged in a deliberate partisan gerrymander to squeeze Democrats out of power. (Those hoping for Justice Kennedy to rein in partisan gerrymanders should take note that he joined in Justice Alito’s *Harris* dissent).

⁹² *Hunt v. Cromartie*, 526 U.S. 541 (1999).

⁹³ *Bush v. Vera*, 517 U.S. 952 (1996).

⁹⁴ *Harris*, 137 S. Ct. at 1488 (Alito, J., concurring in the judgment in part and dissenting in part) (quoting *Cromartie I* and *Vera*) (citations omitted).

⁹⁵ *Id.* at 1487 n. 1 (Alito, J., concurring in the judgment in part and dissenting in part) (“The State concedes that the district was intentionally created as a majority-minority district. And appellants have not satisfied strict scrutiny.”) (citation omitted).

ACS Supreme Court Review

Combined with his views in other cases, Justice Alito's warning in *Harris* against the "danger" that "federal courts will be transformed into weapons of political warfare"⁹⁶ indicates that the Court could well be on a path to declining to vigorously protect the rights of political and racial minorities in redistricting and voting cases, regardless of the legal theory offered by complaining plaintiffs against the states.⁹⁷ This judicial exit from the political thicket and adoption of a "to the victor goes the spoils" approach would end the federal courts' backstop role they have played in protecting minority voting rights.

As Professor Rick Pildes has argued, the Supreme Court through even the voting-rights-friendly *Harris* opinion seems to be signaling that the use of race in redistricting is becoming ever more suspect.⁹⁸ For redistricting authorities to avoid liability in the 2020 round of redistricting, they will stand clear of drawing majority-minority districts unless they have strong legal advice telling them that the Voting Rights Act legally compels their creation.

This signal from *Harris* and the Court's other recent racial gerrymandering cases may help Democrats in the short term, as it will curtail some Republican packing of Democratic-leaning districts ostensibly in the name of protecting voting rights. Perhaps that will somewhat make up for the new freedom many of these states will have in the 2020 round of redistricting thanks to the Supreme Court's 2013 opinion in *Shelby County*. This will be the first redistricting round since the 1970s where covered states

⁹⁶ *Id.* at 1490.

⁹⁷ See Hasen, *Racial Gerrymandering*, *supra* note 3, Part IV (describing the potential for the Supreme Court to exit more from the political thicket under a "to the victor goes the spoils" approach in redistricting and voting cases).

⁹⁸ Rick Pildes, *Analysis of the Supreme Court's North Carolina Racial Redistricting Case*, ELECTION LAW BLOG (May 22, 2017, 10:17 AM), <http://electionlawblog.org/?p=92694> ("The main take-away from today's decision is that the Supreme Court is continuing the project of winding down unnecessary racial redistricting.").

will not have to submit their plans for Department of Justice preclearance.

The skepticism of race-based redistricting could soon come back to bite, however, if and when more Court conservatives come to see even those districts compelled by Section 2 of the Voting Rights Act as unconstitutional. While the future is uncertain,⁹⁹ it is not out of the question for the Court to either hold Section 2's vote dilution rule unconstitutional as a violation of (a colorblind view of) the Fourteenth Amendment's Equal Protection Clause, or, more likely, to so limit Section 2's applicability and legal standard in the name of constitutional avoidance and a post-racial America as to make it a toothless protection for protecting voting rights.

Despite *Cooper*, the end times do not look like good times for voting rights.

⁹⁹ Richard L. Hasen, *Election Law's Path in the Roberts Court's First Decade: A Sharp Right Turn But with Speed Bumps and Surprising Twists*, 68 STAN. L. REV. 1597 (2016).

This page intentionally blank.

Trinity Lutheran Church v. Comer: Paradigm Lost?

Ira C. Lupu & Robert W. Tuttle*

From the beginning of the American republic, federal and state constitutions have recognized the distinctive character of houses of worship.¹ To be sure, this distinctiveness does not put houses of worship outside the reach of the law. If one of their agents injures someone in the course of her duties, the religious employer is responsible in tort law, just like any other entity.² But when their distinctively religious activities are in question—for example, choosing a theological spokesperson,³ or organizing religious instruction of children within their community—constitutional limits of various kinds kick in.

These limits ordinarily take two distinct and complementary forms. First, the government is constitutionally disabled from dictating who leads worship, or regulating its content. The state may not establish criteria for ministry,⁴ nor may it dictate or outlaw particular prayers or liturgical forms. Second, the government is

*The authors are both affiliated with George Washington University. Ira C. Lupu is the F. Elwood & Eleanor Davis Professor Emeritus of Law; Robert W. Tuttle is the David R. and Sherry Kirschner Berz Research Professor of Law and Religion. We are grateful to Marty Lederman and Nelson Tebbe for comments on this manuscript, and to our colleagues at George Washington University Law School for comments at a workshop devoted to discussing the Court's opinion in *Trinity Lutheran Church v. Comer*. The mistakes are ours.

¹See *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2033-35 (Sotomayor, J., dissenting) (discussing prohibitions on public funding of houses of worship).

²Ira C. Lupu and Robert W. Tuttle, *Sexual Misconduct and Ecclesiastical Immunity*, 2004 BYU L. REV. 1789, 1797-1800 (2004).

³*Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012).

⁴*Id.*; see generally Ira C. Lupu and Robert W. Tuttle, *The Mystery of Unanimity in Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 20 LEWIS & CLARK L. REV. 1265 (2017).

ACS Supreme Court Review

constitutionally forbidden from proselytizing, subsidizing worship, or promoting other specifically religious activities. It may not spend to pay the salaries of privately employed clergy,⁵ or the costs of construction of worship space.⁶ These propositions have long been deeply settled in American jurisprudence. The opening words of the First Amendment to the U.S. Constitution,⁷ and the constitutions of the overwhelming majority of the states,⁸ reflect these norms.

With respect to matters of funding and support, proponents of expansive theories of religious privilege have attempted over the past thirty-five years to undermine the paradigm of distinctiveness. A standard move in that effort is the portrayal of that distinctiveness as a form of discrimination. In our discrimination-sensitive culture, this is an understandable and sometimes potent theme, especially in cases involving claims of equal access of religious speakers to public fora.⁹

Before this past Supreme Court Term, however, the paradigm of nondiscrimination had not come close to overtaking the longstanding paradigm under which the Establishment Clause

⁵ The government may pay the salaries of the chaplains it employs. We explore the questions raised by the chaplaincy in Ira C. Lupu & Robert W. Tuttle, *SECULAR GOVERNMENT, RELIGIOUS PEOPLE* 251-262 (Wm. B. Eerdmans Pub. Co. 2014), and in more detail in Ira C. Lupu & Robert W. Tuttle, *Instruments of Accommodation: The Military Chaplaincy and the Constitution*, 110 W. VA. L. REV. 89 (2007).

⁶ See *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Tilton v. Richardson*, 403 U.S. 672 (1971). For deeper discussion of the historical limitations on public funding for construction of houses of worship, see Ira C. Lupu & Robert W. Tuttle, *Historic Preservation Grants to Houses of Worship: A Case Study in the Survival of Separationism*, 43 B.C. L. REV. 1139 (2002). Those who challenge the distinctive constitutional role of religious institutions in the context of rights, see, e.g., Richard Schragger & Micah Schwartzman, *Against Religious Institutionalism*, 99 VA. L. REV. 917 (2013), may be inadvertently undermining that distinctive role in the context of limits on public funding of religious experience.

⁷ “Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . .” U.S. CONST. amend. I.

⁸ See *Trinity Lutheran*, 137 S. Ct. at 2037 n.10 and n.11. (Sotomayor, J., dissenting).

⁹ *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995); *Lamb’s Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981).

imposes a strict and distinctive limit on the state's power to fund houses of worship. This limitation on state funding does not extend to secular non-profit institutions and, in some circumstances, religious institutions that are not houses of worship. The distinctive limitation imposed by the Establishment Clause is diametrically opposed to the nondiscrimination model. In the constitutional universe of distinctive treatment, government financial support for the religious activities of churches is forbidden. Under non-discrimination norms, government financial support for churches is required, not simply permitted, whenever the state supports comparable secular activity.

Viewed against that backdrop, the Supreme Court's decision in *Trinity Lutheran Church v. Comer*¹⁰ (hereafter "*TLC*") represents a stunning and thoroughly unacknowledged move from the religion-distinctive principle of "no funding" to one of nondiscrimination. *TLC* involved Missouri's program for grants to subsidize the cost of resurfacing playgrounds with materials from scrap rubber tires. The Church applied for a grant, and the Missouri Department of Public Resources denied the Church's application solely on the basis of a provision in the State Constitution that prohibits public funding of houses of worship.¹¹ The provision, one of many similar provisions found across state constitutions, deserves quotation in full:

That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest,

¹⁰ *Trinity Lutheran*, 137 S. Ct. at 2014-20.

¹¹ The Church's application ranked fifth of 44 received that year, and the Department made 14 grants. *Id.* at 2018. The Church thus would have received a grant but for the state constitutional limitation. We do wonder why the Department bothered to rank the Church's application, unless it knew this lawsuit was coming and it was helping pave the way.

ACS Supreme Court Review

preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship.¹²

In response, the Church sued the responsible state officials. The Church asserted that the denial, which rested on a constitutional provision requiring distinctive treatment for houses of worship, violated the Free Exercise Clause and Equal Protection Clause of the federal constitution. Missouri “conceded” that the grant would not violate the Establishment Clause of the First Amendment, though there are good reasons to doubt the accuracy and legitimacy of that concession. As Justice Sotomayor forcefully elaborates in her dissent, the Supreme Court had never before permitted—much less required—state financial subsidy for a house of worship. Moreover, Missouri’s concession should have been entirely irrelevant. Parties to a legal dispute may not waive an Establishment Clause violation if one exists. At the very least, the courts at every stage should have addressed the Establishment Clause issue.

As the litigation proceeded, however, the courts focused exclusively on the issue of whether the Free Exercise Clause requires equal treatment of houses of worship. The state contended that it had lawful discretion to exclude churches from the program without unconstitutionally discriminating against them. The lower courts rejected the Church’s arguments of unconstitutional discrimination,¹³ sustained the state’s authority under its

¹² MO. CONST. art. I, § 7.

¹³ Although the Trinity Lutheran advanced an equal protection argument as well as a free exercise claim, the equal protection theory went nowhere in the lower courts and the Supreme Court said nothing about it. This is in keeping with consistent Supreme Court practice of treating cases about religious discrimination exclusively as a matter of Religion Clause concern. *See, e.g.*, Church of

constitution to exclude churches from the program, and ordered dismissal of the suit.¹⁴

As we explain below, the question presented in *TLC*—does the Free Exercise Clause require a state to treat houses of worship identically with other non-profit entities seeking a discretionary grant aimed at enhancing safety?—undeniably required significant engagement with the constitutional tradition, state and federal, of restriction on government funding of churches. The grant would pay to improve the surface of a playground used at a Church pre-school, and the mission of the pre-school included religious training. That training could occur outdoors as well as indoors.

It was therefore profoundly puzzling when seven Justices¹⁵ supported a ruling in the Church’s favor by emphasizing the concern about discrimination, while ignoring the constitutional norms of distinctive treatment for houses of worship.

Only the dissenting opinion by Justice Sotomayor, joined by Justice Ginsburg, invoked the relevant seventy years of Supreme Court precedent and 200 years of constitutional history that constitute that backdrop. The dissenters concluded that, unless the funding agency restricted playground use to secular activity, the grant would have raised serious Establishment Clause questions, and that Missouri was therefore well within its constitutional

the *Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993) (discrimination against Santerian practitioners violates the Free Exercise Clause); *Kiryas Joel School District v. Grumet*, 512 U.S. 687 (1994) (legislative favoring particular sect of Orthodox Jews violates the Establishment Clause); *Larson v. Valente*, 456 U.S. 228 (1982) (denominational preference in state regulation of fundraising by religious groups violates the Establishment Clause).

¹⁴ *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, 976 F. Supp. 2d 1137, 1151 (W.D. Mo. 2013), *aff’d*, 788 F.3d 779, 784 (8th Cir. 2015).

¹⁵ Six Justices (Chief Justice Roberts, and Justices Kennedy, Thomas, Alito, Kagan, and Gorsuch) joined the opinion, except for a crucial footnote that Justices Thomas and Gorsuch did not join. The opinion of the Court is thus Chief Justice Roberts’s opinion, minus that footnote which reads, “This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination.” *Trinity Lutheran*, 137 S. Ct. at 2024 n.3. Later in this article, we will explore the significance of this note. Justice Breyer concurred separately.

ACS Supreme Court Review

discretion to deny the grant pursuant to its general no-funding policy.

Despite this forceful and detailed dissent, Chief Justice Roberts’s opinion for the Court focused exclusively on discrimination based on “religious identity.” The Court’s opinion asserted that Missouri’s interest in church-state separation—described superficially and dismissively as a “policy preference”—cannot justify such discrimination. If a state creates a public benefit for secular purposes (here, playground safety and disposal of scrap tires), the state may not categorically exclude houses of worship. That the benefit was not universally or even widely available made no difference.¹⁶

The paradigm of nondiscrimination is front and center, and forms the opinion’s emotional pivot. Near the end, the opinion uses the line “no churches need apply”¹⁷ to describe the workings of the Missouri scheme. This was factually accurate, but its form is clearly designed to evoke the invidious discrimination associated with exclusion of members of particular races, nationalities, or religions from employment opportunity. The Chief Justice appeals to precisely the same concern about prejudice in the very last section of the opinion, in which he invokes Maryland’s long-ago exclusion of Jews from public office.¹⁸ The opinion thus deliberately obscures the constitutional difference between discrimination against individuals because of their religious identity, and generically distinctive treatment of all houses of worship.

True to its tenacious inclinations to avoid the paradigm of

¹⁶ The relatively scarcity of the benefit makes it quite different from matters of “common right,” like police and fire protection, available to all in the community. See *Everson v. Bd. of Educ.* 330 U.S. 1, 60-61 (1947) (Rutledge, J., dissenting).

¹⁷ *Trinity Lutheran*, 137 S. Ct. at 2024.

¹⁸ *Id.*

distinctive treatment of religious institutions, the Court opinion relies primarily on decisions that involve neither religious institutions, nor discretionary benefits made available to them by the state. *McDaniel v. Paty*¹⁹ held that Tennessee's prohibition on ordained ministers serving in the state legislature violated the Free Exercise Clause. *McDaniel* involved individuals, not religious institutions, and implicated a separate constitutional right to run for and hold state office. *Church of Lukumi Babalu Aye v. Hialeah*²⁰ involved coercive regulation of a particular faith group's sacramental practice. The case had absolutely nothing to do with denial of discretionary financial support, and everything to do with animus toward a particular, unpopular faith.

The other Religion Clause decisions on which the *TLC* opinion relies all include dicta about sectarian discrimination, not generic exclusion of churches or church schools from public support.²¹ Indeed, without a hint of irony, Chief Justice Roberts cites *Everson v. Board of Education of Ewing*,²² in which all nine Justices emphatically embraced the proposition that a state may not directly assist church schools.

The only other non-discrimination decisions mentioned in *TLC* involve free speech claims of equal access to government created fora;²³ the Free Exercise Clause played no part in any of them. Moreover, like *McDaniel v. Paty*, these decisions involved denial of separate constitutional rights to religious persons or groups, not the denial of discretionary funds to religious entities.

Consider the elaborate and longstanding body of constitutional

¹⁹ *McDaniel v. Paty*, 435 U.S. 618 (1978).

²⁰ *Church of Lukumi Babalu Aye*, 508 U.S. 520 (1993).

²¹ *Emp't. Div. v. Smith*, 494 U.S. 872 (1990); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988); *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

²² *Everson*, 330 U.S. 1 (1947).

²³ *Rosenberger*, 515 U.S. 819; *Lamb's Chapel*, 508 U.S. 384; *Widmar*, 454 U.S. 263.

ACS Supreme Court Review

law that these seven Justices wholly ignored. Starting with *Everson* in 1947, and continuing unabated through the Court's most recent encounters with challenges to funding schemes on Establishment Clause grounds,²⁴ virtually every Justice has subscribed to the idea that the state may not directly finance the religious mission of churches or church schools. Most of the decisions in this fifty-plus year span have involved religiously affiliated schools. None have involved direct grants to houses of worship, because the constitutional barrier to such transfers has been so deeply understood and widely respected, as a matter of both modern Establishment Clause law and the historical tradition of church-state relations in the United States.

From the early 1970s until the late 1990s, the Court adopted a prophylactic rule that barred direct aid from government to “pervasively sectarian” institutions.²⁵ The Court reasoned that aid to such institutions would inevitably advance religion, and any effort to prevent that advancement would excessively entangle the state and the church.²⁶ The decisions that generated this rule all involved schools, usually elementary and secondary.

Given that the Court deemed such schools “pervasively sectarian,” even though they taught secular subjects, the constitutional status of houses of worship was obvious. Thus, with respect to programs of direct aid, it was constitutionally unquestioned that “no churches need apply,” because the Constitution barred the government from responding affirmatively. This was anything but invidious discrimination. As well understood and oft repeated,²⁷ this barrier to direct aid kept the

²⁴ *Mitchell v. Helms*, 530 U.S. 793 (2000); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

²⁵ *Lemon v. Kurtzman*, 403 U.S. 602, 638 (1971) (Douglas, J., concurring); *Tilton v. Richardson*, 403 U.S. 672, 685-686 (1971); *Hunt v. McNair*, 413 U.S. 734, 743 (1973).

²⁶ *Lemon*, 403 U.S. at 613-14.

²⁷ See, e.g., *Trinity Lutheran*, 137 S. Ct. at 2027-41, and sources cited therein (Sotomayor, J., dissenting)

state from assuming responsibility for religious worship and indoctrination, and kept religious communities free from the state’s control.²⁸

As recently as 1988, all nine Justices confirmed these longstanding constitutional norms. In *Bowen v. Kendrick*,²⁹ the Court divided 5-4 on the permissibility of federal grants—some to religiously affiliated providers—for the purpose of teaching sexual abstinence. The Court’s majority upheld the grant scheme on its face, but insisted that on remand the lower courts be sure that the grants not go to “pervasively sectarian” entities or be used to pay for “specifically religious activities” such as religious teaching on the reasons for sexual abstinence outside of marriage.³⁰

To be sure, the relevant law of the Establishment Clause has changed in the thirty years since *Bowen v. Kendrick*. Justice O’Connor led the movement away from the prophylactic rule about sectarian entities. Instead, she argued for an approach that focused on whether the aid had a secular purpose and character, and whether the program had adequate safeguards against religious use of the aid.³¹ Thus, in *Mitchell v. Helms*,³² the Court in 2000 upheld a program of aid to schools, public and private (including religiously affiliated schools), of materials useful for instruction, including computers. A plurality of four Justices would have sustained the program based on its secular educational purpose, coupled with its evenhanded treatment of secular and religious

²⁸ Although the relationship between the Establishment Clause and limited government should be self-evident, many fail to understand the importance of the Establishment Clause for religious liberty. Government funds, for example, almost invariably come with conditions. Though a religious community is free to accept those conditions, it may not recognize the potential intrusiveness of government monitoring that the law requires, especially when the grantee poses a significant threat of using the aid for religious purposes.

²⁹ *Bowen v. Kendrick*, 487 U.S. 589 (1988).

³⁰ *Id.* at 621.

³¹ *Agostini v. Felton*, 521 U.S. 203 (1997) (overruling *Aguilar v. Felton*, 473 U.S. 402 (1985)).

³² *Mitchell*, 530 U.S. 793 (2000).

ACS Supreme Court Review

schools.³³ Justices O'Connor and Breyer joined in a narrower, and legally controlling, concurrence, in which they emphasized that the program included adequate safeguards against diversion of the aid to religious use, and that it involved the transfer of goods in kind, not cash.³⁴

Mitchell, which Justice Sotomayor's dissent in *TLC* appropriately emphasized,³⁵ is the Court's last word on direct financing of religious entities. In *Zelman v. Simmons-Harris*,³⁶ decided two years after *Mitchell*, a 5-4 majority upheld Ohio's use of publicly financed school vouchers, redeemable at both secular and religious private schools in Cleveland. In *Zelman*, the Court emphasized that state funding flowed to religious schools only through the independent decisions of families, and that students had a meaningful choice between religious schools and others, including the public schools.

Since *Zelman*, the Supreme Court has decided no cases on the merits of Establishment Clause challenges to government funding programs.³⁷ Its only decisions in the area have involved questions of taxpayer standing to challenge such programs, direct³⁸ or indirect,³⁹ and both of those decisions narrowed the standing of taxpayers. As a result of those narrowing moves, cases involving Establishment Clause challenges to government funding programs have been dramatically reduced in frequency. Nevertheless,

³³ *Id.* at 801-835 (Thomas, J., joined by Rehnquist, C.J., and Scalia and Kennedy, JJ.).

³⁴ *Id.* at 836-867 (O'Connor, J., joined by Breyer, J., concurring).

³⁵ *Trinity Lutheran*, 137 S. Ct. at 2030-31 (Sotomayor, J., dissenting).

³⁶ *Zelman*, 536 U.S. 639 (2002).

³⁷ Of the current nine Members of the Court, five (Chief Justice Roberts, and Justices Alito, Sotomayor, Kagan, and Gorsuch) had never participated in a Supreme Court case involving state funding of religious entities. But the relevant law in these cases is no secret, and Justice Sotomayor had no difficulty in identifying the relevant constitutional law and history. The other four of the five newcomers just ignored all of that.

³⁸ *Hein v. Freedom from Religion Foundation, Inc.*, 551 U.S. 587 (2007).

³⁹ *Arizona Christian School Tuition Org. v. Winn*, 563 U.S. 125 (2011).

nothing in *Zelman* or *Mitchell* suggested that the constitutional bar on direct aid to the religious mission of religiously affiliated schools had been eliminated or weakened. Thus, legal developments over the last fifteen years have not altered the rules that limit the government's power to fund religious institutions, including houses of worship.

Indeed, a grant to Trinity Lutheran Church to improve a playground used by its pre-school would raise quite serious Establishment Clause issues under those governing norms. As noted above, Missouri failed to raise those issues, but such a questionable litigation decision should not bind the Supreme Court in evaluating the constitutionality of the grant denial.⁴⁰ The TLC pre-school has an explicit religious mission, as a ministry fully integrated within the Church. The school "teaches a Christian world view to children of [both members and non-members of the church enrolled in the school]."⁴¹ There is every reason to believe that this Christian teaching would occur on the newly resurfaced playground.

As Justice Sotomayor noted, "the Scrap Tire Program requires an applicant to certify . . . that its mission and activities are secular and that it will put program funds only to secular use."⁴² We have no idea whether the Department of Natural Resources will now adopt safeguards to ensure that a religious pre-school may not use the playground for specifically religious activities. If such safeguards are put in place, the state's need to monitor compliance with those safeguards might present issues of constitutionally forbidden entanglements with church officials.

⁴⁰ *Trinity Lutheran*, 137 S. Ct. at 2028 (Sotomayor, J., dissenting).

⁴¹ *Id.* at 2027.

⁴² *Id.* at 2019 n.3.

ACS Supreme Court Review

Even if the Missouri grant program could be structured in ways that avoid Establishment Clause concerns—a question on which there is serious reason for doubt—there remains the question of “play in the joints” between the Religion Clauses. At all levels of government, including the federal government, there may be reasons to accommodate religious institutions more than the Free Exercise Clause requires. Similarly, government may have reasons to decline support for religious institutions, even if the Establishment Clause would permit such aid. This is especially important at the state level, because many jurisdictions have strong and longstanding constitutional norms against funding of houses of worship. In cases where states have excluded religious entities from programs of discretionary funding, courts in the not-distant past have regularly declined to intervene in the name of the Free Exercise Clause.⁴³

In light of this consistent constitutional practice, the *TLC* Court’s treatment of *Locke v. Davey*⁴⁴ seems remarkably dismissive, and perhaps even hostile. In *Locke*, the Court (7-2) upheld the policy of Washington State that its constitution

⁴³ After the Supreme Court ruled in *Witters v. Wash. Dept. of Services for the Blind*, 474 U.S. 481 (1986), that the Establishment Clause did not forbid Washington State to use its voucher program to pay tuition at a Bible College, the Washington Supreme Court held that the state constitution nevertheless prohibited the payment. *Witters v. State Comm’n for the Blind*, 771 P.2d 1119, 1122 (Wa. 1989). For similar decisions in the context of county tuition payments to private schools, see *Strout v. Albanese*, 178 F.3d 57 (1st Cir. 1999), *cert. denied*, 528 U.S. 931 (1999); *Bagley v. Raymond Sch. Dep’t*, 728 A.2d 127 (Me. 1999), *cert. denied*, 528 U.S. 947 (1999); *Chittenden Town Sch. Dist. v. Vermont Dept. of Educ.*, 738 A.2d 539 (Vt. 1999), *cert. denied*, 528 U.S. 1066 (1999). If states may exclude religious schools from such programs, the case for exclusion of houses of worship is overwhelming.

⁴⁴ *Locke v. Davey*, 540 U.S. 712 (2004). For comprehensive and quite distinct analyses of *Locke* and questions of state discretion to exclude religion from public benefit programs, see Douglas Laycock, Comment, *Theology Scholarships, The Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes But Missing the Liberty*, 118 HARV. L. REV. 155 (2004); Ira C. Lupu & Robert W. Tuttle, *Federalism and Faith*, 56 EMORY L.J. 19 (2006); Jesse R. Merriam, *Finding a Ceiling in a Circular Room: Locke v. Davey, Federalism, and Religious Neutrality*, 16 TEMP. POL. & CIV. RTS. L. REV. 103 (2006); Nelson Tebbe, *Excluding Religion*, 156 U. PA. L. REV. 1263 (2008).

precluded Promise Scholarship recipients from using the grant to pursue a degree in devotional theology. As the *Locke* Court noted, the Establishment Clause was not a barrier to Washington State’s allowing the scholarships to be put to that use, because the scholarships involved the private choice of scholarship recipients.⁴⁵ Nonetheless, the Court respected the state’s decision to adopt a more restrictive policy on government aid for religious experience.⁴⁶

Missouri thus argued in *TLC* that the discretion recognized in *Locke* supported its choice to refuse to fund playground improvements at church schools. The Court’s response to this argument in *TLC* is striking in several respects. We note that the first several paragraphs in the analytic section of Chief Justice Roberts’s opinion are, to a startling degree, an elaborate paraphrase of the first several paragraphs of Justice Scalia’s *dissent* in *Locke*.⁴⁷ That dissent opens with discussion of *Lukumi*, *Everson*, *McDaniel*, *Lyng*, and *Smith*. The *TLC* opinion is nearly identical in both sequence and emphasis.

Proceeding from this presumptively hostile attitude toward state discretion in this context, the *TLC* opinion emphasizes that Joshua Davey was denied funding because of what he “proposed to do” (prepare for ministry), while Trinity Lutheran was denied funding “because of what it is—a church.” The latter, the Court says, effectively demands that the church “renounce its religious character in order to participate in an otherwise generally available public benefit program, for which it is fully qualified.”⁴⁸

⁴⁵ *Locke*, 540 U.S. at 719.

⁴⁶ *Id.* at 720-725.

⁴⁷ Compare *id.* at 726-731 (Scalia, J., dissenting) with *Trinity Lutheran*, 137 S. Ct. at 2019-21. For the Court in *TLC* to do this without attribution to the *Locke* dissent is deeply puzzling, to say the least.

⁴⁸ *Trinity Lutheran*, 137 S. Ct. at 2024.

ACS Supreme Court Review

With all respect, we can say only that the Court's distinction between conduct and identity is accurate, but it misses entirely the reason behind Missouri's constitutional policy. The point of the restriction on playground grants is not to use the state's leverage over applicants to induce them to alter their character. Rather, the restriction furthers the same policies as the prophylactic rule that the Court had followed for years in Establishment Clause cases, and that state constitutions have expressly required for more than two centuries.⁴⁹ Churches, because of what they *are*, will normally use their assets (including real property assets, like a playground adjacent to the church) for religious uses, such as instruction in the faith. The funding restriction flows from the recognition that aiding churches in this way will make the state a partner with the church in providing religious experience. Chief Justice Roberts's distinction between conduct (Davey's) and identity (a church) is thus just another way for the Court to avoid engagement with centuries of church-state policies in the United States, under which houses of worship would rarely be "fully qualified" for direct government assistance.

TLC is a case about federalism as well as religion, because it required the Court to weigh the state's interest in its own constitutional law. Certainly, that interest deserved more credit than the Court opinion acknowledged. Federalism concerns are multiplied by the variety of contexts, arising state to

⁴⁹ The full list of state constitutional provisions are in Justice Sotomayor's dissent in *TLC*. *Trinity Lutheran*, 137 S. Ct. at 2037 n.10 and n.11 (Sotomayor, J., dissenting). The amicus brief filed in support of Missouri by the Baptist Joint Committee on Religious Liberty and the General Synod of the United Church of Christ very ably stated the case for the longstanding principle of separation in funding matters. *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, Brief of Baptist Joint Committee for Religious Liberty and General Synod of the United Church of Christ as Amici Curiae in Support of Respondent 6-21, available at <http://www.scotusblog.com/wp-content/uploads/2016/07/15-577-BJC-Amici-Respondent.pdf>. It also assembled material on state constitutions. *Id.* at Appendix 1. It is at least curious that Justices who are prominent members of the Federalist Society would be so indifferent to this thick history of state constitutional concern.

state, in which the distinctiveness of religious entities is a crucial constitutional variable. A ruling about playgrounds in Missouri is likely to have broad implications for decisions about schools or social services in other states. Yet a reader of the Court's opinion would be forgiven for thinking such broad concerns of federalism played almost no part in the decision.

In separate and brief concurring opinions in *TLC*, Justice Thomas (who dissented in *Locke*) and Justice Gorsuch expressed the view that *Locke* is constitutionally dubious.⁵⁰ Most significantly, Justice Gorsuch challenged the Chief Justice's distinction between religious conduct and religious identity. Religious people do religious things, Justice Gorsuch tells us, so the distinction between religious identity and religious exercise cannot be sustained. Thus, he says, the constitution requires the same protection against the denial of funds to religious entities as it does with respect to religiously motivated conduct by individuals.⁵¹

More than anything else written by the Justices who support the *TLC* result, Justice Gorsuch's claim explicitly repudiates hundreds of years of American constitutional experience. To paraphrase the *Everson* Court, the prohibition on state establishment of religion means "at least" that the state may not finance the people's efforts at religious instruction through houses of worship.⁵² If Justice Gorsuch is correct, however, state support of secular instruction without equivalent support of religious teaching is tantamount to unconstitutional discrimination against religious education. Justice Gorsuch thus goes far beyond the Court's willingness to require equal funding of churches, with respect to secular concerns like playground safety. Justice Gorsuch would extend this obligation of

⁵⁰ Justices Thomas and Gorsuch each joined the other's opinion, both concurring in part.

⁵¹ *Trinity Lutheran*, 137 S. Ct. at 2025-26 (Gorsuch, J., concurring).

⁵² *Everson*, 330 U.S. at 15-16.

ACS Supreme Court Review

equal funding to include government support of explicitly religious activity whenever that activity has a secular counterpart.⁵³

Justice Gorsuch makes this exact point in the very next paragraph, which begins: “Second, and for similar reasons, I am unable to join the footnoted observation, ante, at 2024, n. 3 that ‘[t]his case involves express discrimination based on religious identity with respect to playground resurfacing.’”⁵⁴ That observation involves only undisputed fact, so the only possible object of the refusal by Justices Gorsuch and Thomas to join the footnote is its one additional sentence: “We do not address religious uses of funding or other forms of discrimination.”⁵⁵ The footnote, which only Chief Justice Roberts, and Justices Kennedy, Alito, and Kagan joined, carefully leaves for another day the question of whether government may exclude from funding religious organizations that will use the aid for explicitly religious activities—for example, Bible reading in a literacy class, or religiously themed instruction about sexual abstinence outside of marriage.⁵⁶ For Justices Gorsuch and Thomas, any exclusion of those activities from a general funding program would violate the Free Exercise Clause. This stance, quite simply, turns *Everson* and the constitutional tradition it expresses totally on their heads.

Moreover, Justice Gorsuch ignores his own recent and strenuous claims about the proper role of judges. Writing in the spring of 2016 (after Justice Scalia’s death and well before the 2016 election), Justice Gorsuch said this:

⁵³ Justice Sotomayor’s dissent, joined by Justice Ginsburg, similarly viewed the religious character of houses of worship as indicative of the likelihood of religious activity, but they drew the precisely opposite and once-traditional conclusion—that the constitution bars the state from directly subsidizing houses of worship, or at the very least permits the state to refrain from such funding. *Trinity Lutheran*, 137 S. Ct. at 2038-39 (Sotomayor, J., dissenting).

⁵⁴ *Trinity Lutheran*, 137 S. Ct. at 2026 (2017).

⁵⁵ *Trinity Lutheran*, 137 S. Ct. at 2024 n. 3 (2017).

⁵⁶ *Id.*

[T]he great project of Justice Scalia’s career was to remind us of the differences between judges and legislators. To remind us that legislators may appeal to their own moral convictions and to claims about social utility to reshape the law as they think it should be in the future. But that judges should do none of these things in a democratic society. That judges should instead strive (if humanly and so imperfectly) to apply the law as it is, focusing backward, not forward, and looking to text, structure, and history to decide what a reasonable reader at the time of the events in question would have understood the law to be—not to decide cases based on their own moral convictions or the policy consequences they believe might serve society best.⁵⁷

This is a committed statement of judicial methodology, and we are entitled to measure Justice Gorsuch’s work, including his concurring opinion in *TLC*, against it. Let’s start with the text of the relevant constitutional provision: “Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.”⁵⁸ In *TLC*, Missouri had argued, quite plausibly, that its restriction on funding churches did not violate the Clause because it was not “prohibiting” religious exercise in any way.

⁵⁷ Neil M. Gorsuch, *Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 CASE W. RES. L. REV. 905, 906 (2016). At his Supreme Court confirmation hearings, he repeated this judicial philosophy. See Matt Flegenheimer, Adam Liptak, Carl Hulse and Charlie Savage, *Seven Highlights from the Gorsuch Confirmation Hearings*, N.Y. TIMES, (Mar. 21, 2017), <https://www.nytimes.com/2017/03/21/us/politics/neil-gorsuch-confirmation-hearings.html> (quoting then-Judge Gorsuch as saying “The Constitution doesn’t change. The world around us changes.”); see also Daniel Bush, *What We Learned from Neil Gorsuch’s Marathon Confirmation Hearing*, PBS NEWSHOUR (March 21, 2017), <http://www.pbs.org/newshour/updates/learned-neil-gorsuchs-marathon-confirmation-hearing/> (reporting that then-Judge Gorsuch espoused “selective originalism”).

⁵⁸ U.S. CONST. amend. I

ACS Supreme Court Review

Here is Justice Gorsuch in *TLC*, analyzing the words of the Clause:

First, the Court leaves open the possibility a useful distinction might be drawn between laws that discriminate on the basis of religious status and religious use. . . .

. . .

I [do not] see why the First Amendment’s Free Exercise Clause should care [about that distinction]. After all, that Clause guarantees the free exercise of religion, not just the right to inward belief (or status).⁵⁹

We were initially puzzled by the odd locution of whether “the Free Exercise should care.” But the Justice’s next sentence, focused on the words “free exercise,” hints at an answer. This paragraph represents Justice Gorsuch’s nod to textualism, but he focuses only on the question of whether both the status and conduct of churches reflect the “exercise” of religion. No one disputes that in this case. What the parties dispute is whether a refusal to fund a church, an act consistent with longstanding norms of church-state separation in financial matters, can plausibly be viewed as “prohibiting” that exercise. On that potentially dispositive textual question, Justice Gorsuch had nothing to say.

Justice Gorsuch’s claim to adhere to constitutional originalism offers only deeper embarrassment in his *TLC* concurrence. Recall his counsel to look “to text, structure, and history to decide what a reasonable reader at the time of the events in question would have understood the law to be.”⁶⁰ His opinion completely avoided any mention of history, and it’s not difficult to see why. The Free

⁵⁹ *Trinity Lutheran*, 137 S. Ct. at 2025-26 (Gorsuch, J., concurring).

⁶⁰ Neil M. Gorsuch, *Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 CASE W. RES. L. REV. 905, 906 (2016).

Exercise Clause, made applicable to the states by ratification of the Fourteenth Amendment in 1868,⁶¹ must be read in light of the then-widespread constitutional norm against direct aid to houses of worship. Justice Gorsuch’s separate opinion never mentions the detailed history, offered by Justice Sotomayor,⁶² showing that bans on state aid to houses of worship were common at the founding, and nearly uniform by the time of the adoption of the Fourteenth Amendment. *TLC* was not a case in which the history is thin or obscure; on the contrary, the history is thick and available to all. Justice Gorsuch apparently did not like what it demonstrated. If Justice Gorsuch disregarded these many state constitutional provisions because he viewed them as marks of anti-Catholic discrimination—a popular trope in commentary on *TLC* immediately before and after the decision⁶³—his concerns are both unvoiced and deeply misplaced. A true originalist does not keep secret his interpretation of the relevant history. Moreover, many of these state provisions, including Missouri’s, adopted language from late Eighteenth- and early Nineteenth-century state constitutions. The major disagreements during that era were entirely among

⁶¹ The Supreme Court first acknowledged the incorporation of the Free Exercise Clause in *Cantwell v. Connecticut*, 310 U.S. 296 (1940). A theory of incorporation that built on originalism would interpret the Clause the way it was understood in 1868, when the Fourteenth Amendment was ratified. Such a theory would have to give considerable attention to the many, then-extant state constitutional provisions that barred funding of religious entities. Professor Lash’s detailed and able study of free exercise norms at the time of Reconstruction gives no hint that the drafters and ratifiers of the Fourteenth Amendment saw these “no funding” provisions as inconsistent with the free exercise of religion. See generally Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 Nw. U. L. REV. 1106 (1994).

⁶² *Trinity Lutheran*, 137 S. Ct. at 2032-39 (Sotomayor, J., dissenting).

⁶³ See, e.g., Philip Hamburger, *Prejudice and the Blaine Amendments*, FIRST THINGS (June 20, 2017), <https://www.firstthings.com/web-exclusives/2017/06/prejudice-and-the-blaine-amendments>; Marc DeGirolami, *Where are the “Blaine Amendments”?* *Where is the “Animus” Inquiry?*, MIRROR OF JUSTICE (June 26, 2017), <http://mirrorofjustice.blogspot.com/mirrorofjustice/2017/06/where-are-the-blaine-amendments-where-is-the-animus-inquiry.html>.

ACS Supreme Court Review

Protestants.⁶⁴

TLC thus offered newly confirmed Justice Gorsuch a test of fidelity to his professed methodology of originalism, and he failed miserably.⁶⁵ Once he abandoned text and history, all he had left was his own forbidden territory “[of decid[ing] [the] case based on [his] own moral convictions or the policy consequences [he] believe might serve society best.” How disappointing—and revealing—that this failure came so starkly, dramatically, and quickly in his tenure on the Supreme Court.

The Future of Church-State Funding Principles in Light of *TLC*

Within hours of the decision in *TLC*, journalists began to speculate on its consequences.⁶⁶ The Court encouraged this line of inquiry the next day when, in four cases, it granted certiorari, vacated lower court decisions, and remanded for reconsideration

⁶⁴ See, e.g., The Virginia Act for Religious Freedom (1786) (“[N]o man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever”); GA. CONST. of 1789, art. IV, § 5 (“All persons shall have the free exercise of religion, without being obliged to contribute to the support of any religious profession but their own.”); PA. CONST. of 1790, art. IX, § 3 (“[N]o man can, of right, be compelled to attend, erect, or support any place of worship, or to maintain any ministry against his consent”; CONN. CONST. of 1818, art. VII, § 1 (“[N]o person shall by law be compelled to join or support, nor be classed with, or associated to, any congregation, church or religious association.) The near-unanimous ban in state constitutions on government-imposed support for houses of worship reflects a fundamental shift in Protestantism from the mid-Eighteenth century to the late Eighteenth and Nineteenth centuries. This shift reflects the growing centrality of voluntarism—the core of evangelicalism—in Protestant thought and belief. The believer demonstrates authentic faith only by free acceptance of salvation, free consent to join a particular denomination, and free support of that body. JAMES H. HUTSON, *CHURCH AND STATE IN AMERICA: THE FIRST TWO CENTURIES* 165-166 (2008); JON BUTLER, *AWASH IN A SEA OF FAITH: CHRISTIANIZING THE AMERICAN PEOPLE* 262-268 (1992).

⁶⁵ Nor did Justice Gorsuch make a case for following precedent as a justification for ignoring text and history. Note that in *TLC* he joins Justice Thomas in a concurring opinion that does its best to minimize the scope of *Locke v. Davey*, the most relevant precedent. *Trinity Lutheran*, 137 S. Ct. at 2025 (Thomas, J., concurring).

⁶⁶ See, e.g., Emma Green, *The Supreme Court Strikes Down a Major Church-State Barrier*, THE ATLANTIC (June 26, 2017), <https://www.theatlantic.com/politics/archive/2017/06/trinity-lutheran/531399/>.

in light of *TLC*.⁶⁷ Three of the four had been decided by the Colorado Supreme Court,⁶⁸ and these all involved the use of school vouchers in one Colorado county. The fourth, from the New Mexico Supreme Court, involved loans of schoolbooks to public and private schools.⁶⁹ In all four, the state courts had struck down the aid as violations of state constitutional restrictions on public support for non-public schools. This remand provoked the obvious question of whether *TLC* was going to further the school choice movement, which has long been hampered by various state constitutional restrictions.

Eventually, the resolution of the split among the seven Justices who agreed with the Court's result will determine the impact of *TLC* on future controversies about equal funding. For now, we can confidently say that the votes of these Justices mask very deep divisions among them about Religion Clause and federalism principles. Instead of viewing *TLC* as a 7-2 decision, we think it is more appropriate to break the seven down into groups of four (Chief Justice Roberts, and Justices Kennedy, Alito, and Kagan), two (Justices Thomas and Gorsuch), and one (Justice Breyer). Justice Breyer's opinion, which focuses exclusively on the idea of "public benefit," offers lower courts no guidance on how to distinguish among the various benefits that would or would not be appropriate subjects of state support, and will likely be ignored.

The struggle going forward will be among the other six Justices in the *TLC* majority. The crucial question will be those reserved in footnote 3 of Chief Justice Roberts's opinion: "This case involves

⁶⁷ See Order List (June 27, 2017) available at https://www.supremecourt.gov/orders/courtorders/062717zr_6537.pdf (orders in Nos. 15-556, 15-557, 15-558, and 15-1409).

⁶⁸ *Taxpayers for Public Educ. v. Douglas Co. School Dist.*, 351 P.3d 461 (Co. 2015).

⁶⁹ *Moses v. Skandera*, 367 P.3d 838 (N.M. 2015).

ACS Supreme Court Review

express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination.” As noted above, Justices Thomas and Gorsuch did not join that footnote, and their opinions would require funding of religious activities on terms equal to that provided to their secular counterparts.

What remains unknown is how many of the four Justices who joined the footnote will ultimately side with Justices Gorsuch and Thomas. If it were three or more, the footnote (and Justice Gorsuch’s concurrence) would likely have not appeared. Thus, in extracting guidance from *TLC*, lower courts will face substantial uncertainty in discerning the correct principles to decide cases that involve funding of religious activities.⁷⁰

TLC should make no difference in the reconsideration of *New Mexico Association of Non-Public Schools v. Moses*.⁷¹ The case involves a state program of book loans to schools, public and private (including religious schools). The program was structured as a loan to students and their families, similar to the program upheld against an Establishment Clause challenge in *Board of Education v. Allen*.⁷²

Article XII, section 3 of the New Mexico Constitution, however, which outlaws use of state funds “for the support of any sectarian, denominational or private school, college or university,”

⁷⁰ As noted above, Chief Justice Roberts, Justice Alito, and Justice Kagan have not participated in any Supreme Court decision that reached the merits of Establishment Clause questions about funding religious activities. Justice Kennedy joined the *Mitchell* plurality, 530 U.S. at 801-836, but the in-kind aid in that case had been restricted to secular use. Moreover, the plurality in *Mitchell* characterized the case as involving private, intermediary choice, because aid was distributed to schools on a per capita basis. *Id.* at 830-831. So even Justice Kennedy has not expressed a view about the constitutionality of religious use of direct aid, other than in *Bowen*, where he joined an opinion that precluded such use. *Bowen*, 487 U.S. at 621. See *supra* notes 30-31 and accompanying text.

⁷¹ *Moses*, 367 P.3d 838.

⁷² *Board of Education of Central School Dist. No. 1 v. Allen*, 392 U.S. 236 (1968).

is much broader and more specific than the Establishment Clause.⁷³ The state Supreme Court focused on the sweeping exclusion of “any sectarian, denominational or private school,” and concluded that the provision was designed to protect resources for the public schools.⁷⁴ Accordingly, the book loan program violated the state constitution by aiding all private schools.⁷⁵ Thus, the state Supreme Court decision—like the state constitution itself—did not single out religious schools for disfavored treatment.

We strongly suspect that the language in *TLC*’s footnote 3 with respect to “other forms of discrimination” is a reference to New Mexico’s distinction between public schools and private schools. But New Mexico’s constitutional policy does not especially burden religious education. Instead, it is an affirmative policy of protecting public education against rivals for public support.⁷⁶ Nothing in the Gorsuch-Thomas view or the Court opinion in *TLC* addresses this kind of distinction, one which tends to appear in the education law of virtually every state. We are deeply confident that the outcome in New Mexico will remain the same.⁷⁷

The Colorado decisions, on remand, could present a closer question. Douglas County created a scholarship program, which paid approximately \$4,500 per year for each recipient toward

⁷³ N.M. CONST. art. XII, § 3.

⁷⁴ *Moses*, 367 P.3d at 841.

⁷⁵ *Id.*

⁷⁶ In a comparable case in Michigan, a state court recently rejected the argument that *TLC* should have any bearing on application of a state constitutional provision denying public aid to all private schools. See Council of Organizations and Others for Education about Parochial v. State of Michigan (Mich. Ct. Cl. 2017), available at http://www.aclumich.org/sites/default/files/2017-07-25_Opinion_Prelim_Injunction.pdf. See discussion of the Michigan decision at Howard Friedman, *Trinity Lutheran Decision Does Not Apply to Neutral Ban on Funds to Private Schools*, Religion Clause (July 28, 2017), <http://religionclause.blogspot.com/2017/07/trinity-lutheran-decision-does-not.html>.

⁷⁷ The defenders of the New Mexico book loan program apparently attempted to litigate the case as an attack, on grounds of anti-Catholic animus, on the constitutionality of the state’s constitutional restriction on aiding private schools. But the New Mexico Supreme Court was unreceptive to that attack, and nothing in *TLC* invites any different response.

ACS Supreme Court Review

tuition at participating private schools.⁷⁸ The trial court found that, in the initial program year of 2011-12, 271 students received a scholarship. Of 23 participating schools, 16 were religious in character. Over 90% of scholarship recipients attended religious schools. At the high school level, 119 of 120 students were enrolled in religious schools, and the only non-religious participating schools were limited to “gifted” or “special needs” students.

The state Supreme Court held that the program was inconsistent with Article IX, section 7 of the Colorado Constitution, which bars state or local governmental assistance to religious schools.⁷⁹ Because the program involved intermediary choice, *Zelman* probably insulated from successful attack under the federal Establishment Clause. But, as is the case under most state constitutions, the relevant limitation prohibits any state or local “aid [to] any church or sectarian society, or for any sectarian purpose, or to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church or sectarian denomination whatsoever” The Colorado Supreme Court ruled, 4-3, that the provision covered all religious schools, and that the program unconstitutionally aided such schools by contributing to tuition

⁷⁸ *Taxpayers for Public Educ.*, 351 P.3d at 465-66. Under the County’s funding scheme for the vouchers, the County’s public school district received from the state 100% of the state’s allocated per pupil expenditure. The district kept 25%, and paid 75% to the private school where the student was enrolled. *Id.*

⁷⁹ The portion quoted by the Colorado Supreme Court is as follows:

Aid to private schools, churches, sectarian purpose, forbidden. Neither the general assembly, nor any county, city, town, township, school district or other public corporation, shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian society, or for any sectarian purpose, or to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church or sectarian denomination whatsoever

Id. at 470. The Court construed “sectarian” to mean “religious,” so all religiously affiliated private schools were equally precluded from receiving public funds. *Id.*

payments.⁸⁰

What should the Colorado Supreme Court do on remand in light of *TLC*? Unlike the Missouri program at issue in *TLC*, in which at least four Justices in the majority treated the case as not involving “religious uses,” the Douglas County scholarship program involves a subsidy of such uses for all students that attend a school with a religious character.⁸¹ Because of footnote 3, *TLC* leaves entirely open the question of whether a state violates the Free Exercise Clause when it bars indirect government support for religious education.

Despite the utter failure of guidance from *TLC*, the Colorado Supreme Court should be guided by the crucial difference between the facts of that case and the Douglas County litigation. The trial court enjoined the Douglas County program in its entirety, not just as applied to religious schools, and the state Supreme Court affirmed that grant of relief.⁸² Plainly and simply, the Colorado case does not involve discrimination against religious schools. Unlike in Missouri, where secular schools could obtain playground-resurfacing grants but church schools could not, the Colorado courts barred Douglas County from paying scholarships to *any* private school. Equal treatment mandates may be satisfied by equalizing down as well as by equalizing up, and that is what the Colorado Supreme Court did in its initial decision. So, just as in New Mexico, we expect no different outcome on remand, and we expect the U.S. Supreme Court to leave the case undisturbed

⁸⁰ Schools were free to reduce their own financial aid to students who received a scholarship from the County, and to take applicants’ religious beliefs into account in admissions. *Id.* at 465-66.

⁸¹ That the subsidy may be “indirect” is wholly immaterial to the question of whether it effectively supports religious use. *Locke v. Davey*, which involved college scholarships, was identical in that respect, and the U.S. Supreme Court quite properly treated the case as involving a refusal to subsidize a religious use—in that case, study for the ministry. *Locke*, 540 U.S. at 721-723.

⁸² *Taxpayers for Public Educ.*, 351 P.3d at 465, 475.

ACS Supreme Court Review

thereafter.⁸³

The school choice movement may be disappointed with the outcome of the remands in these cases, but *TLC* will inevitably invite litigation in related circumstances, far more conducive to applying its equal treatment norms. When government financially supports the provision of services and imposes a restriction on religious content of those services, potential grantees that provide religious service are likely to claim unconstitutional discrimination.

For example, religiously affiliated schools may obtain public charters and therefore receive full state financial support for each pupil, but under longstanding federal constitutional law these schools may not engage in religious worship or teaching. Around the United States, these restrictions on “religious uses” of the curriculum have led to significant conflicts with charter schools over a variety of religious practices, including use of the Bible,⁸⁴ engaging in Islamic worship,⁸⁵ and teaching Judaism as part of the Hebrew curriculum.⁸⁶

Armed with *TLC*, lawyers for religiously oriented charter

⁸³ The Colorado Supreme Court gave short shrift to the argument that its constitutional limitation on aid to religious schools was a product of anti-Catholic animus, and therefore a violation of the federal Constitution. *Id.* at 471. Nothing in *TLC* gives the slightest encouragement to that theory of the case on remand. No Justice in *TLC* even mentioned it.

⁸⁴ The Nampa Classical Academy in Idaho has been at the center of the conflict over permissible reading materials in a charter school. See Howard Friedman, *Court Rejects Charter School Challenge To Ban On Classroom Use of Bible*, Religion Clause (May 18, 2010), religionclause.blogspot.com/2010/05/in-nampa-classical-academy-v.html; Howard Friedman, *9th Circuit: Idaho Charter School Teachers Have No 1st Amendment Right To Use Religious Texts*, Religion Clause (Aug. 18, 2011), religionclause.blogspot.com/2011/08/9th-circuit-idaho-charter-school.html.

⁸⁵ See Howard Friedman, *Cultural Identity Charter School Ordered To Make Two Changes In Operations*, Religion Clause (May 20, 2008), religionclause.blogspot.com/2008/05/cultural-identity-charter-school.html.

⁸⁶ See Howard Friedman, *Hebrew Curriculum Finally OK'd For Florida Charter School*, Religion Clause (Sept. 15, 2007), religionclause.blogspot.com/2007/09/hebrew-curriculum-finally-okd-for.html; see also Howard Friedman, *D.C. Board Approves Hebrew Language Charter School*, Religion Clause (Apr. 25, 2012), <http://religionclause.blogspot.com/2012/04/dc-board-approves-hebrew-language.html>. For other examples of controversy over religion in charter schools, see Religion Clause, religionclause.blogspot.com/search?q=charter+school.

schools will argue that the state is discriminating in favor of secular charter schools. For example, secular charter schools may promote their own approaches to civil rights or environmental concerns. In sharp contrast, a religiously oriented charter school may not similarly promote its doctrines in these subjects without risk of violating the Establishment Clause.

If *TLC* is read, as Justices Gorsuch and Thomas would have it, to presumptively preclude restrictions on religious use when secular analogues are not similarly restricted, religiously oriented charter schools would suddenly have a very good case to be free to engage in religious instruction and perhaps even worship. Whether any of the four Justices who joined note 3 in *TLC* would follow this path is unknowable. What is immediately obvious, however, is that this move, if successful, would turn the relevant Religion Clause law upside down. Rather than religious teaching and practice being *barred* in state supported schools, religiously affiliated charter schools would have constitutional *rights* to engage in such teaching and practice. Equalizing down is not a realistic option in this context, because it would require the complete elimination of charter schools.

For another example, consider state-supported social services, such as programs for rehabilitation from drug or alcohol addiction. The Faith Based and Community Initiative under President George W. Bush,⁸⁷ later renamed Faith Based and Neighborhood Partnerships under President Barack Obama, invites participation by organizations with a religious character in federally funded social service programs. From the beginning of the Bush Administration through today, however, federal regulations

⁸⁷ We describe and analyze the Initiative in detail in Ira C. Lupu & Robert W. Tuttle, *The Faith-Based Initiative and the Constitution*, 55 DEPAUL L. REV. 1 (2005). See also IRA C. LUPU & ROBERT W. TUTTLE, *SECULAR GOVERNMENT, RELIGIOUS PEOPLE* 106-109 (2014).

ACS Supreme Court Review

preclude grantees from engaging in explicitly religious activities in government-funded programs.⁸⁸ The federal government imposed this restriction because the Establishment Clause required it.

Enter *TLC*. Religious social service providers and states that want to aid them in their religious missions may mount Free Exercise challenges to this restriction. After all, they will argue, secular providers are free to use their own methods of help or therapy. Why should those who prefer religious methods be subject to discrimination in their choice of methodology?

Our analysis here is identical to our appraisal of the charter school problem. If the Gorsuch-Thomas view eventually earns five votes, a constitutional prohibition⁸⁹ will be transformed into a constitutional mandate of equal treatment. Litigation aimed at securing that equal treatment may cause real harm to these social service programs, because states that forbid direct funding of religious experience could comply with both federal and state law only by funding neither secular nor religious providers.

If all this were to transpire, the law of the Religion Clauses would be radically transformed. And no one in *TLC* was hinting at anything close to this, except for Justice Sotomayor as she opened

⁸⁸ Lupu & Tuttle, *The Faith-Based Initiative and the Constitution*, *supra* note 87, at 10-11. These policies were embodied in an Executive Order from President George W. Bush, Exec. Order No. 13,279, 3 C.F.R. 258 (2003), reprinted in 5 U.S.C. § 601 (1996 & Supp. 2005) (federal funds may not be used to support “inherently religious activities.”). President Obama later amended the Order to clarify that federal funds may not be used to directly support “explicitly religious activities.” See Executive Order—Fundamental Principles and Policymaking Criteria for Partnerships with Faith-Based and Other Neighborhood Organizations § 2(f) (Nov. 17, 2010), obamawhitehouse.archives.gov/the-press-office/2010/11/17/executive-order-fundamental-principles-and-policymaking-criteria-partner.

⁸⁹ See, e.g., *Freedom from Religion Foundation, Inc. v. McCallum*, 179 F. Supp. 2d 950 (W.D. Wisc. 2002) (holding that a direct grant from Wisconsin to a faith-based program for substance-abuse treatment violates the Establishment Clause). Note that grants from Wisconsin involving beneficiary choice, used at the same provider, are constitutionally permitted. See *Freedom from Religion Foundation, Inc. v. McCallum*, 324 F.3d 880 (7th Cir. 2003). We comprehensively analyze the constitutional treatment of direct and indirect financing of religious activities in Lupu & Tuttle, *The Faith-Based Initiative and the Constitution*, *supra* note 87.

her dissent: “This is not a simple case about recycling tires to resurface a playground. The stakes are higher.”⁹⁰

CONCLUSION

As this essay demonstrates, the changes that *TLC* will bring about, in principles of church-state relations and federalism, are quite unpredictable. But the tone of the Court opinion does not inspire confidence that those who joined, including Justice Kagan, embrace any commitment to church-state separation in funding matters, or to federalism principles that will permit states to follow their own longstanding policies in this regard.

Not long ago, the one rock solid element in Establishment Clause law seemed to be that government could not make direct grants to houses of worship, especially in circumstances where the funds would support religious activity. *TLC* has thrown that paradigm of church-state relations into deep question. What’s more, *TLC* threatens a leap beyond state discretion to engage in such spending to a strenuous new paradigm of mandatory equality for religion, in which spending for secular experience must be accompanied by comparable spending for religious experience. Only two Justices, however, have signaled a willingness to go

⁹⁰ *Trinity Lutheran*, 137 S. Ct. at 2027 (Sotomayor, J., dissenting). In the aftermath of *TLC*, a large question lurking is whether laws that treat religious organizations more favorably than their secular counterparts are constitutionally troublesome. If so, a great many statutory accommodations of religion and religious organizations—including the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb – 2000bb-4, and the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc et seq.—are constitutionally questionable, and would have to be either struck down or extended to comparable secular concerns. We believe that not a single sitting Justice would support a sweeping norm of equality between religious and secular organizations, but nothing in *TLC* explains why its equality principle should not be fully symmetrical. Justice Stevens would have confronted his judicial colleagues on this. See *City of Boerne v. Flores*, 521 U.S. 507, 536-537 (1997) (Stevens, J., concurring) (arguing that because RFRA prefers religion to irreligion, it is an unconstitutional establishment).

ACS Supreme Court Review

that far, while four others have reserved judgment. We wonder whether the old paradigm will endure, or whether a radically different one—false to our constitutional history—is on the verge of triumph.

***Pavan v. Smith*: Equality for Gays and Lesbians in Being Married, Not Just in Getting Married**

Steve Sanders*

Did the United States Supreme Court’s landmark 2015 marriage equality decision, *Obergefell v. Hodges*,¹ provide only a narrow and specific right of same-sex couples to obtain state-issued marriage licenses and to have their extant marriages recognized in a new state? Or, was the decision intended to go further—to vindicate the equality and dignity of gays and lesbians at a deeper level—by affirming not only their capacity to enter into marital relationships, but also their capacity to fully participate in the social institution of marriage as it is regulated by American law and understood by contemporary American society?

The Court answered that question, at least partially, in one of its last decisions of the October Term 2016, *Pavan v. Smith*.² Yet the Court may not have been clear and definitive enough in *Pavan* to prevent continued efforts in some states to deny gays and lesbians the full meaning of marriage equality.

I. *Obergefell*: “Equal Dignity in the Eyes of the Law”

The movement for marriage equality for gays and lesbians

*Associate Professor of Law, Indiana University Maurer School of Law. My thanks to Daniel Conkle, Douglas NeJaime, Aviva Orenstein, and Steven Schwinn for helpful comments and edits, and to Sarah Brown for research assistance.

¹ *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).

² *Pavan v. Smith*, 137 S.Ct. 2075 (2017).

ACS Supreme Court Review

began, at least embryonically, in the 1970s but did not become a subject of national controversy and debate until the mid-1990s. In 2004, Massachusetts, as the result of a decision by its state high court,³ became the first state to license same-sex marriages. The first decision by a federal court applying the federal Constitution to strike down a state anti-gay marriage law came in 2010 in *Perry v. Schwarzenegger*,⁴ which invalidated California's Proposition 8. *Perry* emboldened the marriage equality movement, and more federal lawsuits were filed around the country. In 2013 the Supreme Court in *United States v. Windsor*⁵ struck down the federal Defense of Marriage Act, which had prohibited federal recognition of legal same-sex marriages. In the wake of *Windsor*, federal courts in a number of states began striking down laws that prohibited same-sex marriage. *Windsor* was widely perceived as a major step toward an inevitable eventual decision by the justices to invalidate any remaining state-law gay marriage bans that had not already been struck down by lower courts. That decision would come two years later in *Obergefell*.

The *Obergefell* Court anchored its decision in the substantive due process right to marry,⁶ though it said that the right also was derived from the Equal Protection Clause.⁷ “As the State itself makes marriage all the more precious by the significance it attaches to it,” the Court said, “exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects. It demeans gays and lesbians for the State to lock them out of a central institution of the Nation’s society.”⁸ Marriage

³ *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003).

⁴ *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Calif. 2010).

⁵ *U.S. v. Windsor*, 133 S.Ct. 2675 (2013).

⁶ *Obergefell*, 135 S.Ct. at 2600-01.

⁷ *Id.* at 2602.

⁸ *Id.* at 2601-02.

equality, the Court said, was nothing less than a matter of “equal dignity in the eyes of the law.”⁹

II. *Pavan v. Smith: Obergefell as Applied to Parenthood*

A. State court decision

In recent years, increasing numbers of out, self-identified gays and lesbians—often, though not always, in couples—began parenting, leading commentators to remark about a “gayby boom.”¹⁰ This phenomenon has presented challenging new issues for family law, because parenthood for gays and lesbians often involves not only traditional adoption, but also assisted reproductive technologies such as donor insemination, *in vitro* fertilization, or gestational surrogacy. Because persons in same-sex relationships “frequently establish parental relationships in the absence of gestational or genetic connections to their children,”¹¹ their legal relationships to their children may be less predictable, as “law fails to value parenthood’s social dimensions adequately and consistently.”¹² As a result, gay men and lesbians who form same-sex relationships often have found “their parent-child relationships discounted” by the law.¹³ Not surprisingly, scholars have sought to understand *Obergefell*’s implications for parenting by gay and lesbian couples.¹⁴

⁹ *Id.* at 2608.

¹⁰ *SEE, E.G.*, LUCAS GRINDLEY, *GAYBY BOOM? CENSUS SHOWS RISE IN ADOPTIONS*, *The Advocate* (June 14, 2011, 10:10 AM), <https://www.advocate.com/news/daily-news/2011/06/14/gayby-boom-found-us-census-figures>.

¹¹ Douglas NeJaime, *The Nature of Parenthood*, 126 *YALE L.J.* 2260, 2264 (2017).

¹² *Id.*

¹³ *Id.* at 2265-66.

¹⁴ *See, e.g.*, *id.* at 2265 (stating that *Obergefell* “sought to protect not only romantic bonds, but also parent-child relationships, formed by gays and lesbians); Leslie Joan Harris, *Obergefell’s Ambiguous Impact on Legal Parentage*, 92 *CHL.-KENT L. REV.* 55, 58 (2017) (concluding that *Obergefell* has had a “limited” effect on same-sex parenting cases and that “legislative solutions are still needed”). *See generally* Susan Frelich Appleton, *Obergefell’s Liberties: All in the Family*, 77 *OHIO ST. L.J.* 919 (2016) (exploring the relationship between constitutional law and family law that the Supreme Court’s liberty rulings, including *Obergefell*, have created).

ACS Supreme Court Review

Against this backdrop, the Arkansas Supreme Court decided *Smith v. Pavan*,¹⁵ a case brought by three married female couples, all of whom had used anonymously donated sperm and artificial insemination to bring children into their families. The couples brought suit after the Arkansas Department of Health (“ADH”) refused to issue birth certificates to the couples listing both spouses as parents.

The ADH’s action appeared on its face to be a straightforward example of discrimination that disadvantaged persons in same-sex relationships. Arkansas law provides that “[f]or the purposes of birth registration, the mother is deemed to be the woman who gives birth to the child.”¹⁶ Arkansas law also incorporates a presumption of paternity, specifying that “[i]f the mother was married at the time of either conception or birth or between conception and birth the name of the husband shall be entered on the certificate as the father of the child.”¹⁷ In other words, the state grants a legal presumption in favor of the husband in an opposite-sex marriage that he is the child’s legal parent, even without any proof of biological paternity.¹⁸

Significantly, the presumption applies even in cases where a woman conceives by means of an anonymous sperm donor and the husband consents to the procedure.¹⁹ In other words, even when a member of an opposite-sex marriage plainly has no biological tie to the child, Arkansas law treats him as a legal parent by allowing his name to be placed on the birth certificate. Yet, Arkansas did not afford the same privilege to spouses in same-sex marriages who

¹⁵ *Smith v. Pavan*, 505 S.W.3d 169 (Ark. 2016).

¹⁶ ARK. CODE ANN. § 20-18-401(e) (2016).

¹⁷ ARK. CODE ANN. § 20-18-401(f)(1).

¹⁸ The presumption may be overcome if paternity is determined by court order or by affidavits from the mother, her husband, and a putative father. ARK. CODE ANN. § 20-18-401(f)(1)(A)-(B).

¹⁹ ARK. CODE ANN. § 9-10-201(a) (2016).

had shared in childbirth decisions and parenting responsibilities but lacked biological ties to their children.

Despite this obvious disparate treatment, the Arkansas Supreme Court ruled against the plaintiff same-sex couples, and did so by attempting to narrow the reach of *Obergefell*. First, the court observed that “*Obergefell* did not address Arkansas’s statutory framework regarding birth certificates, either expressly or impliedly.”²⁰ But this statement, while true in the most literal sense, was disingenuous. *Obergefell* did not, of course, consider the particulars of Arkansas birth certificate law, because the case did not involve any plaintiffs from that state. But the *Obergefell* court did list “birth and death certificates” among the important incidents that customarily are attached to marital status.²¹ And in the course of explaining why “[t]here is no difference between same- and opposite-sex couples” in their capacities to participate in an institution that is at “the center of so many facets of the legal and social order,” the Court observed that same-sex couples were “denied the constellation of benefits that the States have linked to marriage and are consigned to an instability many opposite-sex couples would find intolerable in their own lives.”²² *Obergefell* plainly drew connections between the right to marry, and state policies which are designed to nurture and protect marriages and which privilege marriage over other relationships.

The Arkansas court attempted to skirt these principles from *Obergefell* by denying that birth certificates are a benefit or incident of marriage. Relying on the fact that the presumption of paternity may be overcome by court order or by affidavits recognizing a biological father who is not the mother’s husband,

²⁰ *Pavan*, 505 S.W.3d at 176.

²¹ *Obergefell*, 135 S.Ct. at 2601.

²² *Id.*

ACS Supreme Court Review

the court maintained that the state’s birth registration scheme actually “centers on the relationship of the biological mother and the biological father to the child, not on the marital relationship of husband and wife.”²³ The main purpose of birth certificates, the court said, is biological record keeping to facilitate “tracing public-health trends and providing critical assistance to an individual’s identification of personal health issues and genetic conditions.”²⁴ Thus, the court said, it is important that “the mother and father on the birth certificate . . . be biologically related to the child.”²⁵ The court insisted that “marriage, parental rights, and vital records” must be considered “distinct categories” of legal analysis.²⁶

The state court’s majority opinion never squarely confronted the question of how these points could be reconciled with the presumption in Arkansas law—rebuttable, but still a presumption—that a husband should be listed on the birth certificate as the parent of any child born into a marriage.²⁷ Nor did it explain why a supposedly biology-based birth registration scheme that was concerned with “public health trends” and “genetic conditions” would afford this presumption even where it is known that a donor’s sperm, not the husband’s, was used to conceive the child.²⁸

The Arkansas court also considered whether “naming the nonbiological spouse on the birth certificate of the child is an

²³ *Pavan*, 505 S.W.3d at 178.

²⁴ *Id.* at 181.

²⁵ *Id.*

²⁶ *Id.* at 180.

²⁷ See *supra* notes 17-19 and accompanying text.

²⁸ At some point in the state appellate litigation, the Alaska Registrar of Vital Records changed its interpretation of state law and conceded that children born of artificial insemination to a married couple should have both spouses listed as parents, regardless of whether they were same or opposite sex. *Pavan*, 505 S.W.3d at 187 (Wood, J., concurring in part and dissenting in part). This development arguably could have mooted the case as to two of the three plaintiff couples (the third couple was not yet married at the time their child was born). But the state supreme court’s majority opinion did not discuss this development, nor did the U.S. Supreme Court’s *per curiam* opinion.

interest of the person so fundamental that the State must accord the interest its respect,” and concluded that it was not.²⁹ But that was not the proper question. Despite the court’s effort to make *Pavan* a case about a parent’s rights in relationship to children rather than the right to be treated equally in marriage, the proper question was why Arkansas law should give disparate treatment to same-sex and opposite-sex couples in a context—recognition of legal parentage for children who are born into a marriage with the help of assisted reproduction—where they are otherwise similarly situated. A dissent by Justice Paul E. Danielson stated the matter plainly and candidly:

Arkansas [law] provides that the name of the “husband” of the mother shall be entered on a birth certificate as the father of the child, without regard to any biological relationship and on the sole basis of his marriage to the mother—specifically, if he is married to the mother at the time of either conception or birth or between conception and birth. The obvious reason for this is to legitimate children whenever possible, even when biological ties do not exist. Thus, there can be no reasonable dispute that the inclusion of a parent’s name on a child’s birth certificate is a benefit associated with and flowing from marriage. *Obergefell* requires that this benefit be accorded to same-sex spouses and opposite-sex spouses with equal force.³⁰

B. U.S. Supreme Court Decision

The U.S. Supreme Court essentially agreed with Justice Danielson’s framing of the issue. A majority of the Court (with

²⁹ *Pavan*, 505 S.W.3d at 180.

³⁰ *Id.* at 190 (Danielson, J., dissenting).

ACS Supreme Court Review

three justices dissenting) apparently saw the question as an easy one, summarily reversing the Arkansas Supreme Court in a relatively short per *curiam* opinion without oral argument or additional briefing beyond the written arguments presented in the petition and opposition to certiorari.

After recounting the background of the case and the Arkansas rules governing birth certificates, the Court held that “*Obergefell* proscribes” the “disparate treatment” that had been given to the plaintiffs.³¹ In Arkansas, the Court said, birth certificates are “more than a mere marker of biological relationships,” because “[t]he State uses those certificates to give married parents a form of legal recognition that is not available to unmarried parents.”³² Thus, “[h]aving made that choice, Arkansas may not, consistent with *Obergefell*, deny married same-sex couples that recognition.”³³ The Court noted that birth certificates often are “used for important transactions like making medical decisions for a child or enrolling a child in school.”³⁴

When *Obergefell* declared that “a State may not ‘exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples,’” the Court intended, it said in *Pavan*, that those “terms and conditions” refer not merely to the requirements for a marriage license, but to the “rights, benefits and responsibilities” that accompany marital status.³⁵ The Court observed that *Obergefell* had “expressly identified ‘birth and death certificates’” among these rights and benefits, and noted that “[s]everal of the plaintiffs in *Obergefell* challenged a State’s refusal to recognize their same-sex spouses on their children’s birth

³¹ *Pavan*, 137 S.Ct. at 2078.

³² *Id.* at 2078-79.

³³ *Id.* at 2079.

³⁴ *Id.* at 2078.

³⁵ *Id.* (quoting *Obergefell*, 135 S.Ct. at 2605, 2601).

certificates.”³⁶

Indeed, the Court could have added that the decision’s namesake, James Obergefell, did not file his federal lawsuit seeking a right to get married. Rather, his objective was to have his home state of Ohio recognize his marriage to his terminally ill husband John, which had been performed in Maryland, so that James could be listed as the legal spouse on John’s Ohio death certificate.³⁷ Being listed on a death certificate—whose primary purpose is the record the date and cause of someone’s death—probably is not very high on anyone’s list of the important rights and benefits of marriage. Yet James Obergefell’s quest for simple equal treatment on this matter took him from being an unknown Cincinnati real estate agent to someone whose name will forever be linked to a landmark U.S. Supreme Court decision for gay and lesbian rights.

The Court’s *per curiam* opinion drew a dissent from summary disposition by newly seated Justice Neil Gorsuch, joined by justices Clarence Thomas and Samuel Alito. Justice Gorsuch’s dissent argued that the Court’s summary treatment of the matter was inappropriate because, in his view, it was unclear why *Obergefell* should necessarily be offended by “a birth registration regime based on biology.”³⁸ As explained above, however, this is not really an accurate or even honest description of the Arkansas birth certificate scheme, in which, for married heterosexual couples, biological fact is subordinated to the presumption of paternity.³⁹

³⁶ *Id.* (quoting *Obergefell*, 135 S.Ct. at 2601).

³⁷ *Obergefell*, 135 S.Ct. at 2594-95.

³⁸ *Pavan*, 137 S.Ct. at 2079 (Gorsuch, J., dissenting).

³⁹ See *supra* notes 17-19, 30 and accompanying text.

III. Discussion

Although opposite-sex marriage had always been assumed in all states, no state expressly defined marriage as a union between a man and a woman until Maryland did so in 1973 “in an apparent response to attempts by same-sex couples to obtain marriage licenses.”⁴⁰ The bans on same-sex marriage enacted by a majority of the states from the 1970s to 2012 did not arise from a careful, well-informed, deliberative process in each state in which the pros and cons of marriage equality were fairly and carefully considered. Rather, these express bans were the products of political backlash against an emerging movement for LGBT rights generally and marriage equality specifically.⁴¹ Most of the bans were hastily enacted by legislatures or through ballot measures in response to political campaigns by social and religious conservatives who argued that gays and lesbians presented a threat to the institution of marriage and to the very idea of the family itself.

This historical and social context may help to explain why the Court in *Obergefell* did not merely decide that the Constitution protects a right of gays and lesbians to marry. The Court framed its decision in the language of “equal dignity.”⁴² It noted that in the courts (perhaps as opposed, implicitly, to the political process), the question of marriage equality could be considered “without scornful or disparaging commentary.”⁴³ And so while its subject

⁴⁰ Kevin Rector, *Md. Attorney General Says Supreme Court Must Overturn Same-Sex Marriage Bans Nationwide*, THE BALTIMORE SUN (Mar. 9, 2015, 4:00 PM), <http://www.baltimoresun.com/features/gay-in-maryland/gay-matters/bs-gm-attorney-general-issues-report-calling-samesex-marriage-bans-20150309-story.html>.

⁴¹ For treatments of this history, see Steve Sanders, *Making It Up: Lessons for Equal Protection Doctrine from the Use and Abuse of Hypothesized Purposes in the Marriage Equality Litigation*, 68 HASTINGS L.J. 657, 674-683 (2017) (arguing that the history, context, and effects of the marriage bans yield considerable evidence from which animus could be inferred); MICHAEL J. KLARMAN, *FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE* (2013).

⁴² *Obergefell*, 135 S.Ct. at 2608.

⁴³ *Id.* at 2597.

was the right to marry, *Obergefell* also represented something larger. Against the backdrop of several decades of political abuse and backlash against claims for gay and lesbian rights, the Court was bringing this group into full and equal citizenship under the Constitution.

The *Obergefell* opinion reflected a broad understanding of contemporary American marriage as “a keystone of our social order”⁴⁴ and an institution that “safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education.”⁴⁵ Indeed, the Court observed that “many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted.”⁴⁶ Denying their parents equal marriage rights, the Court said, inflicted on the children of same-sex couples “harm,” “humiliat[ion],” and “a more difficult and uncertain family life.”⁴⁷ Among the “profound” advantages of legal marriage is that it “allows children ‘to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.’”⁴⁸

One cannot separate the Court’s discussion of the right of gays and lesbians to marry from its discussion of the legally conferred benefits and responsibilities of marriage. The Court explained that it was time to decide the question of marriage equality because “slower, case-by-case determination of the required availability of specific public benefits to same-sex couples . . . would deny gays and lesbians many rights and responsibilities intertwined

⁴⁴ *Id.* at 2601.

⁴⁵ *Id.* at 2600 (emphasis added).

⁴⁶ *Id.* at 2600.

⁴⁷ *Id.* at 2600-01.

⁴⁸ *Id.* at 2600 (quoting *Windsor*, 133 S.Ct. at 2694–95).

ACS Supreme Court Review

with marriage.”⁴⁹ Unsurprisingly, the Court listed birth certificates among the familiar incidents of marriage; most Americans understand that marriage typically affects whose names are listed on a newborn’s birth record.

To be sure, much of the reasoning in *Obergefell* is opaque, and understanding its full meaning may require the reader to draw some inferences or read between the lines.⁵⁰ Justice Anthony Kennedy, the author of *Obergefell*, is famous in his substantive due process and equal protection jurisprudence for painting in broad, bold, and often blurry strokes; he is not famous for precise legal formalism. This has led to criticisms of the *Obergefell* opinion, even among those who agreed with the result. For example, Professor Andrew Koppelman, a longtime advocate for marriage equality, has criticized the opinion’s “remarkably weak reasoning” and “leaps of logic.”⁵¹

Still, it is difficult to see how a jurist could read *Obergefell* and conclude that Justice Kennedy or the other members of the majority intended to allow Arkansas or any other state to subject same-sex couples to legal regimes in which marriage and parenting are treated as separate and distinct undertakings. To be sure, many children are raised by parents who are not married, and law regulates many issues in the parent-child relationship in ways that are independent of marriage. But an honest reading of *Obergefell* makes clear that the Court was addressing the dignity of gay and lesbian couples in *being* married as well as *getting* married, and

⁴⁹ *Id.* at 2606.

⁵⁰ One commentator has suggested that *Obergefell* “left unresolved important ambiguities” and that “future interpreters” will need to look to “nontextual tools, such as adjudicative context, contemporary reception, and subsequent applications.” Craig Green, *Turning the Kaleidoscope: Toward a Theory of Interpreting Precedents*, 94 N.C. L. REV. 379, 389 (2016).

⁵¹ Andrew Koppelman, *The Supreme Court Made the Right Call on Marriage Equality — but They Did It the Wrong Way*, SALON (June 29, 2015, 11:15 AM), http://www.salon.com/2015/06/29/the_supreme_court_made_the_right_call_on_marriage_equality_%E2%80%94but_they_did_it_the_wrong_way/.

being married often includes raising children.

The members of the Arkansas Supreme Court are not the only jurists who have wrestled with the meaning and scope of *Obergefell*. A similar birth certificate case involving lesbian couples in Indiana who had used artificial insemination remains pending, as of this writing, in the Seventh Circuit U.S. Court of Appeals.⁵² In Kansas, a federal district court rejected that state's arguments that *Obergefell* should be read narrowly and should not apply to parental rights:⁵³ "*Obergefell* requires every state to treat same-sex married couples the same way it treats opposite-sex married couples," the court said, and "[t]his includes the marital benefits of raising children together, with the same certainty and stability given opposite-sex couples."⁵⁴ Another federal district court in Mississippi preliminarily enjoined a pre-*Obergefell* state law that functionally prohibited adoptions by married same-sex couples. While the district court acknowledged that *Obergefell*'s "approach could cause confusion,"⁵⁵ it nonetheless read the decision as "extend[ing] its holding to marriage-related benefits—which includes the right to adopt."⁵⁶ The district court noted that "the majority opinion foreclosed litigation over laws interfering with the right to marry" as well as "rights and responsibilities intertwined with marriage."⁵⁷ And in a post-Pavan decision, the Arizona Supreme Court also rejected the argument that *Obergefell* should be read narrowly as governing only the right to marry, and it invalidated a parentage presumption that applied to males in opposite-sex marriages but not to the female spouse of a birth

⁵² Henderson v. Adams, No. 17-01141 (7th Cir. filed Jan. 23, 2017).

⁵³ Marie v. Mosier, 196 F. Supp. 3d 1202, 1218-1219 (D. Kan. 2016).

⁵⁴ *Id.* at 1219.

⁵⁵ Campaign for S. Equal. vs. Miss. Dep't of Human Servs., 175 F. Supp. 3d 691, 709 (S.D. Miss. 2016).

⁵⁶ *Id.* at 710.

⁵⁷ *Id.* (internal citation and quotation marks omitted).

ACS Supreme Court Review

mother who had used an anonymous sperm donor.⁵⁸

It is perhaps understandable that some lower courts have commented about the difficulty of divining *Obergefell*'s full meaning. The Supreme Court did not include a sentence like the following: "Aside from holding that marriage licenses and recognition must be made available on equal terms, we further hold that persons in all marriages, whether same-sex or opposite-sex, must be treated equally and must receive the same rights, benefits, incidents, presumptions, and responsibilities—including those associated with the parent-child relationship—that the federal government, the states, or their agencies and political subdivisions have chosen to provide by law." One might have hoped that the Court in *Pavan* would have realized its error and taken the opportunity to preclude further litigation on similar matters by including some clear and unequivocal language such as I have suggested. But it did not. (Perhaps this small-bore approach was necessary to keep the vote of Chief Justice John Roberts, who had dissented in *Obergefell* but did not join the dissenters in *Pavan*.) Aside from rejecting Arkansas's "disparate treatment" of birth certificates, the Court did not clarify or add doctrinal coherence to the equal protection principles that *Obergefell* invoked, along with substantive due process, as a basis for its decision. Consequently, *Pavan* did not erect a firm or clear barrier to new and imaginative schemes in other states intended to treat gays and lesbians as second-class citizens.

Take, for example, Texas. Four days after the U.S. Supreme Court issued *Pavan*, the Texas Supreme Court, in an interlocutory appeal, allowed a case to go forward in which two private citizens plan to argue to a Texas trial court that, *Obergefell* notwithstanding,

⁵⁸ *McLaughlin v. Jones*, 401 P.3d 492, 496 (Ariz. 2017).

the City of Houston may deny same-sex couples the benefits it provides to opposite-sex couples.⁵⁹ According to the Texas justices, this argument was not precluded because the Supreme Court in *Obergefell* “did not address and resolve” the question of “whether and the extent to which the Constitution requires states or cities to provide tax-funded benefits to same-sex couples.”⁶⁰ *Obergefell*, they argued, held only that “the Constitution requires states to license and recognize same-sex marriages to the same extent that they license and recognize opposite-sex marriages, but it did not hold that states must provide the same publicly funded benefits to all married persons.”⁶¹ Incredibly, the Texas court said its analysis was not affected by *Pavan*, remarking that “neither *Obergefell* nor *Pavan* provides the final word on the tangential questions *Obergefell*’s holdings raise but *Obergefell* itself did not address.”⁶²

Such an underreading of *Obergefell* is wrong both doctrinally and morally. To maintain that the decision was only about the right to obtain a marriage license, and not about the right to fully participate on equal terms in the status of marriage as contemporary American law and society understand it, requires an almost deliberate obtuseness.⁶³

It should be noted that the citizen plaintiffs in *Pidgeon* have no serious constitutional or public policy theory about why disparate treatment between gay and straight married couples should be

⁵⁹ *Pidgeon v. Turner*, No. 15-0688, 2017 WL 2829350 (Tex. June 30, 2017).

⁶⁰ *Id.* at *10.

⁶¹ *Id.*

⁶² *Id.* at *12 n.21.

⁶³ Or perhaps the Texas court, which had originally declined to hear the case, simply caved under pressure from Texas Republican elected officials. See Doyin Oyeniyi, *Here’s What You Need To Know About Pidgeon v. Turner*, TEXAS MONTHLY, (Mar. 1, 2017), <https://www.texasmonthly.com/the-daily-post/heres-need-know-pidgeon-v-turner/> (noting that “pressure” on the court to hear the case “reached its peak when Governor Greg Abbott, Lieutenant Governor Dan Patrick, and Texas Attorney General Ken Paxton filed an amicus brief urging the court to reopen the case”).

ACS Supreme Court Review

permissible after *Obergefell*. They simply oppose the idea of “taxpayer-funded benefits to same-sex couples”⁶⁴ and resent the idea that federal courts can tell a Texas city how to behave. Their lawyer has said he would like to use the case as a vehicle for eventually asking the U.S. Supreme Court to overturn *Obergefell*.⁶⁵

One difference between the Arkansas and Texas cases is that the Arkansas birth registration scheme at issue in *Pavan* predated *Obergefell*. It was not enacted with the intent to disadvantage families headed by gay men and lesbians. Arkansas family law statutes, like those in many states, still contain gendered language—words like “husband” and “wife”—and have not been updated to reflect the post-*Obergefell* reality of legal same-sex marriage. This made it perhaps understandable that the state health department might question whether it had the authority to issue birth certificates to same-sex couples on the same terms under which they were issued to heterosexual couples. By contrast, in *Pidgeon*, the resistance apparently is driven by anti-marriage equality backlash, mixed with traditional Southern resentment of the authority of the U.S. Supreme Court.

Of course, the sensible thing for all states to do would be to update their marriage and parentage laws to conform to the contemporary realities of same-sex marriage and families. But change comes hard to states like Arkansas, Indiana, Kansas, Mississippi, and Texas, which resisted marriage equality at the ballot box and in the courts. And so for the foreseeable future we are likely to see, at best, a passive-aggressive neglect of important family law questions in America’s red states by the conservative Republicans who control the governments in those states. These

⁶⁴ *Pidgeon*, 2017 WL 2829350, at *5.

⁶⁵ Oyeniyi, *supra* note 63.

elected officials will feel no particular incentive to modernize their codes, and same-sex couples may need to continue engaging in costly and wasteful litigation to fully vindicate the “equal dignity” they were promised in *Obergefell*.

This page intentionally blank.

Implied Constitutional Remedies After *Abbasi*

Stephen I. Vladeck*

There is really nothing charitable to say about Justice Kennedy’s opinion for a 4-2 majority in *Ziglar v. Abbasi*, in which the Supreme Court rejected an effort by non-citizens caught up in the post-September 11 immigration roundup of Muslims (and other young men of Arab descent) in and around New York City to recover damages for the onerous and allegedly unconstitutional conditions of their confinement.¹ Not only did the *Abbasi* Court all but shut the door on *Bivens* remedies—damages for constitutional violations by federal officers that courts infer directly into the Constitution—but it did so in a (shorthanded) ruling predicated on four analytically indefensible doctrinal missteps and a series of utterly incoherent normative justifications. And if that wasn’t bad enough, because the case is about remedies, and not rights, *Abbasi* has hardly received significant popular attention—even though, as I wrote the day it came down, “*Abbasi* is perhaps the most important case the Court . . . decided [during its October 2016] Term, and one of the most important it has handed down with regard to remedies for unconstitutional federal government conduct in decades.”²

*Professor of Law, University of Texas School of Law. My thanks to Steve Schwinn for inviting me to contribute this essay—and to his indefatigable patience thereafter.

¹ *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017).

² Steve Vladeck, *On Justice Kennedy’s Flawed and Depressing Narrowing of Constitutional Damages Remedies*, JUST SECURITY (June 19, 2017, 5:49 PM), <https://www.justsecurity.org/42334/justice-kennedys-flawed-depressing-narrowing-constitutional-damages-remedies/>.

ACS Supreme Court Review

The short essay that follows has three goals: First, I aim to explain exactly why *Abbasi*'s doctrinal analysis was so gallingly superficial. After providing background in Part I, Part II demonstrates that, whatever one thinks about the appropriate role of the courts in fashioning remedies not provided for by statute, *Abbasi* reaches its result only by telling a deeply warped story about existing doctrine and prior precedent. Second, and doctrine aside, Part III pivots to the normative justifications Justice Kennedy offered for the hostility to judge-made damages remedies in *Abbasi*, especially in the national security context, and explains why those justifications so thoroughly fail to persuade. Unless the aversion to judge-made damages remedies for constitutional violations by federal officers is simply an aversion to judge-made remedies writ large, focusing on the special case of after-the-fact challenges to national security policies makes very little sense, indeed.

To be sure, a common reaction to *Abbasi* has been that the majority's hostility to judge-made remedies is necessarily damages-specific, and so the Constitution can still meaningfully be vindicated through claims for prospective relief. But as Part IV explains, Chief Justice Roberts has already started to lay down markers for paring back judge-made remedies for injunctive relief against state or federal government misconduct—an approach that may soon command a majority of the Justices (if it doesn't already). Simply put, for as problematic a decision as *Abbasi* is, it may be only the first step toward a far deeper and more troubling retrenchment by the federal courts from inferring constitutional remedies more generally.

I. The Road to *Abbasi*

To understand why *Abbasi*'s analysis of the *Bivens* question was so frustratingly superficial, a bit of background is in order³: In 1871—shortly after ratification of the post-Civil War amendments, which enshrined new federal constitutional constraints on state actors—Congress enacted a freestanding statutory remedy for those whose constitutional rights were violated by state officers. That cause of action, codified today at 42 U.S.C. § 1983, has been an indispensable mechanism for holding state officers accountable for violations of the federal Constitution—and for ensuring not just the supremacy of federal law, but the role of the federal courts as a bulwark against unconstitutional state conduct. At the heart of the problem in *Abbasi* is the fact that, notwithstanding § 1983, Congress has never chosen to provide a comparable remedy for violations of federal law (or even just the federal Constitution) by federal officers.

Instead, victims of constitutional violations by federal officers historically could only assert their constitutional rights as defenses to state (or federal) enforcement proceedings, or, more significantly, through judge-made civil remedies—remedies that, for most of U.S. history, have been fashioned under state, rather than federal law. The Supreme Court long ago rejected the argument that federal jurisdiction in such cases ought to be exclusive,⁴ and even as late as the mid-1960s, the Court continued to explain that, “When it comes to suits for damages for abuse of power, federal officials are usually governed by local law.”⁵

³ The following discussion derives from STEPHEN I. VLADECK, ACS ISSUE BRIEF: THE *BIVENS* TERM: WHY THE SUPREME COURT SHOULD REINVIGORATE DAMAGES SUITS AGAINST FEDERAL OFFICERS (2017), available at https://www.acslaw.org/sites/default/files/The_Bivens_Term.pdf.

⁴ *Teal v. Felton*, 53 U.S. (12 How.) 284 (1851).

⁵ *Wheeldin v. Wheeler*, 373 U.S. 647, 652 (1963).

ACS Supreme Court Review

By that point, however, several flaws in the original model had crystallized. First, although it had been possible to loosely analogize certain constitutional protections to state tort law (*e.g.*, vindicating Fourth Amendment violations through trespass), that analogy did not hold up well to some of the other constitutional rights (such as equal protection) into which the courts were then breathing new life. Second, the same period saw federal courts more routinely asserting the power to enjoin unconstitutional conduct by the federal government—even though, as with damages, no statute expressly authorized them to provide such relief—creating both a strange jurisdictional asymmetry between prospective and retrospective relief against federal officers and a precedent for a more aggressive federal judicial role. Third, and related, the 1950s and 1960s brought with them the rise of what Judge Henry Friendly called “the new federal common law,”⁶ pursuant to which federal courts identified more specific—and more analytically coherent—grounds on which to fashion judge-made (as opposed to statutory) rules of decision, defenses, and causes of action.

These developments came to a head in *Bivens*—a case arising out of an unconstitutional raid of a home by six agents of the Federal Bureau of Narcotics (today’s DEA). *Bivens*—who was never charged as a result of the unlawful search, and therefore had no opportunity to vindicate his rights through a motion to suppress—instead sought damages directly under the Fourth Amendment for the violation. Tellingly, the Nixon administration’s argument in response was not that the Constitution denied *Bivens* a remedy; it was that the appropriate remedy for his constitutional

⁶ Henry J. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 389–91 (1964).

claim was provided by New York state law—and that judge-made federal damages remedies would only be appropriate in cases in which they were “indispensable for vindicating constitutional rights.”⁷

Writing for a 5-3 majority (with Justice Harlan concurring in the judgment), Justice William Brennan disagreed. So long as Congress had not provided an adequate, alternative remedy, and so long as the dispute did not involve “special factors counseling hesitation in the absence of affirmative action by Congress,” private individuals whose constitutional rights had been violated by federal officers were entitled to pursue damages remedies in the federal courts. To be sure, valid defenses—including official immunity—might still preclude relief on the merits in such cases. But the key contribution of *Bivens* was to suggest that, where there were no such obstacles, and where a plaintiff was entitled to relief on the merits, the federal courts had the authority to award damages—not just to vindicate the constitutional rights of private individuals, but, in the words of Chief Justice William Rehnquist, “to deter individual federal officers from committing constitutional violations.”⁸

The 45 years in which *Bivens* has been on the books can best be broken down into two periods: Expansion and retrenchment. Thus, in the Supreme Court’s first two cases after *Bivens* to revisit the 1971 ruling, the Court expanded its analysis to also encompass equal protection claims under the Fifth Amendment’s Due Process Clause,⁹ and claims against federal prison officials under the Cruel and Unusual Punishments Clause of the Eighth Amendment.¹⁰ And although the *Bivens* dissenters had objected that judicial

⁷ Brief for Respondents at 24, *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (No. 301).

⁸ *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 71 (2001).

⁹ *Davis v. Passman*, 442 U.S. 228 (1979).

¹⁰ *Carlson v. Green*, 446 U.S. 14 (1980).

ACS Supreme Court Review

recognition of a self-executing cause of action for damages was an arrogation of judicial power and a usurpation of the legislative function, Congress, when it amended the Federal Tort Claims Act in 1974 (the statute authorizing ordinary tort suits against the federal government), signified its approval of *Bivens*—extending the FTCA to encompass intentional torts by law enforcement officers while expressing its view of the FTCA as complementing, rather than displacing, such judge-made remedies.¹¹

Beginning in the 1980s, though, the narrative grew more equivocal. First, the Supreme Court began declining to recognize *Bivens* remedies in cases in which federal statutes provided any remedy to redress the underlying constitutional harm—even where the statutory remedy was not commensurate with the kind of damages that would have been available under *Bivens*. Thus, for example, in *Schweiker v. Chilicky*, the Court held that the Social Security Act’s remedy for wrongful termination of benefits—which was nothing more than the restoration of benefits and payment of any unlawfully withheld funds—was enough to preclude a damages claim under the Fifth Amendment’s Due Process Clause.¹² Second, in a pair of cases brought by servicemember plaintiffs, the Court for the first time identified “special factors counseling hesitation” against recognizing a *Bivens* remedy, holding that separation of powers considerations militated against the civilian federal courts fashioning remedies for servicemembers against their superior officers.¹³ Subsequent Supreme Court decisions expanded this “special factors” analysis to encompass claims against government agencies (as opposed to individual officers),¹⁴ and claims against private prison corporations.¹⁵

¹¹ *See id.* at 19–20.

¹² *Schweiker v. Chilicky*, 487 U.S. 412 (1988).

¹³ *United States v. Stanley*, 483 U.S. 669 (1987); *Chappell v. Wallace*, 462 U.S. 296 (1983).

¹⁴ *FDIC v. Meyer*, 510 U.S. 471 (1994).

¹⁵ *Malesko*, 534 U.S. 61.

But the most significant development for *Bivens* during this time period is also the least understood: Whereas the choice that cases like *Bivens* had thus far presented was, as in *Bivens* itself, between federal judge-made damages remedies and state judge-made damages remedies, Congress in 1988 amended the FTCA to provide that all state-law tort claims against federal officers acting within the scope of their employment had to be brought in federal court under the FTCA.¹⁶ As Professor Carlos Vázquez and I have argued at some length, the 1988 amendment—known as the Westfall Act—was actually unclear as to whether it also applied to state-law claims for federal constitutional violations, such as that which the Nixon administration had supported in *Bivens*. Indeed, as we’ve explained, there are compelling reasons to conclude that it did not—and that it left intact the power of state courts to provide damages against federal officers for constitutional violations.¹⁷

But what is clear about the Westfall Act on this point is how it had been read by every subsequent court—to (perhaps incorrectly) also encompass state-law claims for federal constitutional violations. In other words, whereas the choice the *Bivens* Court faced was between state-law damages and damages under the federal Constitution, the choice that federal courts have confronted in post-1988 *Bivens* cases (at least where there is no alternative remedy) is “*Bivens* or nothing.” And increasingly, the lower courts, at least, had chosen “nothing,” without acknowledging the dramatically different consequences of such a ruling today as compared to before the Westfall Act. Indeed, as I’ve summarized elsewhere, prior to *Abbasi*, there were decisions from at least six

¹⁶ See 28 U.S.C. § 2679(b) (2015).

¹⁷ See Carlos M. Vázquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the Bivens Question*, 161 U. PA. L. REV. 509 (2013).

ACS Supreme Court Review

different circuits refusing to infer *Bivens* remedies for private plaintiffs who would otherwise be left with no remedy for violations of their constitutional rights under state or federal law.¹⁸

Part of the lower courts' justification for the rising hostility to *Bivens* can be traced to Justice Antonin Scalia's concurrence in a 2001 *Bivens* case—*Malesko v. Correctional Services Corp.* Writing for himself and Justice Clarence Thomas, Scalia attacked *Bivens* head-on, decrying it as a “relic of the heady days in which this Court assumed common-law powers to create causes of action,” powers that the Court was in the midst of dramatically scaling back in the context of statutory claims. Thus, he concluded, *Bivens* and the two other Supreme Court decisions approving comparable claims ought to be limited to their facts.¹⁹

But until *Abbasi* the rest of the Court had never endorsed such skepticism, and for good reasons: First, unlike statutory rights (the existence and scope of which are wholly a matter of legislative grace), constitutional rights are the province of the federal judiciary, which is “supreme in the exposition of the law of the Constitution,”²⁰ including the means by which that law must be enforced. Second, and related, the purpose of constitutional rights is to constrain the political branches, and not the other way around. Thus, whatever separation of powers problems might arise from judicial recognition of implied statutory remedies, recognition of implied constitutional remedies is a central means of vindicating, rather than aggrandizing, separated powers. Third, as Justice Harlan emphasized in his *Bivens* concurrence, objections to *Bivens* remedies sounding in judicial power ring especially hollow in light

¹⁸ See Stephen I. Vladeck, *The Demise of Merits-Based Adjudication in Post-9/11 National Security Litigation*, 64 DRAKE L. REV. 1035 (2016).

¹⁹ *Malesko*, 534 U.S. at 75 (Scalia, J., concurring).

²⁰ *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

of the far more coercive authority the federal courts have long (and rightly) exercised to enjoin unconstitutional federal conduct without an express cause of action.

Perhaps for those reasons, the Supreme Court in the first 15 years after *Malesko* continued to express skepticism about *Bivens*, but nothing more—and had never held, in a case presenting a private plaintiff for whom the choice really was “*Bivens* or nothing,” that the plaintiff should be left with nothing. Instead, in cases such as *Wilkie v. Robbins*,²¹ *Hui v. Castaneda*,²² and *Minneci v. Pollard*,²³ the Court relied upon alternative federal and state remedies as its justification for refusing to recognize a *Bivens* claim. And when cases have come to the Justices presenting the starker choice—between *Bivens* and nothing—their approach, at least until last Term, had been to duck the matter by denying certiorari.

But on October 11, 2016, the Justices granted certiorari in *Abbasi*, in which one of the questions presented was whether non-citizen immigration detainees could pursue a *Bivens* claim arising out of their allegedly unconstitutional treatment while detained as part of the post-9/11 roundup of Muslim and Arab immigrants in and around New York (a divided panel of the Second Circuit had said “yes”). On the same day, the Justices also granted review in *Hernández v. Mesa*—a case arising out of a U.S. Border Patrol agent’s allegedly unconstitutional cross-border shooting of an unarmed 15-year-old Mexican national. And, most curiously, although the lower court rulings in *Hernández* had focused on whether the Constitution even *applied* in such a case (and, if it did, the agent’s entitlement to a qualified immunity defense—which the

²¹ *Wilkie v. Robbins*, 551 U.S. 537 (2007).

²² *Hui v. Castaneda*, 559 U.S. 799 (2010).

²³ *Minneci v. Pollard*, 565 U.S. 118 (2012).

ACS Supreme Court Review

en banc Fifth Circuit unanimously sustained), the Justices added to the cert. grant in *Hernández* the question whether “the claim in this case [may] be asserted under *Bivens*.” Taken together, then, the grants in *Abbasi* and *Hernández* seemed to bespeak a renewed interest on the Justices’ part in *Bivens*—and in a pair of cases, unlike any *Bivens* case the Court had heard since the Westfall Act was enacted, in which the choice truly was “*Bivens* or nothing.”²⁴

II. *Abbasi*’s Doctrinal Shortcomings

On June 19, the Court handed down *Abbasi*. After recounting the background in Part I, Justice Kennedy opened Part II of his majority opinion by noting the 1871 enactment of 42 U.S.C. § 1983, which, recall from above, authorizes federal suits against state officers for violations of federal rights (including constitutional rights). In contrast, he noted, “Congress did not create an analogous statute for federal officials. Indeed, in the 100 years leading up to *Bivens*, Congress did not provide a specific damages remedy for plaintiffs whose constitutional rights were violated by agents of the Federal Government.”²⁵ This statement is true, but misleading, for Justice Kennedy used it to imply that the Court’s 1971 decision in *Bivens* (first recognizing circumstances in which federal courts could imply a damages remedy for a federal constitutional violation) was a bolt from the blue. Far from it, as Part I suggests.

As Part I explained, from the Founding into the 1960s, there

²⁴ One week after deciding *Abbasi*, the Court vacated the en banc Fifth Circuit decision in *Hernández* and sent the case back to the Court of Appeals. Among other things, although the Justices took issue with the Fifth Circuit’s qualified immunity analysis, they not-so-subtly suggested that *Abbasi* provided an alternative ground on which the Fifth Circuit could rest a decision on remand. See *Hernández v. Mesa*, 137 S. Ct. 2003, 2006–07 (2017) (per curiam).

²⁵ *Abbasi*, 137 S. Ct. at 1854.

was actually a robust regime of damages suits against federal officers for constitutional violations in the form of judge-made civil remedies—remedies that, for the better part of the Nation’s first two centuries, derived from state, rather than federal law. The notion that state courts (and state remedies) would be the primary means for enforcing the federal Constitution may seem entirely foreign to us today, but it’s deeply consistent with Founding-era understandings of the relevant roles of state versus federal courts, and, more fundamentally, with the core principle behind the “Madisonian Compromise” (the notion that Congress never even had to create lower federal courts).

What this important and widely accepted history teaches is that *Bivens* was a practical response to a series of problems that had emerged in the state-law remedial model, not a dramatic usurpation of judicial power vis-a-vis the legislature. It was “*Bivens* or state law” not “*Bivens* or nothing.” Indeed, recall from above that the Nixon administration’s argument in *Bivens* itself was not that the Constitution denied *Bivens* a remedy altogether; it was that the appropriate remedy for his constitutional claim was provided by New York state law—and that judge-made federal damages remedies would only be appropriate in cases in which they were “indispensable for vindicating constitutional rights.” Against that backdrop, the question *Bivens* meant to raise was whether we’d be better off with remedies for constitutional violations by federal officers being creatures of federal, rather than state, law. If that’s the question, it’s easy to see why even Justice John Marshall Harlan II thought the answer ought to be “yes.”

In *Abbasi*, Justice Kennedy completely ignored this history. Worse, he suggested that his cryptic, remarkably incomplete summation of history (in which nothing happened between the

ACS Supreme Court Review

enactment of § 1983 and *Bivens*) is the background “against which” *Bivens* was decided. Of course, if courts didn’t recognize damages remedies against federal officers before *Bivens*, it would be easy to understand the reaction that *Bivens* is an outlier, and an arrogation of judicial power. But a proper understanding of the story (one Justice Kennedy seemed wholly uninterested in telling—even though it was well-presented in the briefs) paints a very different picture of the stakes in *Bivens* itself—and in many of the cases that have followed.

As for the important but hitherto-neglected effects of the Westfall Act described above, Justice Kennedy compounded that error in *Abbasi*, saying nary a word about the Westfall Act (he sort of cited it at one point for an unrelated proposition), or the very different question that *Bivens* suits necessarily present today as compared to before 1988. Instead of grappling with the implications of Congress (apparently) shutting the door to the state-law remedies that thrived prior to (and, indeed, through) *Bivens*, Justice Kennedy’s majority opinion operates as if they just didn’t exist, a point that mattered a whole lot when he turned to why courts should be skeptical about implied *statutory* remedies.

Indeed, instead of confronting the rich history of common-law remedies and the messy problem of the Westfall Act, the analytical core of Justice Kennedy’s hostility to *Bivens* is Part II.C., in which he basically adopts for a Supreme Court majority the deeply flawed analogy first articulated by Justice Scalia in his *Malesko* concurrence. After recognizing the (obvious) point that judicial implication of a statutory remedy raises different issues than implication of a constitutional remedy, he nevertheless observed that

it is a significant step under separation-of-powers principles for a court to determine that it has the authority, under the judicial power, to create and enforce a cause of action for damages against federal officials in order to remedy a constitutional violation. When determining whether traditional equitable powers suffice to give necessary constitutional protection—or whether, in addition, a damages remedy is necessary—there are a number of economic and governmental concerns to consider. Claims against federal officials often create substantial costs, in the form of defense and indemnification. Congress, then, has a substantial responsibility to determine whether, and the extent to which, monetary and other liabilities should be imposed upon individual officers and employees of the Federal Government. In addition, the time and administrative costs attendant upon intrusions resulting from the discovery and trial process are significant factors to be considered.²⁶

In other words, courts should be skeptical of recognizing damages claims for constitutional violations because Congress is in a better position to decide when the government (not the officer, which had been Chief Justice Rehnquist’s concern in an earlier case) should have to pay damages awards, and because discovery and trial could be onerous (never mind that that’s what qualified immunity is for). Again, in contrast to the separation-of-powers objection to implying a statutory remedy, I just don’t understand the objection where constitutional rights are at stake.

Perhaps aware of the potentially stunning implications of

²⁶ *Id.* at 1856. No citations are omitted; there *were* no citations.

ACS Supreme Court Review

his hostility to *Bivens* in Part II of his opinion, Justice Kennedy offered a modest series of olive branches in Part III, including the notion that *Bivens* claims will still be available on facts resembling *Bivens* itself (including, perhaps, the detainee abuse claim against lower-level officials in *Abbasi*). He also suggested that this case doesn't really present the specter of "*Bivens* or nothing," because the Petitioners had an alternative means of challenging their detention—through habeas petitions:

[T]he habeas remedy, if necessity required its use, would have provided a faster and more direct route to relief than a suit for money damages. A successful habeas petition would have required officials to place respondents in less-restrictive conditions immediately; yet this damages suit remains unresolved some 15 years later. (As in *Bell* and *Preiser*, the Court need not determine the scope or availability of the habeas corpus remedy, a question that is not before the Court and has not been briefed or argued.) In sum, respondents had available to them "other alternative forms of judicial relief." And when alternative methods of relief are available, a *Bivens* remedy usually is not.²⁷

Yes, you read that correctly: "We're not sure if habeas could even have been used to bring a challenge to the conditions of confinement, but it was (theoretically?) possible that it might have been available, so *Bivens* isn't." Even if habeas could reach challenges to conditions of confinement (and the lower courts are still divided today), I'm unaware of any suggestion prior to *Abbasi*

²⁷ *Id.* at 1863 (citations omitted).

that habeas was an adequate alternative to damages, and for good reason: Habeas is about unlawful detention, and so is mooted by a detainee's release or transfer. It is therefore usually a woefully inefficient tool for challenging policies such as the ones at issue in *Abbasi*. There's also the little problem that many (if not most) of the detainees were held in conditions where it would not have been possible for them to even bring habeas petitions. Finally, and taken to its extreme, Justice Kennedy is effectively suggesting that *Bivens* will *never* be available for a claim that could've been pursued via habeas, and so may thereby have doomed the one claim he actually kind of preserved.

Justice Breyer's dissent had it exactly right: "Given these safeguards against undue interference by the Judiciary in times of war or national-security emergency, the Court's abolition, or limitation of, *Bivens* actions goes too far. If you are cold, put on a sweater, perhaps an overcoat, perhaps also turn up the heat, but do not set fire to the house."²⁸ If anything, though, Breyer did not go far enough; his objections were more to the normative underpinnings of Justice Kennedy's majority opinion (more on those shortly), not its shoddy, skewed, and superficial doctrinal analysis.

By categorically ignoring the rich history of common-law remedies, by paying no-never-mind to the Westfall Act, and by accepting without any real skepticism the claim that courts are intruding upon the political branches simply by deigning to award damages (why, pray tell, are injunctions less of an intrusion?), *Abbasi* will likely prove to be a nail in the coffin of *Bivens*—and, more generally, in the ability of plaintiffs in a wide range of contexts to obtain remedies for even the most egregious

²⁸ *Id.* at 1884 (Breyer, J., dissenting).

ACS Supreme Court Review

constitutional violations. Congress, of course, could always respond by finally considering some kind of federal analogue to 42 U.S.C. § 1983, but we (and Justice Kennedy) know that they won't. That's why it's so important for courts to be especially zealous in the recognition of remedies for constitutional violations, and why the decision in *Abbasi* is such a stunning (and, especially in these times, depressing) development.

III. *Abbasi*'s Normative Incoherence

Abbasi would be problematic enough if it simply reflected the doctrinal flaws highlighted above. But there are also at least three respects in which even the *normative* justifications that Justice Kennedy offered in defense of the result (and the hostility to *Bivens*) fail to persuade. First, the normative case against *Bivens* rests on a view of its intrusive effect that is not just wholly unsubstantiated but also internally inconsistent as a logical matter. Second, it incorporates into *Bivens* concerns about undue intrusion that other doctrines already account for in more nuanced, sophisticated ways. Third, and most importantly, it assumes that damages actions represent a greater intrusion into the function of the political branches in general (and in national security cases, specifically) than does prospective relief (such as injunctions). That's a theory of the separation of powers that, frankly, makes no sense. Certainly one can reasonably be opposed to an aggressive judicial role in national security cases in general, or in cases seeking prospective relief, specifically. But the idea that judicial recognition of an after-the-fact damages suit represents a greater threat to the separation of powers than judicial imposition of an injunction against ongoing national security policies (ranging from the 1973 bombing of Cambodia to military detention at

Guantánamo to the travel ban) is, for lack of a better word, nuts.

The most important passages of Justice Kennedy's majority opinion are spread across Parts II and III of his majority opinion. In condensed version, Part II of the opinion makes the following claims about the economic and non-economic costs imposed by damages suits:

- “Claims against federal officials often create substantial costs, in the form of defense and indemnification. Congress, then, has a substantial responsibility to determine whether, and the extent to which, monetary and other liabilities should be imposed upon individual officers and employees of the Federal Government.”²⁹
- When deciding whether to recognize a judge-made cause of action for a violation of the Constitution, “the inquiry must concentrate on whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed.”³⁰
- “[T]he decision to recognize a damages remedy requires an assessment of its impact on governmental operations systemwide. Those matters include the burdens on Government employees who are sued personally, as well as the projected costs and consequences to the Government itself when the tort and monetary liability mechanisms of the legal system are used to bring about the proper formulation and implementation of public policies.”³¹

Then, in Part III, Justice Kennedy turned to why these costs

²⁹ *Id.* at 1856 (majority opinion).

³⁰ *Id.* at 1857–58.

³¹ *Id.* at 1858.

ACS Supreme Court Review

are especially pronounced in suits implicating national security policies:

- “[T]he burden and demand of litigation might well prevent [the *Abbasi* defendants]—or, to be more precise, future officials like them—from devoting the time and effort required for the proper discharge of their duties.”³²
- “[T]he discovery and litigation process would either border upon or directly implicate the discussion and deliberations that led to the formation of the policy in question. Allowing a damages suit in this context, or in a like context in other circumstances, would require courts to interfere in an intrusive way with sensitive functions of the Executive Branch.”³³
- “National-security policy is the prerogative of the Congress and President. Judicial inquiry into the national-security realm raises ‘concerns for the separation of powers in trenching on matters committed to the other branches.’ These concerns are *even more pronounced* when the judicial inquiry comes in the context of a claim seeking money damages rather than a claim seeking injunctive or other equitable relief. The risk of personal damages liability is more likely to cause an official to second-guess difficult but necessary decisions concerning national-security policy.”³⁴
- “For these and other reasons, courts have shown deference to what the Executive Branch ‘has determined . . . is essential to national security.’ Indeed, ‘courts traditionally have been reluctant to intrude upon the authority of the Executive

³² *Id.* at 1860.

³³ *Id.* at 1860–61.

³⁴ *Id.* at 1861 (citation omitted, emphasis added).

in military and national security affairs’ unless ‘Congress specifically has provided otherwise.’ Congress has not provided otherwise here.”³⁵

- “If *Bivens* liability were to be imposed, high officers who face personal liability for damages might refrain from taking urgent and lawful action in a time of crisis. And, as already noted, the costs and difficulties of later litigation might intrude upon and interfere with the proper exercise of their office.”³⁶

In other words, Justice Kennedy identified concerns about courts imposing economic and non-economic costs on government officers as the principal separation-of-powers justification for declining to recognize an implied constitutional cause of action for damages, and suggested that those costs are especially pronounced in national security cases (and in contrast to suits for ongoing, prospective relief).

Justice Kennedy’s discussion of the intrusiveness of judge-made damages remedies both in general and in national security cases, specifically, suffers from at least three independent defects—each of which should be enough to give pause even to those who think he reached the correct result:

First, Justice Kennedy provided no authority to substantiate any of his assertions about the economic and non-economic costs that recognition of *Bivens* remedies would impose, other than a few stray references to prior Supreme Court decisions (that themselves cited no primary authority). That is to say, he offers no evidence that damages suits

³⁵ *Id.* (citations omitted).

³⁶ *Id.* at 1863.

ACS Supreme Court Review

actually have the impact he posits. That's quite likely because they don't.

For starters, as Justice Kennedy himself conceded, the federal government generally indemnifies its officers from damages liability for any and all conduct that falls within the scope of their employment. Thus, in point of fact, officers like the *Abbasi* defendants face no real monetary jeopardy even for actions that are ultimately adjudged to be unconstitutional (which means their conduct is also not protected by qualified immunity, as discussed below). And they are also usually represented by government lawyers or by private lawyers who, in most cases, are being paid by the government (or are acting pro bono). The point is not that these suits create no economic costs; far from it. But, contra Justice Kennedy, those costs are invariably borne by the government, not by the officer defendants, a distinction that necessarily undercuts much of Justice Kennedy's discussion of why those costs are so intrusive.

Second, Justice Kennedy's concerns about the non-economic costs of such litigation—the impact on officers' ability to do their jobs because of the burdens of discovery, trial, etc.—are already accounted for elsewhere. The whole purpose of the qualified immunity defense is to protect responsible government officers from these very costs by foreclosing discovery (to say nothing of trial) in any case in which the plaintiff cannot allege facts that, if true, would establish a violation of clearly established law. Thus, although Justice Kennedy worried that “[t]he risk of personal damages liability is more likely to cause an official to second-guess difficult but necessary decisions concerning national-security policy,” that's the precise justification typically invoked (including by Justice Kennedy himself) to defend the qualified immunity doctrine. To invoke it in this context is to double-count that

concern—and to thereby ignore the extent to which those costs are already largely abated by other more carefully calibrated (and case-specific) protections. There’s lots that can—and should—be said about the shortcomings of contemporary qualified immunity doctrine (see, for example, Justice Thomas’s concurring opinion in *Abbasi*³⁷). But Justice Kennedy, as one of its staunchest defenders, at least appeared to be oblivious to its impact.

Third, the real intrusion Justice Kennedy appears to be worried about—that courts might “interfere in an intrusive way with sensitive functions of the Executive Branch”—is, quite obviously, a much bigger concern in suits for prospective relief (where plaintiffs seek to halt ongoing government action) than in suits for damages years (or, in this case, decades) after the fact. I’ve written about this specific point before,³⁸ but in short, a court order that the government must (1) halt an ongoing military operation, (2) release an individual in military custody, or (3) stop a new immigration policy that the government has argued is necessary to protect national security should, quite obviously, reflect a far greater intrusion into the “sensitive functions of the Executive Branch” than an after-the-fact damages action. In the former context, there are any number of reasons why courts might not be well-suited to resolve the dispute, foremost among them the difficulty they might have, in the moment, with assessing facts that may only become clear in retrospect (for example, whether a law enforcement officer faced an imminent threat of harm under *Tennessee v. Garner*³⁹).

³⁷ *Id.* at 1870–72 (Thomas, J., concurring in part and concurring in the judgment).

³⁸ See Steve Vladeck, *Why a “Drone Court” Won’t Work—But (Nominal) Damages Might...*, LAWFARE (Feb. 10, 2013, 5:12 PM), <https://www.lawfareblog.com/why-drone-court-wont-work-nominal-damages-might>.

³⁹ *Tennessee v. Garner*, 471 U.S. 1 (1985).

ACS Supreme Court Review

A damages suit raises none of those concerns—especially when accompanied by indemnification and qualified immunity. It imposes costs, to be sure—but those costs seem, to me at least, to pale in comparison to the very real (and real-time) costs that prospective relief imposes (and can impose) on national security policies and policymakers. Of course, some might think that this is therefore a reason to oppose judicial interference across the board in national security cases. Fair enough. My point here is that Justice Kennedy doesn't. Instead, his opinion is adamant that “[t]hese concerns are even more pronounced when the judicial inquiry comes in the context of a claim seeking money damages rather than a claim seeking injunctive or other equitable relief.”

I'm not sure what more to say about this reasoning than that it boggles the mind. Not only is the degree of the intrusion reflected in a damages suit so obviously lesser than that reflected in a suit for prospective relief, but the suggestion to the contrary implies that Justice Kennedy's real concern is with the intrusion into not the government's actions, but those of its officers. That is to say, on Justice Kennedy's view, the separation of powers, in this context, exists to protect Executive Branch officers from the courts, and not the Executive Branch itself. That view is not only belied by how these cases are actually litigated (and, in the virtually empty set of cases in which plaintiffs prevail, how damages are paid), but it's a staggeringly wrongheaded assessment—especially in today's climate—of the role of the courts in our constitutional system.

IV. Are Injunctions Next?

If there's a silver lining in *Abbasi*, it's the extent to which Justice Kennedy's hostility to judge-made remedies appears to be damages-specific. At first blush, judge-made remedies for

ongoing constitutional violations by state or federal officers remain available—and, indeed, perhaps the courts’ preferred mechanism through which plaintiffs can enforce constitutional rights. But a pair of less-noticed decisions over the last five years leaves reason to be worried that, in fact, injunctive relief could be the Justices’ next target—which would have even more deleterious consequences not only for the vindication of plaintiffs’ constitutional rights, but for ensuring that state and federal officers can be held to account.

The first of these decisions is the Court’s 2012 ruling in *Douglas v. Independent Living Center of Southern California, Inc.*⁴⁰ Writing for a 5-4 majority, Justice Breyer avoided the question on which the Justices had granted certiorari, i.e., whether the Supremacy Clause provides Medicaid beneficiaries and providers with a cause of action to enjoin California state officials from enforcing a state law allegedly in violation of—and therefore preempted by—the federal Medicaid statute. Because intervening administrative action had changed the posture of the case, the majority concluded that the matter should be returned to the Ninth Circuit, which could consider the effect of such developments—if any—as a matter of first impression.

Although the majority’s reasoning may not have been self-evident, the result may best be understood in light of Chief Justice Roberts’s sweeping dissent. Writing for himself and Justices Scalia, Thomas, and Alito, the Chief Justice saw the issue presented in *Douglas* as akin to the one he had successfully litigated before the Court in *Gonzaga University v. Doe*.⁴¹ The *Gonzaga* Court had held that private litigants could not enforce

⁴⁰ *Douglas v. Indep. Living Ctr. of S. California, Inc.*, 565 U.S. 606 (2012).

⁴¹ *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002).

ACS Supreme Court Review

a federal statute through 42 U.S.C. § 1983 if Congress did not clearly intend for the underlying statute to be privately enforceable. As Chief Justice Roberts put it in *Douglas*,

[T]o say that there is a federal statutory right enforceable under the Supremacy Clause, when there is no such right under the pertinent statute itself, would effect a complete end-run around this Court’s implied right of action and 42 U.S.C. § 1983 jurisprudence. . . . This body of law would serve no purpose if a plaintiff could overcome the absence of a statutory right of action simply by invoking a right of action under the Supremacy Clause to the exact same effect.⁴²

Thus, while the majority pursued a narrow course, the Chief Justice would have held that injunctive relief would seldom be available to private plaintiffs under the Supremacy Clause to enjoin governmental officers from violating federal statutes that do not themselves provide a cause of action. Given that Justice Kennedy (who joined Justice Breyer’s narrow majority opinion in *Douglas*) had himself argued for an analogous result in his concurrence in *Virginia Office for Protection & Advocacy (“VOPA”) v. Stewart*,⁴³ there may already be five votes to take such a potentially momentous—and troubling—step.

Consider *Ex parte Young*.⁴⁴ Although scholars continue to debate the origins and scope of the 1908 decision, the case has routinely been cited for the proposition that the Supremacy Clause

⁴² *Douglas*, 565 U.S. at 619 (Roberts, C.J., dissenting).

⁴³ *Virginia Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 262–66 (2011) (Kennedy, J., concurring).

⁴⁴ *Ex Parte Young*, 209 U.S. 123 (1908).

authorizes equitable relief against state officers for prospective violations of federal law (1) notwithstanding state sovereign immunity, and (2) regardless of whether the underlying federal law is itself privately enforceable. Whether or not *Ex parte Young* itself articulated this rule, it has long been the prevailing consensus that injunctive relief for constitutional violations does not require a freestanding statutory cause of action (and instead arises under the relevant constitutional provision).

To similar effect, preemption claims challenging the prospective enforcement of state law have historically been recognized under the Supremacy Clause despite the absence of a statutory cause of action. Thus, as Justice Scalia explained for the Court in 2011, in assessing the availability of a remedy under *Ex parte Young*, “a court need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.”⁴⁵

To its credit, the *Douglas* dissent did not ignore *Ex parte Young* and its progeny. Instead, it dismissed the relevance of those cases by suggesting that relief under *Ex parte Young* should not be available to litigants who “are not subject to or threatened with any enforcement proceeding” by the state whose law they seek to challenge.⁴⁶ So understood, the Supremacy Clause would only support injunctive relief for “the pre-emptive assertion in equity of a defense that would otherwise have been available in the State’s enforcement proceedings at law.”⁴⁷

Although at least one scholar—Professor John Harrison—

⁴⁵ *VOPA*, 563 U.S. at 255.

⁴⁶ *Douglas*, 565 U.S. at 620 (Roberts, C.J., dissenting).

⁴⁷ *Id.* (quoting *VOPA*, 563 U.S. at 262 (Kennedy, J., concurring)).

ACS Supreme Court Review

has argued for precisely this understanding of *Ex parte Young*,⁴⁸ the Supreme Court itself has never previously embraced it, and Chief Justice Roberts did not provide additional explanation for why such a reading is the correct one. Such an omission is particularly telling given that the injury in such cases does not arise merely from the state subjecting a specific party to enforcement proceedings based on an unconstitutional state law. Rather, the injury arises from the state's enforcement of an unconstitutional law writ large. So construed, *Young* is part of a jurisprudential imperative recognizing the ability of litigants to enjoin *any* unconstitutional state action without a distinct statutory right to do so—because the Constitution itself may in some cases require such a remedy. Even if such remedies are not constitutionally compelled, they still play a critical role in ensuring the supremacy of federal law. They also provide a safeguard against all unconstitutional state conduct, not merely conduct that arises from efforts to enforce unconstitutional state law. As Justice Rehnquist explained in *Green v. Mansour*, “[T]he availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause.”⁴⁹

Had the *Douglas* dissenters had their way, then, the Court would have deprived the Supremacy Clause of such force. The dissenters would have limited Supremacy Clause-based injunctions to situations in which (1) the underlying federal right was itself privately enforceable, or (2) injunctive relief was sought to preempt an impending state enforcement proceeding. Whether or not such a result would be normatively desirable, it would be inordinately momentous, for it would suggest that the Supremacy

⁴⁸ John Harrison, *Ex Parte Young*, 60 STAN. L. REV. 989, 1008 (2008).

⁴⁹ *Green v. Mansour*, 474 U.S. 64, 68 (1985).

Clause is only violated by a state's actual enforcement of a preempted state law, and not merely the enactment or potential enforcement thereof. In any case in which the underlying federal right could be violated without a state enforcement action, the *Douglas* dissenters would foreclose injunctive relief unless Congress specifically provided a cause of action.

That implication may help explain why Justice Kennedy, who argued for a narrow understanding of *Ex parte Young* in the *VOPA* case, nevertheless joined the majority in *Douglas* in sidestepping the issue. But unless he has a change of heart on the merits (or, as many suspect is likely, retires at the end of the October 2017 Term), it may only be a matter of time before the Chief Justice's dissent in *Douglas* becomes law.

At its core, the true problem with the Chief Justice's reasoning is that the analogy to the *Gonzaga* decision and 42 U.S.C. § 1983 fails to persuade. In *Gonzaga*, the question was simply whether a statute Congress passed could be enforced through a cause of action Congress had separately provided. The Court there concluded that private litigants could not enforce federal statutes through § 1983 unless Congress unmistakably manifested an intent for the underlying statute to be privately enforceable. Although one may well disagree with the outcome in *Gonzaga*, it goes without saying that the result did not implicate constitutional concerns, since Congress has all but plenary power to define the parameters of federal nonconstitutional rights and remedies, and there is little to the view that the Constitution ever compels the existence of statutory remedies to vindicate wholly statutory rights.

In contrast, if the Supremacy Clause divests state officers of the power to act in violation of any federal law (as *Ex parte Young* holds), then a plaintiff who seeks injunctive relief in a case like *Douglas* is seeking as much to enforce the Constitution against the

ACS Supreme Court Review

state officer as he or she is seeking to enforce the relevant federal statute. An inability to bring such a suit would leave plaintiffs without a remedy for an ongoing constitutional violation, as opposed to leaving them without a remedy for a statutory violation (as in *Gonzaga*), or even a prior constitutional violation (as in *Bivens* cases).

Taken to its logical extreme, the Chief Justice's reasoning might even extend to suits for injunctive relief to enforce specific constitutional provisions (such as the Fourth Amendment), in addition to suits like those at issue in *Douglas*, which seek to enforce the Supremacy Clause. After all, other than the Suspension Clause and the Takings Clause, *no* constitutional provision expressly provides a cause of action. And if the answer is that no such cause of action is required to enforce these other provisions prospectively, one is left to wonder why the Supremacy Clause is different in this regard; the *Douglas* dissent did not say.

It may well be that Chief Justice Roberts believes—like Professor Harrison—that the only constitutionally required remedy in such cases is provided by state enforcement proceedings, which allow for “invalidity and nothing more.” On this view, the Constitution is only a shield against state action, and not a sword. For decades, the Supreme Court has steadfastly resisted that temptation, at least when it comes to injunctive relief. If the Justices decide to change course, as *Douglas* suggests they soon might, one can only hope that such a decision will rest on more than just an unconvincing analogy to an (itself controversial) nonconstitutional case.

Instead, the Justices said even less about the issue three years later even as they took a significant step toward vindicating Chief Justice Roberts's *Douglas* dissent. In *Armstrong v. Exceptional Child Center, Inc.*, the Court once again confronted the question

it had sidestepped in *Douglas*: Whether a cause of action was available to enforce the Medicaid statute against state officials allegedly violating it. This time around, the Court answered that question—dividing 5-4 in the negative, after first rejecting the argument that the Supremacy Clause *itself* creates such a cause of action:

It is true enough that we have long held that federal courts may in some circumstances grant injunctive relief against state officers who are violating, or planning to violate, federal law. But that has been true not only with respect to violations of federal law by state officials, but also with respect to violations of federal law by federal officials. Thus, the Supremacy Clause need not be (and in light of our textual analysis above, cannot be) the explanation. What our cases demonstrate is that, “in a proper case, relief may be given in a court of equity . . . to prevent an injurious act by a public officer.”

The ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England. It is a judge-made remedy, and we have never held or even suggested that, in its application to state officers, it rests upon an implied right of action contained in the Supremacy Clause. That is because, as even the dissent implicitly acknowledges, it does not.⁵⁰

⁵⁰ *Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378, 1384 (2015) (citations omitted).

ACS Supreme Court Review

To be sure, *Armstrong* itself only raised whether a cause of action to enjoin enforcement of a preempted state law is grounded in the Constitution, as opposed to traditional principles of equity. But as the above passage suggests, *Armstrong* at least suggests that this holding applies to *all* constitutional claims—that suits for injunctive relief to enforce *any* constitutional provision stem not from the Constitution itself, but from equity. And equity, as *Armstrong* suggests, provides any number of justifications for declining to enjoin the unlawful or unconstitutional conduct at issue. Put another way, between *Abbasi* and *Armstrong*, it is not difficult to imagine a near future in which private, offensive enforcement of constitutional rights against state and federal officers has become the exception—when not so long ago it was clearly (and correctly) the rule.



(202) 393-6181

ACSLaw.org



@ACSLaw