From: (b)(6) Anita Singh (ODAG)
Subject: Fwd: briefing memos
To: Lin, Frank (ODAG)
Sent: February 24, 2022 1:41 PM (UTC-05:00)
Attached: Scoped Out Per Agreem tab 1 - Administrative Law.docx, Scoped Out Per Agreement, tab 4 - Commerce Clause Federalism 10A.docx, tab 5 - Criminal Law.docx, tab 6 - Crim Procedure 4th Amd.docx, tab 7 - Crim Procedure 5th & 6th Amd.docx, Scoped Out Per Agreement tab 9 - Executive War Power (02-23 final).docx, tab 10 - Fed Jurisdiction.docx, tab 11 - Financial Regulation.docx, tab 12 - First Am Religion.docx, tab 13 - First Am Speech.docx, tab 14 - Health Care.docx, Scoped Out Per A , tab 17 - Jurisprudence.docx, tab 18 - Miscellaneous.docx, tab 19 - Pandemic Authorities.docx, tab 20 - Qualified Immunity.docx, tab 21 - Second Amendment.docx, tab 22 - Separation of Powers.docx, Scoped Out Per Agreement tab 24 - Substantive Due Process & Repro Rights.docx, tab 25 - Takings.docx, tab 26 - Treaty Power.docx, tab 27 - Voting Rights.docx

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Begin forwarded message:

> **From:** "Colangelo, Matthew (OASG)" (b) (6) [redacted]
> **Date:** February 24, 2022 at 1:05:24 PM EST
> **To:** "Reich, Mitchell (OAG)" (b) (6) [redacted], "Thompson, Karl (ODAG)" (b) (6) [redacted], "Maltby, Jeremy (ODAG)" (b) (6) [redacted], "Wolfson, Paul (OASG)" (b) (6) [redacted], "Henthorne, Betsy (OASG)" (b) (6) [redacted], "Singh, Anita M. (ODAG)" (b) (6) [redacted]
> **Subject: briefing memos**
>
> Here’s the set of final memos that went over yesterday FYI

ADMINISTRATIVE LAW

I. Constitutional Issues

A. Non-Delegation Doctrine

Agencies act in a quasi-legislative manner when promulgating regulations with the effect of law. Though the non-delegation doctrine bars Congress from delegating away its legislative power, the Supreme Court has affirmed Congress's ability to grant administrative agencies broad rulemaking authority, such as authorizing the FCC to regulate "in the public interest." Congress must simply provide an agency with an intelligible principle to which it must conform its rulemaking. *Whitman v. American Trucking Ass'ns* (2001).

The non-delegation doctrine has received some renewed attention in the past decade. In *Reynolds v. United States* (2012), Justice Scalia invoked the doctrine in the context of the Sex Offender Registration and Notification Act (SORNA). In particular, Justice Scalia was skeptical whether "Congress can constitutionally leave it to the Attorney General to decide—with no statutory standard whatever governing his discretion—whether a criminal statute will or will not apply to certain individuals." "That seems to me sailing close to the wind with regard to the principle that legislative powers are nondelegable . . . ." And Justice Thomas has called into question the intelligible principle test as failing to adequately reinforce the Constitution's allocation of legislative power. *Dep't of Transp. v. Ass'n of Am. R.R.* (2015) (Thomas, J., concurring in the judgment).

The Court revisited the non-delegation doctrine in *Gundy v. United States* (2018), another case involving a challenge to SORNA. Four Justices (Justice Kagan, joined by Justices Ginsburg, Breyer, and Sotomayor) concluded that SORNA provided adequate guidance to satisfy the intelligible principle standard. Justice Alito concurred in the judgment but said he would "support" reconsideration of the Court's approach to non-delegation. Justice Gorsuch (joined by Chief Justice Roberts and Justice Thomas) issued a dissenting opinion explaining that the Court's "mutated version of the 'intelligible principle' remark has no basis in the original meaning of the Constitution, in history, or even in the decision from which it was plucked." (Justice Kavanaugh did not participate.) Justice Gorsuch (joined by Justice Thomas and Justice Alito) recently again relied on the non-delegation principle in his concurring opining in *NFIB v. Department of Labor* (2022), and Justice Kavanaugh has also expressed a desire to "consider [the doctrine] in future cases, citing to *Gundy*. *See Paul v. United States* (2019) (statement respecting denial of certiorari).

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B. Judicial Review of Agency Factual Determinations and Reasoning

Judicial review of agency action is ordinarily based solely on the record compiled by the agency, which may not be expanded through discovery in court. *SEC v. Chenery Corp.* (1947).

Historically, courts have generally deferred to agencies on issues within their core competency. The APA "sets forth the full extent of judicial authority to review executive agency action for procedural correctness," and permits setting aside agency action only where arbitrary and capricious. *Fed. Commc'ns Comm'n v. Fox Television Stations, Inc*. (2009). Persuading a court that an expert agency has acted "arbitrarily and capriciously" traditionally has been quite difficult, as the agency need only examine the relevant data and articulate a satisfactory explanation for its action. "Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.* (1983). A change of agency policy does not require the agency to offer a more substantial explanation for its action than it offered when it adopted the original policy. *Fox Television Stations*.

Recently, however, the Supreme Court has employed a more searching form of arbitrary and capricious review to invalidate agency actions. In *Department of Commerce v. New York* (2019), the Court agreed—in a fractured opinion authored by the Chief Justice—that the decision to include a citizenship question on the 2020 census questionnaire should be remanded to the agency. Despite concluding that the Secretary of Commerce had the legal authority to add the question and the administrative record supported the decision, the Supreme Court looked beyond the administrative record to conclude that the addition of a citizenship question was not the result of a reasoned decisionmaking process. The Court concluded that the Secretary proffered "an explanation for agency action that is incongruent with what the record reveals about the agency's priorities and decisionmaking process." Justice Thomas (joined by Justices Gorsuch and Kavanaugh) concurred in part and dissented in part. He explained that the Court's inquiry should have ended with the conclusions that the Secretary complied with the law and gave a reasoned explanation for his decision. Justice Breyer (joined by Justices Ginsburg, Sotomayor, and Kagan) argued that the Secretary had failed to give an adequate explanation for his decision. Justice Alito concluded that the decision whether to include a citizenship question was committed to the Secretary's discretion.

The Court also recently addressed the decision of the Department of Homeland Security to rescind a deferred immigration enforcement policy. In *Dep't of Homeland Security v. Regents* *of the Univ. of Cal.* (2020), the Court concluded that the decision was arbitrary and capricious because the rationale in the legislative record—that the Attorney General had found the deferred enforcement policy illegal—applied only to part of the policy and the agency had failed to consider other options and legitimate reliance interests. In dissent, Justice Thomas (joined by Justices Alito and Gorsuch) argued that the rescission was lawful because the initial deferral policy had not been lawfully issued, and the rescission of an unlawful program requires no additional policy justifications. Justice Kavanaugh authored a separate dissent. He looked to a memorandum that the majority refused to consider because it had issued nine months after the initial rescission. He found that the later memorandum was itself an agency action and provide a sufficient basis for the rescission.

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D. Judicial Review of Interpretations of Agency Regulations

In addition to *Chevron* deference to agency interpretations of ambiguous statutes, the Supreme Court has recognized deference to an agency's interpretations of its own regulations, even when such interpretation arises during litigation. *Auer v. Robbins* (1997). This species of deference has been criticized, with Justice Scalia observing that such deference essentially "allows the agency to control the extent of its notice-and-comment-free domain." *Perez v. Mortgage Bankers Ass'n* (2015) (Scalia, J., concurring in the judgment). As Justice Scalia noted, "[t]o expand this domain, the agency need only write substantive rules more broadly and vaguely, leaving plenty of gaps to be filled in later, using interpretive rules unchecked by notice and comment." Justice Thomas has critiqued *Auer* deference on constitutional grounds, noting that it "effects a transfer of the judicial power to an executive agency." *Perez* (2015) (Thomas, J., concurring in the judgment).

The Supreme Court, however, recently upheld the application of *Auer* deference. *Kisor v. Wilkie* (2019). But the Court noted that a court should defer only when a regulation is ambiguous and the character of the agency interpretation entitles it to deference. Justice Gorsuch (joined by Justices Thomas, Alito, and Kavanaugh) concurred in the judgment. He concluded that *Auer* deference conflicted with the APA's mandate that a court should "decide all relevant questions of law" and conflicted with the constitutional duty of courts to independently interpret the law.

FEDERAL COURT JURISDICTION

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III. The Supreme Court's Original Jurisdiction

Article III, section 2, gives the Supreme Court both original and appellate jurisdiction. The Court shall exercise original jurisdiction "[i]n all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be [a] Party." Since 1789, Congress has further defined this grant of jurisdiction by providing that the Supreme Court shall have "original *and exclusive* jurisdiction of all controversies between two or more States," but that it shall have "original *but not exclusive* jurisdiction" of most other categories of cases arising under Article III, section 2. *See* 28 U.S.C. § 1251 (emphasis added). The Court has long understood itself to have discretion to decline to accept cases falling within the terms of its original jurisdiction, even where its jurisdiction is exclusive. *See Texas v. New Mexico* (1983). Justices Thomas and Alito have criticized this approach and have called for it to be reexamined. *See, e.g.*, *Texas v. California* (2021) (Alito, J., dissenting from denial of motion for leave to file complaint); *Nebraska v. Colorado* (2016) (Thomas, J., dissenting from the denial of motion for leave to file complaint).

Original jurisdiction cases often address disputes between states regarding boundaries and disputes over interstate bodies of water (primarily rivers). *See, e.g., Mississippi v. Tennessee* (2021); *Florida v. Georgia* (2018), *op. after remand* (2021); *Texas v. New Mexico & Colorado* (2018).

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A. Appellate Review of Lower Federal Court Decisions

The Supreme Court may in its discretion review "[c]ases in" the federal courts of appeals by "writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree," 28 U.S.C. § 1254(1), as well as final decisions issued by certain other non-Article III courts, like the Court of Appeals for the Armed Forces, *e.g.*, 28 U.S.C. § 1259.

In *Ortiz v. United States* (2018), the Court affirmed that it has appellate jurisdiction over suits from the Court of Appeals for the Armed Forces. Justice Alito dissented (joined by Justice Gorsuch) arguing that the Court's appellate jurisdiction only permits review of exercises of judicial power, and the Court of Appeals for the Armed Forces is an Executive Branch that does not exercise judicial power. Justice Thomas responded in a separate concurrence (largely endorsed by the majority) that the relevant question is not which Branch of government is exercising the power but the nature of the power being exercised. In his view, the Court of Appeals for the Armed Forces exercises a judicial power pursuant to a historical exception to the Article III Vesting Clause and therefore, its decisions are reviewable by the Supreme Court.

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C. Congressional Authority to Strip Jurisdiction

Though Congress has broad discretion to fashion federal court jurisdiction within the scope of Article III, the Supreme Court has held that Congress may not retroactively require federal courts to reopen final judgements. *Plaut v. Spendthrift Farm, Inc* (1995).

In *Patchak v. Zinke* (2018), a sharply divided Court recognized that Congress has the legislative power to strip federal courts of jurisdiction over a class of cases, even through laws that apply to pending lawsuits and effectively ensure that one side will win. Writing for a four-justice plurality, Justice Thomas stressed that "Congress violates Article III" by engaging in a judicial function "when it compels findings or results under old law," but "Congress does not violate Article III when it changes the law." In the plurality's view, the statute was a valid exercise of Congress's jurisdiction-stripping power, as "with limited exceptions, a congressional grant of jurisdiction is a prerequisite to the exercise of judicial power" in the first place. Justice Ginsburg, joined by Justice Sotomayor, concurring in the judgment, would have upheld the statute on the basis of Congress's authority to withdraw consent to suit in areas subject to sovereign immunity. Chief Justice Roberts dissented, joined by Justices Kennedy and Gorsuch, arguing that the Constitution's limits on Congress's ability to "arrogat[e] the judicial power to itself and decid[e] a particular case" means that it also cannot indirectly resolve disputes by "legislative intervention[s]" that "leav[e] the court no adjudicatory function to perform." *Compare with Bank Markazi v. Peterson* (2016) (ruling 7-2 that "a statute does not impinge on judicial power when it directs courts to apply a new legal standard to undisputed facts").

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VII. Suspension Clause and Congress's Power to Limit Review of Constitutional Questions

The Suspension Clause, article I, section 9, clause 2 of the Constitution provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." In *Boumediene v. Bush* (2008), the Supreme Court held that the Suspension Clause extends to detainees at Guantanamo Bay. But the Court has also held that the "substitution of a collateral remedy which is neither inadequate nor ineffective to test the legality of a person's detention does not constitute a suspension of the writ of habeas corpus." *Swain v. Pressley* (1977).

The Supreme Court has read the Suspension Clause as possibly prohibiting Congress from eliminating review of certain "pure questions of law" that bear on the legality of executive detention. In *St. Cyr*, the Court reviewed a statute that provided, "Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against [a deportable] alien" and concluded that it was not "clear" enough to bar jurisdiction pursuant to the general habeas statute, 28 U.S.C. § 2241. The Court determined that a substantial constitutional question would arise if it interpreted the statute as prohibiting habeas review, because the Suspension Clause guarantees the right to bring a habeas claim to address "pure questions of law like the one raised by the respondent in this case." Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, dissented, arguing that the Suspension Clause protects at most against "temporarily but entirely eliminating the 'Privilege of the Writ'," but does not protect against legislation "permanently alter[ing] its content."

In other contexts, the Court has suggested that it might be unconstitutional for Congress to strip federal courts of all jurisdiction over constitutional questions. *See, e.g.*, *Webster v. Doe* (1988) (stating that a "serious constitutional question . . . would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim").

In *Department of Homeland Security v. Thuraissigiam* (2020), the Court held that Congress did not violate the Suspension Clause by restricting judicial review of asylum claims of aliens subject to expedited removal. The Court explained that habeas corpus had traditionally allowed a petitioner to seek release from unlawful detention. Because a claim for asylum does not seek that relief, the Court held that it is outside the scope of the Suspension Clause.

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FINANCIAL SECTOR REGULATION

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VI. Whistleblower Awards Under Dodd-Frank

In *Digital Realty Trust v. Somers* (2018), the Supreme Court held 9-0 that Dodd-Frank's anti-retaliation provision, which is intended to protect whistleblowers who provide "information relating to a violation of the securities laws to the [SEC]," does not extend to an individual who "blew the whistle" to his private employer but not to the SEC. Stressing that a statute's "explicit definition" of a term—even if it departs from the term's ordinary meaning and cuts against the "purposes" of the statute as a whole—must be applied throughout, the Court reasoned that the respondent did not fall within Dodd-Frank's definition of "whistleblower" because he did not provide information "to the [SEC]" prior to his termination. The Court did not defer to the SEC's contrary interpretation under *Chevron U.S.A. Inc. v. NRDC* (1984), because "the statute's unambiguous whistleblower definition, in short, precludes the Commission from more expansively interpreting that term." Justices Thomas, Alito, and Gorsuch concurred in the result and much of the Court's opinion, but did not join "the portions of the Court's opinion that venture beyond the statutory text."

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FIRST AMENDMENT: RELIGION

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A. Government-Sponsored Religious Expression

One frequently litigated subject under the Establishment Clause is government-sponsored religious expression, such as public monuments and legislative prayer. The case law governing such expression cannot be distilled into any simple doctrinal test. Indeed, most of the decisions in this area are fractured, and different Justices have endorsed different tests.

A pair of decisions from the Supreme Court in 2005 illustrates the difficulty in discerning a governing standard. In *McCreary County v. ACLU* (2005), the Court invoked the three-part test set out in *Lemon v. Kurtzman* (1971), and invalidated a paper display of the Ten Commandments inside a courthouse on the ground that the county lacked a secular purpose in erecting the display. But in *Van Orden v. Perry* (2005), issued the same day, the Court upheld a stone monument of the Ten Commandments on the Texas State Capitol grounds, focusing on the "nature of the monument and our nation's history." The plurality opinion found the *Lemon* test "not useful in dealing with" passive monument cases, while the concurring opinion of Justice Breyer (who cast the decisive vote to uphold the display) focused on the context of the display, the message conveyed, and the history and longevity of the monument.

Five years later, a plurality of the Court relied on neither of these tests to assess a monument challenge. In *Salazar v. Buono* (2010), a plurality of the Court upheld a World War I memorial consisting of a solitary cross on former federal land that Congress had given to a veteran's group in exchange for other land after a legal challenge to the cross. Employing the "endorsement" or "reasonable observer" test, the Court reasoned that "an objective observer who knows all of the pertinent facts and circumstances surrounding the symbol and its placement" would not perceive government endorsement or advancement of religion.

Recently, the Court again wrestled with the appropriate standard. In *American Legion v. American Humanist Association* (2019), Maryland residents alleged that the prominent display of a 32-foot tall Latin cross on public land as a memorial to soldiers who died in World War I violated the Establishment Clause. The Court explained that the fact that the cross is undoubtedly a Christian symbol does not mean that it cannot take on an added secular meaning, and that the challenged monument represented a symbolic resting place for ancestors who never returned home, a place for the community to gather and honor all veterans and their sacrifices for this nation, and a historical landmark. But no majority of the Court joined an opinion stating the applicable test. Writing for a plurality, Justice Alito (joined by the Chief Justice, Justice Breyer, and Justice Kavanaugh) explained that *Lemon* had failed to provide a "grand unified theory of the Establishment Clause." Later cases had "taken a more modest approach that focuses on the particular issue at hand and looks to history for guidance." In a concurrence, Justice Kagan agreed that *Lemon* did not solve every case, but noted that *Lemon*'s "focus on purposes and effects is crucial." She rejected "any broader statements about history's role in Establishment Clause analysis." Justice Thomas concurred in the judgment, writing that he agreed with the plurality's rejection of *Lemon* and would "take the next logical step and overrule the *Lemon* test in all contexts." In dissent, Justice Ginsburg (joined by Justice Sotomayor) asked whether the monument had the effect of endorsing religion. She argued that "[t]he Latin cross is the foremost symbol of the Christian faith," and, by maintaining the cross on a public highway, Maryland "elevates Christianity over other faiths, and religion over nonreligion."

The Court's jurisprudence regarding legislative prayer reflects similar disagreement regarding the applicable Establishment Clause test. In *Marsh v. Chambers* (1983), the Court upheld opening legislative prayer in a state legislature as deeply rooted in our nation's traditions. In *Town of Greece v. Galloway* (2014), the Court extended that ruling in upholding a town board's practice of inviting local clergy to deliver prayer, even though most of the prayers were Christian. The majority believed that practice fit within the historical tradition of legislative prayer, but three Justices (Kennedy, Alito, and the Chief Justice) also found it relevant that persons attending the board meetings were not coerced into participation. The lower courts are divided on whether *Galloway* extends to legislator-led prayer at county board meetings. The Supreme Court denied a writ of certiorari to consider the matter in 2018, with only Justices Thomas and Gorsuch dissenting. *See Rowan County v. Lund* (2018).

This Term, in *Shurtleff v. City of Boston*, the Supreme Court is considering whether the City of Boston lawfully relied on the Establishment Clause in refusing to allow an organization to fly a religious flag from a City flagpole located outside Boston City Hall. The City generally allows private groups to fly private flags from that flagpole, but the First Circuit held that flags flown from that flagpole constitute government speech and that the Establishment Clause required denial of this religious flag. The plaintiff contends that the case actually involves private speech, that Boston has discriminated based on viewpoint, and that Boston's Establishment Clause concerns all flow from its mistaken belief that the flag constitutes government speech.

B. Religious Expression in Public Schools

Religious expression in public schools has prompted its own body of case law. These cases distinguish student-sponsored religious expression, which is generally protected by the Free Speech Clause and does not create Establishment Clause problems, from government-sponsored religious speech, which generally is forbidden as coercive or lacking in a secular purpose or effect. While the government is forbidden from engaging in religious speech in public schools, the government may teach *about* religion in schools. *See Board of Educ. of Westside Comm. Schools v. Mergens* (1990); *Santa Fe Indep. School Dist. v. Doe* (2000).

In *Elk Grove Unified School District v. Newdow* (2004), the Supreme Court held that the plaintiff did not have standing to challenge the recitation of the Pledge of Allegiance in his daughter's public school. Chief Justice Rehnquist would have reached the merits and ruled that mentioning God in the Pledge is consistent with historical practice and precedent. Justice O'Connor also wrote separately, arguing that the history, character, and context of the Pledge made it permissible. Justice Thomas wrote that the Establishment Clause should not have been incorporated into the Fourteenth Amendment, and thus only applies to the federal government.

This Term, in *Kennedy v. Bremerton Sch. Dist.*, the Supreme Court will consider whether a public high school lawfully fired a football coach for engaging in prayer at the 50-yard line after the conclusion of football games. The coach contends that the Constitution protects his right to pray, as a private citizen, in public. The district court concluded that the prayers violated the Establishment Clause because the public would perceive the prayers as endorsed by the school. The Ninth Circuit agreed, but the Supreme Court granted certiorari to review the matter.

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FIRST AMENDMENT – FREEDOM OF SPEECH AND ASSOCIATION

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V. Libel

In *New York Times v. Sullivan* (1964), the Court held that the First Amendment places limits on state-law libel actions brought by public officials, requiring that the libelous statement be made with "actual malice"—knowledge of falsehood or reckless disregard for whether or not the statement is true—to be actionable. In later cases, the Court extended this doctrine beyond public officials to "public figures." *See, e.g.*, *Gertz v. Robert Welch, Inc.* (1974). The Court has also explained that “expressions of ‘opinion’ may often imply an assertion of objective fact,” which may be the subject of a libel action. *Milkovich v. Lorain Journal Co.* (1990). Two Justices (Thomas and Gorsuch) have recently suggested that *Sullivan* should be reassessed. *See Berisha v. Lawson* (2021) (dissents from denial of certiorari).

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X. Restrictions on Abortion Clinic Protests

In *Hill v. Colorado* (2000), the Supreme Court upheld against a First Amendment challenge a state statute creating an eight-foot bubble around persons within 100 feet of a health care facility, prohibiting approaching closer than that distance for the purpose of protesting, educating, or counseling that person. The Court held that the statute was content-neutral and thus not subject to strict scrutiny.

In *McCullen v Coakley* (2014), the Court invalided a Massachusetts abortion clinic buffer zone law that outlawed even peaceful, consensual speech on public sidewalks within 35 feet of abortion clinics. Although all nine justices agreed on the result, there were sharp differences as to the analysis. The five-justice majority (Chief Justice Roberts and Justices Ginsburg, Breyer, Sotomayor, and Kagan) found the law content-neutral, but not narrowly tailored, because Massachusetts has many other ways to protect clinic access without criminalizing peaceful use of the public sidewalks for speech. Four justices (Scalia, Kennedy, Thomas, and Alito) would have found the law content-based, because the restriction was tied to abortion and contained exemptions for speakers from the abortion clinics.

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HEALTH CARE

The Affordable Care Act (ACA)

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I. Litigation over the individual mandate and the Medicaid eligibility expansion

In *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012), the Supreme Court addressed challenges to the ACA's individual mandate and the Medicaid eligibility expansion. Although five Justices concluded that the individual mandate could not be upheld as an exercise of Congress's commerce power, the Court (per Chief Justice Roberts) issued a 5-4 decision upholding that provision as an exercise of Congress's taxing power. The Court further held (7-2) that Congress could not make a State's traditional Medicaid funding contingent on the ACA's expansion of Medicaid eligibility. The joint dissent (Scalia, Kennedy, Thomas, Alito) would have declared the individual mandate unconstitutional and inseverable from the rest of the ACA, which would have rendered the entire legislation a nullity.

In *King v. Burwell*, 576 U.S. 473 (2015), the Supreme Court (per Chief Justice Roberts) rejected the statutory argument that the ACA's premium tax credits are unavailable for health insurance purchased through an Exchange that is run by the federal government, rather by a State. Although the Court upheld the challenged IRS regulation, the Court concluded that *Chevron* deference was unwarranted because Congress did not intend to delegate to the IRS a significant question of health insurance policy in which that agency had no particular expertise. Justices Scalia, Thomas, and Alito dissented.

The dispute in *California v. Texas*, 141 S. Ct. 2104 (2021), arose because Congress enacted legislation that zeroed out the individual mandate's tax penalty, effective 2019. The district court ruled that, as amended, the individual mandate was unconstitutional and inseverable from the rest of the ACA, but the court stayed its judgment. The Firth Circuit affirmed the constitutional ruling but vacated the inseverability ruling. The Supreme Court ruled (per Justice Breyer) that the plaintiffs lacked standing because the zeroing out of the tax penalty made the individual mandate unenforceable. Justices Alito and Gorsuch dissented.

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JURISPRUDENCE

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III. ***Stare Decisis***

Under the doctrine of "stare decisis" (Latin for "to stand by the decision"), the Supreme Court generally adheres to its prior holdings absent "special justification" for revisiting them.

The Court has applied a "superpowered form" of the doctrine in the context of statutory interpretation, on the theory that, unlike in constitutional cases, Congress is free to correct any statutory decision that it regards as erroneous. *Kimble v. Marvel Entertainment, LLC* (2015). In constitutional cases, the Court has been considerably more willing to revisit precedents that it has come to regard as erroneous; it has emphasized that "*stare decisis* is not an 'inexorable command.'" *Planned Parenthood v. Casey* (1992).

The Court's opinion in *Casey*, reaffirming the "core holding" of *Roe v. Wade*, offers a prominent articulation of the "prudential and pragmatic considerations" that inform the determination whether a precedent should be overruled. It outlines four factors:

- whether a rule has proven to be intolerable simply in defying practical workability;
- whether a rule is subject to the kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation;
- whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; and
- whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.

The *Casey* opinion stated that although *Roe* has engendered opposition, it had "in no sense proven unworkable," and it could not be repudiated without serious inequity to people who, "for two decades of economic and social developments," had "organized intimate relationships and made choices that define their views of themselves and their places in society[] in reliance on the availability of abortion in the event that contraception should fail." The Court further concluded that no evolution of legal principle had left *Roe*'s central rule a doctrinal anachronism discounted by society, and that no change in *Roe*'s factual underpinning had left its central holding obsolete. *Casey* distinguished its hewing to precedent from the Court's prior departures from precedent in *West Coast Hotel v. Parrish* (1937) (departing from the doctrine of economic substantive due process epitomized by *Lochner v. New York* (1905)), and *Brown v. Board of Education* (1954) (overruling *Plessy* v. *Ferguson* (1896)), noting that in those cases the Court relied on a changed understanding of facts, not visible to the prior Courts.

The Court's decisions in *Dickerson v. United States* (2000) and *Lawrence v. Texas* (2003) are also prominent illustrations of the application of stare decisis principles.

In *Dickerson*, the Court reaffirmed *Miranda v. Arizona* (1966). Chief Justice Rehnquist's opinion noted that even had a majority disagreed with *Miranda*'s reasoning, *stare decisis* would counsel strongly in favor of maintaining its rule, because it had "become embedded in routine police practice [and] part of our national culture," and because subsequent decisions had shaped its impact on police practices while reaffirming its central rule.

In *Lawrence v. Texas* (2003), the Court concluded that the Due Process Clause barred the criminalization of private sexual conduct between consenting adults, overruling the contrary holding of *Bowers v. Hardwick* (1986). Justice Kennedy's majority opinion concluded that *Bowers* was wrongly decided and limited its discussion of *stare decisis* to the assertion that *Bowers* had "not induced detrimental reliance comparable to some instances where recognized individual rights are involved."

More recently, in *Citizens United v. Federal Election Commission* (2010), the Court held that the First Amendment prohibited restrictions on a corporation's political speech (in the form of independent expenditures), overruling *Austin v. Michigan Chamber of Commerce* (1990). Writing for the majority, Justice Kennedy stated that "[b]eyond workability, the relevant factors in deciding whether to adhere to the principle of stare decisis include the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned." The Court concluded that these factors weighed in favor of overruling *Austin*.

The Supreme Court has overruled several precedents in the past few Terms. Examples of cases where the Court has found *stare decisis* overcome include:

- *Ramos v. Louisiana* (2020), overruling *Apodaca v. Oregon* (1972), and holding that criminal defendants have a right to a unanimous jury verdict;

- *Knick v. Township of Scott* (2019), overruling *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City* (1985), and holding that property owners may bring Fifth Amendment takings claims under § 1983 without first resorting to state courts for redress;

- *Franchise Tax Board of California v. Hyatt* (2019), overruling *Nevada v. Hall* (1979), and holding that States may not be sued in the courts of other States without their consent;

- *Janus v. AFSCME* (2018), overruling *Abood v. Detroit Board of Education* (1977), and holding that public-sector employees who have declined union membership may not be compelled to pay union dues; and

- *South Dakota v. Wayfair, Inc.* (2018), overruling *Quill Corp. v. North Dakota* (1992), and holding that a State may require an out-of-state seller without a physical presence in the State to collect and remit sales taxes on goods shipped to consumers in the State.

In other recent cases, however, the Court has declined calls to overrule its precedents. In *Gamble v. United States* (2019), for example, the Court invoked stare decisis to uphold the dual-sovereigns doctrine, which holds that the Double Jeopardy Clause reaches only serial prosecutions by a single sovereign. The Court explained that departure from precedent demands "special justification," and found that the historical evidence cited against the dual-sovereigns doctrine was too weak to provide such a justification. Justice Thomas wrote a concurring opinion to express his view that stare decisis should never be invoked “to uphold precedents that are demonstrably erroneous.”

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MISCELLANEOUS ISSUES: FALSE CLAIMS ACT/*QUI TAM*, UNCONSTITUTIONAL CONDITIONS, & INTELLECTUAL PROPERTY

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B. Copyrights

As the Supreme Court has recognized, the Copyright Act attempts to balance competing interests: "Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts." *Twentieth Century Music Corp. v. Aiken* (1975). The Copyright Act includes limitations on the nature of the works, and specific rules exempt certain persons and activities from the scope of the exclusive rights. Through these grants and limitations of exclusivity, Congress determined when the copyright owner may restrict the use of a copyrighted work and when the public may use the work (or portions of it) free from the owner's restrictions.

Recently, the Supreme Court again addressed these competing interests in *Google LLC v. Oracle America, Inc.* (2021). That case involved a claim that Google infringed Oracle's copyrights by copying certain "declaring code" (instructions that tell the computer where to locate further pre-programmed instructions within a software program) from Oracle's Java software to Google's Android operating system. The petition for certiorari asked two questions: first, whether the declaring code could be the subject of copyright and, second, whether Google's copying of Oracle's declaring code to create a new computer program was non-infringing pursuant to the codified equitable doctrine of "fair use." As Justice Thomas noted in his dissent, the majority "side-stepped" the first question and resolved the case based on the second question, finding that the Google's use of the declaring code was a fair use. But that decision left open the question of whether the code itself was copyright eligible. While the copyright in a computer program certainly extends to the "expression," i.e., the choice of wording and ordering, it cannot by statute extend to functional aspects, such as the procedures, processes, methods of operation, or concepts embodied in those expressions. And the "declaring code" is largely functional, serving only to direct the computer to another location in the program. As the majority and dissent in *Google* agree, computer programs are expressly identified as being the subject of copyright law, but the unresolved question is the extent to which such individual lines of code may be protected and how the Court can guide lower courts to achieve consistent results.

PANDEMIC AUTHORITIES AND RESPONSE

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B. CDC Orders

Throughout the pandemic, the Centers for Disease Control and Prevention (CDC) has issued a number of orders aimed to respond to pandemic conditions. Unlike the actions discussed above, those orders have been the subject of significant litigation.

One such order was an eviction moratorium first announced in September 2020, after a narrower set of eviction protections established by Congress had expired. The moratorium was extended several times in the first half of 2021 and, after briefly lapsing, was replaced by a new, narrower version in August 2021. As relevant here, and with various exceptions, the August 2021 version of the moratorium prohibited landlords from evicting tenants for nonpayment of rent in areas where COVID transmission was high, if the tenants met certain qualifying requirements for relief.

On August 26, 2021, the Supreme Court vacated a lower court's stay of a final judgment vacating the eviction moratorium nationwide, effectively bringing the moratorium to a close.[1] *Alabama Ass'n of Realtors v. Department of Health & Human Services*, 141 S. Ct. 2485 (2021). The per curiam opinion concluded that the statute that the CDC invoked—which permitted the agency to "make and enforce such regulations as in [its] judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases," 42 U.S.C. § 264(a)—did not authorize the moratorium because the "downstream connection between eviction and the interstate spread of disease is markedly different from the direct targeting of disease that characterizes" the specific grants of authority to CDC elsewhere in the statute. *Id.* at 2488. "Even if the text were ambiguous," the Court continued, "the sheer scope of the CDC's claimed authority under § 361(a) would counsel against the Government's interpretation," because Congress is required to "speak clearly when authorizing an agency to exercise powers of 'vast economic and political significance'" like the eviction moratorium. *Id.* at 2489 (quoting *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014)). (Some lower courts, and some Justices writing separately, have referred to this as a "major questions" doctrine.) Justice Breyer, joined by Justice Sotomayor and Justice Kagan, dissented, concluding that the statutory text authorized the moratorium and disputing the conclusion that "Congress must speak more clearly to authorize the CDC to address public health crises via eviction moratoria." *Id.* at 2492.

While several other CDC policies—concerning masking, testing, and cruise travel—have resulted in litigation, the Supreme Court has not addressed their merits. In general, the plaintiffs in these cases have raised challenges similar to those in the eviction moratorium cases, and the government has responded that, whatever the outer limits of the agency's authority, these actions are conventional pandemic-response measures contemplated by the statute.. In the mask cases, at issue is a CDC order that generally requires passengers to wear masks while traveling on airplanes, trains, and other modes of transportation. In one case, the district court denied emergency relief, citing a lack of irreparable harm, and the Supreme Court declined to intervene, *Wall v. CDC*, No. 21A2 (U.S. July 13, 2021) (application for injunctive relief denied by Justice Thomas). The Supreme Court has likewise declined to intervene in related cases challenging the Transportation Security Administration's authority to enforce the CDC mask order. *Wall v. TSA*, 142 S. Ct. 860 (2022); *see Corbett v. TSA*, 19 F.4th 478, 480 (D.C. Cir. 2021). In the testing cases, plaintiffs have challenged a CDC order that generally requires international air travelers to show proof of a negative COVID-19 test (or documentation of recent recovery from COVID-19) before departing for the United States; in the lead case, emergency relief was denied by the district court and the Eleventh Circuit. And in the cruise ship case, the State of Florida challenged the CDC's "conditional sail order," which required cruise ships to implement various safety protocols as a condition to operating in U.S. ports. The district court preliminarily enjoined the order, and, after the Eleventh Circuit rejected the agency's motion for a stay

[1] The Court had declined to vacate a stay two months earlier. *Alabama Ass'n of Realtors v. Department of Health & Human Servs.*, 141 S. Ct. 2320 (2021). Justices Thomas, Alito, Gorsuch, and Barrett would have granted the application to vacate the stay. Concurring in the denial of the application, Justice Kavanaugh explained that "[b]ecause the CDC plans to end the moratorium in only a few weeks, on July 31, and because those few weeks will allow for additional and more orderly distribution of the congressionally appropriated rental assistance funds, I vote at this time to deny the application." *Id.* at 2321; *see also id.* ("In my view, clear and specific congressional authorization (via new legislation) would be necessary for the CDC to extend the moratorium past July 31."). The CDC's narrower version of the eviction moratorium came after the resolution of this application.

pending appeal, the order became voluntary for ships operating out of Florida ports in July 2021 and expired in January 2022, mooting the case.

C. Vaccination Mandates

After COVID-19 vaccines became widely available and the first vaccine received full approval from the U.S. Food and Drug Administration (FDA), the President and federal agencies imposed a number of vaccination requirements, nearly all of which led to litigation.

1. OSHA ETS. In November 2021, the Occupational Safety and Health Administration (OSHA) announced an emergency temporary standard (ETS) that would have required all employers with 100 or more employees to either adopt a mandatory vaccination policy or to give their employees a weekly testing alternative. 86 Fed. Reg. 61,502 (2021). OSHA proceeded under 29 U.S.C. § 655(c)(1), which permits the agency to adopt certain emergency rules that are "necessary" to protect employees from a "grave danger." After the Fifth Circuit stayed the ETS, the Sixth Circuit (which received all challenges pursuant to a statutory lottery procedure) lifted the stay. *In re MCP No. 165*, 21 F.4th 357 (6th Cir. 2021). The Supreme Court reinstated the stay on January 13, 2022. 142 S. Ct. 661 (2022). As in the CDC eviction moratorium case, the Court's per curiam opinion concluded that Congress must "speak clearly" to authorize a policy as significant as OSHA's vaccination mandate. *Id.* at 665 (quoting *Alabama Ass'n of Realtors*, 141 S. Ct. at 2489). And the Court concluded that the statute did not speak clearly, because it was best read to "set *workplace* safety standards," and because COVID spreads not only in workplaces, but also "at home, in schools, during sporting events, and everywhere else that people gather." *Id.* Justice Gorsuch, with whom Justices Thomas and Alito joined, concurred, explaining that the clear-statement rule safeguards principles of liberty. *Id.* at 668-69. Justice Breyer, Justice Sotomayor, and Justice Kagan jointly dissented, concluding that "nothing in the Act's text supports the majority's limitation on OSHA's regulatory authority." *Id.* at 673.

2. CMS rule. Also in November 2021, the Centers for Medicare and Medicaid Services (CMS) promulgated an interim final rule that required facilities receiving Medicare or Medicaid funding to ensure that their healthcare workers were vaccinated against COVID-19. 86 Fed. Reg. 61,561 (2021). CMS based its authority to issue the rule on a variety of Medicare and Medicaid statutes that generally authorized the Secretary to promulgate "requirements as [he] finds necessary in the interest of the health and safety of individuals who are furnished services in the institution." 42 U.S.C. § 1395x(e)(9). Two district courts enjoined the rule, but the Supreme Court stayed the preliminary injunctions. *Biden v. Missouri*, 142 S. Ct. 647 (2021). The per curiam opinion explained that "ensuring that providers take steps to avoid transmitting a dangerous virus to their patients is consistent with the fundamental principle of the medical profession: first, do no harm," and was therefore consistent with CMS's authority to ensure the "health and safety" of patients. *Id.* at 652. The opinion also rejected arguments that the rule was arbitrary and capricious and that the Secretary lacked good cause to waive notice-and-comment requirements. *Id.* at 654. Justice Thomas, joined by Justice Alito, Justice Gorsuch, and Justice Barrett, dissented on statutory authority grounds. *Id.* at 655. Justice Alito, joined by Justice Thomas, Justice Gorsuch, and Justice Barrett, separately dissented on notice-and-comment grounds. *Id.* at 659.

3. Executive Order 14042. In September 2021, President Biden issued Executive Order 14042, which required federal agencies to include in their contracts a requirement that most contractor employees become vaccinated. 86 Fed. Reg. 50,985 (2021). This executive order was issued pursuant to the President's authority under the Federal Property and Administrative Services Act (FPASA) (also known as the "Procurement Act"), 40 U.S.C. § 101 *et seq.*, which empowers the President to "prescribe policies and directives that the President considers necessary to carry out this subtitle," and which explains that the purpose of the subtitle is to "provide the Federal Government with an economical and efficient system" for "[p]rocuring and supplying property and nonpersonal services." 40 U.S.C. §§ 101, 121(a). As of this writing, Executive Order 14042 is subject to a nationwide injunction, *see Georgia v. Biden*, _ F. Supp. 3d _, 2021 WL 5779939 (S.D. Ga. Dec. 7, 2021), as well as to several more geographically limited injunctions. The courts that have enjoined the executive order have held that the President lacks statutory authority under FPASA to require vaccination, particularly in light of the major-questions principles expressed in the Supreme Court's eviction-moratorium and ETS cases. The government sought to stay the nationwide injunction pending appeal, but the Eleventh Circuit denied that request, concluding that the government had not shown irreparable harm. The government also sought to stay a geographically limited injunction issued by a district court in Kentucky, but the Sixth Circuit denied a stay. *Kentucky v. Biden*, 23 F.4th 585, 593 (6th Cir. 2022). The government's appeals remain pending in the Fifth, Sixth, Eighth, and Eleventh Circuits.

4. Executive Order 14043. Also in September 2021, President Biden issued Executive Order 14043, which generally requires federal employees to become vaccinated unless they are entitled to a religious or medical exemption. 86 Fed. Reg. 50,989 (2021). After several district courts rejected challenges to this order, a district court in Texas issued a nationwide injunction in January 2022, concluding that the President likely lacked constitutional and statutory authority to require vaccination of federal employees. *Feds for Medical Freedom v. Biden*, _ F. Supp. 3d _, 2022 WL 188329 (S.D. Tex. Jan. 21, 2022). The government has moved to stay the nationwide injunction pending appeal. The Fifth Circuit motions panel (over a dissent) deferred a ruling on the stay request to the merits panel. *Feds for Medical Freedom v. Biden* _ F.4th _, 2022 WL 391820 (5th Cir. Feb. 9, 2022). Briefing on the merits in the Fifth Circuit is now complete, and oral argument is scheduled for early March 2022.

5. Military vaccination mandate. In August 2021, the Secretary of Defense issued a memorandum adding the COVID-19 vaccine to the list of vaccines required for service members. Following that memorandum, each military service issued regulations to implement the vaccination requirement. The requirement permits religious and medical exceptions as required by law. To date, no court has enjoined the military vaccination mandate on a nationwide or classwide basis, although three district courts have found that certain service members are likely to succeed on their claims that RFRA and the First Amendment require the military to grant them a religious exception. In one of those cases, *Navy Seals 1-26 v. Biden*, _ F. Supp. 3d _, 2022 WL 3443 (N.D. Tex. Jan. 3, 2022), the government has appealed and has sought a stay pending appeal.

6. Head Start mandate. In September 2021, HHS promulgated an interim final rule to require Head Start staff and certain volunteers to become vaccinated unless they are entitled to an exemption. Before the requirement took effect, two district courts enjoined the rule, blocking its enforcement in 25 States. As of this writing, the rule remains in effect in the remaining States (except in certain programs in Michigan where enforcement is subject to a temporary restraining order), and the government's appeals remain pending.

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B. Capacity Restrictions on Places of Worship

The earliest legal challenges to States' and localities' COVID-19 authorities largely concerned capacity restrictions on churches and other places of worship. Early in the pandemic, courts generally deferred to governments' judgments in this area, generally citing the Supreme Court's statement in *Jacobson* that governmental responses to a pandemic should be upheld unless they have "no real or substantial relation to those objects, or [are], beyond all question, a plain, palpable invasion of rights secured by the fundamental law." Later, the courts became more skeptical of capacity restrictions on religious entities.

The Supreme Court's first two cases, *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020), and *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603 (2020), concerned state laws that limited capacity at gatherings, including worship services, to a certain number of people, while imposing somewhat more generous restrictions on businesses. In both cases, the lower courts declined to order an immediate injunction, and the Supreme Court likewise declined to award emergency injunctive relief. In *South Bay*, the Chief Justice concurred in the denial of the application, explaining that "[t]he precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement" and quoting *Jacobson* to assert that courts should not second-guess those policy decisions. 140 S. Ct. at 1613. Justice Thomas, Justice Alito, Justice Gorsuch, and Justice Kavanaugh voted to grant the application, and Justice Kavanaugh authored a dissent. *Id.* at 1614. In *Calvary*, likewise, Justice Alito, Justice Gorsuch, and Justice Kavanaugh all authored dissents, and Justice Thomas joined the dissent authored by Justice Alito. *See id.* at 2605 (Alito, J., dissenting) (arguing that the "directive specifically treats worship services differently from other activities that involve extended, indoor gatherings of large groups of people" and so violates the Free Exercise Clause).

The Court later engaged in a more searching review of governments' pandemic responses. In *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020), issued four months after *Calvary Chapel*, the Court issued an injunction pending appeal that barred New York State from enforcing capacity restrictions against two religious entities. In an order, five Justices concluded that the applicants were likely to succeed on the merits because the challenged policies "single[d] out houses of worship for especially harsh treatment" by permitting "essential businesses" to admit more people than houses of worship. *Id.* at 67. The Chief Justice, Justice Breyer, Justice Sotomayor, and Justice Kagan dissented; Justice Gorsuch and Justice Kavanaugh authored concurring opinions. A few months later, in *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021) (*South Bay II*), the Court issued a similar injunction against California's capacity restrictions, over a dissent by Justice Kagan (joined by Justice Breyer and Justice Sotomayor) that argued that California treated places of worship in the same manner as secular institutions that pose similar risk of disease transmission. *See id.* at 723 ("So it is alarming that the Court second-guesses the judgments of expert officials, and displaces their conclusions with its own."). Finally, in *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), the Court issued another injunction against a related set of California capacity restrictions as applied to bible study in homes, again over a three-Justice dissent by Justice Kagan.

The key debate in these cases concerned how to compare secular and religious activity. In each case, all Justices seemed to accept the principle that a State generally is required to treat religious institutions no less favorably than comparable secular institutions. *See South Bay II*, 141 S. Ct. at 719 (statement of Gorsuch, J.); *id.* at 721 (Kagan, J., dissenting). But the Justices debated what sort of comparison was appropriate. The dissenting Justices were more likely to defer to experts' judgments that worship posed unique risks of disease transmission, *see Tandon*, 141 S. Ct. at 1299 (Kagan, J., dissenting), while the majority concluded that such judgments were insufficient generalizations that failed to adequately show a disparity in the "risk various activities pose," *id.* at 1296 (per curiam). *See also id.* ("[T]he government . . . must do more than assert that certain risk factors are always present in worship, or always absent from other secular activities." (quotation marks omitted)).

C. State Vaccination Requirements

The federal courts have taken a more deferential approach when it comes to state and local vaccination requirements. Where plaintiffs have asserted that a vaccination requirement violates principles of substantive due process or equal protection, courts have concluded that vaccination policies can be upheld because they are supported by a rational basis. *See, e.g., Klaassen v. Trustees of Indiana Univ.*, 7 F.4th 592, 593 (7th Cir. 2021) (Easterbrook, J.) ("Given [*Jacobson*], which holds that a state may require all members of the public to be vaccinated against smallpox, there can't be a constitutional problem with vaccination against SARS-CoV-2."). Courts have also rejected religious challenges to state vaccination requirements. For example, in *Does 1-3 v. Mills*, 142 S. Ct. 17 (2021), the Supreme Court rejected an application for an injunction that asserted that Maine's vaccination requirement for healthcare workers was unconstitutional because it permitted medical but not religious exceptions. Justice Barrett, joined by Justice Kavanaugh, concurred in that decision, writing that the Court's involvement was premature. *Id.* at 18. Justice Gorsuch wrote a dissent, joined by Justice Thomas and Justice Alito. *Id.* Two months later, the Court again rejected an emergency application concerning New York's vaccine mandate, which likewise permitted medical but not religious exceptions, over dissenting votes from three Justices. *Dr. A v. Hochul*, 142 S. Ct. 552 (2021).

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QUALIFIED IMMUNITY

Under the doctrine of qualified immunity, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald* (1982). Qualified immunity is a key defense in nearly every suit for damages for alleged violations of the Constitution, as well as cases brought under federal statutes permitting causes of action for damages. The defense is most often used as a defense to claims under 42 U.S.C. § 1983, which provides a cause of action for deprivation of rights by state officials acting "under color of" state law, and *Bivens v. Six Unknown Named Agents* (1971), which implied a damages cause of action for deprivation of rights by federal officials.

In explaining the justification for qualified immunity, the Supreme Court has stressed that the doctrine balances two important interests: "the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan* (2009). Thus, qualified immunity "help[s] to avoid 'unwarranted timidity' in performance of public duties, ensur[es] that talented candidates are not deterred from public service, and prevent[s] the harmful distractions from carrying out the work of government that can often accompany damages suits." *Filarsky v. Delia* (2012). Since these burdens on government officials begin to accrue as soon as a case is filed, the Supreme Court's qualified immunity jurisprudence has also "stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter v. Bryant* (1991).

Central to the qualified immunity doctrine is the question of whether the right at issue is "clearly established." Government officials "cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it." *Plumhoff v. Rickard* (2014). Thus, qualified immunity provides "ample room for mistaken judgments" and protects all government officials except "the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs* (1986). While there need not be a prior case directly on point, a right is "clearly established" only when existing precedent has "placed the statutory or constitutional question beyond debate." *Kisela v. Hughes* (2018). The Supreme Court has repeatedly instructed lower courts "not to define clearly established law at a high level of generality, since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced." *Plumhoff*.

Recently, the Supreme Court has paid particular attention to qualified immunity with respect to claims, brought under the Fourth Amendment, that law enforcement officers have used excessive force. In recent terms, the Court has issued a number of decisions in such cases summarily reversing courts of appeals, without merits briefing or argument. The Court has noted that defining the clearly established right with "specificity is especially important in the Fourth Amendment context" because "it is sometimes difficult for an officer to determine how the relevant legal doctrine . . . will apply to the factual situation the officer confronts." *Mullenix v. Luna* (2015) (per curiam). For example, in *Kisela v. Hughes* (2018) (per curiam), the Supreme Court summarily reversed the Ninth Circuit's denial of qualified immunity to a state police officer who shot a woman who "was holding a large kitchen knife, had taken steps toward another woman standing nearby, and had refused to drop the knife after at least two commands to do so." The Ninth Circuit found the factual record sufficient to demonstrate excessive force in violation of the Fourth Amendment. In reversing, the Supreme Court explained that "it does not suffice for a court simply to state that an officer may not use unreasonable and excessive force, deny qualified immunity, and then remit the case for a trial on the question of reasonableness." When "judged against the backdrop of the law [of excessive force] at the time of the conduct" at issue in the case, the Court held that a reasonable officer could have believed he was acting lawfully because of the perceived threat to the bystander on the scene, and thus qualified immunity was appropriate.

More recently, in *City of Talequah, Oklahoma v. Bond* (2021) (per curiam), the Supreme Court summarily reversed the Tenth Circuit's denial of qualified immunity to local police officers who cornered a man in his garage and then shot him when he grabbed a hammer, raised it behind his head, "and took a stance as if he was about to throw the hammer or charge at the officers." The Tenth Circuit held it was clearly established that an officer can be "held liable for a shooting that is itself objectively reasonable if the officer's reckless or deliberate conduct created a situation requiring deadly force." However, the Supreme Court distinguished the precedent cited in the Tenth Circuit's opinion by noting the "dramatically different" facts in those other cases and concluded that "a reasonable officer could miss the connection between" the circumstances of those cases and the ones faced by the officers in the garage.

Some justices have questioned qualified immunity in recent years, albeit for different reasons. In *Kisela*, Justice Sotomayor (joined by Justice Ginsburg) authored a dissent arguing that the Supreme Court had transformed qualified immunity "into an absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment." Whereas, Justice Thomas, in a dissent from a denial of certiorari, opined that the Court's qualified immunity doctrine should "return to the approach of asking whether immunity was historically accorded the relevant official in an analogous situation at common law." *Baxter v. Bracey* (2020). Nevertheless, while a minority of justices have expressed reservations, the Supreme Court has recently turned down several opportunities to scale back the doctrine of qualified immunity. *See, e.g.*, *Corbitt v. Vickers* (2020), *Zadeh v. Robinson* (2020), *Baxter v. Bracey* (2020).

SECOND AMENDMENT

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III. Recent Supreme Court Activity

Following *Heller* and *McDonald*, the Supreme Court has mostly avoided taking up new Second Amendment issues until recently.

In *Caetano v. Massachusetts*, 577 U.S. 411 (2017), the Court summarily reversed a Massachusetts Supreme Judicial Court decision upholding that state's ban on stun guns. The state court had upheld the ban by reasoning that stun guns were not in existence at the founding and are not adaptable to military use. Finding both of these reasons squarely precluded by *Heller*, the Supreme Court vacated and remanded in a per curiam opinion. Justice Alito, joined by Justice Thomas, concurred in the judgment. They would have gone further and struck down the stun gun ban. That same year, Justices Thomas and Gorsuch dissented from a decision to deny review of a Ninth Circuit decision in *Peruta v. California*, 137 S. Ct. 1995 (2017) that upheld a California law that made it practically impossible for almost all gun owers to carry firearms in public spaces. Their dissent argued that by refraining from deciding these issues, the Court "treat[s] … the Second Amendment as a disfavored right" that is only "selectively enforce[d]."

In *New York State Rifle & Pistol Ass'n v. City of New York*, 140 S. Ct. 2025 (2020), the Court granted certiorari to review a New York City ordinance that prohibited a person from carrying a handgun to second homes and out-of-state shooting ranges. After the Court granted certiorari, New York amended the ordinance. In a per curiam opinion, the Court declined to reach the merits, instead concluded that the amendment mooted the case, and remanded because the plaintiffs might still have had claims under New York's amended ordinance. Justice Alito, joined by Justice Thomas and Justice Gorsuch, dissented. They would have found that the case was not moot and that New York's ordinance violated the Second Amendment.

On April 26, 2021, the Court granted certiorari in *New York State Rifle & Pistol Ass'n v. Bruen*, No. 20-843. The Second Circuit, in a summary order, had rejected a Second Amendment challenge to New York's requirement that an applicant for a license to carry a concealed handgun outside the home must show that proper cause exists for its issuance. Oral argument was held on November 3, 2021, and a decision remains pending.

SEPARATION OF POWERS

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IV. Article III and Limits on Judicial Remedies

The exercise of the judicial power presents several interesting and occasionally difficult separation of powers questions.

Jurisdiction stripping occasionally causes friction between Congress and the courts. *Ex Parte McCardle* (1869) recognized that Article III permits Congress to create "exceptions" to the appellate jurisdiction of the Supreme Court, effectively stripping the Court of jurisdiction to hear certain cases. *See* U.S. Const. art. III, § 2 ("In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, *with such Exceptions, and under such Regulations as the Congress shall make*." (emphasis added)). The Court in recent times, however, has been very reluctant to allow Congress to deprive courts of all jurisdiction to decide a question of law. In *INS v. St. Cyr* (2001), for example, the Court stated that depriving all federal courts of jurisdiction, including habeas corpus jurisdiction, to review a "pure question of law" regarding the deportability of an alien, would raise serious constitutional questions under the Constitution's Suspension Clause, art. I, § 9, cl. 2. Thus, the Court has avoided interpretations of statutes that would deprive federal courts of all jurisdiction over the matter, in the absence of a clear statutory statement. The precise scope of Congress's ability to limit the Supreme Court's jurisdiction is subject to extensive academic debate.

The Court has recognized that Congress may unconstitutionally impinge on the judicial power in other ways. In *Plaut v. Spendthrift Farm* (1995), the Court struck down a statute that required federal courts to re-open already final judgments, which the Court explained was an exclusively judicial function. Recently, the Court revisited Congress's power to determine the outcome of a pending case. *See Patchak v. Zinke* (2018). The case involved a dispute over the designation of land in Michigan as tribal land, which exempted it from state law and allowed a casino to be built on the land. While litigation over that designation was pending, Congress enacted a statute to ratify the designation and provide that litigation challenging that decision "shall not be filed or maintained in a Federal court and shall be promptly dismissed." In fractured opinions, the Court affirmed the dismissal of the litigation under that statute. Justice Thomas, writing for a plurality, declared that the legislative power permits Congress to make laws that apply retroactively, even to pending suits, and that when Congress strips federal courts of jurisdiction it exercises valid legislative power. Justice Ginsburg (joined by Justice Sotomayor) declared that Congress's authority to retain or waive federal sovereign immunity was sufficient to decide the case, because the statute displaced the APA's waiver of sovereign immunity. Chief Justice Roberts (joined by Justices Kennedy and Gorsuch) dissented, arguing that the legislature does not have the authority to determine the outcome of a given case.

Courts are not immune from the temptation to extend their power. In *Missouri v. Jenkins* (1995), the Court rejected one such attempt, reminding federal district courts that they have broad, but not unlimited, remedial authority to respond to unconstitutional racial segregation in public schools. It accordingly reversed an order requiring a State to increase the salaries of school staff and continue funding remedial "quality education" programs, because it did not "serv[e] as proper means" to "restor[ing] state and local authorities to the control of a school system that is operating in compliance with the Constitution."

The political-question doctrine recognizes that some questions may lie outside the judicial power. In *Baker v. Carr* (1962), the Court explained the contours of the political-question doctrine, holding that a question may be non-justiciable if textually committed to a coordinate branch of government. "[I]t is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the *States*, which gives rise to the *political question*." (emphasis added). But the Court has also explained that a decision is not a political question merely because it implicates another branch. Thus, in *Powell v. McCormack* (1969), the Court held that it could review the House of Representatives' decision to judge a member unqualified to take his seat. The case "require[d] no more than an interpretation of the Constitution." "Such a determination falls within the traditional role accorded courts to interpret the law, and does not involve a 'lack of the respect due (a) coordinate (branch) of government,' nor does it involve an 'initial policy determination of a kind clearly for nonjudicial discretion.'" *Id.*; *see also Zivotofsky v. Clinton* (2012).

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VI. Article III and Nationwide Injunctions

“Article III of the Constitution limits the exercise of the judicial power to ‘Cases’ and ‘Controversies.’” *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) (citation omitted). A federal court may entertain a suit only by a plaintiff who has suffered a concrete “injury in fact,” and the court may grant relief only to remedy “the inadequacy that produced [the plaintiff’s] injury.” *Gill v. Whitford*, 138 S. Ct. 1916, 1929-30 (2018) (quoting *Lewis v. Casey*, 518 U.S. 343, 357 (1996)). Accordingly, the Supreme Court has narrowed injunctions that extended relief beyond the harms to “any plaintiff in th[e] lawsuit.” *Lewis*, 518 U.S. at 358. Principles of equity reinforce those limitations, as a court’s equitable authority to award relief is generally confined to relief “traditionally accorded by courts of equity” in 1789. *Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 318, 319 (1999).

The Supreme Court has twice granted certiorari to review the propriety of injunctions that afford relief to nonparties when not necessary to remedy the plaintiff’s asserted injury. The Supreme Court resolved each case on other grounds. In *Trump v. Hawaii* (2018), Justice Thomas concurred to express his skepticism that district courts have authority to enter such injunctions, which he said “did not emerge until a century and a half after the founding” and “appear to be inconsistent with longstanding limits on equitable relief and the power of Article III courts.” (Thomas, J., concurring). Justice Gorsuch has also said that “[t]he traditional system of lower courts issuing interlocutory relief limited to the parties at hand . . . . encourages multiple judges and multiple circuits to weigh in” on a given legal question. *New York*, 140 S. Ct. at 600 (Gorsuch, J., concurring).

SUBSTANTIVE DUE PROCESS AND REPRODUCTIVE RIGHTS

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A. Reproductive Rights

The Supreme Court's reproductive-rights jurisprudence has its roots in *Griswold v. Connecticut* (1965), where the Court recognized a constitutional right of married persons to buy contraceptives, based on a right to privacy found in the "penumbras" of various provisions in the Bill of Rights. In *Eisenstadt v. Baird* (1972), the Court expanded that right to unmarried persons under the Equal Protection Clause. The Court reasoned that "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."

In *Roe v. Wade* (1973), the Court recognized a fundamental constitutional right to have an abortion under the substantive due process component of the Fourteenth Amendment, thereby subjecting laws restricting abortion to strict scrutiny. *Roe* also established a trimester timetable for determining the legality of abortion laws: For the first trimester, "the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician"; for the second trimester, "the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health"; for the third trimester (considered the period after viability), "the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."

In *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992), the Court declined to overrule *Roe*'s "core holding" that abortion prior to viability is a constitutional right. But the Court (through a joint opinion by Justices O'Connor, Kennedy, and Souter) declined to apply both strict scrutiny and *Roe*'s trimester framework; it also did not describe abortion as a fundamental right. Under the standard announced in *Casey*, the government is able to regulate abortion prior to viability so long as it does not place an "undue burden" on the abortion right. Subsequent to viability, the state may regulate, and even proscribe, abortion except where "necessary, in appropriate medical judgment, for the preservation of the [mother's] life or health."

In *Gonzales v. Carhart* (2007), the Court ruled, by a 5-4 vote, that the federal ban on a procedure called intact dilation and extraction, also known as "partial-birth abortion" was constitutionally permissible. The majority assumed the validity of *Casey* and held that, under its framework, "[r]egulations which do no more than create a structural mechanism by which the State . . . may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose." The Court held that even the lack of an exception for a woman's health did not render the statute unconstitutional, because deference to the legislature's judgment of the health risks from the procedure was appropriate and because safe alternatives to the procedure exist. The Court reached that conclusion even though it had previously invalidated a similar Nebraska law in *Stenberg v. Carhart* (2000).

In *Whole Woman's Health v. Hellerstedt* (2016), the Court invalidated by a 5-3 vote provisions of a Texas law that required that physicians performing abortions have admitting privileges at a hospital no more than 30 miles away and that abortion facilities meet the minimum standards required for ambulatory surgical centers. The majority applied *Casey*'s undue burden standard to hold that, as to admitting privileges, the law did not advance the state's legitimate interest in protecting women's health beyond the prior law, which required providers to have a "working arrangement" with doctors who had admitting privileges. As to surgical facility standards, the Court held that they provided no health benefit when complications arise because those generally occur after a patient has left the facility, and that abortions in abortion facilities are safer than other common procedures that occur in outpatient clinics not subject to the surgical-center requirements. At the same time, the Court reasoned, the requirements would burden the ability of women to access abortions because many facilities in Texas would close. Justice Thomas argued in dissent that the Court had "radically rewrit[ten]" the undue burden standard by "consider[ing] the burdens a law imposes on abortion access together with the benefits those laws confer," transforming the undue burden test to something more akin to strict scrutiny.

In *June Medical Services, L.L.C. v. Russo* (2020), the Court again struck down a law (this time in Louisiana) that required doctors who perform abortions to have admitting privileges at a nearby hospital. A four-justice plurality (Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan) found that the admitting-privileges requirement would reduce the number and geographic distribution of abortion providers and would not produce the asserted benefits of the requirement. Chief Justice Roberts provided the fifth vote in a concurring opinion. He explained that he continued to believe *Whole Women's Health* was wrongly decided, but he believed it necessary to adhere to the decision as a binding precedent. He also explained that he read the Court's abortion decisions not to call for a balancing of benefits and burdens, but only an assessment of whether a law imposed a substantial burden. Because he found that Louisiana's law imposed a burden "to the same degree" as the law in *Whole Women's Health*, he concluded that it was unconstitutional. Justices Thomas, Alito, Gorsuch, and Kavanaugh each wrote dissenting opinions.

The Supreme Court is now considering the case of *Dobbs v. Jackson Women's Health Organization*. In 2018, Mississippi enacted the Gestational Age Act, which prohibits abortion after 15 weeks' gestation, with limited exceptions. Jackson Women's Health Organization, the only abortion provider in Mississippi, brought suit challenging the Act's constitutionality, and the district court permanently enjoined the Act's enforcement. The court determined that the undisputed facts in the case established that the point of viability is 23-24 weeks and accordingly held that the State's 15-week abortion ban was unconstitutional under *Roe* and *Casey*. It rejected the State's argument that the Act was a mere regulation on abortion subject to *Casey*'s undue-burden standard, akin to the statute upheld in *Gonzales*, rather than a pre-viability abortion ban. The Fifth Circuit affirmed.

The State petitioned for certiorari, which the Supreme Court granted, limited to the question of "whether all pre-viability prohibitions on elective abortion are unconstitutional." The State's petition principally asked the Court to uphold the Act by relaxing the "strict viability line"; in a footnote, it proposed overruling *Roe* and *Casey* as an alternative. The State's opening merits brief, however, squarely asks the Court to overrule those precedents. The State argues that "a right to abortion has no basis in constitutional text, structure, history, or tradition," and that rational-basis review should apply to laws restricting abortion. The State also argues that stare decisis does not require adhering to *Roe* and *Casey* because those decisions are egregiously wrong, unworkable, have caused various harms, are scientifically and legally outdated, and have not created legitimate reliance interests. Alternatively, the State asks the Court to abandon viability as a bright line rule. The plaintiffs argue that the Court should not consider the State's arguments in favor of overruling *Roe* and *Casey* because the State's petition mentioned that course only in a footnote. On the merits, the plaintiffs argue that *Roe* and *Casey* were rightly decided, that stare decisis requires adhering to them, and that, with respect to the State's alternative argument, the State has offered no sustainable alternative to the viability line that would preserve a right to abortion. The Supreme Court heard oral argument in the case on December 1, 2021, but as of this writing had not issued a decision.

Disputes over access to abortion have also formed the backdrop for related litigation over reproductive rights, such as the litigation over Texas's Senate Bill 8 and challenges to HHS rules issued under Title X of the Public Health Service Act. Those matters are discussed in Part II below.

B. LGBT Rights

Over the last three decades, the Supreme Court has repeatedly held unconstitutional laws that discriminate on the basis of sexual orientation or express animus against same-sex couples.

In *Romer* v. *Evans* (1996), the Court struck down on equal protection grounds a state constitutional provision preventing local municipalities from adopting rules protecting gay persons from discrimination. The Court concluded that Colorado had acted "not to further a proper legislative end but to make them unequal to everyone else," and held that "[a] State cannot so deem a class of persons a stranger to its laws."

In *Lawrence v. Texas* (2003), the Court invalidated a Texas law that made it a crime for two persons of the same sex to engage in sodomy. Although the Court did not go so far as to declare the right to private sexual activity a "fundamental right," it did rely on substantive due process to hold that the petitioners' "right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government." The Court expressly overruled *Bowers v. Hardwick* (1986), which had upheld the constitutionality of a similar Georgia law, and explained that "the doctrine of *stare decisis* is essential to the respect accorded to the judgments of the Court and to the stability of the law . . . [but] is not . . . an inexorable command."

In *United States v. Windsor* (2013), the Court held that the Fifth Amendment's Due Process Clause forbade Congress from defining "marriage" in the federal Defense of Marriage Act (DOMA) as the union of one man and one woman for purposes of federal law. The Court noted that, by history and tradition, the definition of marriage has been treated as being within the authority of the States. DOMA, in the Court's view, "reject[ed] this long-established precept." According to the Court, the State of New York's decision to give same-sex couples the right to marry "conferred upon them a dignity and status of immense import." But DOMA, the Court concluded, imposed restrictions and disabilities on this class of persons, in violation of "basic due process and equal protection principles applicable to the Federal Government." The Court held that the resulting injury and indignity is a deprivation of liberty protected by the Fifth Amendment.

Two terms later, in *Obergefell v. Hodges* (2015), the Court interpreted the Fourteenth Amendment to prohibit States from "exclud[ing] same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples." In doing so, the Court answered the question that it had declined to reach in *Hollingsworth v. Perry* (2013), in which it dismissed for lack of jurisdiction a challenge to a State's prohibition of same-sex marriage. In addition to holding that same-sex couples have a right to marry, the Court in *Obergefell* held that a State is required to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-State. Citing the "interlocking nature" of constitutional safeguards in the Due Process and Equal Protection Clauses of the Fourteenth Amendment, the Court concluded that the right to marry is a fundamental right inherent in the liberty of the person, and that under those Clauses, same-sex couples may not be deprived of that right. The Court overruled *Baker v. Nelson* (1972), in which the Court, in an unreasoned summary decision, had rejected a challenge to a State's prohibition of same-sex marriage on the basis that such a challenge failed to raise a substantial federal question.

The Supreme Court has never recognized sexual orientation as a suspect classification for equal protection purposes. The Court was asked to do so in both *Windsor* and *Obergefell*, but instead based its decisions on the grounds noted above. Dissenting in *Windsor*, Justice Scalia expressed that although the majority appeared to believe that a rational basis standard was appropriate, it did not "apply anything that resembles that deferential framework." And similarly, the dissent in *Obergefell* authored by Chief Justice Roberts and joined by Justices Scalia and Thomas remarked on the "absence" in the majority opinion of "anything resembling our usual framework for deciding equal protection cases." Notably, in *Windsor* the Second Circuit had applied heightened equal protection scrutiny to classifications based on sexual orientation, *see Windsor v. United States*, 699 F.3d 169, 181 (2nd Cir. 2012). Likewise, the Court has not recently addressed whether gender identity is a protected characteristic, or whether transgender persons constitute a suspect class. The Court has not returned to the subject of constitutional protections for LGBTQ+ persons since *Obergefell*. In *Bostock v. Clayton County* (2021), the Supreme Court held that Title VII's prohibition against discrimination on the basis of sex encompasses discrimination on the basis of sexual orientation and gender identity. That decision, however, was framed entirely in terms of statutory interpretation, not constitutional due process.

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II. Other Reproductive Rights Litigation

Texas's SB8, which took effect on September 1, 2021, provides that a physician may not knowingly perform or induce an abortion after cardiac activity is detected in the embryo, with limited exceptions. Cardiac activity begins at approximately six weeks of pregnancy, as measured from a woman's last menstrual period. In an apparent attempt to avoid a pre-enforcement challenge to SB8 under *Ex parte Young* (1908), and 42 U.S.C. § 1983, SB8 provides for enforcement through private civil actions rather than by State or local officials. Suits may be brought against anyone who performs or aids, or intends to perform or aid, a prohibited abortion, and a successful SB8 plaintiff is entitled to, among other things, at least $10,000 in damages.

The Court has considered jurisdictional issues in two key cases challenging SB8, both of which continue to unfold in the lower courts as of this writing. Before SB8 took effect, abortion providers and patient advocates filed *Whole Woman's Health v. Jackson* (2021), a pre-enforcement challenge in federal district court against the Texas attorney general, a state court judge, a state court clerk, several state medical licensing officials, and a private defendant who had indicated his intent to bring SB8 enforcement suits, alleging that SB8 is a pre-viability abortion ban that is unconstitutional under *Roe* and *Casey*. All defendants moved to dismiss, and the district court denied the motion. After the defendants appealed, the Fifth Circuit stayed the district court's proceedings and rejected the plaintiffs' request for an injunction pending appeal. The plaintiffs sought emergency injunctive relief in the Supreme Court, which the Court denied on September 1, 2021, noting that the plaintiffs had "raised serious question regarding the constitutionality" of SB8 but that their application "present[ed] complex and novel antecedent procedural questions on which they have not carried their burden." The Chief Justice and Justices Breyer, Sotomayor, and Kagan each filed dissenting opinions.

The United States subsequently sued the State of Texas in federal district court, seeking declaratory and injunctive relief against the enforcement of SB8, and alleging that SB8 violated the Fourteenth Amendment and Supremacy Clause, was preempted in part, and violated the principle of intergovernmental immunity. The United States asserted that it had authority to bring the suit in equity to protect the supremacy of the Constitution. The district court granted a preliminary injunction, forbidding the State, including its officers, employees, agents, and anyone else acting on its behalf, from enforcing SB8. Texas and three private intervenor defendants appealed and moved for a stay pending appeal. The Fifth Circuit granted a stay of the preliminary injunction, and the United States filed an application asking the Supreme Court to vacate the stay.

The Court treated the United States' application as a petition for writ of certiorari before judgment and granted it, as well as a petition for writ of certiorari before judgment that the private plaintiffs had filed. After expedited briefing and oral argument, the Court issued a decision in the private plaintiffs' case, *Whole Woman's Health v. Jackson*, in which the Court held that the plaintiffs' pre-enforcement challenge could proceed past the motion to dismiss stage but only against the state licensing officials. Five Justices (Justice Gorsuch, joined by Justices Thomas, Alito, Kavanaugh, and Barrett) agreed that the suit could not proceed against (1) the state court judge and state court clerk, because they do not fall within the *Ex parte Young* exception to state sovereign immunity and because they are not adverse to plaintiffs for Article III purposes; (2) the Texas attorney general, because he lacks authority to enforce SB8; and (3) the private defendant, as he had filed a declaration disclaiming any intent to file an SB8 suit against the plaintiffs. The Chief Justice, joined by Justices Breyer, Sotomayor, and Kagan, concurred in the judgment in part and dissented in part. He agreed with a plurality opinion (written by Justice Gorsuch and joined by Justices Alito, Kavanaugh, and Barrett) that the suit could proceed against the licensing officials, but Chief Justice Roberts would have also allowed the suit to proceed against the Texas attorney general and the state court clerk. Justice Sotomayor, in an opinion joined by Justices Breyer and Kagan, warned that by "blessing significant portions of [SB8's] effort to evade review," the Court had "clear[ed] the way for States to reprise and perfect Texas' scheme in the future to target the exercise of any right recognized by this Court with which they disagree." The Court separately dismissed the United States' petition as improvidently granted and denied the application to vacate the Fifth Circuit's stay; only Justice Sotomayor noted a dissent.

On remand in *Whole Woman's Health*, the Fifth Circuit granted the defendants' motion to certify to the Texas Supreme Court the question of whether the state licensing officials do, in fact, have authority to enforce SB8 as a matter of state law. The plaintiffs petitioned the U.S. Supreme Court for a writ of mandamus directing the Fifth Circuit to return the case to the district court, which the Court denied over the dissent of Justices Breyer, Sotomayor, and Kagan. The Texas Supreme Court is scheduled to hear arguments on the certified question on February 24.

On remand in the United States' case, the United States moved in the Fifth Circuit to vacate the preliminary injunction in light of the Supreme Court's decision in *Whole Woman's Health* and remand to the district court for further proceedings, which the defendants opposed. The Fifth Circuit ordered that the motion be carried with the case and set the appeal for briefing and oral argument.

In addition to the federal court litigation discussed above, there are 14 consolidated cases challenging SB8 under the Federal and Texas Constitutions that are currently pending in Texas state court.

THE JUST COMPENSATION CLAUSE

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I. The Public Use Requirement

In *Kelo v. City of New London* (2005), the Court held that “public use” may include government taking of a property that would then be deeded to another private party as part of an urban development plan. The Court left open the possibility that a taking that is not part of a broader urban development plan, but instead effects a “one-to-one” transfer from one private party to another (even if it would increase jobs and a government’s property tax base), would violate the Fifth Amendment. Justice O’Connor, joined by Chief Justice Rehnquist, Justice Scalia, and Justice Thomas, dissented, stating that the Court’s holding that a transfer of property from one private party to another constituted “public use” “abandons [a] long-held, basic limitation on government power.”

The Court’s opinion in *Kelo* relied upon its prior holding in *Hawaii Housing Authority v. Midkiff* (1984). In *Midkiff*, the Court sustained a Hawaiian effort to purchase and to redistribute land to broaden the ownership of land in fee simple. Although Justice O’Connor had written the Court’s opinion in *Midkiff*, her dissenting opinion in *Kelo* distinguished the government program in *Midkiff* on the ground that it was intended to remedy a distinctly public problem (oligarchic land ownership), whereas the urban development plan at issue in *Kelo* was not.

II. Regulatory Takings

Justice Holmes' opinion in *Pennsylvania Coal Co. v. Mahon* (1922) held that the Just Compensation Clause not only reaches a "direct appropriation" of property but also regulation—"while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

How much is "too far" has been the subject of considerable dispute. In *Penn Central Transp. Co. v. New York City* (1978), the Court set forth several factors for determining whether a regulation on the use of property—though short of any type of physical occupation—had effected a taking: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the government action (a taking is more likely if the conduct can be characterized as akin to a "physical invasion," and less likely if the interference "arises from some public program adjusting the benefits and burdens of economic life to promote the common good."). Applying these factors, the Court found that New York City's program to preserve historic landmarks by placing restrictions on the development of individual landmarks did not constitute a taking. Certain members of the Court have criticized the *Penn Central* test as leading to inconsistent results. *Bridge Aina Le'a v. Hawaii Land Use Commission* (2021) (Thomas, J., dissenting in denial of certiorari) ("A know-it-when-you-see-it test is no good if one court sees it and another does not."). Nevertheless, the "flexible test developed in *Penn Central*" remains the framework generally applied for government regulations restricting the use of property. *See Cedar Point Nursery v. Nassid* (2021).

However, the Court has adopted a pair of categorical rules that supersede the *Penn Central* factors in the regulatory takings context. First, the physical occupation or invasion of property, including through regulation, is a taking for which the government must provide "just compensation." *See Loretto v. Teleprompter Manhattan CATV Corp.* (1982) (law permitting cable company to attach wires to apartment buildings was physical, though slight, occupation of property and thus a taking that must be compensated).

In *Cedar Point Nursery v. Hassid* (2021), the Court reaffirmed the rule that "[w]henever a regulation results in a physical appropriation of property, a *per se* taking has occurred, and *Penn Central* has no place." Accordingly, in *Cedar Point*, the Court determined that a regulation granting union organizers the right to physically enter the land of certain agricultural growers up to 120 days per year, obviating the owner's right to exclude, constituted a taking by physical invasion. The Court recognized, however, that when a property owner has otherwise opened the property to the public, such that there is no unauthorized physical invasion, rules governing access would be subject to the *Penn Central* test rather than the categorical rule. In addition, the Court acknowledged a number of exceptions to the categorical rule with respect to government actions that might be characterized as physical invasions, including isolated intrusions more properly treated as a trespass than an appropriation of property, an invasion that "is consistent with longstanding background restrictions on property rights," and where the government has required "property owners to cede a right of access as a condition of receiving certain benefits." The dissent, authored by Justice Breyer, and joined by Justices Sotomayor and Kagan, asserted that the access regulation at issue did not constitute a permanent physical invasion under the Court's precedent, and should therefore be analyzed under the multi-factor *Penn Central* framework. The dissent also cautioned that a large number of ordinary government regulations, including inspections, would potentially be subject to the majority's categorical rule.

Second, the Court has recognized a categorical regulatory taking "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good. . . ." *Lucas v. South Carolina Coastal Council* (1992). Imposition of such a regulation would require compensation, the Court said, unless "background principles of nuisance and property law independently restrict the owner's intended use of the property." Because the regulation at issue in *Lucas*, which banned the construction of any permanent habitable structures on two lots, deprived the owner of all economically beneficial uses and no background principles otherwise restricted the owner's intended use, the regulation amounted to a taking.

The Court in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* (2002), however, declined to apply *Lucas's* categorical approach in holding that a regulation prohibiting any construction on lakefront property for a 32-month period was not a taking. The Court applied the *Penn Central* factors, and key to its decision to apply the multi-factor test was that the moratorium applied only for a definite period of time. One must consider, the Court said, "the parcel as a whole"—a consideration that precluded "severing" the 32-month segment from the remainder of the landowner's fee simple estate—in evaluating whether a taking occurred.

More recently, the Supreme Court has considered the proper inquiry for determining the unit of property against which to assess the economic impact of the challenged government action (the "denominator"), a necessary analysis in applying either *Penn Central* or *Lucas*. *Murr v. Wisconsin* (2017). The Court stressed that an "objective" analysis determined "whether reasonable expectations about property ownership would lead a landowner to anticipate that his holdings would be treated as one parcel, or, instead, as separate tracts." Courts should consider (1) "the treatment of the land under state and local law, in particular how it is bounded or divided," (2) "the physical characteristics of the landowner's property," and (3) "the value of the property under the challenged regulation, with special attention to the effect of burdened land on the value of other holdings."

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THE TREATY POWER

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II. Subject Matter Restrictions on Treaties

Article I, section 8 of the Constitution defines the legislative power of Congress, and the Tenth Amendment generally reserves to the States matters not delegated to Congress. The power to "make treaties" is, however, one expressly delegated to the federal Government, and the Supreme Court has held that treaties may extend to matters that are beyond Congress's enumerated legislative powers and otherwise within the reserved powers of the States. *See Missouri v. Holland* (1920). In so holding, the Court rejected the argument that "what an act of Congress could not do unaided, in derogation of the powers reserved to the States, a treaty cannot do." *Id.* Separately, *Holland* also held that "[i]f the treaty is valid there can be no dispute about the validity of the statute as a necessary and proper means to execute" the treaty—even if such legislation goes beyond the powers enumerated in Article I, section 8. *Id.*

This is not to say that the matters subject to regulation by treaty and congressional implementing legislation are unlimited. At a minimum, a treaty may not contravene an express prohibition in the Constitution, such as a provision of the Bill of Rights. *See, e.g., Reid v. Covert* (1957). The Court has left open whether there are other limits on the treaty power. *See Holland* (1920) ("We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way."). The treaty at issue in *Holland* involved birds that annually traveled across international borders—a fact that was central to the Court's holding in that case. *Id*. It is possible that treaties aimed at matters outside the traditional topics requiring international consent—the rules of war, peace, alliance, rights of diplomats, borders, international commerce, property disputes, and the reciprocal rights of resident aliens, to name a few—could be the subject of constitutional objections. In *Bond v. United States* (2014), three Justices (Scalia, Thomas, and Alito, JJ) joined a concurring opinion that discussed "the structural and historical evidence suggesting that the Treaty Power can be used to arrange intercourse with other nations, but not to regulate purely domestic affairs."

Federalism principles may also limit Congress's power in implementing a treaty. In *Bond v. United States* (2014), the Court construed a treaty-implementing criminal statute that barred the use of chemical weapons not to reach a case of local assault that likely violated several state statutes. The majority explained that the treaty had arisen in response to war crimes and terrorism and that Congress must accordingly have intended "a much more limited prohibition" in its implementing statute than one that would "fundamentally upset the Constitution's balance between national and local power." *Id.* Concurring in the judgment, Justices Scalia and Thomas concluded that Congress lacked authority to enact the statute, reasoning—contrary to *Holland*—that Congress "must rely upon its independent" Article I, § 8 powers to implement a treaty. Senator Cruz, a Judiciary Committee member, has similarly criticized *Holland* and argued that "when the federal government acts to create or implement a treaty, the Constitution requires that it do so pursuant to an enumerated power." Sen. Ted Cruz, *Limits on the Treaty Power*, Harv. L. Rev. (2014).

The Constitution does give the States some authority to enter into agreements with foreign governments, although that power is regulated by the federal government. The Compact Clause provides that "[n]o State shall, without the Consent of Congress … enter into any Agreement or Compact … with a foreign Power." U.S. Const. Art. I, § 10, cl. 3. Under that authority, Congress has, for example, consented to agreements between States and Canada or Mexico concerning bridges connecting those countries with ours. 33 U.S.C. 535a.

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VOTING RIGHTS

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III. Voting Rights and Ballot Access

In general, "evenhanded restrictions [on the right to vote] that protect the integrity and reliability of the electoral process" are constitutional. *Crawford v. Marion County Election Board* (2008). When voting laws are challenged as unconstitutional because they allegedly burden the right to vote, courts balance those burdens against the governmental interest in maintaining the challenged practice. The doctrinal framework for that analysis is typically referred to as the *Anderson-Burdick* test. *See Anderson v. Celebrezze*, 460 U.S. 780 (1983). The *Anderson-Burdick* framework uses a flexible sliding scale, in which the rigorousness of the court's inquiry increases with the severity of the burden. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). For example, when a state imposes a severe burden, strict scrutiny applies and any burdensome action must be narrowly tailored to advance a compelling state interest. *Id*.

In *Crawford*, the Supreme Court upheld Indiana's voter identification statute, with a plurality concluding that the burdens imposed on the right to vote were outweighed by the State's interests in deterring and detecting voter fraud and safeguarding voter confidence. Justices Scalia, Thomas, and Alito agreed with the result, but would have applied a different test. In their view, "nonsevere, nondiscriminatory restrictions" should be upheld if they serve important regulatory interests, whereas laws that impose severe burdens on everyone's right to vote (not just some individuals') should be subjected to strict scrutiny. The Indiana law fell into the former category.

The Seventh Circuit deployed this kind of analysis to uphold Wisconsin's voter-ID law. *Frank v. Walker* (7th Cir. 2016). The law was challenged by voters who are arguably unable to obtain a qualifying photo ID with reasonable effort. After a series of appeals and remands, in 2020 the Seventh Circuit issued an opinion reversing an injunction that provided significant leeway to voters to substitute an affidavit for a required ID. It instructed the district court not to "order any relief that excuses applicants from the failure to comply with reasonable requests for information that is material to voting eligibility." *Luft v. Evers*, 963 F.3d 665, 680 (7th Cir. 2020).

Courts in recent years have also upheld some voting laws, and invalidated others, in the face of race discrimination claims. For example, the *en banc* Fifth Circuit concluded that Texas's voter ID law had a discriminatory result on the ability of minority voters to participate in the electoral process in violation of Section 2 of the Voting Rights Act, but remanded for the district court to reconsider its finding that the law was enacted for a racially discriminatory purpose. *Veasey v. Abbott* (5th Cir. 2016) (en banc). During remand, the Texas legislature passed a law designed to cure the flaws cited when the case was first tried. Plaintiffs, however, successfully convinced the district court to enjoin not only the first voter ID law but also the new ameliorative law, effectively reinstating a voting law in Texas that lacked any photo voter ID requirement. The Fifth Circuit granted the State's emergency motion and reversed the district court's permanent injunction. *Veasey v. Abbott* (5th Cir. 2018). The court held that, under the circumstances of the case, the district court had no legal basis to invalidate the new law.

In contrast, the Fourth Circuit concluded that North Carolina's omnibus election law—which included new voter ID requirements as well as new changes regarding early voting, same-day registration and provisional ballots—was enacted for a discriminatory purpose in violation of Section 2, the Equal Protection of the Fourteenth Amendment, and the voting guarantees of the Fifteenth and Twenty-Sixth Amendments. *N.C. State Conf. of the NAACP v. McCrory* (4th Cir. 2016). North Carolina's petition for a writ of certiorari was denied. Meanwhile, the Fourth Circuit upheld Virginia's voter identification law, which allowed voters to use more forms of identification than did the North Carolina statute struck down in *McCrory*, from legal challenges. *Lee v. Va. State Bd. of Elections* (4th Cir. 2016).

In *Brnovich v. Democratic National Committee* (2021), the Supreme Court considered challenges to two Arizona laws related to elections, one prohibiting the counting of provisional ballots cast outside of a voter's home precinct and another prohibiting collection of voted ballots by third parties in most instances when they are not related to the voter. This was the first case for the Court to consider claims of vote denial or abridgement (as opposed to vote dilution) under the results standard of Section 2 of the Voting Rights Act. The Court's decision did not articulate a test per se for such claims, but discussed some relevant factors that lower courts could consider under the totality of the circumstances. These guideposts, which are neither exhaustive nor determinative, include, among others, the size and degree of the burden on voting, the size of the disparities between the protected class and other groups, and the opportunities provided by a state's voting system. The Court's decision also discussed the standard for proving discriminatory intent claims.

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INTERSTATE COMMERCE CLAUSE, SPENDING CLAUSE, FEDERALISM, AND THE TENTH AMENDMENT

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I. Interstate Commerce Clause

The Supreme Court's understanding of the scope of Congress's power to "regulate Commerce . . . among the several States" has fluctuated over the centuries. Under Chief Justice Marshall, the Court interpreted this power broadly, enabling Congress to pass legislation that created at first a fledgling economy of national scope and later a common market of worldwide significance. From the 1880s until the 1930s, the Court attempted to narrow the federal government's ability to regulate commerce, but beginning in the 1940s, the Court adopted a broad construction of Congress's authority to employ the commerce power that encompassed not only interstate commerce, but also intrastate activities that substantially affect interstate commerce. This trend continued through the civil rights era and into the 1990s. In 1995, the Court, for the first time since the 1930s, found that Congress had exceeded its authority in regulating private conduct through the Commerce Clause. And in 2012, a majority of the Court found that a legal requirement to purchase health insurance did not fall within Congress's authority under the Commerce Clause, even though the Court upheld the mandate pursuant to Congress's taxing power.

The Supreme Court broadly interpreted the Commerce Clause in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). There, the Court struck down a New York law that gave two individuals an exclusive monopoly to operate steamships on the State's waters. To the extent that the State's license prevented steamships licensed by the federal government from operating on the State's navigable waters, the New York law was unconstitutional. The Court found that navigation is commerce, and that interstate commerce is "restricted to that commerce which concerns more States than one." *Id.* at 195. On this last point, the Court explained that "[t]he phrase is not one which would probably have been selected to indicate the completely interior traffic of a State, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce, to which the power was to be extended, would not have been made, had the intention been to extend the power to every description." *Id.* at 194–95. Congressional power over interstate commerce is "the power to regulate; that is, to prescribe the rule by which commerce is to be governed." *Id.* at 196. And where the federal government has regulated commerce, the States cannot interfere with that Congressional regulation. In concert with the Necessary and Proper Clause as interpreted by the Court's earlier decision in *McCulloch v. Maryland* (1819), the Commerce Clause became a potent force for Congressional action.

After the Civil War, the Court's case law began to spell out in more detail the limits on the Commerce Power. In *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895), the Court rejected the government's Sherman Act claim against a monopolizer of sugar manufacturing. The Court found that "[c]ommerce succeeds to manufacture, and is not a part of it." *Id.* at 12. For the next four decades, the Court adopted a narrow reading of the Commerce Clause to defeat various federal statutes that increased government control over the economy, such as laws outlawing the interstate shipment of goods made by child labor. Even through the New Deal, the Court continued to distinguish between "direct" and "indirect" interstate commerce, finding that production with the intent to transport across state lines could not be constitutionally regulated by Congress. *See A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 546–47 (1935) (discussing the "necessary and well-established distinction between direct and indirect effects" upon interstate commerce). The Court also relied on the Tenth Amendment as a barrier to federal action. *Carter v. Carter Coal Co.* 298 U.S. 238, 294–97 (1936) (holding that the Bituminous Coal Conservation Act was unconstitutional, where Congress sought to regulate the production of coal).

The Court repudiated this reading of the Commerce Clause in the 1940s. In 1941, the Supreme Court upheld the Fair Labor Standards Act as against a Commerce Clause and Tenth Amendment challenge. *United States v. Darby*, 312 U.S. 100, (1941) ("The power of Congress over interstate commerce is not confined to the regulation of commerce among the states," but extends to activities that "have a substantial effect on interstate commerce."). In the same decision, the Court held that the Tenth Amendment was a "truism," in which that which is not delegated is retained. *Id.* at 125. Then, in *Wickard v. Filburn*, 317 U.S. 111, 125 (1942), the Court held that Congress, under its Commerce Clause power, may regulate even local non-commerce (growing of wheat for on-farm consumption) that exerts a "substantial economic effect on interstate commerce."

In the 1960s, Congress relied on the Commerce Clause to enact the public accommodation provisions of the Civil Rights Act of 1964, which prohibited discrimination even as to small businesses operating in only one location. In *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964), the Court held that Congress may regulate the use of the channels of interstate commerce and the local incidents of interstate commerce, "including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce."

In more recent cases, the Supreme Court has acknowledged that Congress's power to "regulate Commerce . . . among the several States," while broad, has some limiting principles.

The first was *United States v. Lopez*, 514 U.S. 549 (1995), where the Court invalidated 5-4 a federal statute prohibiting the possession of a firearm near a school zone. Reviewing its opinions, the Court noted that Congress's authority to regulate extends to three categories: (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce; and (3) activities that substantially affect interstate commerce. The first two are not controversial; *Lopez* focused on the third. Within this class, the Court distinguished economic from non-economic activity. Noting precedents such as *Wickard*, the Court concluded that purely intrastate economic activity "substantially affects" interstate commerce when the activity in the aggregate clearly affects interstate commerce. (Thus, per *Wickard*, if everyone grew wheat at home for personal consumption, the interstate wheat market would be substantially affected.) The Court also allowed regulation of purely intrastate activity where such regulation forms "an essential part of a larger regulation or economic activity." The Court in *Lopez* further noted two methods by which Congress might have established the requisite connection to interstate commerce, neither of which was present in the statute at issue. First, the statute could have contained an express interstate jurisdictional element. Second, Congress could have included explicit factual findings showing the connection to commerce, although the Court acknowledged that such findings were not necessary. The Court finally concluded that the "possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of commerce," and therefore invalidated the statute.

In *United States v. Morrison*, 529 U.S. 598 (2000), the Court invalidated a provision of the Violence Against Women Act that provided a federal civil remedy for the victims of gender-motivated violence. The Court dismissed Congress's findings regarding the impact of gender-motivated violence, asserting that whether the effects on interstate commerce were sufficient posed a judicial rather than a legislative question. The Court chastised Congress for its method of reasoning, specifically for relying on an extensive causal chain that ultimately would eliminate any limits on federal authority from the Commerce Clause:

> In these cases, Congress' findings are substantially weakened by the fact that they rely so heavily on a method of reasoning that we have already rejected as unworkable if we are to maintain the Constitution's enumeration of powers. . . . The reasoning that petitioners advance seeks to follow the but-for causal chain from the initial occurrence of violent crime (the suppression of which has always been the prime object of the States' police power) to every attenuated effect upon interstate commerce. If accepted, petitioners' reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption. Indeed, if Congress may regulate gender-motivated violence, it would be able to regulate murder or any other type of violence since gender-motivated violence, as a subset of all violent crime, is certain to have lesser economic impacts than the larger class of *which* it is a part.

Id. at 615–16. Therefore, Congress may not "regulate non-economic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." *Id.* at 617. The Court declined to adopt a strict rule that non-economic activity may never be aggregated for determining whether it substantially impacts interstate commerce.

Justice Souter's dissenting opinion in *Morrison*, joined by three other Justices, argued that there should be *no* judicially enforced limits on the Commerce Clause power. In the view of the *Morrison* dissenters, the national political process provides the sole means of enforcing the limits on Congress's enumerated powers. Several commentators have endorsed this "political safeguards of federalism" theory, though others have criticized it. In Chief Justice Roberts's hearing, Chairman Specter expressed the view that the Court in this area should not second-guess the factual findings made by Congress to support Congress's conclusions about an effect on interstate commerce.

In *Gonzales v. Raich*, 545 U.S. 1 (2005), the Court held that the Commerce Clause allows Congress to prohibit the intrastate cultivation and use of marijuana. Relying on *Wickard*, the Court reasoned that intrastate production of marijuana has a substantial effect on supply and demand in the national market for that commodity, and so could be regulated by Congress. The Court said that it need not determine whether the growers' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a "rational basis" exists for so concluding. *Id.* at 19. In *Raich*, the Court said, Congress had a rational basis to conclude that "leaving home-consumed marijuana outside federal control would … affect price and market conditions," especially in light of the enforcement difficulties with distinguishing marijuana cultivated locally and marijuana grown elsewhere, and concerns about diversion into illicit channels. *Id.* The Court distinguished *Lopez* and *Morrison*, as cases that "had nothing to do with 'commerce' or any sort of economic enterprise."

In *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012) ("*NFIB I*"), a majority of the Court found that the "individual mandate" under the Patient Protection and Affordable Care Act—which imposed a minimum essential coverage requirement under which certain individuals must purchase and maintain health insurance coverage—exceeded Congress's power under the Commerce Clause and the Necessary and Proper Clause. Chief Justice Roberts arrived at this conclusion, in a portion of his opinion that was not joined by any of the other Justices. The joint dissent (Scalia, Kennedy, Thomas, Alito) also arrived at the conclusion that Congress had no authority under the Commerce Clause or the Necessary and Proper Clause to impose the individual mandate. *See id.* at 648 (joint dissent) ("Whatever may be the conceptual limits upon the Commerce Clause and upon the power to tax and spend, they cannot be such as will enable the Federal Government to regulate all private conduct and to compel the States to function as administrators of federal programs."). The Court, however, ultimately upheld the mandate as a permissible exercise of the Congress's taxing power.

The Court has not directly entertained another major challenge to Congress's power to regulate interstate commerce since its decision in *NFIB*. In recent months, the Court has struck down government actions to mitigate the COVID-19 pandemic by applying the "major questions" doctrine to its reading of federal statutes. Under this doctrine, the Court "'expect[s] Congress to speak clearly' if it wishes to assign to an executive agency decisions 'of vast economic and political significance.'" *Alabama Ass'n of Realtors v. Dep't of Health & Human*

Servs., 141 S. Ct. 2485, 2489 (2021) ("*Alabama Realtors*") (CDC moratorium on evictions); *see also National Federation of Independent Business v. Dep't of Labor*, 142 S. Ct. 661, 665 (2022) ("*NFIB II*") (striking down OSHA's "vaccine or test" mandate on businesses with more than 100 employees). The doctrine, at least in part, reflects concerns on the part of at least some Justices that the federal government simply lacked the authority under the interstate commerce clause to order a nationwide eviction moratorium (*Alabama Realtors*) or vaccination rules (*NFIB II*). *NFIB II*, 142 S. Ct. at 667–68 (Gorsuch, J., concurring) (asserting that the authority to require individuals to undergo a medical procedure has "been regulated at the state level by authorities who enjoy broader and more general governmental powers" than the federal government); *Alabama Realtors*, 141 S. Ct. at 2489 ("The moratorium intrudes into an area that is the particular domain of state law: the landlord-tenant relationship.").

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B. Preemption

Preemption occurs where both Congress and the States seek to regulate private actors. The Supreme Court has held that federal law preempts state law when: (1) a federal statute contains an express preemption provision ("express preemption"); (2) Congress has occupied a field of regulation, where the framework of regulation is "so pervasive . . . that Congress left no room for the States to supplement it" or where a "federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject" ("field preemption"); or (3) federal law conflicts with state law, including when state law stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" ("conflict preemption"). *Arizona v. United States*, 567 U.S. 387, 399–400 (2012). (Although Justice Thomas has stated that he does not agree that "standing as an obstacle" is a proper basis for preemption, he, like all the other Justices, agrees that state law is preempted until conflict preemption principles when it is actually impossible for a private party to comply with both federal and state law.)

While each type of preemption is reflected in Supreme Court jurisprudence, the Court recently emphasized that "all of them work in the same way: Congress enacts a law that imposes restrictions or confers rights on private actors; a state law confers rights or imposes restrictions that conflict with the federal law; and therefore the federal law takes precedence and the state law is preempted." *Murphy*, 138 S. Ct. at 1480. The Supremacy Clause, which is the basis for the preemption doctrine, "is not an independent grant of legislative power to Congress," but "simply provides a rule of decision." *Id.* at 1479. For a federal law to validly preempt state law, it must: (1) represent the exercise of a power (apart from the Supremacy Clause) conferred on Congress by the Constitution; and (2) regulate the conduct of private actors, not the States themselves (to avoid running afoul of the anticommandeering doctrine discussed above). *Id.*

We have included a sampling of Supreme Court preemption cases:

Engine Manufacturers Association v. South Coast Air Quality Management District, 541 U.S. 246 (2004), held that the Clean Air Act preempted a local government's vehicle fleet rules that prohibited the purchase or lease of certain types of vehicles.

Aetna Health, Inc. v. Davila, 542 U.S. 200 (2004), held that ERISA completely preempted state claims alleging injuries to a plan beneficiary from administrators' decisions not to provide coverage.

Wyeth v. Levine, 555 U.S. 555 (2009), held that FDA's labeling approvals did not provide a brand drug manufacturer with a complete defense to state tort claims (i.e., claims that the manufacturer failed to provide adequate warnings regarding the administration of its drug). But "clear evidence" that the FDA would not have approved a change to the drug's label preempts a claim, grounded in state law, that a drug manufacturer failed to warn consumers of the change-related risks associated with using the drug. In *Merck Sharp & Dohme Corp. v. Albrecht*, 139 S. Ct. 1668 (2019), the Supreme Court clarified that such determinations are made by a judge, not a jury.

Arizona v. Inter Tribal Council of Arizona, 570 U.S. 1 (2013), held that the National Voter Registration Act, which required States to "accept and use" a uniform federal form to register voters for federal elections, preempted Arizona's law rejecting any application for registration not accompanied by documentary evidence of citizenship.

Mutual Pharm. Co. v. Bartlett, 570 U.S. 472 (2013), held that state law design-defect claims against a generic drug manufacturer that turn on the adequacy of a drug's warnings were preempted by federal law. The Court cited *PLIVA v. Mensing*, 564 U.S. 604 (2011), which held that federal law prohibits generic drug manufactures from independently changing their drugs' labels (but federal law does not prohibit brand drug manufacturers from doing so, see *Wyeth*). Accordingly, preemption applied because state law imposed a duty on the generic manufacturer not to comply with federal law.

In a 3-3-3 decision, the Court held in *Virginia Uranium, Inc. v. Warren*, 139 S. Ct. 1894 (2019), that the Atomic Energy Act does not preempt a Virginia law banning uranium mining. Justices Gorsuch, Thomas, and Kavanaugh found neither field nor conflict preemption, reasoning that "Congress conspicuously chose to leave untouched the States' historic authority over the regulation of mining activities on private lands within their borders" and nothing "suggest[ed] that the enforcement of Virginia's law would frustrate the AEA's purposes and objectives." Justices Ginsburg, Sotomayor, and Kagan agreed that there was no preemption, but wrote separately due to a disagreement with Justice Gorsuch's "discussion of the perils of inquiring into legislative motive," which "sweeps well beyond the confines of this case." Chief Justice Roberts, joined by Justices Breyer and Alito, dissented. They would have found the Virginia law preempted because the State impermissibly regulated a field that was "*not* preempted (uranium mining safety) as an indirect means of regulating other fields that are preempted (safety concerns about uranium milling and tailings)."

Kansas v. Garcia, 140 S. Ct. 791, 797 (2020), held that the Immigration Reform and Control Act of 1986—which provides that certain employment forms and "any information contained in or appended to such form[s] may not be used for purposes other than for enforcement of " listed federal statutes —did not expressly or impliedly preempt a Kansas law that criminalizes the "using" of any "personal identifying information" belonging to another person with the intent to "[d]efraud that person, anyone else, in order to receive any benefit."

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CRIMINAL LAW—DEATH PENALTY, EIGHTH AMENDMENT, AND RELATED HABEAS RULES

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted"

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A. Procedural Default and Abuse of the Writ

Two judge-made doctrines limit habeas relief even in the absence of AEDPA's various statutory bars: procedural default and abuse of the writ. Under the procedural default doctrine, a defendant who has exhausted his direct appeals and collateral review in state court is precluded from raising new issues in a subsequent federal habeas petition. A federal court will entertain a procedurally defaulted claim in a habeas petition only if the prisoner shows either (1) cause and prejudice to excuse the default or (2) "actual innocence." *Murray v. Carrier* (1986).

"[T]he existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the . . . procedural rule." *Murray*. In addition, "cause" may exist where "a constitutional claim is so novel that its legal basis is not reasonably available to counsel." *Reed v. Ross* (1984). This requires more than a showing that circuit precedent foreclosed the claim at the time of direct review. *Engle v. Isaac* (1982). For instance, in *Maples v. Thomas* (2012), the Court held that Maples could show "cause" to excuse his procedural default based on the unannounced and unauthorized abandonment without notice of Maples' case by his lawyers.

Inadequate assistance of counsel at initial-review collateral proceedings may also establish "cause" for a procedural default of a claim of ineffective assistance at trial. *Martinez v. Ryan* (2012). That is, where a state requires a defendant to raise an ineffective-assistance claim in collateral post-conviction proceedings rather than on direct appeal, the ineffectiveness of the defendant's *post-conviction* counsel may provide "cause" to excuse the defendant's failure to perfect in state court his challenge to the effectiveness of his *trial* counsel (but the Court did not recognize a constitutional right to counsel in collateral post-conviction proceedings). In *Trevino v. Thaler* (2013), the Court clarified that *Martinez* also applies when the state strongly encourages – but does not require – a defendant to raise his ineffective-assistance claim in a collateral post-conviction proceeding. *See Trevino v. Thaler* (Texas procedures for capital cases created timing limits that rendered it highly likely that a direct appeal will not furnish a meaningful opportunity to challenge trial counsel's effectiveness).

"Actual prejudice" requires a showing that the error worked to the defendant's "actual and substantial disadvantage." *United States v. Frady* (1982).

Even if a prisoner cannot establish cause and prejudice, he can still have his defaulted claim heard if he meets the extraordinary standard of "actual innocence." Where an actual innocence claim is based on newly discovered evidence, the petitioner must show "that more likely than not, in light of the new evidence, no reasonable juror would find him guilty beyond a reasonable doubt." *House v. Bell* (2006). "'[A]ctual innocence' means factual innocence, not mere legal insufficiency," meaning the government can expand the record to rebut a claim of actual innocence. *Bousley v. United States* (1998). In capital cases, a defaulting petitioner can show "actual innocence" if he shows by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the aggravating circumstances that rendered him eligible for the death penalty. *Sawyer v. Whitley* (1992).

In addition to the procedural default rule, federal habeas review is limited by the abuse-of-the-writ doctrine. This doctrine prevents a habeas petitioner from "raising a claim in a subsequent petition that he could have raised in his first." *McCleskey v. Zant* (1991). As with procedural default, a petitioner may be heard on the merits of the new claim if he shows both cause for his failure to include the claim earlier and actual prejudice resulting from the alleged error.

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CRIMINAL PROCEDURE—THE FOURTH AMENDMENT

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

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B. Exclusionary Rule

In *Weeks v. United States* (1914), the Court held that evidence obtained in violation of the Fourth Amendment could not be admitted in a federal prosecution. And in *Mapp v. Ohio* (1961), the Court held that the exclusionary rule applied in state courts as well because "the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments." The exclusionary rule is "not a personal constitutional right," nor is it designed to "redress the injury" caused by a Fourth Amendment violation. *Stone v. Powell* (1976). Instead, the rule's "sole purpose" is to deter Fourth Amendment violations by the police. *Davis v. United States* (2011). That is, the rule is designed "to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Mapp*. In general, the exclusionary rule extends not only to the evidence directly obtained from the Fourth Amendment violation, but also to secondary evidence that is the "fruit of the poisonous tree," unless the connection between the Fourth Amendment violation and the discovery of secondary evidence has "become so attenuated as to dissipate the taint." *Wong Sun v. United States* (1963).

The exclusionary rule has its detractors. In *Hudson v. Michigan* (2006), the Court observed that "[t]he exclusionary rule generates 'substantial social costs,' which sometimes include setting the guilty free and the dangerous at large." *See also People v. Defore* (N.Y. 1926) (Cardozo, J.) ("[t]he criminal is to go free because the constable has blundered"). Justice Thomas has also expressed "serious doubts" about the authority to impose the federal exclusionary rule on state courts, noting that the rule is "not rooted in the Constitution or a federal statute." *Collins v Virginia* (2018) (Thomas, J., concurring).

Rather than abolish the rule, however, the Supreme Court has cut back on the rule's application in cases where the Court does not believe exclusion would serve the rule's purposes. That is, the Court will not apply the exclusionary rule unless its deterrent benefits outweigh its costs. In *Hudson*, for example, the Court concluded that violation of the knock-and-announce rule did not require suppression because "the social costs of applying the exclusionary rule to knock-and-announce violations are considerable; the incentive to such violations is minimal to begin with, and the extant deterrences against them are substantial." Additional exceptions to the exclusionary rule are addressed below.

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CRIMINAL PROCEDURE—THE FIFTH AND SIXTH AMENDMENTS

The Fifth Amendment

No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself . . . .

I. Double Jeopardy

Under the Double Jeopardy Clause of the Fifth Amendment, no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." The Clause protects against both successive prosecution and successive punishment for the same offense. It does not, however, apply to the imposition of a civil penalty (including civil confinement) following a criminal prosecution or sentence. *See Kansas v. Hendricks* (1997) (upholding involuntary confinement of convicted sex offender after being released from prison).

The Supreme Court generally relies on the "same elements" test of *Blockburger v. United States* (1932) to define the "same offense": Where the same act or transaction violates two distinct statutory provisions, they constitute separate offenses if "each statute requires proof of an additional fact which the other does not."

The Supreme Court looks to a final judgment to determine whether a person will "twice" be put in jeopardy of life or limb. "Although the common-law protection against double jeopardy historically applied only to charges on which a jury had rendered a verdict, [the Supreme Court has] long held that the Double Jeopardy Clause of the Fifth Amendment prohibits reexamination of a court-degreed acquittal to the same extent it prohibits reexamination of an acquittal by jury verdict." *Smith v. Massachusetts* (2005). Thus, where a judge, in response to a defense motion made midway through the trial, acquits on an offense due to lack of evidence, the court's ruling qualifies as a "judgment of acquittal" for purposes of the Double Jeopardy Clause and the judge may not revisit it.

The Double Jeopardy protection also incorporates a principle of issue preclusion. Thus, where a jury acquits on some counts and hangs on others, each involving the same issue, double jeopardy bars retrial on the hung counts. *Yeager v. United States* (2009). But when a jury returns irreconcilably inconsistent verdicts on the question, double jeopardy does not bar retrial of the issue. *United States v. Powell* (1984). Similarly, when a jury returns inconsistent verdicts of conviction and acquittal and the guilty verdicts are vacated on appeal, the issue-preclusion component of the Double Jeopardy Clause does not bar retrial on the vacated counts of conviction. *Bravo-Fernandez v. United States* (2016). And a defendant may not rely on the issue-preclusion principle of the Double Jeopardy Clause to preclude a trial on charges that the defendant had expressly agreed to sever from the charges in the first trial. *Currier v. Virginia* (2018).

The Supreme Court has held that the Double Jeopardy Clause does not bar successive prosecutions for the same conduct by separate sovereigns, such as two different states, or a state and the federal government. *See Heath v. Alabama* (1985); *Commonwealth of Puerto Rico v. Sanchez Valle* (2016). The Court recently reaffirmed this "separate sovereigns" doctrine in *Gamble v. United States* (2019), in a decision by Justice Alito. Justice Ginsburg and Justice Gorsuch authored dissents. Justice Thomas wrote separately to note that his "initial skepticism" of the doctrine was not supported by the "historical record." On February 22, 2022, the Court will hear arguments in *Denezpi v. United States*, No. 20-7622, to determine whether a defendant who was previously convicted of tribal offenses in a regulatory court established by the Bureau of Indian Affairs may also be convicted of federal offenses.

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The Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . to be confronted with the witnesses against him . . . , and to have the Assistance of Counsel for his defence.

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B. Scientific Reports

In *Melendez-Diaz v. Massachusetts* (2009), the Court held that chemists' certificates of analysis – certifying that particular substances contained cocaine were admissible under the Confrontation Clause – were equivalent to affidavits, which fall into the "core class of testimonial statements." Absent live testimony from the chemists, the certificates were inadmissible. *See also Bullcoming v. New Mexico* (2011) ("surrogate testimony" by "a scientist who did not sign the certification or perform or observe the test reported in the certification" but was familiar with the laboratory's testing procedures did not satisfy Confrontation Clause).

In *Williams v. Illinois* (2012), a divided Court found no Confrontation Clause violation from the admission of expert testimony based on the report of a non-testifying DNA analyst. Five justices concluded that the underlying DNA analysis was not testimonial, but they could not agree on the appropriate test for what is "testimonial." Writing for a four-justice plurality, Justice Alito concluded that the report was not offered for its truth, but merely formed the basis for the expert's testimony, and therefore did not implicate the Confrontation Clause. Alternatively, the plurality reasoned that even if the statements in the report were admitted for their truth, they were not testimonial because the "report's primary purpose was to catch a dangerous rapist who was still at large," and not to accuse a "targeted individual." Justice Thomas concurred, reasoning that the statements in the report *were* admitted for their truth, but the underlying DNA analysis was not testimonial because it did not contain sufficient solemnity to trigger the Confrontation Clause.

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IV. Right to Jury Trial / Sentencing Issues

In *Apprendi v. New Jersey* (2000), the Court held that, except for the existence of a prior conviction, the Sixth Amendment right to trial by jury requires that any *fact* that increases the statutory maximum sentence must be submitted to a jury and proved beyond a reasonable doubt. In this context, "statutory maximum" means "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Blakely v. Washington* (2004).

The Court has applied *Apprendi*'s rule to instances involving plea bargains, *Blakely v. Washington* (2004), mandatory sentencing guidelines, *United States v. Booker* (2005), criminal fines, *Southern Union Co. v. United States* (2012), and capital punishment, *Ring v. Arizona* (2002). *See also Hurst v. Florida* (2016) (Florida's capital sentencing scheme, under which an advisory jury makes a recommendation to a judge, and the judge makes the critical findings needed for imposition of a death sentence, violates the Sixth Amendment right to jury trial). *Ring* and *Hurst* do not apply retroactively on collateral review and an appellate court may reweigh sentencing factors. *McKinney v. Arizona* (2020).

Indeed, it was the requirement of jury factfinding that led the Court to declare the mandatory Sentencing Guidelines unconstitutional and refashion them as advisory. *Booker* (2005). The Court has also extended *Apprendi* to require that "any fact that increases the mandatory minimum . . . be submitted to the jury." *Alleyne v. United States* (2013).

The Supreme Court recently extended *Apprendi* to revocation of post-incarceration supervised release. *United States v. Haymond* (2019). A four justice plurality—Justice Gorsuch, joined by Justices Ginsburg, Sotomayor, and Kagan—concluded that *Apprendi* applied to supervised release. As a result, a district court cannot revoke a defendant's supervised release and send him back to prison for an additional term "beyond that authorized by the jury's verdict" "based on facts found by a judge by a mere preponderance of the evidence." Justice Breyer concurred in the judgment. He agreed with the plurality that "the specific provision of the supervised-release statute, § 3583(k), is unconstitutional." But he reached this conclusion because it mandates a fixed five-year term of imprisonment for a particular set of crimes committed while on supervised release, regardless of the original term of supervised release. In dissent, Justice Alito, joined by the Chief Justice and Justices Thomas and Kavanaugh, found that the jury trial right did not apply because revocation of supervised release was the administration of a previously imposed sentence.

The Court recently held that the Sixth Amendment required a state to obtain a unanimous jury verdict to convict a defendant of a serious offense. *Ramos v. Louisiana* (2020). This decision overruled precedents that had held recognized that the Sixth Amendment jury right was incorporated against the states, but did not require the states to obtain a unanimous verdict. *See Apodaca v. Oregon* (1972). The unanimity requirement does not apply retroactively on federal collateral review. *Edwards v. Vannoy* (2021).

EXECUTIVE POWER AND WAR ISSUES

I. President's War Powers and Other Inherent Powers

It has long been understood that the President possesses inherent power to ensure the security of the nation, even absent express congressional authorization, *In re Neagle* (1890), but the extent of that power and its interaction with congressional power is a more difficult question. Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer* (1952) sets forth a widely accepted framework for evaluating presidential power: In the first category, "the President acts pursuant to an express or implied authorization of Congress." Here, "the strongest of presumptions and the widest latitude of judicial interpretation" attach. In the second category, the President acts in the absence of either congressional authorization or prohibition. In this situation, "there is a zone of twilight in which [the President] and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or acquiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility." Finally, in the third category, the President acts contrary to the express or implied will of Congress. It is here that the President's "power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject."

Of course, the *Youngstown* framework is not a complete solution to thorny issues of presidential power. It does not address how a Court should determine whether Congress has indeed authorized an action, but case law suggests that congressional authorization need not be explicit or specific. In *Dames & Moore v. Regan* (1981), for example, the Court held that Congress had impliedly authorized President Carter to suspend claims proceedings in American courts as part of an Iran claims settlement deal because of "the general tenor of Congress's legislation in th[e] area" and "history of congressional acquiescence" to claim settlement by executive agreement. The same year, the Court concluded that Congress had acquiesced in the Executive's exercise of power to revoke a passport, even though such power had rarely been exercised, because the occasions calling for its exercise had also been rare. *Haig v. Agee* (1981). And in *Hamdi v. Rumsfeld* (2004), five Justices of the Court concluded that Congress had expressly authorized the detention of enemy combatants during hostilities in Afghanistan when it passed the Authorization for the Use of Military Force after September 11, 2001, on the ground that detention was a "fundamental incident" of Congress's more general authorization of the use of force.

Nor does the *Youngstown* framework resolve whether a president is properly exercising one of his constitutional powers or whether such power is exclusive. The Supreme Court grappled with these questions in *Zivotofsky ex rel. Zivotofsky v. Kerry* (2015), where the Executive and Congress pressed competing claims of authority to determine whether children of U.S. nationals born in Jerusalem should have their passports and consular reports of birth abroad list their place of birth as "Israel." Congress had passed a statute directing such issuance at an applicant's request, and the Executive had refused to comply, contending that the statute infringed the President's recognition power. A 5-justice majority concluded that the statute ran afoul of the Executive's "exclusive" power to recognize foreign nations and governments. Justice Thomas concurred in part and dissented in part, concluding that the President had no power to overrule Congress's decision about the consular report of birth abroad, but that Congress had no power to regulate that aspect of the passport. The Chief Justice and Justices Scalia and Alito dissented, concluding that, even if the President possessed the exclusive recognition power (a proposition they found doubtful), the statute did not implicate that power. Moreover, in their view, if Congress and the President enjoyed concurrent powers over a subject, Congress's authority would always trump the President's, as the President is tasked with taking care that laws be faithfully executed.

Outside the unique context of responding to an attack on the United States, the Supreme Court has avoided ruling directly on whether the President may conduct military operations without express authorization from Congress. *See The Amy Warwick*, 67 U.S. 635, 668 (1862) ("If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force . . . without waiting for any special legislative authority."). The Department of Justice's Office of Legal Counsel (OLC) has set forth the Executive Branch's views about when the President may direct the use of military force in the absence of express authorization from Congress. Drawing upon dozens of examples in 230 years of American history, and upon previous OLC and Attorney General opinions issued in both Republican and Democratic administrations, OLC has explained in publicly-released opinions that its analysis of proposed military actions has turned on two inquiries: (1) whether the President could reasonably determine that the proposed action serves important national interests, and (2) whether the "anticipated nature, scope, and duration" of the conflict might rise to the level of a war under the Constitution. Applying that test, OLC has concluded in many different contexts that the President was authorized to use force in the national interest without prior congressional approval. Recent examples include OLC's guidance in April 2011 that the President had the authority to direct the use of force in Libya to preserve regional stability and support the credibility and effectiveness of the United Nations Security Council; in April 2018, that the President could lawfully direct airstrikes against three facilities associated with the chemical-weapons capability of Syria; and in January 2020, that the President could lawfully direct an airstrike targeting a commander of the Iranian Islamic Revolutionary Guard Corps "actively developing plans" for attacks on United States military personnel and diplomats in Iraq.

II. Detention of Combatants, the Geneva Conventions, Military Commissions, and Guantanamo Bay

A. Power to Detain and Try Enemy Combatants

The President may capture and detain lawful combatants and may capture, detain, and try unlawful combatants during active hostilities. *Ex parte Quirin* (1942). Even citizens may be so detained, at least where Congress has authorized such detention. *Hamdi v. Rumsfeld* (2004). But the President may not detain and try by military tribunal citizens not qualifying as enemy combatants or connected with the military, at least so long as the courts are open. *Ex parte Milligan* (1866).

The war in Afghanistan and the broader conflict against al-Qaeda have prompted much litigation about the President's power to detain. As noted above, in *Hamdi* (2004), a majority of the Supreme Court concluded that the President had power to detain within the United States a U.S. citizen captured on the battlefield in Afghanistan. A four-Justice plurality and Justice Thomas (in dissent) agreed that by authorizing the President "to use all necessary and appropriate force against those nations, organizations, or persons" associated with the September 11, 2001, terrorist attacks, the AUMF allows the detention of "individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al[-]Qaeda terrorist network responsible for [the September 11] attacks" for the duration of the particular conflict in which they were captured. Thus, the AUMF is an "Act of Congress" for purposes of 18 U.S.C. § 4001(a), which provides that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." In addition, a four-Justice plurality concluded that, pursuant to the Due Process Clause, "a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." The Court did not resolve whether the President would have had authority to detain Hamdi in the absence of the AUMF. Further, the plurality explained that its understanding of detention authority under the AUMF was based on "long-standing law of war principles," and "[i]f the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel."Relying on *Hamdi*, the Fourth Circuit held in *Padilla v. Hanft* (2005) that the AUMF also authorized the President to detain as an enemy combatant a U.S. citizen associated with al-Qaeda and captured inside the United States. The Fourth Circuit rejected Jose Padilla's claim that capture in the United States requires the government to use the process of criminal law enforcement rather than military detention. Subsequently, a divided Fourth Circuit, sitting *en banc*, similarly held in *al-Marri v. Pucciarelli* (2008) that the AUMF authorized the President to detain U.S. citizen enemy combatants associated with al-Qaeda and captured in the United States.

In *Al-Bihani v. Obama* (2010) and subsequent cases, the D.C. Circuit relying on *Hamdi* held that the AUMF authorizes the detention of alien enemy combatants who were "part of or substantially supported" al-Qaeda, Taliban, or associated forces. And in the National Defense Authorization Act for Fiscal Year 2012 (FY2012 NDAA), Congress expressly "affirm[ed]" that the AUMF "includes the authority for the United States to detain covered persons [including those who were part of or substantially supported al-Qaeda, the Taliban, or associated forces] . . . pending disposition under the laws of war," and further provided that the statute did not "affect existing law or authorities relating to the detention of" United States persons or others captured in the United States.

In *Al-Alwi v. Trump* (2018), a Guantanamo detainee argued, based on the *Hamdi* plurality's reservation, that the government's authority to detain an enemy combatant under the 2001 AUMF had "unraveled" because the war in Afghanistan was a new species of conflict uninformed by the previous law of war. The D.C. Circuit, however, rejected the argument and upheld the government's detention authority, concluding that the conflict in Afghanistan at the time had not terminated for purposes of the AUMF when no "political act" had signaled an end of the conflict. The District Court for the District of Columbia is currently considering whether the withdrawal of United States military forces from Afghanistan has terminated the conflict authorized by the AUMF.

As affirmed in the FY2012 NDAA, the 2001 AUMF applies to “al-Qa’ida, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners.” The Obama, Trump, and Biden Administrations have all interpreted the 2001 AUMF as authorizing the use of force against the Islamic State of Iraq and Syria (known as “ISIS” and “ISIL”), among other groups. Since 2014, Congress has repeatedly appropriated funds to support the United States’ counter-ISIS efforts. The Department of Justice has filed briefs in the D.C. district court arguing that ISIS is within the ambit of the 2001 AUMF because of its relationship with al-Qaida, but the court has not found it necessary to reach a decision on the issue to date.

Scoped Out Per Agreement

From: Morawetz, Nancy
Subject: [EXTERNAL] article on the new Supreme Court and implications for individual litigators and government counsel
To: Guttentag, Lucas (ODAG)
Sent: February 1, 2022 3:50 PM (UTC-05:00)
Attached: 2022 2 1 draft for submission.docx

Hi Lucas,

I hope that you are well.

I wanted to share with you an article I have written about how the Supreme Court has changed its approach to technical immigration cases and the perils that poses for both government policy positions and immigration litigators. I discuss the approach being taken in B-Z-R- and other options for resolving issues at an agency level. I welcome any comments and of course would be very happy to discuss any of this.

Thanks,

Nancy

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The Perils of Supreme Court Intervention in Previously Technical Immigration Cases

Nancy Morawetz[†*]

This Article argues that the Post-Kennedy Court has altered its approach to immigration law issues that the Court previously treated as technical. Surveying cases from 2001 through 2018 of technical issues related to the deportability and relief eligibility of noncitizens with past criminal convictions, the Article shows that the Court often ruled unanimously either for or against the noncitizen, and that relatively few cases were decided on conventional ideological grounds. Since Justice Kennedy's retirement, however, the two first highly technical cases concerning eligibility for relief from deportation for noncitizens with convictions were decided on conventional ideological grounds. Furthermore, the Court's opinions showed a disdain for past precedent and methodological approaches that have protected noncitizens from harsh readings of these laws. Recent cases have also gone beyond the position adopted by the government, either in its briefs or in published agency precedent. The result is a situation in which plenary review in the Supreme Court threatens the rights of noncitizens and at times the policy positions of the Administration. The article argues that this new situation creates obligations for counsel, potential amici and government counsel.

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It is now clear that the Supreme Court has swung to the right in a way that threatens longstanding precedent in many areas of law.[1] In addition, the Court has adopted new tools for exerting its power through the "shadow docket" even when it does not ultimately consider a case on the merits.[2] In immigration, both these trends are evident in high profile cases, such as the Supreme Court's rushed intervention to require the Biden Administration to reinstate the Trump Administration's policy of keeping asylum seekers in Mexico under the Orwellian title: "Migration Protection Protocols."[3]

This article posits that the trend towards anti-immigrant decisions has moved from areas that have been politically charged to areas of immigration law that used to be considered technical. As the technical has become political, the steady stream of once-technical cases threatens to solidify anti-immigrant policies that will be very hard to undo. Understanding the dangers of Supreme Court intervention is therefore essential both for immigration advocates and for an administration that defends a multitude of technical decisions about how to read immigration laws. Today, when any issue reaches the Supreme Court, the odds of a result that undermines both immigrant rights and the power of the Executive to administer laws with any element of compassion is high.

This article does not suggest that cases can be neatly categorized as political or technical. Indeed, all Supreme Court cases about immigration law involve questions of how to best interpret constitutional and statutory

[1] *See, e.g*, *Whole Women's Health v. Jackson*, No. 21A24 (Sept. 1, 2021)(denying stay of Texas law banning most abortions); *Brnovich* v. *Democratic National Committee*, 141 S.Ct. 2321, 2351 (1 (2021)(Kagan, dissenting)(charging that Court has rewritten Voting Rights Act to match policy preferences); Lee Kovarsky, *The Trump Executions*, U of Texas Public Law Research Paper (July 27, 2021)(showing how the Supreme Court facilitated former President Trump's rush to executions); Aziz Huq, *The Roberts Court is Dying. Here's What Comes Next*, POLITICO (Sept. 15, 2021)(commenting on how even when the Chief Justice has broken with his conservative colleagues, he has done so on process, not substance).

[2] *See, e.g.*, Steven Vladeck, *The Supreme Court doesn't just abuse its shadow docket. It does so inconsistently,* WASHINGTON POST (Sept. 3, 2021)(commenting on inconsistent use of shadow docket to advance conservative policy positions); *Alabama Ass'n of Realtors v. Dept of Health and Human Services*, No. 21A23 (Aug. 26, 2021)(intervention to prevent ban on evictions during the Covid-19 pandemic).

[3] *Biden v. Texas*, No., 21A21 (Aug. 24, 2021)(denying stay of injunction requiring reinstatement of Migration Protection Protocols);

provisions and in that sense the lawyers present technical arguments about the best readings of those provisions, as well as how to apply past caselaw and methods of interpretation. Instead, this article posits that groups of cases can move from being treated by the Court as technical to being treated as political or ideological. When that happens, it appears that the subject matter of the case leads the Justices to put a thumb on the scale of technical arguments, and the results in the cases fall along a conventional right left axis.

To illustrate this point, this article takes a close look at recent decisions at the intersection of immigration law and criminal law. Noncitizens with criminal convictions have been a target for decades in Congress.[4] In both large immigration bills and criminal law bills, Congress has treated the "criminal alien"[5] as a punching bag. The statute, debates and report language use language designed to politicize and deceive, such as terming convictions "aggravated felonies" when they are neither aggravated nor always felonies.[6] These overreaches by Congress were followed by Executive interpretations (in both Democratic and Republican administrations) that stretched the laws to be more draconian than they were written.[7] Often, however, the Supreme Court pushed back in opinions that were lopsided or even unanimous, applying the technical requirements of the statute and limiting some of the most extreme interpretations of these laws.

Now, however, the previously technical has become political. After Justice Kennedy's departure from the Court in 2018, the first two cases addressing deportability and bars to relief for noncitizens with criminal convictions were not decided as technical cases.[8] Instead, they were decided by a Court divided on conventional ideological grounds. No longer do we have, for example, a Justice Scalia, who ruled for noncitizens with criminal convictions in 6 out of 11 cases described in this article

[4] *See generally*, ALINA DAS, NO JUSTICE IN THE SHADOWS: HOW AMERICA CRIMINALIZES IMMIGRANTS (2020).
[5] This term is generally used to refer to any noncitizen who has had contact with the criminal justice system, whether through an arrest or conviction. It labels people regardless of the fairness or validity of the underlying interaction with the criminal legal system or the length of time that has passed since that interaction.
[6] Das, *supra* n.4, at 19-20.
[7] Consider for example, the agency positions that led to the trio of Supreme Court cases on the proper application of the "drug trafficking" aggravated felony ground, discussed infra at 9-13.
[8] *See infra* pages 18-29.

between 1996 and his death in 2016.[9] No longer do we have cases in which Justice Sotomayor and Justice Thomas are in agreement in a divided case.[10] We are in a very different time, and any case runs a serious risk of being decided in the shadow of the same anti-immigrant tropes about the "criminal alien" that fueled some of the worst excesses in Congress and without regard to precedent and principles that have shaped prior rulings. Today, the Court may take a case as an opportunity to read the immigration laws in ways that were never articulated by any formal agency decision but are instead developed by lawyers defending an agency result in a particular case. Indeed, the Court will go beyond arguments advanced by government counsel and thereby close off defenses to deportation and impose greater harshness on noncitizens. Both litigators and those in the Executive seeking to preserve a modicum of humanity in the immigration laws ignore these trends at their peril.

Part I of this article describes the how the Court treated cases concerning noncitizens with criminal convictions who face deportability or possible bars to a discretionary hearing during the period before Justice Kennedy's departure from the Court. Part II explores the Court's two post-Kennedy decisions in this area and argues that they mark a decided shift from the past. Part III offers some observations on steps that litigators and the Executive could take to curtail the opportunities for the current Supreme Court to impose further damage on immigration law.

I. The 1996 Laws and Supreme Court Treatment of Cases in Deportability and Access to Relief for Noncitizens with Criminal Convictions: 1996-2018

The post-Kennedy Court has dramatically shifted in its treatment of cases involving deportability and access to relief hearings for noncitizens with criminal convictions. This part begins with a description of the kinds of legal issues that have reached the Court since passage of the landmark 1996 immigration laws and how they were treated by the Court prior to Justice Kennedy's departure.

[9] The cases discussed in this article are set out in the Appendix to this article. Those in which Justice Scalia ruled for the immigrant were *Leocal* v. *Ashcroft,* 543 U.S. 1 (2004); *Lopez* v. *Gonzales,* 549 U.S. 47 (2006); *Carachuri-Rosendo* v. *Holder,* 560 U.S. 563 (2010); *Judulang* v. *Holder*, 565 U.S. 42 (2011); *Moncrieffe* v. *Holder,* 569 U.S. 184 (2013); and *Mellouli* v. *Lynch,* 575 U.S. 798 (2015). Although three of these cases were unanimous, Justice Scalia broke with Justices Thomas and Alito in *Moncrieffe* and *Mellouli* and with Justice Thomas in *Lopez*.

[10] *Luna Torres* v. *Lynch*, 578 U.S. 452 (2016)

A. <u>The 1996 Laws, and How they Changed Immigration Law and Set the Stage for Court Resolution of Legal Questions</u>

The 1996 Congress made sweeping changes to immigration law, including revamping the rules governing long-time residents who faced deportation.[11] Congress expanded grounds of deportability and altered the eligibility rules for a wide array of forms of relief from deportation. Each one of these new provisions created legal questions about the scope of the changes. Despite the passage of 25 years, many legal questions are not settled, and the Supreme Court continues to play a central role in deciding what makes someone deportable and what makes that person eligible for relief from deportation.

Prior to 1996, two forms of relief protected long time noncitizens from being deported without a chance at a hearing in which they could present individualized facts about their situation. The first of these, relief under Section 212(c) of the Immigration and Nationality Act ("INA"),[12] was available to lawful permanent residents. In 1996, the eligibility criteria required that the person have seven years of lawful residence and not have been convicted of an "aggravated felony" for which the person had served five years in prison.[13] At the time, the immigration law had a list of convictions that were considered "aggravated felonies." The limitation on relief based on having served five years for a conviction of an aggravated felony limited the scope of the provision, although it no doubt applied in a disparate way based on racial justice disparities that determined the

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[11] *See generally*, Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 Harv. L. Rev. 1936 (2000); Jason Cade, *The Plea Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 Cardozo L. Rev. 1751 (2013).
[12] Immigration and Nationality Act, Pub.L.No. 82-414, 66 Stat. 163 (1952), § 212(c).
[13] The text of the law stated: "Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title. The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years. 8 U.S.C.A. § 1182 (West)(1996)

length of sentences and how much time was served.[14]

The second form of relief, for noncitizens who were not lawful permanent residents, was "suspension of deportation." The eligibility requirements for this form of relief depended on the reason why the individual was deportable. For those deportable on criminal grounds, eligibility for relief required continuous residence of ten years following commission of the act that was the ground of deportation.[15] The individual would then have to show that deportation would cause exceptional and extremely unusual hardship to the individual facing deportation or to a spouse, parent or child who was a United States citizen of a lawful permanent resident.

These two forms of relief from deportation had a long history, dating back to 1940 when the Attorney General concluded that discretionary relief was permitted under the Seventh Proviso of the section 3 of the Immigration Act of 1917 could be read to provide discretion to permit discretionary relief from deportation for a noncitizen deportable for a crime involving moral turpitude.[16] In 1952 the INA further cemented these forms of relief setting out formal eligibility criteria.[17] Although they were revised over time, these two forms of relief provided a crucial safety valve in cases where the government sought to deport a noncitizen. As

[14] *See generally* REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS SPECIAL RAPPORTEUR ON CONTEMPORARY FORMS OF RACISM, RACIAL DISCRIMINATION, XENOPHOBIA, AND RELATED INTOLERANCE REGARDING RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM (2018)(documenting extensive racial disparities throughout every stage of the criminal legal system); THE SENTENCING PROJECT, REDUCING RACIAL DISPARITIES IN THE CRIMINAL JUSTICE SYSTEM (2000)(same).

[15] For those deportable on various criminal grounds, the law provided the following requirements for the person seeking relief: "has been physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence…" 8 U.S.C.A. § 1254 (West)(1996).

[16] *Matter of L-*, 1 I. & N. Dec. 1 (BIA 1940). For a critique of how these forms of relief were applied in practice, and racial disparities in the granting of relief, *see* MAE NGAI, IMPOSSIBLE SUBJECTS (2014).

[17] Immigration and Nationality Act, Pub.L.No. 82-414, 66 Stat. 163 (1952), § 244.

developed in case law, they allowed for consideration of such equities as length of residence in the United States, family ties, military service, employment history and rehabilitation since any criminal offense.[18]

The 1996 Congress expanded the grounds of deportability, including adding and expanding a long list of convictions deemed "aggravated felonies." Some categories were defined by a generic type of offense, while others were defined through a cross-reference to a federal crime.[19] Some were cabined by the length of the prison term;[20] some were cabined by a dollar loss amount;[21] some were not cabined by anything other than the type of crime.[22] These new deportability grounds raised numerous questions about the breadth of the immigration categories and which state law crimes fell under the federal categories.

Congress also altered the requirements for obtaining a relief hearing. For lawful permanent residents, two simultaneous changes in the 1996 law greatly reduced access to a 212(c) hearing. A new form of relief called "cancellation of removal" for lawful permanent residents ("LPR cancellation") eliminated any sentence requirement for disqualifying "aggravated felonies."[23] This greatly reduced access to a relief hearing. This change went beyond that proposed in either house of Congress, which had proposed that a lawful permanent resident be barred from such an equity hearing if he or she had been convicted of an "aggravated felony" for which the sentence imposed was five years.[24] As a result, the newly expanded "aggravated felony" definition, without any qualifier served to both impose deportability and bar relief from removal.[25]

[18] *See, e.g., Matter of Y- C- C-,* 6 I. & N. Dec. 670 (BIA 1955)(granting suspension for long time noncitizen who provided service to the merchant marine during war years); *Matter of B-,* 5 I & N Dec. 72 (BIA)(1953)(granting suspension and concluding that bar based on subversive associations did not apply where they were "acts of a young girl in love.")
[19] *Compare* 8 U.S.C. 1101(a)(43)(S)(offense relating to perjury) *with* 8 USC 1101(a)(43)(B)(cross referencing federal controlled substance laws).
[20] *See, e.g.,* 8 U.S.C. 1101(a)(43)(F)(crime of violence); G (theft offense).
[21] *See, e.g.,* 8 U.S.C. 1101(a)(43(M)(fraud involving loss exceeding $10,000.)
[22] *See, e.g.,* 8 U.S.C. 1101(a)(43)(sexual abuse of a minor).
[23] 8 U.S.C. 1229b(a).
[24] Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws*, at 1955 n. 106 (discussing legislative history and how restriction was added in a conference report).
[25] The effect of both of these changes was amplified by new definitional provisions that defined the terms "conviction" and "sentence." Under 8 U.S.C. 1101(a)(48) a suspended sentence is treated as a sentence, and some dispositions

For noncitizens who lacked permanent resident status, Congress also greatly altered access to relief. Under the new law, cancellation of removal for non-lawful permanent residents (non-LPR cancellation") is unavailable to a person with a conviction for any offense that is an inadmissibility ground (namely an offense that could be used to prevent a new visa or, in general, entry into the country) or for an offense that is a ground of deportability (namely an offense that renders a person subject to expulsion).[26] In addition, the old law allowed a noncitizen facing deportation to show that deportation would cause the noncitizen exceptional and extremely unusual hardship. Under the 1996 law, the only relevant hardship is to a parent, spouse, or child who is a lawful permanent resident or a United States citizen.[27]

Congress also added additional bars to relief based on the time of any offense. For both the continuous residence requirements of LPR and non-LPR cancellation, Congress created a "stop time" rule that stops the clock on continuous residence based on service of a charging document for certain criminal offenses.[28] In a sense, the stop time rule operates in the opposite way of the pre-1996 law for suspension, which looked at the time of good moral character since the offense. As voted on in the House and Senate, the "stop time" rule only stopped accrual of time at the time the charging document was served. The conference report added an additional bar based on the timing of criminal dispositions.[29]

Together, new grounds of deportability and new eligibility requirements for an individualized relief hearing, now called "cancellation of removal," raised a dizzying array of legal questions. These included how to match criminal convictions under the laws of the fifty states to the dozens of categories of aggravated felonies; how the laws applied to those who were convicted before the laws were enacted; and how to read new rules about computing the length of continuous residence.

B. Litigation in the Supreme Court Over Deportability and Access to Relief from Deportation Between 2001 and 2018

that would not be considered convictions under state law are deemed to be convictions under federal immigration law.

[26] 8 U.S.C. 1229b(b)(1)(C).

[27] 8 U.S.C. 1229b(B)(1)(D).

[28] 8 U.S.C. §1229b(d).

[29] See Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U.L. Rev. 97, 151-52 (1998)(discussing legislative history of stop time provision).

Leading up to Justice Kennedy's retirement in 2018, cases involving deportability, relief from removal, and the intersection of immigration and criminal law were largely treated as technical as opposed to ideological cases.[30] During the period from 2001 and 2018 the Court decided fourteen cases on the substantive rights of noncitizens with criminal convictions in cases involving either criteria for deportability or criminal bars to an individualized relief hearing. These cases involved the scope of the aggravated felony definition (which triggers deportability and bars individualized relief hearings), the methodology for comparing state convictions to federal categories and other issues related to eligibility for relief. The cases broke both in favor and against the immigrant and a large portion of cases were decided by lopsided majorities. The cases also read as technical examinations of the relevant law.

1. Cases about the Scope of the Aggravated Felony Definition and Grounds for Deportation

A large number of Supreme Court cases in the 2001 – 2018 period concerned the definition of an "aggravated felony." This category serves as a bar to any equity hearing for lawful permanent residents as well as other noncitizens. For lawful permanent residents, an aggravated felony conviction bars consideration of the equities of the case, regardless of the strength of those equities, such as service in the United States military, decades of rehabilitation, or having all of one's family in the United States.[31] For non-permanent residents, it served as a bar to even considering whether removal would cause, for example, "extraordinary and extremely unusual hardship" to a United States citizen spouse or child.[32] As a result, the contours of the aggravated felony definition have enormous importance in determining the fate of non-United States citizens. The Court's decisions were split in terms of whether they upheld the government. But they were also overwhelmingly lopsided, or even unanimous majorities for the positions taken by the Court.

[30] Note that this specific dividing line is chosen based on the group of cases discussed in this article. Other cases divided along ideological grounds earlier. *See*, *e.g.*, *Demore* v. *Kim*, 538 U.S. 510 (2003)(splitting 5-4 on the merits of challenge to mandatory detention); *Jennings* v. Rodriguez, 138 S. Ct. 830 (2018)(splitting 5-3 on the merits of a challenge to mandatory detention).
[31] 8 U.S.C. §1229b(a)(3). *See Matter of C-V-T-*, 22 I&N Dec. 7, 11 (BIA 1998)(describing factors that can be considered at a cancellation hearing).
[32] 8 U.S.C. §1229b(b)(1)(C)(barring those with convictions under any ground of deportability, including convictions labeled as aggravated felonies).

a) Controlled Substance Cases

Between 2006 and 2013, the Court decided three cases on the proper scope of the aggravated felony definition for drug trafficking crimes. In each of these cases, the Court ruled for the immigrant by a lopsided majority.

In 2006, the Court considered *Lopez v. Gonzales*.[33] The government argued that any state felony drug conviction should be treated as a drug trafficking aggravated felony, even if the state law did not require any trafficking element for a conviction. The Court ruled 8-1 against the government. In an opinion joined by Chief Justice Roberts and Justices Scalia and Alito, Justice Souter wrote that the government's position did not fit "with any commonsense conception of 'illegal trafficking.'"[34] Furthermore, it meant that a crime that could not be punished as a felony under federal law was being treated as an aggravated felony simply because the state chose to label it that way. The Court paid particular attention to the implications of the government's argument for marijuana offenses. It noted that the federal statute treats marijuana possession as a misdemeanor and that the grounds of deportability for controlled substance offense exclude small amounts of marijuana.[35]

Four years later in *Carachuri-Rosendo v. Holder*,[36] the Court revisited which controlled substance offenses would be categorized as aggravated felonies. In *Carachuri-Rosendo*, the government took the position that any two drug possession convictions, no matter how classified by the state, should together be treated as a drug trafficking aggravated felony. The government's position rested on the fact that a federal prosecutor could charge a second possession offense as a recidivist offense and, in that hypothetical scenario, the individual could be convicted of a felony under federal law.[37] The Court's ruling was unanimous against the government, although Justices Scalia and Thomas concurred on separate grounds. The Court noted that under federal law the classification of a second marijuana offense depends on whether a prosecutor had chosen to charge an individual as a recidivist. It rejected the idea that a hypothetical state prosecution could visit the harsh consequences of the aggravated felony label.[38]

[33] 549 U.S. 47 (2006).
[34] *Id*. at 53.
[35] *Id*. at 59.
[36] 560 U.S. 563 (2010).
[37] *Id*. at 575-76.
[38] *Id*. at 579.

Three years later, the Court returned to the controlled substance aggravated felony category in *Moncrieffe v. Holder*.[39] The issue in *Moncrieffe* was how to categorize a state marijuana conviction under a law that was expansive enough to include small transfers of marijuana for no remuneration. The issue arose because under federal law, the transfer of a small amount of marijuana is punished as a misdemeanor.[40] This time the Court ruled 7-2 against the government with Chief Justices Roberts and Justice Scalia joining the majority and Justices Thomas and Alito dissenting. The Court concluded that an offense that would be punished as a misdemeanor under federal law could not be treated as a drug trafficking aggravated felony.

b) <u>Other Aggravated Felony Categories</u>

The Court heard seven cases about the aggravated felony category that did not involve controlled substances. The immigrant won three of these cases and the government prevailed in four. Once again, most of the margins were lopsided. Three cases were unanimous; one was 8-1; two were 6-3. The single 5-4 case involved constitutional questions about the void for vagueness doctrine.

In *Leocal v. Ashcroft*,[41] a 2004 case, Chief Justice Rehnquist wrote for a unanimous Court that the crime of violence aggravated felony category did not reach convictions for driving under the influence based on criminal negligence.

In *Gonzales v. Duenas-Alvarez*,[42] a 2006 case, the Court ruled 8-1 for the government on whether a California theft conviction was an aggravated felony. The Court found that immigrant's the argument for treating the California statute as reaching offenses outside the scope of the federal category depended on "legal imagination."[43] The Court concluded that a noncitizen seeking to show that a state crime should be interpreted as falling outside a federal category must show a realistic a realistic probability that the state statute is actually broader than the federal statute.

In 2009 and 2012, the Court considered two cases involving the

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[39] 569 U.S. 184 (2013).
[40] *Id*. at 199 (discussing how government's argument would treat a federal misdemeanor as a felony).
[41] 543 U.S. 1 (2004).
[42] 549 U.S. 183 (2007).
[43] *Id*. at 193.

fraud aggravated felony category. In *Nijhawan* v. *Holder*,[44] the Court ruled 9-0 for the government that the categorical approach – a methodology for determining whether a state conviction matches the federal conviction-based category - did not apply to the amount threshold for an aggravated felony fraud offense. In *Kawashima* v. *Holder*,[45] the Court proceeded to rule 6-3 for the government that the tax evasion aggravated felony category reaches a board swath of tax offenses. Justices Ginsburg, Breyer and Kagan dissented.

In 2016, in *Luna Torres v. Lynch*,[46] the Court considered whether state crimes that did not involve any interstate commerce element fell within the federal aggravated felony for arson committed across state lines. The Court ruled 6-3 for the government that the state crimes were aggravated felonies and that the absence of an interstate commerce element, as argued in that case,[47] did not matter. Justices Sotomayor, Thomas and Breyer dissented.

In 2017, in *Esquivel-Quintana v. Sessions*,[48] the Court took on the aggravated felony category directed to convictions for sexual abuse of a minor. The eight-member Court unanimously rejected the government's position that the law extended to convictions in states where the age of consent is 18.

The only closely divided decision was the Court's 2018 5-4 ruling in *Sessions v. Dimaya*.[49] *Dimaya* was a void for vagueness challenge to one aspect of the crime of violence aggravated felony. Justice Kagan wrote for the Court in an opinion joined in part by Justice Gorsuch. Chief Justice Roberts dissented, along with Justices Alito, Thomas and Kennedy. A separate dissent by Justice Thomas would have further limited the types of arguments that could be presented by noncitizens.

c. Other Deportability Grounds

In the years since 1996, the Court heard one case about grounds of deportability other than the aggravated felony ground. In *Mellouli v.*

[44] 557 U.S. 29 (2009).
[45] 565 U.S. 478 (2012).
[46] 578 U.S. 452 (2016).
[47] The Court limited its holding to situations where the interstate commerce element is purely jurisdictional. 136 S.Ct. at 1634.
[48] 137 S.Ct. 1562 (2017).
[49] 138 S.Ct. 1204 (2018).

Lynch,[50] the Court considered deportability based on a state drug conviction from a state that punishes a broader set of substances than the federal law. Although the underlying question in the case could have been at issue before 1996, since it involved a pre-existing basis for deportation, the case was a product of the 1996 laws. Mellouli had entered lawfully in 2004, so that a conviction in 2010, if it was a basis of deportability, would bar him from relief from removal. That was because the 1996 law created a "stop time" rule that limited access to relief for those who were deportable within their first seven years in the country.[51] The Court ruled 7-2 in favor of Mellouli's argument that the Kansas state was not a match with the federal controlled substance statute. The opinion was joined by Chief Justice Roberts and Justice Scalia. The dissenters were Justices Thomas and Alito.

2. Other Issues Related to Deportability and Relief for Noncitizens with Criminal Convictions

In the years between 2001 and 2018, the Court decided five other cases that related to deportability and access to relief. Two of these cases were decided 9-0, one for the noncitizen and one from the government. Other cases were decided 8-1 and 6-3 for the noncitizen. Only one was a 5-4 split.

In 2001, the Court ruled 5-4 in *I.N.S. v. St. Cyr*[52] that changes in access to relief in the 1996 law should not be applied retroactively. This case broke on ideological grounds with four dissenters: Justices Scalia, Thomas, O'Connor and Chief Justice Rehnquist. Notably, however, the dissenters did not reach the merits of the claims. Instead, they would have found that the Court lacked jurisdiction over this substantive questions.[53]

In 2011, the Court resolved the complicated fallout of its decision in *St Cyr* about access to pre-1996 relief under section 212(c) of the INA. In *Judulang* v. *Holder*,[54] a unanimous Court ruled that access to pre-1996 relief was broadly available for lawful permanent residents with pre-1996 convictions, rejecting artificial distinctions drawn by the circuit courts and the agency on the scope of access to prior relief.

In 2012, the Court also considered the proper interpretation of a

[50] 575 U.S. 798 (2015).
[51] 8 U.S.C. §§1229b(1)(2)(&(d).
[52] 533 U.S. 289 (2001).
[53] *Id*. at 326.
[54] 565 U.S. 42 (2011).

new provision defining when a noncitizen who travels should be subject to the rules for new applicants for admission. In *Vartelas* v. *Holder*,[55] the Court concluded 6-3 that the new rules should not apply to a person who had a conviction that pre-dated the 1996 laws. Chief Justice Roberts joined the majority. Justices Scalia, Thomas and Alito dissented.

C. Reflections on the 2001-2018 Period of Litigation.

A detailed look at cases decided between 2001 and 2018 shows that they were treated largely as part of the Court's technical statutory docket, and not as highly controversial decisions.[56] These cases generally recognized the two-step process for determining whether deportation is mandatory and discussed rules of construction that favor statutory constructions that protect immigrants from deportation. They also firmly upheld the categorical approach methodology for determining when a noncitizen has been convicted of an offense. Even when ruling against the noncitizen, these cases did not rely on any presumed generalized Congressional intent to rid the United States of all noncitizens with criminal convictions, but instead as cases involving technical issues of statutory construction about whether a particular level of harshness was dictated by the language of specific provisions.

a. Treating Deportability and Eligibility for Relief as Technical and Noncontroversial Cases

For the most part, the Court treated cases involving deportability on criminal grounds and restrictions on relief as technical cases that were noncontroversial. Only two of the fourteen cases, *INS v. St. Cyr* and *Dimaya v. Sessions*, were decided on a 5-4 basis. Moreover, the dissenters in *St. Cyr* did not reach the merits because they concluded that the Court lacked jurisdiction. The case therefore does not show a split on the substantive rules on who should be subject to deportation or eligible for relief. This rate of 5-4 decisions, 14%, is similar to an average rate of 5-4 decisions over the entire period of approximately 16%.[57]

55 566 U.S. 257 (2012).
56 Kevin Johnson has made a similar observation about the years 2009-13, looking at the full range of immigration cases. *See* Kevin R. Johnson, *Immigration in the Supreme Court, 2009-13: A New Era of Immigration Law Unexceptionalism*, 68 Okl. L. Rev. 57 (2015).
57 This rate of 5-4 decision is based on the annual statistical overview published by SCOTUSBlog. SCOTUSBlog has altered its methodology a bit from year to year, which is why the statistic is offered as an approximation.

The remaining cases show a high level of unanimous or very lopsided opinions. The Court decided six cases, or 43%, unanimously. Another case was 8-1 and two more were 7-2. If you put this group of nine cases together, they made up 64% of the cases on substantive rules on deportability and relief for persons with criminal convictions decided over the seventeen years.

The remaining four cases were decided by 6-3 or 5-3 margins. But the decisions did not always break on conventional ideological lines. In *Kawashima*, for example, Justice Sotomayor joined Justice Thomas's majority opinion finding that a tax offense was an aggravated felony. In *Luna Torres*, Justice Kagan drafted the opinion that ruled against the noncitizen and was joined by Justice Ginsburg. The dissent, which would have ruled for the noncitizen, included Justices Thomas, Sotomayor and Breyer. In *Dimaya*, Justice Gorsuch joined the majority opinion in favor of the noncitizen. Only *Vartelas* could be described as a split where the "swing" Justices decided the case. In that case, Justice Kennedy and Chief Justice Roberts joined Justice Ginsburg's opinion finding that new rules on treating returning lawful permanent residents as subject to inadmissibility grounds (and therefore subject to a broader set of grounds for removal) did not apply to those with pre-1996 convictions.

Students of the Court will know that these mixed coalitions are not unusual and that the public focus on an ideologically divided Court historically describes a minority of the Court's cases. The important point for purposes of this article is that this general characterization of the Court carried over to its substantive cases on which long-time noncitizen residents with criminal convictions would face deportation or a bar to an individualized hearing.

b. <u>Recognizing the Two Step System for Deportation</u>

The Court's decisions between 2001 and 2018 also demonstrated a clear understanding of the two-step process for deportation in which a broader set of deportability grounds creates the possibility of deportation and a more narrow set of bars to relief determines who has access to an individualized hearing. Access to relief was front and center in the *St. Cyr* case where the noncitizen sought to access pre-1996 relief. It was also central to the *Judulang* case where the Court concluded that the agency's implementation of the *St. Cyr* ruling was arbitrary and capricious.

Turning to the post-1996 scheme, the Court repeatedly showed its understanding of this framework in cases under the 1996 law where classification of a conviction as an "aggravated felony" would mean mandatory rather than discretionary deportation. In *Carachuri-Rosendo*, for example, the seven-member majority opinion explicitly noted that "whether a noncitizen has committed an 'aggravated felony' is relevant, inter alia, to the type of relief he may obtain from a removal order, but not to whether he is in fact removable."[58] Thus, it said, Mr. Carachuri could "avoid the harsh consequence of mandatory removal. But he will not avoid the fact that his conviction makes him, in the first instance, removable. Any relief he may obtain depends upon the discretion of the Attorney General."[59] The Court made the same point in *Moncrieffe v. Holder*, noting that "if a noncitizen has been convicted of one of a narrower set of crimes classified as 'aggravated felonies,' then he is not only deportable, but also ineligible for these discretionary forms of relief." [60]

The Court addressed access to an individualized relief hearing in two other cases. In *Lopez,* it noted that access to discretionary relief meant that Mr. Lopez's removal did not moot out the case.[61] In *Luna-Torres*, it observed that the aggravated felony classification of Mr. Luna Torres's conviction served to prevent him from seeking cancellation of removal.[62]

Although not part of the fourteen cases discussed in this article, because they were not strictly speaking about who is subject to deportation on criminal grounds and who faces a criminal bar to relief, two other cases in this time period are notable in showing the Court's clear understanding of the role of mandatory deportation rules and the stakes at issue for noncitizens. In *Padilla v. Kentucky*, issued in 2010, the Court ruled 7-2 that criminal defense counsel had breached their duties to a criminal defendant about the immigration consequences of a plea.[63] *Padilla* had a more familiar ideological split, with Justice Thomas and Scalia dissenting and arguing that there are no Sixth Amendment rights related to advice on immigration issues. Nonetheless, Chief Justice Roberts and Justice Alito concurred, agreeing that the noncitizen's rights were violated with misadvice, but seeking a more limited rule.[64] Seven years later in *Lee v. United States*, the Court ruled 6-2 that a lawful permanent resident who was misinformed about the immigration consequences of his plea did not

[58] 560 U.S. 563, 581 (2010).
[59] *Id.*
[60] 569 U.S. 184, 187 (2013)(citations omitted).
[61] 549 U.S. 47, 52 n. 7 (2006)(noting that finding on aggravated felony category determined access to relief through cancellation).
[62] 578 U.S. 452, 136 S.Ct. 1619, 1623-24 (2016).
[63] 559 U.S. 356 (2010)
[64] Id. at 375 (Alito, J., concurring).

have to show individualized prejudice.[65] This time, Chief Justice Roberts wrote the opinion for the Court. He explained that Lee's attorney had wrongly assured him that his plea would not have deportation consequences when it would in fact lead to mandatory deportation. Given the stakes for Lee, he reasoned, it was wrong to presume that Lee would not have taken his chance at going to trial had he been properly informed.[66] Justices Thomas and Alito dissented. These two cases highlighted critical features of how the deportation system works and the role of deportability and access to relief from removal. In both cases, the ineffectiveness issue arose because the underlying conviction was categorized by immigration law as a drug trafficking aggravated felony that barred discretionary relief.

c. Deciding Cases Based on the Categorical Approach

The Court's decisions between 2001 and 2018 also adopted strong endorsements of the categorical approach. As explained in these cases, the categorical approach looks at what is required for a conviction regardless of the facts alleged in the particular case. The Court considered eight cases considering whether a particular conviction should be categorized as a deportable offense or an aggravated felony.[67] Although there is plenty of room for disagreement about the specific outcomes of these cases, these cases either explicitly endorsed or applied the categorical approach.

The Court applied categorical reasoning expressly in *Carachuri*, *Moncrieffe, Mellouli*, *Nijhawan, Kawashima*, *Duenas-Alvarez* and *Luna Torres*. In each of these cases, the Court held that immigration consequences of convictions that are based on what a person was "convicted of" must look to the nature of the crime as defined by statute and not the individual facts of the noncitizen's case. In two cases, the Court observed that here was a long history in immigration law of categorizing convictions based on the least acts required for a conviction under the relevant law.[68] The seven-member majority opinion in *Mellouli* observed that "As early as 1913, courts examining the federal immigration

[65] 137 S.Ct. 1958 (2017).
[66] *Id*. at 1967-69.
[67] During this time, the Court also decided important categorical cases in the context of the Armed Career Criminal Act. *See Mathis* v. *United States, 579 U.S. 500 (2016); Descamps* v. *United States*, 570 U.S. 254 (2013).
[68] *Moncrieffe*, 569 U.S. at 191 (*citing* Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U.L. Rev. 1669, 1688-1702, 1749-1752 (2011)); *Mellouli*, 575 U.S. 798, 805 (2015)(same).

statute concluded that Congress, by tying immigration penalties to convictions, intended to "limi[t] the immigration adjudicator's assessment of a past criminal conviction to a legal analysis of the statutory offense," and to disallow "[examination] of the facts underlying the crime."[69]

d. Recognizing of Rules of Construction Favoring Noncitizen

Over the eighteen years prior to Justice Kennedy's retirement, the Court also repeatedly acknowledged the rules of construction favoring readings of statutory ambiguities to favor noncitizens facing deportation. In *St. Cyr*, the Court relied expressly on this rule of construction.[70] Other cases acknowledged the rule, while leaving its implications to another day, in light of the Court's conclusion that the statute was clear. The Court announced this rule of construction in 1948[71] and reaffirmed it several times prior to *St. Cyr*.[72]

Although the rule was not dispositive in later cases, it was cited as good law and noted as an issue the Court did not need to address. For example, in his unanimous opinion in *Esquivel Quintana*, Justice Thomas noted that the parties had argued about the relationship between a rule of lenity for noncitizens and *Chevron* deference.[73] He did not question the validity of the two general rules of construction, simply noting that because the Court found the statute was clear, and that the offense was not an aggravated felony, there was no need to consult those rules. Similarly, ruling against the noncitizen and writing for six members of the Court in *Kawashima*, Justice Thomas commented that it was "true that we have in the past, construed ambiguities in deportation statutes in the alien's favor." But he concluded that the statute before the Court was sufficiently clear that the rule did not apply.[74]

II: The Post-Kennedy Court: Ideologically Divided Opinions Limiting Access to Relief from Removal

After Justice Kennedy retired in June of 2018, and the Post-Kennedy Court took form, ideological divisions hardened on critical questions regarding access to relief from deportation. The Court decided two

[69] *Id*.
[70] 533 U.S. at 321.
[71] *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948)).
[72] *Cardoza-Fonseca*, 480 U.S. at 449; *INS v. Errico*, 385 U.S. 214, 225 (1966); *Costello v. INS*, 376 U.S. 120, 128 (1964);
[73] 137 S.Ct. 1562, 1572 (2017).
[74] 566 U.S. 478, 489 (2012).

relevant cases that are directly relevant to noncitizens with criminal convictions, *Barton* v. *Barr*,[75] and *Pereida* v. *Wilkinson*.[76] In both cases, the Court ruled for the government in opinions divided along ideological lines. Chief Justice Roberts, who had ruled for the noncitizen in numerous cases prior to 2019, voted for the government in both cases. These cases go to the basic rules as designed in 1996 about who gets a chance to make a case on the equities to stay in the United States. By ruling as it did, the new Court greatly shut down the critical safety valve of relief from deportation through individualized hearings that examine of the equities in individual cases.[77]

A. *Barton* v. *Barr*

In the first post-Kennedy case about access to relief, *Barton* v. *Barr*,[78] the Court rule 5-4 that criminal conduct that is a basis for denying admission to the United States can serve to stop the accrual of residence

[75] 140 S.Ct. 1442 (2020).
[76] 141 S.Ct. 754 (2021).
[77] During the Terms when the Court decided *Barton* and *Pereida*, it also ruled for the noncitizen in two cases that had the practical effect of expanding access to relief. These cases, however, did not directly address substantive criteria for relief for noncitizens with convictions as *Barton* and *Pereida* did. In *Niz-Chavez v. Garland*, the Court ruled 6-3 that a charging document that does not meet the requirements of the statute cannot be used to stop the accrual of residence for relief from removal. The decision was 5-4 with Justices Gorsuch and Barrett joining Justices Breyer, Sotomayor and Kagan. Unlike *Barton* and *Pereida*, *Niz-Chavez* involves a transitory issue related to the government's compliance with the statute, and not a question of statutory eligibility for relief based on past acts and records that cannot be changed. It also did not involve criminal grounds. In *Guerrero-Lasprilla*, the Court ruled 7-2 that equitable tolling questions involve mixed questions of fact and law and are therefore subject to judicial review. *Guerrero-Lasprilla* concerned the courts' jurisdiction over equitable tolling decisions. Because those equitable tolling decisions matter for noncitizens who have been barred from relief and seek the benefit of later judicial decisions, it has the effect of expanding access to relief. It was not, however a decision about how to read the statute's constraints on relief based on criminal convictions and therefore is not a direct ruling on the scope of access to discretionary relief. For that reason, those decisions, while suggesting that noncitizens can be successful in the current Court, have less relevance to the underlying criteria for deportability and access to discretionary relief and the ideological turn in cases about the treatment of the "criminal alien." There is good reason, however to fear that the turn evident in the cases involving criminal convictions will spill over to other areas where the current Court has not yet exhibited similar harshness.
[78] 140 S.Ct. 1442 (2020).

and thereby deny access to a relief hearing for a lawful permanent resident. Despite being a technical issue that did not involve broader jurisprudential questions (such as void for vagueness doctrine or approaches to retroactive laws), the ruling was 5-4, with Chief Justice Roberts joining Justices Kavanaugh, Gorsuch, Alito, and Thomas to rule against the noncitizen.

Barton concerned the stop time rule[79] for counting residence in the United States. The stakes were enormous for the system of relief from removal. If the residence clock stops before seven years in the case of a lawful permanent resident or ten years in the case of a noncitizen without permanent residence, the immigration court cannot have an equity hearing no matter how sympathetic the noncitizen's case.[80] That means no relief hearing for United States military veterans, no relief hearing where a citizen child is severely disabled, no relief hearing when the criminal offense is many years old.

Barton presented an issue on which the agency had not taken a position in a published opinion. The ultimate ruling of the Court therefore has sweeping implications that were not vetted through any formal agency process. At issue was opaque language added by the conference report to the stop time rule. As originally proposed, the stop time rule only operated based on service of a charging document in the immigration case. The apparent theory was that a person should not benefit from time that results from delays in proceedings. The language of the final bill, however, was poorly drafted and not explained in the accompanying conference report. It stated: "Any period of continuous residence in the United States shall be deemed to end when an alien has committed an offense referred to in Section 212{a)(2) that renders the alien inadmissible to the United States under Section 212(a)(2) or removable from the United States under Section 237(a)(2) or 237(a)(4)."

The question in *Barton* was how to apply this language when a permanent resident, such as Barton, was already admitted to the country and was not subject to being removed based on inadmissibility. Under immigration law, persons who have been admitted to the country can face removal if they are subject to deportability.[81] Those seeking to enter or obtain a new visa are required to meet admissibility grounds. Barton was

[79] 8 U.S.C. §1229b(d)(1).
[80] See 8 U.S.C. §1229b(a)(2)(seven years of continuous residence required for cancellation of removal for lawful permanent residents); §1229b(b)(1)(A)(ten years of continuous residence required for cancellation of removal for non-lawful permanent residents).
[81] 8 U.S.C. 1227(a)(2).

a lawful permanent resident who was not seeking admission. He argued that the clock could not stop in his case on the basis of an offense that was an inadmissibility ground and not a deportability ground.

In Barton's case, the government's trial attorney had argued before the immigration judge that Barton could not seek cancellation due to an arrest during his first seven years in the United States. The Immigration Judge ruled that it did not matter that the identified offense had not been part of the charges on which Barton was found removable. On this point, he relied on a precedent decision of the Board of Immigration Appeals in *Matter of Jurado-Delgado*.[82] The IJ did not address what would later be the critical question before the Supreme Court, namely whether it mattered that the 1996 offense would not have made Barton deportable.[83] A single member of the Board of Immigration Appeals affirmed, also presuming that *Matter of Jurado-Delgado* resolved the question, even though that case did not concern how to treat cases where an individual was not seeking admission and was not rendered "deportable."

Once the case got to the Court of Appeals, the Office of Immigration Litigation ("OIL"), a part of the Justice Department, took on the job of defending the unpublished decision of the BIA. It proceeded to defend the ruling and won a victory in the Eleventh Circuit that any ground of inadmissibility is sufficient to stop the clock for a lawful permanent resident, even if the offense did not make the person deportable. The government argued that being "inadmissible" is a status that can apply to a person lawfully admitted for permanent residence and does not depend on whether the person could be removed from the country on that basis.[84] The argument also turned on technical questions of the rule against "surplusage" in reading a statute. Barton argued that if all that was necessary was "an offense referred to in section 212", then there would be no need to add in that the offense made the person "inadmissible or deportable." The Eleventh Circuit agreed with the OIL attorney's position that being "inadmissible" is a status that does not require that the noncitizen be subject to removal on that basis. It went on to conclude that there was no surplusage problem because being "rendered" inadmissible requires more than committing an offense referred to in section 212.[85] It

[82] 24 I&N Dec. 29 (B.I.A. 2006).
[83] Opinion of the Immigration Judge, *In re Barton, reproduced in* Petition for Writ of Certiorari, *Barton v. Barr*, No. 18-725, at 35a (treating Matter of Jurado Delgado as resolving application of the stop time rule).
[84] Brief for Respondent, *Barr* v. *U.S. Att'y Gen'l*, No. 17-13055 (Oct. 28, 2017), at 17.
[85] *Id*. at 1298-1302

did not address the larger question why the statute would bother to refer to persons made removable under 237(a)(2)(the provision setting forth grounds of deportability) if this were the correct reading. That provision was pure surplusage under the position taken by the Eleventh Circuit.

With the benefit of pro bono Supreme Court counsel, Barton sought certiorari. He presented a split between the Ninth Circuit and the Eleventh, Fifth, and Second Circuits (although the petition admitted that the Second Circuit view was dicta).[86] Not one of these cases involved a precedent decision of the BIA. The petition also referred to an unpublished decision of the Third Circuit. In opposing certiorari, the Solicitor General (SG) argued that intervention by the Court "would be premature."[87] It proceeded to note that: "[the BIA] has yet to issue a precedential opinion addressing the issue, and further percolation in the courts of appeals would be beneficial, particularly given that the court of appeals' decision in this case was the first to conclude that the plain language of the statute forecloses petitioner's interpretation."[88] The Court nonetheless took the case.

Once the case was taken, the SG's office proceeded to deliver a full-throated defense of a position that had never been adopted by any formal agency procedure. It argued that the proper way to read the statute was that any offense that is sufficient to make a noncitizen inadmissible is enough to stop the clock for residence. As to congressional purpose, the SG cited only a general purpose to prevent noncitizens from accruing time after having "'abuse[d] the hospitality of this country'" citing an opinion of the BIA.[89] The SG also argued that the petitioner's position would create discrepancies between those who travel following a criminal conviction and those who do not travel (a reading that was not in fact necessary since the question was the person's status at the time of the offense.)[90] Finally, the SG resurrected arguments that cancellation is a matter of "grace" and that it makes sense for eligibility to be read narrowly.[91] None of these policy ideas of what makes "sense" was ever

[86] Petition for Writ of Certiorari, *Barton* v. *Barr*, No. 18-725 (Dec. 4, 2018), at 18 n.2.
[87] Brief in Opposition, *Barton* v. *Barr*, No. 18-725, at 11.
[88] *Id*. at 6.
[89] Brief of Respondent, *Barton v. Barr*, No. 18-075, at 10. The brief cited *In re Perez*, 22 I. & N. Dec. 689, 700 (B.I.A. 1999) (en banc), a case that concerned retroactivity issues about the scope of the clock stop rule and not its proper interpretation.
[90] *Id*. at 19-20.
[91] *Id*. at 21.

endorsed by the BIA. Nowhere did the SG acknowledge that there was no indication in the legislative history that the criminal offense add-on to the clock stop rule was meant to do anything else than affect those who were subject to removal but not yet put in proceedings.

Justice Kavanaugh, in an opinion for the Court, joined by Chief Justice Roberts and Justices Thomas, Alito, and Gorsuch, leaned heavily on the supposed purpose of the clock stop rule. He presumed a rationale that Congress never articulated. He said that "the cancellation-of-removal statute functions like a traditional recidivist sentencing statute."[92] It was therefore "entirely ordinary to look beyond the offense of conviction at criminal sentencing, and it is likewise entirely ordinary to look beyond the offense of removal at the cancellation-of-removal stage of an immigration case." This casual analogy was nowhere mentioned in the oral argument by any Justice or any party.[93] It was invoked three times in the opinion, with no opportunity for Barton's counsel to explain why the analogy was inapt.

In more language that sounds more in policy than analysis of the immigration statute, Justice Kavanaugh stated that it was "not surprising" that Congress would look to grounds of inadmissibility since those grounds decide who should be admitted in the first place. He then blithely stated: "If a crime is serious enough to deny admission to a noncitizen, the crime can also be serious enough to preclude cancellation of removal, at least if committed during the initial seven years of residence." This statement presumed that Congress meant to apply inadmissibility rules to lawful permanent residents. It further presumed that the rules on who may be admitted only exclude those with serious crimes, when in fact even a marijuana offense, a crime that has been committed by the vast majority of Americans, is enough to bar admission no matter how long ago it occurred.[94] Presuming that such an offense, no matter how long ago, would be enough to bar cancellation ignores the entire structure of immigration law which, in general, applies far stricter standards for admission that for deciding who with roots in the country will be deported.[95]

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[92] 140 S. Ct. 1442, 1446, 1449, 1453 (2020).
[93] *Barton* v. *Barr*, No. 18-725 (transcript of argument).
[94] *See* Nancy Morawetz, *Rethinking Drug Inadmissibility*, 50 Wm. & Mary L. Rev. 163, 194-96 (2008)(discussing national data on one time use of marihuana by age cohort).
[95] For example, inadmissibility can be based on an "admission of facts" and not solely on a conviction. 8 U.S.C. § 1182(a)(2)(a)(i) & (ii). Grounds of inadmisisbility include any violation of a controlled substance law, 8 U.S.C. §

In the end, Justice Kavanaugh relied heavily on his policy arguments to justify the result. He conceded that his reading created surplusage, but suggested that as long as any reading led to surplusage of some degree he could ignore that canon, which was at the heart of Barton's argument.[96] He acknowledged the harshness of deportation, but concluded that "Congress also made a choice to categorically preclude cancellation of removal for noncitizens who have substantial criminal records" with no reference to the scope of the ruling he adopted and what kind of minor criminal records it would encompass. The opinion ends with a reference to *Jurado Delgado,* a decision that concerns a very different question from that on which the Court ruled – namely whether the bar to relief can apply without respect to the ground of removability charged by the agency and found by the IJ - and which both the court below and the Solicitor General had previously acknowledged had not squarely considered the legal issues in *Barton*.[97]

Unlike most cases that had led to sharp splits prior to 2018, *Barton* did not concern any overarching jurisprudential issues, such as void for vagueness doctrine, or retroactivity principles. It was instead a technical case about how to read a provision of the immigration law that had been on the books for over two decades, on which the agency had not issued a published position, and which was fairly newly being litigated in the circuit courts. It is hard to see this decision as anything but the manifestation of a new ideological turn on the Court and a willingness to read a purpose of harshness into restrictions on relief.

B. *Pereida* v. *Wilkinson*

In its second case curtailing access to relief, *Pereida* v. *Wilkinson,* the Court considered how to apply bars to relief hearings when the record of conviction related to a possible bar to relief is ambiguous. Mr. Pereida was a long-time resident of the United States who sought cancellation of removal for non-lawful permanent residents based on "exceptional and

1182(a)(2)(a)(i), while the deportability provision has an exception for small amounts of marijuana. 8 U.S.C. § 1227(a)(2)(B). There are, however, a few ways in which inadmissibility is not as broad, such as firearm offenses, which are grounds of deportability but not inadmissibility.

[96] 140 S. Ct. at 1453

[97] See Brief in Opposition, *Barton v. Barr* at 12 (noting that the Court had not issued a precedential opinion on the issue in *Barton*); *Barton* v. *US Att'y Gen*, 904 F.3d 1294, 1302 n. 5 (noting that *Jurado-Delgado* concerned a different question from *Barton*).

extremely unusual hardship" that his deportation would cause to his United States citizen children.[98] This relief is unavailable to noncitizens ever convicted of an offense that makes the person either inadmissible or deportable.[99] In Mr. Pereida's case, the record of conviction was unclear. Further, he was convicted under what is known as a "divisible" statute which sets out multiple crimes, some of which meet the requirements for a disqualifying conviction and some of which do not.[100] The question was whether he was eligible for a cancellation of removal hearing when the criminal records were unclear about whether he was convicted of a disqualifying crime.[101]

A key issue in *Pereida* was how to incorporate the categorical approach in the context of applications for relief where the noncitizen bears the burden of proof. The categorical approach is a methodology for classifying convictions that has been central to immigration cases for over a century.[102] The question in each case is what the minimum requirements are for a conviction under the relevant criminal law, and whether any such conviction fits the federal ground of inadmissibility, deportability or bar to relief. The methodology is central to how the Court has decided each of the aggravated felony cases since 1996, as well as the *Mellouli* case, which concerned deportability for state controlled substance convictions.

In *Pereida*, the noncitizen had been convicted under a divisible statute, which means that the relevant criminal statute encompassed more than one crime and could be divided into different crimes. As presented in the litigation, some of those crimes could be categorized as "crimes involving moral turpitude" (which would disqualify a non-LPR from pursuing cancellation of removal) and some could not. Mr. Pereida's conviction record was unclear about whether his conviction was for one of those disqualifying crimes. At issue in the case was whether was eligible for cancellation or was barred due to a conviction for a crime involving moral turpitude.

[98] Petition for Writ of Certiorari, *Pereida* v. *Barr*, No. 19-438 (Sept. 30, 2019), at 1 (quoting requirements for cancellation for non-permanent residents at 8 U.S.C. 1229b(b)(1)(D).
[99] 8 U.S.C. 1229b(b).
[100] *See generally Mathis* v. *United States*, 579 U.S. 500 (2016)(setting out the requirements for a statute to be divisible).
[101] *Pereida* v. *Wilkinson*, 141 S.Ct. 754, 759 (2021).
[102] *See* Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U.L. Rev. 1669 (2011))

As with *Barton* case, the issues litigated in *Pereida* went well beyond those that had been adopted by the Attorney General in any opinion or regulation. In a precedential decision, *Matter of Almanza*,[103] the Board of Immigration Appeals had considered a case in which the noncitizen refused a request from the immigration judge to produce documents about his conviction that might have shown whether his conviction was for a subsection of a criminal statute that was a bar to relief. Mr. Almanza's counsel took the position that it was the government's obligation to produce the records, and that in the face of an unclear record, his client should be presumed not to have been convicted under the part of the divisible statute that would bar relief. In its decision, the BIA framed the question as whether Mr. Almanza had satisfied his burden to show that he was eligible for relief.

The BIA held that Mr. Almanza bore the burden of establishing eligibility for relief and that he also bore the burden of producing corroborating evidence requested by the immigration judge.[104] The BIA emphasized that the IJ had been clear about requesting the records and that Mr. Almanza had provided no reason for failing to do so. It concluded that a respondent "can[not] satisfy his burden of proof by producing the inconclusive portions of a record of conviction, and by failing to comply with an appropriate request from the Immigration Judge to produce the more conclusive portions of that record." Thus, while *Matter of Almanza* placed a burden on the noncitizen to provide a judge with reasons for any inconclusive record, it did not hold that an inconclusive record, on its own, acts as a bar to relief.

In Mr. Pereida's case, as in other cases involving these issues that were litigated in the circuit courts, those courts that ruled for the government went beyond *Almanza* to find that an inconclusive record, on its own, can serve to block access to relief. The IJ in Mr. Pereida's case relied on records presented by the government that Mr. Pereida had been convicted under a part of the state statute that was a crime involving moral turpitude. On appeal, the BIA concluded that the records in the case were insufficient to determine the subsection under which Mr. Pereida was convicted.[105] But it went on hold that Mr. Pereida was barred from relief without considering whether any records existed that could clarify the subsection for his conviction. This reasoning went well beyond the BIA's precedential holding in *Matter of Almanza*, because it barred Mr. Pereida

[103] 24 I & N Dec. 771 (BIA 2009).
[104] *Id*. at 774.
[105] Opinion of the Board of Immigration Appeals, reproduced in Petition for Writ of Certiorari, *Pereida* v. *Barr*, at 17a.

from seeking relief even if he had no ability whatsoever to produce documents that could shed light on whether he was convicted of a disqualifying offense.

Before the court of appeals government litigators leaned into the argument that the burden of proof was decisive in the face of an inconclusive record. Some courts accepted this position. In the Eighth Circuit opinion in Mr. Pereida's case, the court explained that none of the available documents in Mr. Pereida's case could resolve the subsection under which he was convicted. Assuming that the record was complete the court noted: "the fact that Pereida is not to blame for the ambiguity surrounding his criminal conviction does not relieve him of the obligation to prove eligibility for discretionary relief under this circuit's precedent."[106]

The SG supported a grant of certiorari based on the split in the circuits. But the SG's brief in response did not fully embrace the logic of the Eightr Circuit. The SG argued that in assigning the burden to the noncitizen "Congress ensured that aliens do not benefit from withholding available evidence that would shed light on which offense an alien was previously convicted of." This statement was consistent with the agency's rationale in *Matter of Almanza* (although the SG did not cite to that case)[107] The SG agreed that the Court should take the case to address a split in the circuits, and the Court took the case.

Before the Supreme Court, the SG argued that the question of what crime the noncitizen was convicted of was a factual question, and not a legal question under the categorical approach. The SG argued that the burden of proof was on the noncitizen, and also that the burden of production was on the noncitizen to provide evidence, noting that another rule would create an incentive to withhold evidence. In making this second point, the SG cited to *Matter of Almanza*. Turning to the facts of the case, the SG emphasized its view that Mr. Pereida had the opportunity to refute the evidence submitted by the government but had chosen not to do so.[108]

The Court ruled against Mr. Pereida in an opinion written by Justice Gorsuch and joined by the Chief Justice and Justices Alito, Thomas and Kavanaugh. The Court's opinion makes no reference to the leading BIA precedent in *Matter of Almanza* and does not consider the possibility that

[106] *Pereida* v. *Barr*, 916 F.3d 1128, 1133 (8th Cir. 2019).
[107] Brief in Opposition, *Pereida* v. *Barr*, No. 19-438, at 12.
[108] Brief for the Respondent, *Pereida* v. *Barr*, No. 19-438, 31 (Feb. 2020)

a noncitizen's burden is simply to produce available records when requested by the IJ or explain their unavailability. It treats the question of the nature of the underlying conviction as a fact question not subject to the categorical approach. The Court wrote that the burden on that fact question required the noncitizen to present evidence that showed that the subsection of the conviction was one that did not bar relief. The Court also proceeded to question the idea that the burden on noncitizens was unfair. Justice Gorsuch, writing for the Court, suggested that Mr. Pereida, whose criminal proceedings were pending during his removal case, might be responsible for the absence of appropriate records. But in a discussion that reached beyond the issues in the case, Justice Gorsuch suggested it does not matter whether the task faced by the noncitizen was impossible. It is the task mandated by Congress in setting forth that the applicant for relief bears the burden of proof.

The Court's opinion in *Pereida* also commented on what evidence can be used to determine the subsection of a statute under which a noncitizen was convicted. On this matter there was no dispute in the briefs. Both the government and Pereida's counsel agreed that the only proper documents for determining the nature of a conviction were those recognized under *Shepard* v. *United States*,[109] which sets out a limited set of formal criminal court documents that are appropriate for determining what subsection of a divisible statute was the basis for a conviction. As presented in the briefs, the question for the Court was whether the statute could be read as precluding relief when there were no available *Shepard* documents indicating the subsection under which the individual had been convicted. As amici had shown the Court, these formal court documents showing the subsection of a conviction are frequently never created or are destroyed after a period of time.[110] In his opinion, Justice Gorsuch questioned the relevance of the *Shepard* documents and presumed that other documents, including those that the statute deems admissible into evidence prove the existence of a conviction (as opposed to the proper categorization of the conviction) could be used by a noncitizen to meet the burden identified by the Court.[111] Neither party had relied on that other statute and there was no briefing about its relevance to categorizing convictions.

Since the decision in *Pereida*, members of the BIA have seized on the statute identified by Justice Gorsuch, 8 U.S.C. § 1229a(c)(3)(B), and

[109] 544 U.S. 13, 26 (2005).
[110] Brief for Amici Curiae National Association of Criminal Defense Lawyers & National Association of Federal Defenders in Support of Petitioner, *Pereida* v. *Barr*, No. 19-438 (Feb. 2020).
[111] *See Pereida*, 141 S.Ct. at 767 (discussing 8 U.S.C. §1229a(c)(3)(B)).

suggested that it provides a whole new way to dismantle the categorical approach in immigration cases. In an amicus invitation, the BIA asked whether for briefing in the relevance of this subsection to deportability issues (which were not at issue in *Pereida*) and for eligibility for persecution-based relief (which also was not at issue in *Pereida*).[112] Thus the relatively narrow question presented in Mr. Pereida's case, has now mushroomed into a wholesale questioning of the use of categorical analysis in immigration cases.

C. Unpacking the Hostility to Relief for Noncitizens with Criminal Convictions in *Barton v. Barr* and *Pereida v. Wilkinson*

The Court's decisions in *Barton* and *Pereida* reflect a new hostility to systems of relief from removal, at least with respect to noncitizens with past criminal convictions. They reflect a lack of appreciation of the historical role of relief from removal in tempering the harshness of broad grounds of deportability and the lines that Congress drew in 1996 on access to that relief. While there can be no question that the 1996 laws are harsher than prior laws, there is little reason to think that Congress intended to visit the particular harshness reflected in these post-Kennedy Court opinions.

1. Rhetorical Excess

The *Barton* and Per*eida* opinions both employ rhetorical tools to deny the role of relief in tempering the harshness of law governing deportation. Consider the first line of the Court's opinion in *Pereida*. Justice Gorsuch writes: "Everyone agrees that Clemente Avelino Pereida entered this country unlawfully, and that the government has secured a lawful order directing his removal. The only remaining question is whether Mr. Pereida can prove his eligibility for discretionary relief."[113]

In fact, anyone with a basic understanding of immigration law knows that a "lawful order directing [a noncitizen's] removal" from an immigration court only happens after the court decides (1) that the individual is removable; and (2) that the person is either not eligible for relief or should not receive relief. The question in Mr. Pereida's case was whether he was eligible for relief. Furthermore, the question the Court

[112] BIA Amicus Invitation No. 21-30-09 (avail. at https://www.justice.gov/eoir/page/file/1445471/download, last visited Jan. 29. 2022).
[113] 141 S.Ct. 754, 758 (2021).

was deciding had nothing to do with whether Mr. Pereida entered lawfully or not. Instead, it was a general question about how to apply bars to relief when the record of conviction is unclear. Thus, the question is fully applicable to long time lawful permanent residents who are deportable and are seeking a hearing on their equities before being deported. The Court's discussion of Mr. Pereida's status at entry might have had some rhetorical value in preparing the reader to sympathize with the result. But it had nothing to do with the issue before the Court.

It is hard to imagine this error – treating a "lawful order of removal" as possible without consideration of eligibility for relief from removal - in the two decades before the *Pereida* decision. The central issue in the vast majority of cases over the past two decades was whether a person who was deportable was or was not barred from relief. Consider *St. Cyr*, where the Court held that access to relief was important enough to apply anti-retroactivity principles.[114] Or consider the three Supreme Court cases concerning which controlled substance offenses are properly categorized as an aggravated felony.[115] In every one of those cases, it was clear that the individual was deportable for the offense, but no lawful order of removal was possible without first considering eligibility for relief. And in all three cases, the Court overwhelmingly ruled that the noncitizen should have a shot at a relief hearing. Or consider the two key criminal cases, *Padilla* and *Lee*, on the obligation of criminal defense counsel to advise a noncitizen of the risks of removal and the likelihood that a person would risk trial rather than give up on a chance to remain with family in the United States.[116] Both cases involved drug convictions where the key error of counsel was pleading guilty to a drug offense that would be categorized as an aggravated felony and thus as a bar to relief through cancellation of removal.

Similarly, consider how Justice Kavanaugh discusses the issues in *Barton*. He characterizes Congress as having developed "strict" limits on who can apply for cancellation of removal,[117] when the question in the case is exactly how strict the rules should be. He offers no source for this claimed Congressional intent to be as strict as possible. The opinion goes on to muddle the issues, saying that the question in the case is whether cancellation eligibility is limited by the charged offense of removal,[118]

[114] 533 U.S. 289, 321-24 (2001)(describing importance of decisions affecting availability of relief from deportation).
[115] *See* p. 10-11 *supra*.
[116] *See* p. 16-17 *supra*.
[117] 140 S.Ct. at 1445, 1448.
[118] *Id*. at 1447.

when the essential issue in the case is whether an offense that could not be charged as a ground of removal can serve to stop access to relief for a person who is a long time resident and not seeking admission into the country.

2. Use of Facts

In both *Pereida* and *Barton*, the Court's opinions rely heavily on unfavorable facts about the individual – facts that would be fair game at any relief hearing – but then go on to say that they are properly reading the statute for all sets of facts. In this sense the opinions read more like an attorney's brief than as opinions that are based on broader principles.

In *Pereida*, Justice Gorsuch makes much of the fact that Mr. Pereida's conviction took place during his immigration proceedings, so that he had an opportunity to obtain the criminal records that would resolve any question about whether he was convicted under one part of the statute or another. The Court suggested that Mr. Pereida was manipulating the record and insinuated that he had access to materials he had simply chosen not to provide to the immigration court. But the Court then proceeded to say, albeit in dicta, that that fact didn't matter for its ruling and that it was just too bad that some people would be barred from relief through no fault of their own. But if that was a fair way to read the statute, why did the Court spend time suggesting that the courts were being manipulated instead of backing its conclusion that such manipulation was irrelevant? The only answer is that these facts could be used to discredit the noncitizen in the particular case and thereby gloss over the harshness of the rule the Court adopted.

Similarly, in *Barton*, the Court dwelled on Mr. Barton's record, noting in its conclusion that "the laws enacted by Congress do not allow cancellation of removal when a noncitizen has amassed a criminal record of this kind." Indeed, in Mr. Barton's case, the stop time question arose with an aggravated assault conviction within the first seven years, followed by several additional convictions. But the Court's interpretation of the statute had little to do with a "criminal record of this kind." Instead, its holding means that a single offense, including very minor drug offenses, and including some that never led to a conviction, would serve to bar relief potentially after decades of a clean record. And, as in *Pereida*, the Court hid behind the presumed intent of Congress that Congress could revise, when there was in fact no such intent evident from Congress, which had inserted the relevant language at the last minute and had offered no explanation of its scope.

3. Ignoring Precedent

The *Pereida* decision also displays an astounding lack of appreciation of the Court's precedents. Justice Gorsuch states without any caveats that the categorical approach arose in the context of criminal cases and "migrated" to the immigration context.[119] He simply fails to acknowledge two Supreme Court decisions, *Mellouli* and *Moncrieffe*, that recognized the categorical approach as central to immigration cases for more than a century. Notably, *Moncrieffe* devotes a paragraph to this proposition, including a citation to a 1914 case that is includes an early explanation of why this methodology is appropriate in immigration cases.[120] By sourcing the categorical approach to more recent criminal cases, Justice Gorsuch could go on to question how rigorously it applied in immigration cases. Nor did he consider that the criminal cases did not rest their analysis on constitutional issues specific to criminal cases, but instead to broader question of what it means for a person to be "convicted" of an offense.[121] Had he acknowledged the Court's past precedents, he could not have proceeded to speculate about myriad ways in which the categorical approach could be modified for application in the immigration realm.

4. Inconsistent and Argumentative Use of Agency Precedent

In *Barton*, the Court pretended that it was relying on positions of the agency, but, as the SG admitted in the opposition to the petition, there was no agency precedent on the central question whether an offense that could not serve as a ground of deportability could serve as a bar to relief. Throughout the opinion, Justice Kavanaugh cited published agency decisions on other issues to weave together the semblance that the opinion was based on agency precedent.[122]

Meanwhile in *Pereida*, where there was on point agency precedent, Justice Gorsuch simply did not cite to it. Had he done so, he might have had to explore whether the appropriate burden in the case was a factual burden of persuasion and not a burden of production based on the availability of evidence. Had Justice Gorsuch explored the issue as involving a burden of production, the Court's holding would have been

[119] *Pereida*, 141 S.Ct at 762.
[120] *Moncrieffe,* 569 U.S. at 191 (*citing United States ex rel. Mylius* v. *Uhl,* 210 F. 860, 862 (C.A.2 1914).)
[121] *See Mathis* v. *United States*, 136 S.Ct at 2252- 53(citing textual and fairness reasons for the categorical approach).
[122] *Barton*, 140 S.Ct at 1442 (*citing In re Jurado Delgado*); 1447 (same); 1450 (same); 1450 (*citing In re Perez*, 22 I & N Dec. 689 (BIA 1999).

more narrow and more in line with the agency's precedents.

5. Reaching Issues or Rationales that Were Not Presented

Both *Pereida* and *Barton* reach out to address issues or adopt rationales that were not argued by either party. In *Pereida*, Justice Gorsuch looked to a provision of the statute on how to establish the fact of a conviction as a way to decide whether the conviction matches relevant grounds of deportation.[123] Neither party suggested this, it was not briefed, and the Court had no benefit of an adversary process to evaluate whether there was any basis for this idea. In P*ereida* the Court's musings are dicta. But there is good reason to worry that they will be picked up going forward to change the rules under which both criminal defense and immigration counsel have operated.

Similarly, in *Barton*, the Court's opinion is the first place where the stop time rule was characterized as a recidivist provision.[124] Had that been presented, there would have been very good arguments for why it was an inapt analogy. Recidivism suggests a past conviction, not just a possible admission to past behavior. Furthermore, recidivism tends to affect the severity of a sentence, rather than acting as a bar to any consideration by the sentencing court. Had the government argued that the stop time rule was intended to be a recidivism provision, the parties could have shown that there was nothing in the statute or the legislative history suggesting that that was the case or, if it was, that the recidivism grounds Congress chose to apply were the very expansive bars to admission. But since the idea began in the Court, it was never tested.

The Court's reach for rationales for harsh interpretations that mandate deportation also disregards the Supreme Court's long-established rule of reading immigration statutes in a way that favors the noncitizen.[125] That rule, which functions like the rule of lenity in criminal cases, should have resolved any ambiguities in either case in favor of preserving the safety valve of a relief hearing for the noncitizen. Instead, both opinions embrace readings that they acknowledge will place insurmountable burdens before those seeking relief.

6. Inconsistent Use of Statutory Interpretation Rules

[123] *See Pereida*, 141 S.Ct. at 767 (discussing 8 U.S.C. §1229a(c)(3)(B)).
[124] *See* p. 23 *supra* (noting that the term recidivist did not appear at argument).
[125] *See* p. 18 *supra*.

Both *Pereida* and *Barton* purport to be readings of the immigration statute as it was enacted by Congress. But the opinions do not in fact adhere to consistent principles of statutory interpretation.

In *Barton*, the petitioner's central argument was that the government's reading of the statute created a major problem of surplusage. Recall that the issue in *Barton* was whether the residency clock stopped with a person being convicted of an offenses that triggered removability or whether it was sufficient for the person to fall into an abstract category of person's whose offense triggered the inadmissibility grounds for determining who can obtain a visa. If in fact, being "inadmissible" was sufficient to stop the clock for a permanent resident already in the country who was not seeking a new visa, the entire section citing to grounds of deportability was redundant. Justice Kavanaugh casually dismissed this problem by noting that the parties agreed that there would be some surplusage under either reading of the provision.[126] But the existence of some surplusage is hardly a reason to ignore the rule and choose the reading with the most surplusage!

The role of result orientation in lieu of relying on statutory tools is perhaps most apparent when Justice Kavanaugh proceeds to read the statute according to a policy interpretation that he invents for the case – that Congress wanted to base eligibility for a hearing on whether the person was a "recidivist"[127] and selected the broadest possible reading of what it means to be a recidivist. There was absolutely nothing in the statute that endorsed this reading.

Meanwhile in *Pereida*, Justice Gorsuch bases his decision on the idea that the term "burden" is a unitary concept that excludes concepts such as a burden of production. Had he considered the precedential opinion of the Board of Immigration Appeals, he might have had to consider alternative meanings for this term, such as a burden to produce available records.

Of course, any decision can be criticized, as these opinions were by the dissenters. But one senses that the new more solid majority is not even listening to its colleagues on the Court. Instead, it is rewriting the rules as it would prefer them to be, not as Congress has mandated, and not with any attention to the essential role of access to relief hearings for long term residents seeking to remain in the United States.

[126] *Barton*, 140 S.Ct. at 1453 (noting that either party's interpretation would create some redundancy).
[127] *Barton* at 1446, 1453 & 1460.

Altogether, the *Barton* and *Pereida* decisions signal a serious turn in how the Court is approaching deportability and eligibility for relief for noncitizens with criminal convictions. These cases suggest that Court is more willing to find justifications for the most harsh consequences of deportation. Moreover, the more partisan flavor of the cases suggests that they signal a turn in perception that will be hard to roll back.

IV Responding to the Court's Turn

The changes in the Court's approach to technical immigration issues require litigants, potential amici, and the government to rethink past approaches to immigration cases. With any case providing an opportunity for the Court to retract access to relief hearings and mandate more deportations, a noncitizen's downside risk from Supreme Court review is far greater than before. While it might appear that the noncitizen has nothing to lose by seeking review, alternative approaches might be more likely to achieve a beneficial result and responsible counsel should scrutinize any possibility for pursuing relief outside the Court. Meanwhile, possible amici organizations should factor both the chances that plenary review will achieve the desired result as well as the risk that any case will invite the Court to impose legal frameworks that extend beyond the issues in the case and thereby speed deportations and restrict access to relief. Potential amici at the cert stage should consider whether the chance of rectifying one line of bad precedent in a circuit may have unintended bad consequences for other issues of concern to the amici organizations. With respect to the government, its interest should not be to maximize deportations, but instead to apply the statutes in a way that most serves whatever policy views the government might have. Allowing cases to go before a Court that will strike out on its own to limit access to relief from deportation does not serve the interests of an administration that understands relief hearings as a crucial bulwark against unjust deportations (however that administration might define them).

A. Structural Forces Driving the Supreme Court's Immigration Docket

To understand the measures parties should take in light of the Court's turn against noncitizens, it is important to grasp the underlying litigation dynamics that drive the Court's immigration docket. These dynamics are unusual and explain why there have been and will continue to be a substantial number of circuit splits that present themselves for the Court's review.

Immigration typically cases begin with decisions by immigration judges that either side can appeal to the Board of Immigration Appeals

(BIA). This is a system of mass adjudication, with judges deciding nearly three hundred thousand [128] cases per year and the BIA deciding around 30,000 cases per year.[129] Many of these cases are decided by a single member of the Board and only a small fraction are published as precedents. When the BIA issues its decision, it stands as the position of the Attorney General, unless the Attorney General certifies the case to issue a new decision.[130] Court review happens when the noncitizen challenges the decision of the BIA or the Attorney General in court. Unlike other systems of mass adjudication, such as social security benefits cases, where appeals go first to the district court,[131] petitions for review in immigration cases go directly to the courts of appeals. There are literally thousands of these cases filed in the courts of appeals every year, and thousands of dispositions.[132] It is hardly surprising that a system that has thousands of cases decided by twelve different courts of appeals will lead to conflicts in the circuits on the proper application of federal law.

Once the circuits divide on an issue, there is also a ready pro bono bar prepared to take cases to the Supreme Court. As I have described in prior writings, this bar seeks opportunities for handling merits cases before the Court and for oral argument.[133] Immigration cases, like criminal cases, do not involve conflicts with paying clients and are therefore particularly likely to survive conflicts checks at large firms with appellate practices.

The fact that the Court is less sympathetic to noncitizens cannot be expected to stop the flow of petitions for writ of certiorari. Lawyers taking on individuals who have lost below will see Supreme Court review as a

[128] United States Department of Justice, Executive Office for Immigration Review, Statistics Yearbook, Fiscal Year 2018 at 9 (291,370 cases completed at the immigration court level in FY 2018)(avail. at https://www.justice.gov/eoir/file/1198896/download).
[129] *Id*. at 35.
[130] 8 C.F.R. § 1003.1 (h).
[131] 42 U.S.C. § 405(g).
[132] In the twelve months ending in June 30, 2021, the courts of appeals decided 6,765 administrative cases, 3,928 of which were decided on the merits. United States Court, Statistical Tables for the Federal Judiciary, Table B-1 (June 30, 2021), avail. at https://www.uscourts.gov/statistics/table/b-1/statistical-tables-federal-judiciary/2021/06/30). About eighty five percent of administrative appeals to the courts of appeals involve immigration cases. *See* Federal Judicial Caseload Statistics 2013, U.S. CTS. *http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2013*.
[133] Nancy Morawetz, *Counterbalancing Distorted Incentives in Supreme Court Pro Bono Practice: Recommendations for the New Supreme Court Pro Bono Bar and Public Interest Practice Communities*, 86 N.Y.U.L.Rev. 131 (2011).

chance at a good outcome, even if the chances are not as high as they once were. Lower odds, even if lawyers see them as lower, are not going to alter the dynamics that generate offers of free assistance to pursue a case at the Supreme Court if these is a possibility for the Court to grant certiorari.[134]

Meanwhile, the potential for conflicts among the circuit courts has not lessened with time. April 2022 marks twenty-five years since the effective date of the 1996 law, but the Court is still facing cases about what that statute means and how it is properly applied in various contexts. The aggravated felony definition has twenty discrete subsections,[135] many of which are divided into subsections. Even when the Court has reviewed one of those subsections, the Court's opinion will often leave questions about the scope of the definition for another day. For example, in *Esquivel-Quintana*, the Court rejected a reading of the definition that reached sexual relationships between older teenagers, but did not set out a rule that explained how the provisions would apply, for example, to other sexual contact, cases involving age disparities, or state statutes with different affirmative defenses from federal law.[136] Similarly in *Luna Torres*, the Court concluded that an interstate commerce element is not required for a state conviction of arson to be an aggravated felony, but did not address arguments that had not been pressed below that the interstate commerce element in the federal statute served a purpose other than jurisdiction, for example, targeting more serious offenses. At the same time, there are significant methodological questions that cross categories, such whether to afford deference to the aggravated felony rulings of the BIA since the issue arises as well in the criminal context; or whether the "realistic probability" standard for categorical analysis announced in *Duenas-Alvarez* extends to situations where disparities between state and federal categories are apparent from face of the statute. These issues promise many opportunities (or dangers depending on one's perspective) for further Supreme Court intervention on immigration matters.

B. <u>Rethinking the Obligations of Individual Counsel</u>

[134] *See, e.g.*, Jeffrey L. Fisher, *A Clinic's Place in the Supreme Court Bar,* 65 Stan. L. Rev. 137, 191, 193 (2013)(arguing that the Supreme Court bar should not turn away a potentially meritorious case because the case may have negative consequences).

[135] 8 U.S.C. § 1101(a)(43).

[136] 137 S. Ct. at 1572 (describing interpretation of 8 U.S.C. § 10101(a)(43(A)'s subsection on "sexual abuse of a minor" as applying when a statutory rape offense relies solely on the age of the victim).

In my prior article, *Counterbalancing Distorted Incentives in Supreme Court Pro Bono Practice: Recommendations for the New Supreme Court Pro Bono Bar and Public Interest Practice Communities*,[137] I suggested several ways that counsel could mitigate the distorted incentives of Supreme Court pro bono and Supreme Court clinic practice.[138] These recommendations remain relevant today. The new turn on the Court, however, combined with the new Administration, suggests some concrete ways in which pro bono counsel could alter their approach to achieve better results for their clients.

In *Counterbalancing*, I proposed that counsel (1) engage in a full case analysis, including examination of alternative routes for serving the client's interest; (2) coordinate with other counsel to learn of cases raising similar issues to determine best the best vehicle for review; (3) counsel their clients to explore the relative merits of different approaches; and (4) work with experts in the substance and practice of the relevant area of law.[139] All of these approaches remain relevant today. The negative turn in the Court towards noncitizens together with the election of an administration that purports to be more receptive to positions favoring immigrants, however, creates new ways to think about these options.

With respect to alternative routes for resolution, the current administration has issued guidance on prosecutorial discretion that invites lawyers to identify ways that issues can be resolved amicably.[140] The latest guidance from Secretary Mayorkas emphasizes that every enforcement decision reflects a choice about the government's priorities. Although the Secretary has not issued guidance that specifically addressed cases that are in court, the renewed emphasis on prosecutorial discretion means that

[137] 86 N.Y.U.L.Rev. 131 (2011).
[138] Jeffrey Fisher has criticized my arguments about distorted incentives, claiming that the interests of the Supreme Court clinics line up with those of potential clients. Fisher, *supra* n. 134, at 177 (arguing that Supreme Court clinics have different incentives from law firm practices.) More generally, naming the incentives does not mean that all lawyers or all firms fail to act in responsible ways to counteract those incentives; indeed this article applauds lawyers who work to ensure that the client's interests remain paramount.
[139] Notably, none of these suggestions create any tension with the client's interests, and Professor Fisher's critique of my article embraces all of these approaches while strongly defending his clinic from having deviated from any of them. Fisher, *supra* n. 134 at 179-187.
[140] Memorandum from Alejandro Mayorkas, Secretary, Department of Homeland Security, to Tae Johnson, re Guidelines for the Enforcement of Civil Immigration Law (Sept. 30 2021), avail at https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf.

there might be opportunities for a client that go beyond the "cert-worthy" issue in the case. Consider for example a joint motion to reopen removal proceedings before the BIA.[141] These motions can be filed at any time and might be based, for example, on legal developments since the original order. Although a noncitizen pursuing such a motion must establish either compliance with strict time limits, or a basis for equitable tolling, these limits do not apply when the parties jointly move the BIA to reopen a case. These opportunities are all the more important to seize at a time when a favorable outcome at the Supreme Court is less likely.

In addition, the executive branch can provide relief to an individual in ways that address the more systemic issues presented in a case. The Attorney General has the power to certify an issue and reconsider issues decided by the BIA or prior Attorneys General.[142] There may therefore be opportunities for more global resolutions of an issue presented in a case through further litigation at the agency instead of litigation at the Supreme Court. This power of the Attorney General can of course be used either in ways to expand or contract the rights of noncitizens. For example, in the past, the Attorney General has issued new decisions in the midst of Supreme Court litigation that bolster the position of the agency.[143] But the certification power can also be used to revisit positions with which the Administration might disagree.

One case this Term illustrates the power of certification. In *Birhanu* v. *Garland*,[144] the petitioner is seeking review of the agency's refusal to consider a noncitizen's mental health at the time of a past criminal

[141] The parties are pursuing this approach in *Hernandez-Serrano v. Garland*, No. 20-3175 (6th Cir.), where a divided panel created a split about the IJ and BIA's authority to "administratively close" proceedings. Although the case raises a clear circuit split, the parties have jointly moved the BIA to reopen the case, with further litigation postponed in the meantime.

[142] 8 C.F.R. § 1003.1(h). *See* Adam B. Cox & Cristina M. Rodriguez, THE PRESIDENT AND IMMIGRATION LAW 187 (2020)(describing the use of this power during the Trump Administration).

[143] *See, e.g., In re Soriano*, 21 I & N Dec. 516, 534 n. 4 (BIA 1996, A.G. 1997)(Attorney General vacatur of BIA decision and certification of the case shortly before supplemental merits briefs were due in the Supreme Court in *I.N.S. v. Elramly*, 516 U.S. 1170 (1996), and leading to the Court's remand of the case without plenary argument, 518 U.S. 1051 (1996)). *See also Matter of N.A.M*, 24 I & N Dec. 336 (B.I.A. 2007) (issued during the pendency of *Ali* v *Achim*, 552 U.S. 1085 (2007)(dismissing case based on agreement of the parties); 72 Fed. Reg. 67674-01, Nov. 30, 2007)(proposed during the pendency of *Dada* v. *Mukasey*, 554 U.S. 1 (2008)).

[144] No. 19-9599, filed Oct. 21, 2021.

conviction in deciding whether the conviction is a "particularly serious crime" that bars relief based on fear-based claims.[145] The BIA issued a precedential decision, *Matter of G-G-S-*,[146] categorically rejecting any consideration of the individual's mental health at the time of a past conviction. Plenary review could involve a host of additional issues, including: whether the BIA precedent violates the statute; whether the Court should defer to the agency interpretation; and what role international standards for a "particularly serious crime", which include a present-day inquiry into dangerousness, should play in evaluating a noncitizen's eligibility for relief.

With Birhanu's petition pending before the Court, the Attorney General decided to certify a related case that presents the same issue of the correctness of the decision in *Matter of G-G-S-*.[147] Meanwhile, the parties have postponed the time for the Solicitor General to reply in *Birhanu*. There is of course a risk that the Attorney General will reaffirm *G-G-S-* and bolster the reasoning of the decision. But there is also an opportunity for briefing before the agency that could lead to a decision that offers a better standard for Birhanu and that will avoid the danger of an adverse Supreme Court opinion.

What seems possible through certification in *Birhanu* takes work and requires that the Supreme Court advocate work with others to create the possibilities for a solution outside the Supreme Court. That requires counsel that remains true to their obligations to their client to pursue any route to victory and not just the one that is presented through Supreme Court litigation.

C. Rethinking Role of Amici Organizations

Organization that appear as *amici* before the Court have an important role to play in mitigating the potential harm from plenary Supreme Court review. Savvy Supreme Court counsel know well that an amicus brief at the certiorari stage can increase the chances that the Court will take a case.[148] It is therefore hardly surprising that immigrant rights organizations face requests to support petitions as amici. Unlike the lawyers representing an individual, these organizations have an

[145] 8 U.S.C. 1231(b)(3)(B)(ii).
[146] 26 I & N. Dec. 339 (B.I.A. 2014).
[147] *Matter of B-Z-R-*, 28 I&N Dec. 424 (A.G. 2021).
[148] See Allison Orr Larsen and Neal Devins, *The Amicus Machine*, 102 Va. L. Rev. 1901, 1936-40 (2016)(discussing the impact of certiorari stage amicus briefs on the Court's willingness to grant certiorari).

opportunity to look beyond the individual's case and consider the broader risks of Supreme Court review.

Some amicus groups have a regional focus and might see a case as an opportunity to achieve a better rule for their circuit that follows the rule currently in effect in another circuit. Similar to lawyers representing individuals, they might see little risk in the Court resolving a conflict because all of their clients otherwise are subject to the unfavorable rule. These groups ought to factor in as well the possibility that the Court will reach beyond the specific issue and adopt methodological approaches that disadvantage their clients. This risk is evident in hindsight in the experience of the *Pereida* litigation. The opinion in *Pereida*, as discussed above, not only rejected Pereida's claim for relief, but also provided an opportunity for the Court to comment on an issue that was not before the Court, namely a provision about admissibility of documents and its possible relationship to the categorical approach that was not before the Court. This commentary has already led the BIA to invite briefing on questions that have dramatic implications for the application of the categorical approach not just in the context of eligibility for relief, but also in determining deportability.[149] The experience with *Pereida* shows that when the Court undertakes review of any issue, it can do damage well beyond the issues presented in the case.

D. Rethinking the Approach of Government Counsel

The new dynamics on the Supreme Court present new challenges for the government as well, particularly if government counsel is interested in furthering a vision of immigration policy that is not simply about maximizing deportations and hurdles to relief hearings. Despite well-grounded criticism of the Biden Administration for its positions on immigration policy, this Administration has made outward facing claims to seek a more humane system of immigration law. These positions present obligations for the lawyers who represent the government. They require scrutiny in each case of the legal positions that have been asserted in a case and whether they match the Administration's view of proper application of the laws. They require consideration of the potential consequences of Supreme Court review leading to an outcome that reaches beyond the four corners of the case. They also require receptivity to possible solutions that implement the agency's stated objectives on prosecutorial discretion.

149 Board of Immigration Appeals, Amicus Invitation No. 21-30-09 (Nov. 19, 2021)

By the time cases reach the Supreme Court, they have been shaped by arguments of government counsel before the agency and the Court of Appeals. The government's legal positions in immigration cases are first developed by government trial attorneys at Immigration and Customs Enforcement before immigration judges and the BIA. Once a case goes before the courts, the government's position is advanced by the Office of Immigration Litigation, a specialized unit within the Justice Department. Unlike, for example, a government appeal of a district court decision, the positions taken by the Office of Immigration Litigation in the courts of appeals are not vetted by the Office of the Solicitor General. Thus, the issues as presented in circuit splits are not likely to have benefitted from a considered review of whether they implement a vision of the law that the government wishes to defend.

Once cases are past the courts of appeals, the Solicitor General's office has many opportunities to mitigate the potential consequences of review by a Court that is hostile to the rights of immigrants. First, it can choose not seek certiorari in cases it lost below. During the Trump Administration, the Solicitor General's office was unusually aggressive in taking immigration cases to the Supreme Court.[150] That has not been the case with the Biden Administration, although it has continued to press cases where the original petitions were filed by the prior Solicitor General.[151] Second, where cases are pressed by lawyers representing individual noncitizens, it could review each case to decide whether some alternative resolution is appropriate and if not, how the office can mitigate the risk that a decision will reach beyond the issues presented in that individual case.

Just as individual lawyers have an obligation to consider alternative forms of prosecutorial discretion available to their clients, the government has an obligation to assure that it is not seeking removal in a case where that does not further the administration's announced views on prosecutorial discretion. The role of government counsel is especially important here because the market dynamics of pro bono lawyering at the Supreme Court could limit the degree to which the individual lawyer

[150] This phenomenon was most pronounced with cases involving broad issues, such as class actions, and the Muslim ban on visas. But the Solicitor General also sought certiorari in some individual immigration cases. *See*, *e.g*., *Garland v. Ming Dai*, 141 S.Ct. 1669 (2021).

[151] This is particularly striking in cases involving the right to a bond hearing for noncitizens being held under the discretionary detention regime of 8 U.S.C. § 1241(a)(6). *See Johnson* v. *Areteaga-Martinez*, No. 19-896, argued Jan. 11, 2022; *Garland v. Aleman Gonzalez*, No. 20-322, argued Jan. 11, 2022.

identifies opportunities for resolution. The government may be in as good a place as the individual counsel to identify a resolution that obviates Supreme Court review.

The Solicitor General's office and the Executive branch can also treat cases headed for Supreme Court review as opportunities to reconsider the government's positions on best interpretations of the governing law. The *Birhanu* case is a good example. At the heart of *Birhanu* are the obligations of the United States towards persons who fear persecution in their country of origin. As a signatory to the Refugee Convention, the United States has pledged to provide protection to genuine refugees subject to discrete exceptions. One of those exceptions, as enacted into the immigration laws, is if the individual "having been convicted by final judgment of a particularly serious crime, is a danger to the community of the United States." [152] The text of this provision (like the international law from which is comes) is plainly focused on whether the individual "is" a danger. Unfortunately, however, the caselaw has treated the conviction itself as sufficient to presume danger.[153] But that leaves the question of what it is about the past conviction that allows the government to presume danger such that a genuine refugee will be denied protection. That is where *Matter of G-G-S-* comes in. *Matter of G-G-S-* concluded that an immigration judge should not consider the possible mental impairment of the refugee at the time of the conviction in deciding whether it should bar the possibility of persecution-based relief.

By certifying the issue of *Matter of G-G-S-*, Attorney General Garland is taking a second look at the agency's position before decising whether to defend it in the Supreme Court. He is opening up the possibility of adopting a position that is truer to the text of the statute and the Refugee Convention, instead of sending the Solicitor General's office to defend a past position of the agency. It is also a way to avoid plenary review and the possibility of the Court adopting some as-of-now unknown limitation on relief that the government never sought but which this Court might choose to adopt.

The Solicitor General's office could also engage in more extensive vetting of legal positions before cementing its views in briefs before the Court. Extensions of time in responding to petitions could serve not just

[152] 8 U.S.C. §1231(b)(3).
[153] *Matter of N.A.M.*, 24 I&N Dec. 336, 342 (B.I.A. 2007)(" once an alien is found to have committed a particularly serious crime, we no longer engage in a separate determination to address whether the alien is a danger to the community.").

to manage a busy docket but also to invite broader input into what would be an appropriate position for the government on the issues. One can presume that there is already consultation with the Office of Immigration Litigation, but because that office's primary role is to defend removal orders, it might not best reflect the broader interests of the government. Indeed, due to the lawmaking role of Supreme Court adjudication, it would be appropriate to create a participatory process with immigration experts from the outside. Such a process could identify legal positions that undermine the Executive branch's interest in achieving a more just execution of the laws and preserving the agencies' discretion.

The government would be best served by a more considered evaluation of its legal positions long before cases reach the Supreme Court stage. The litigation positions adopted by the Office of Immigration Litigation set the stage for positions argued by the Solicitor General. Yet, as the *Barton* case, illustrates these positions are adopted and argued to defend deportations even in the absence of any binding agency precedent. They are choices that are currently made in the context of defending removal, not in the context of evaluating what the governing laws mean. An administration that purports to care about a more humane system of immigration laws can begin by assuring that there is greater consideration of whether it is appropriate to read the law in the harshest way possible.

Finally, the government has the ability, under *Brand X*,[154] to adopt new interpretations of a statute even where the courts have affirmed a past interpretation or the courts have addressed an issue in advance of an authoritative agency interpretation. This was certainly the case in *Barton*, where the Solicitor General conceded that there was no agency precedent on point and the Supreme Court's decision is not fairly read as offering the only plausible reading of the statutory phrase at issue. It is also the case with the dicta in *Pereida* that explores issues about documents to establish the nature of a conviction when that statute was not at issue and the Court's comments do not account for the origins of the relevant statute. These are matters where the agency has a second chance to assure that the statute is read to uphold access to relief hearings where they are not barred by

[154] *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) ("A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.")

Congress.

The question is not whether the government has the power, but whether it will use its power in a way that serves the broader objectives of the underlying statutes, or will instead confine itself to defending removal orders that its prosecutors have secured below. With the ongoing threat to basic fairness posed by the current Court and its hostility to noncitizens, it is time for the government to step up to this role, and reconsider its aggressiveness in seeking broad applications of deportation laws.

Conclusion

The post-Kennedy Court has altered the dynamics for immigration litigation such that previously technical cases are now decided are more conventional ideological grounds and show a basic hostility to noncitizens, especially those with criminal convictions who are the subject of this Article's study. This change in the Court has important implications for all of the actors who appear before the Court. Individual lawyers, amicus organizations and government counsel have renewed reason to look for alternatives to resolution of these technical issues before the Supreme Court.

APPENDIX

Table of Cases 2001-2021 Involving Deportability or Bars to Relief on Criminal Grounds

Case and citation	Issues	Majority Opinion Justices (author in bold)	Dissenting Opinion Justices (author in bold)	Other Opinions (authors in bold)	Result in favor of noncitizen?	Notes
INS v. St Cyr, 533 U.S. 289 (2001)	(1) Jurisdiction over retroactive impact of repeal of 212(c) and (2) retroactive reach of repeal of 212(c).	**Stevens**, Souter, Kennedy, Breyer, Ginsburg,	**Scalia**, Rehnquist, Thomas, O'Connor (in part)	**O'Connor** (dissenting)	Yes	Dissent is on jurisdiction and would not reach merits
Leocal v. Ashcroft, 543 U.S. 1 (2004)	Whether driving under the influence with a criminal negligence standard is an aggravated felony "crime of violence" under INA 101(a)(43)( )	**Rehnquist,** for an unanimous Court	none		Yes	

Lopez v. Gonzales, 549 U.S. 47 (2006)	Whether any state felony drug offense is an aggravated felony under INA 101(a)(43)(B)	**Souter**, Roberts, Stevens, Scalia, Kennedy, Ginsburg, Breyer, Alito	**Thomas**		Yes	
Gonzalez v. Duenas-Alvarez, 549 U.S. 183 (2007)	Whether California aiding and abetting theft offense is an aggravated felony under INA 101(a)(43)()	**Breyer**, Roberts, Scalia, Kennedy, Souter, Thomas, Ginsburg, Alito, Stevens (in part)	**Stevens** (concurring and dissenting)		No	
Nijhawan v. Holder, 557 U.S. 29 (2009)	Whether categorical approach applies to dollar threshold for fraud aggravated felony under INA 101(a)(43)(M)(i)	**Breyer** (for unanimous court)			No	

Carachuri-Rosendo v. Holder, 560 U.S. 563 (2010)	Whether second drug possession offense is a drug trafficking aggravated felony under INA 101(a)(43)(B)	**Stevens**, Roberts, Kennedy, Ginsburg, Breyer, Alito, Sotomayor		**Scalia** (concurring in judgment); **Thomas** (concurring in judgment)	Yes	
Judulang v. Holder, 565 U.S. 42 (2011)	Whether to uphold BIA's comparable grounds methodology on access to 212(c)	**Kagan** (for a unanimous court)			Yes	
Kawashima v. Holder, 565 U.S. 478 (2012)	Whether tax offenses under 26 U.S.C. §7206(1) &(2) are crimes of deceit under INA 101(a)(43)(M)(i)	**Thomas**, Roberts, Scalia, Kennedy, Alito, Sotomayor	**Ginsburg**, Breyer, Kagan		No	
Vartelas v. Holder, 566 U. S. 257	Whether 1996 law provision on	**Ginsburg**, Roberts, Kennedy,	**Scalia**, Thomas, Alito		Yes	

(2012)	admissibility of noncitizens who travel, INA 101(a)(13) applies to individual whose criminal offense pre-dates 1996 law	Breyer, Sotomayor, Kagan				
Moncrieffe v. Holder, 569 U.S. 184 (2013)	Whether state drug offense that includes distribution of a small amount of marijuana for no remuneration constitutes an aggravated felony under INA 101(a)(43)(B)	**Sotomayor**, Roberts, Scalia, Kennedy, Ginsburg, Breyer, Kagan	**Thomas, Alito**		Yes	
Mellouli v. Lynch, 575 U.S. 798	Whether a state drug offense is related to a federal	**Ginsburg**, Roberts Scalia, Kennedy,	**Thomas**, Alito		Yes	

(2015)	controlled substance offense under INA 237 (a)(2)(B) if the state schedule is broader that the federal schedule	Breyer, Sotomayor, Kagan				
Luna Torres v. Lynch, 578 U.S. 452 (2016)	Whether state arson offense without interstate commerce element is an aggravated felony within the meaning of INA 101(a)(43)	**Kagan**, Roberts, Kennedy, Ginsburg, Alito	**Sotomayor**, Thomas, Breyer		No	
Esquivel-Quintana v. Sessions, 137 S.Ct. 1562 (2017)	Whether California sex offense defining minor as under 18 constitutes a sexual abuse of a minor aggravate	**Thomas** for a unanimous Court			Yes	Justice Gorsuch did not participate

	d felony under INA 101(a)(43)(A)					
Sessions v. Dimaya, 138 S.Ct. 1204 (2018)	Whether residual clause of aggravated felony crime of violence is void for vagueness	**Kagan,** Ginsburg, Breyer, Sotomayor, Gorsuch (judgment of the Court and opinion of the Court as to parts II and IV-A))	**Roberts**, Kennedy, Thomas, Alito; **Thomas, (**Kennedy, Alito joining in part)	**Gorsuch** concurring in the judgment	Yes	
Barton v. *Barr*, 140 S.Ct. 1442 (2020)	Whether the stop time rule in a case involving a permanent resident who is not facing admission is triggered by admissibility grounds or	**Kavanaugh**, Roberts, Thomas, Alito Gorsuch	**Sotomayor**, Ginsburg, Breyer, Kagan		No	

	deportability grounds.					
Pereida v. Wilkinson, 141 S.Ct 754 (2021)	Whether noncitizen faces bar to relief when the underlying criminal statute is divisible and the record is inconclusive as to whether the offense fell under a divisible part that is an aggravated felony.	**Gorsuch**, Roberts, Thomas, Alito, Kavanaugh	**Breyer**, Sotomayor, Kagan		No	Justice Barrett did not participate

From: Loeb, Emily M. (ODAG)
Subject: WaPo
To: Fletcher, Brian H. (OSG); Colangelo, Matthew (OASG); Reich, Mitchell (OAG); Thompson, Karl (ODAG)
Sent: January 31, 2022 12:36 PM (UTC-05:00)

https://www.washingtonpost.com/politics/2022/01/31/ginni-thomas-clarence-thomas-conflict-jan6-committee/

Emily M. Loeb
Associate Deputy Attorney General
Office of the Deputy Attorney General
C: (b) (6) [redacted]
(b) (6) [redacted]

From: Loeb, Emily M. (ODAG)
Subject: Tweet by Norman Ornstein on Twitter
To: Thompson, Karl (ODAG)
Sent: January 19, 2022 7:33 PM (UTC-05:00)

Norman Ornstein
@NormOrnstein

The fact that Clarence Thomas continues to fail to recuse himself, given the activities of his wife that are directly related to the insurrection, is mind-boggling
1/19/22, 6:19 PM

From: Emily Loeb
Subject: [EXTERNAL] Tweet by Norman Ornstein on Twitter
To: Loeb, Emily M. (ODAG)
Sent: January 19, 2022 6:40 PM (UTC-05:00)

Norman Ornstein
@NormOrnstein

The fact that Clarence Thomas continues to fail to recuse himself, given the activities of his wife that are directly related to the insurrection, is mind-boggling

1/19/22, 6:19 PM

Emily Loeb
C: (b) (6) [redacted]

From: Klapper, Matthew B. (OAG)
Subject: FW: Invitation for the AG...
To: Purdy, Nikita (OAG)
Sent: January 19, 2022 11:45 AM (UTC-05:00)
Attached: FINAL Garland Invitation Hand Award.pdf

For discussion today.

From: Klapper, Matthew B. (OAG)
Sent: Thursday, December 9, 2021 1:45 PM
To: Fishman, Paul J. [redacted]
Cc: Schedule, AG86 (OAG) [redacted]
Subject: RE: Invitation for the AG...

Great to see you too, Paul. Copying scheduling team. Back to you soon.

From: Fishman, Paul J. [redacted]
Sent: Thursday, December 9, 2021 11:08 AM
To: Klapper, Matthew B. (OAG) [redacted]
Subject: [EXTERNAL] Invitation for the AG...

Matt --

It was great to see you and the AG last week. It was such a treat and so exciting for me to see you both sitting behind those respective desks, particularly after not having been in the building since the last AGAC meeting of the Obama administration. It was quite moving, actually -- more than I expected. And thanks for taking the time for the coffee and the schmooze. It's been too long…

As we discussed, I've attached the invitation for the AG to receive the Federal Bar Council's Learned Hand award at our annual Law Day dinner (which, you will note, will not actually be on Law Day). I appreciate that it's five months out, and that he already may have other commitments during that period. But the organization (and I, in particular) would be thrilled if he can make it. You'll see that we'd love to have Lynn come as well, and I hope that perhaps you and Vicky could come too.

Many thanks.

Paul

Paul J. Fishman
Partner

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immediately by telephone or by return e-mail and delete it from his or her computer.

Federal Bar Council

JONATHAN M. MOSES
President

ANNA STOWE DENICOLA
Executive Director

December 7, 2021

VIA EMAIL

The Honorable Merrick Garland
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Re: Federal Bar Council Learned Hand Award

Dear Attorney General Garland:

On behalf of the Federal Bar Council, I write to invite you to receive the Council's highest honor, the Learned Hand Medal for Excellence in Federal Jurisprudence. We would be honored if you accepted the award at our 2022 Law Day Dinner, when the Council will also be celebrating its 90th anniversary. We currently have May 5, 10, and 25, 2022, on hold for our celebration in New York City, and would work with your staff to accommodate your schedule.

It is customary for the recipient to be the evening's speaker and we would be honored if you would continue that tradition. Alternatively, if you prefer, we could use a "fireside chat" format. We would also be delighted to host your wife Lynn if she would like to join you for the occasion.

The Federal Bar Council is a unique organization of lawyers and judges within the Second Circuit, dedicated to promoting excellence in federal practice and fellowship in the profession. We are also committed to encouraging respectful, cordial relations between the bench and bar, to protecting the independence of the judiciary, and to promoting the rule of law. More than twenty federal judges, including the late Justice Ruth Bader Ginsburg, have served as trustees of the Council.

Our Law Day dinner is typically attended by approximately 800 lawyers and many of the judges from the federal courts within the Second Circuit. The dinner often presents a wonderful opportunity for a reunion of our honoree's clerks, staff, and friends in the New York City area, many of whom are often already members of the Council.

Prior recipients of the Hand Medal have included Chief Justice Warren E. Burger, Justices Samuel A. Alito, Jr., Harry A. Blackmun, William J. Brennan, Jr., Stephen G. Breyer, Ruth Bader Ginsburg, Arthur J. Goldberg, John Marshall Harlan, Anthony M. Kennedy, Thurgood Marshall, Sandra Day O'Connor, Lewis F. Powell, Jr., Antonin Scalia, and Clarence Thomas, as well as Attorneys

Page 2

General Edward H. Levi and Michael B. Mukasey. I have attached a complete list of the leading judges, public officials, and practitioners we have honored in years past. We would be honored if we could add your name to that list next year.

Please let us know if you or your staff have any questions. We very much hope that you will join us.

Respectfully,

Jonathan M. Moses
President, Federal Bar Council

Enclosure

cc: Robert J. Giuffra Jr. Esq.
Paul J. Fishman, Esq.
Anna Stowe DeNicola, Esq.

Federal Bar Council

Learned Hand Award

Established by the Federal Bar Council in 1962

The Council presents an annual medal for “Excellence in Federal Jurisprudence” designated the Learned Hand Medal, in memory of the late distinguished jurist. The medal is traditionally presented at the Law Day Dinner.

2021 – Judge Debra A. Livingston

2019 – Judge Guido Calabresi

2018 – Judge Jed S. Rakoff

2017 – Judge Richard C. Wesley

2016 –Judge Gerard E. Lynch

2015 – Justice Clarence Thomas

2014 – Justice Stephen G. Breyer

2013 – Judge Barrington D. Parker

2012 – Judge Robert A. Katzmann

2011 – Justice John Paul Stevens

2010 – Justice Samuel A. Alito, Jr.

2009 – Judge Lewis A. Kaplan

2008 – Judge Robert D. Sack

2007 – Judge Reena Raggi

2006 – Judge Edward R. Korman

2005 – Judge Richard A. Posner

2004 – Judge Michael B. Mukasey

2003 – Judge Dennis Jacobs

2002 – Judge John M. Walker, Jr.

2001 – Justice Anthony M. Kennedy

2000 – Judge José A. Cabranes

1999 – Justice Ruth Bader Ginsburg

1998 – Professor Charles Alan Wright

1997 – Judge Pierre N. Leval

1996 – Judge Ralph K. Winter

1995 – Judge Amalya L. Kearse

1994 – Judge Thomas J. Meskill

1993 – Justice Sandra Day O’Connor

1992 – Judge Leonard B. Sand

1991 – Justice Antonin Scalia

1990 – Justice Harry A. Blackmun

1989 – Judge Morris A. Lasker

1988 – Professor Gerald Gunther

1987 – Judge Jon O. Newman

1986 – Judge Jack B. Weinstein

1985 – Professor Herbert Wechsler

1984 – Judge Edward T. Gignoux

1983 – Judge James L. Oakes

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1982 – Judge Wilfred Feinberg

1981 – Judge Walter R. Mansfield

1980 – Judge John F. Dooling, Jr.

1979 – Professor Walter Gellhorn

1978 – Professor Paul A. Freund

1977 – Justice Lewis F. Powell, Jr.

1976 – Judge Edward H. Levi

1975 – Justice Thurgood Marshall

1974 – Judge Irving R. Kaufman

1973 – Judge Edward Weinfeld

1972 – Judge Henry J. Friendly

1971 – Justice Warren E. Burger

1970 – U.S. Secretary of State William P. Rogers

1969 – U.S. Attorney General Herbert Brownell, Jr.

1968 – Justice William J. Brennan, Jr.

1967 – Justice John M. Harlan

1966 – Justice Abe Fortas

1965 – Judge Harold R. Medina

1964 – Judge J. Edward Lumbard, Jr.

1963 – Justice Arthur J. Goldberg

1962 – Professor James William Moore

From:
Subject: RE: Supreme Court Investitures
To: Singh, Anita M. (ODAG); Ramamurti, Arjun R. (OAG)
Sent: September 20, 2021 3:04 PM (UTC-04:00)

From: Singh, Anita M. (ODAG) [redacted]
Sent: Monday, September 20, 2021 2:49 PM
To: Ramamurti, Arjun R. (OAG) [redacted]
Cc: Klapper, Matthew B. (OAG) [redacted]
Subject: Re: Supreme Court Investitures

Thank you so much for the quick turn on this, Arjun! Matt - back to you ASAP.

Anita M. Singh
Chief of Staff
Office of the Deputy Attorney General
U.S. Department of Justice

C: [redacted]
O: [redacted]

On Sep 20, 2021, at 2:47 PM, Ramamurti, Arjun R. (OAG) [redacted] wrote:

Hi Anita,

Here's what I could track down in terms of DOJ attendance at Supreme Court investiture ceremonies:

Brett Kavanaugh: Acting AG Matthew Whitaker (presents commission); DAG Rod Rosenstein; SG Noel Francisco
Neil Gorsuch: DAG Rod Rosenstein (presents commission); Acting SG Jeff Wall; Noel Francisco (then-nominated for SG)
Elena Kagan: AG Eric Holder (presents commission); Acting SG Neal Katyal
Sonia Sotomayor: AG Eric Holder (presents commission)
Samuel Alito: AG Alberto Gonzales (presents commission)
John Roberts: AG Alberto Gonzales (presents commission)
Stephen Breyer: AG Janet Reno (presents commission)
Ruth Bader Ginsburg: AG Janet Reno (presents commission); SG Drew Days III
Clarence Thomas: Acting AG William Barr (presents commission)
David Souter: AG Richard Thornburgh (presents commission); SG Kenneth Starr

Best,
Arjun

From: Robertson, Ashley E. (ODAG)
Subject: RE: DAG prep materials
To: Lewis, Megan (ODAG)
Sent: August 9, 2021 1:01 PM (UTC-04:00)
Attached: DOJ Hearing QA Prep 1 - 2.9.2021 - for printing.docx, DOJ Hearing QA Nat Sec FINAL.docx, LOM Updates 3.1.2021- for printing.docx, 2.19.2020 Update - printing.docx

Hi Meg,

Of course – attached are two binders we prepared for her during the confirmation:

1. DOJ Hearing QA (General)
2. DOJ Hearing QA (Nat Sec)

We also sent a update papers throughout, and I've sent a couple of examples. If helpful, I can track down any additional materials, but I think this should cover the major ones!

Thanks,

Ashley

From: Lewis, Megan (ODAG) (b) (6) [redacted]
Sent: Monday, August 9, 2021 12:49 PM
To: Robertson, Ashley E. (ODAG) (b) (6) [redacted]
Subject: DAG prep materials

Ashley- do you have the prep materials from the DAG's confirmation hearing? Or, in the alternative, an exemplar of what format she likes for a prep paper / Q&A doc? I know there is a template for briefing memos, but I think that's intended for longer memos.

<u>Department Policy</u>

"Nationwide" Injunctions

Scoped Out Per Agreement

Background:

The SJC held a hearing on Rule by District Judge: The Challenges of Universal Injunctions in February 2020. Witnesses testified about the increased use of lawsuits (often by state attorneys general, of both political parties) to halt federal policies, and the rise in district court issuance of "nationwide" or "universal" injunctions that prevent the federal government from enforcing the policy anywhere in the United States. Attorney General Sessions issued guidance directing the DOJ to oppose nationwide injunctions and Attorney General Barr was also vocal in his criticism of federal judges using this type of broad injunctive relief to prevent the government from enforcing its policies. (See, WSJ Op-Ed by Barr from September 2019; see also DAG Rosen comments at ACUS forum on nationwide injunctions). Justice Gorsuch and Justice Thomas have signaled their desire for the Supreme Court to address and provide guidance to the lower courts on this practice. [DHS v New York].

Statistically speaking, the issuance of universal injunctions has increased over the past several years. In his opening remarks at an ACUS forum on nationwide injunctions, DAG Rosen provided the following statistics: "12 nationwide injunctions were issued against the George W. Bush administration in eight years, and 19 nationwide injunctions were issued against the Obama administration, also in eight years. So that is a 58 percent increase in the Obama years, as the trend gained steam. During the current administration, federal courts have issued at least 55 nationwide injunctions in just three years. That is a rate of nearly 18 nationwide injunctions per year. To put it another way, nationwide injunctions are being issued at over 12 times the rate as in the George W. Bush administration."

With regard to positions from SJC Members, this article does a good job capturing the key points from the SJC hearing, and the lack of consensus on whether Congress should seek to enact reforms or the Supreme Court should be given the opportunity to address the issue. Key positions include:

- Then-chairman Senator Lindsey Graham (R-SC) said of nationwide injunctions: "Somebody needs to fix it because I don't think you can run the country this way." Senator Graham was unsure whether Congress or the Supreme Court was best positioned to confront the issue but warned: "My concern is that this is only going to get worse over time" and "people are going to lose faith in the courts."

- Diane Feinstein (D-CA) lauded the "important role" that nationwide injunctions had played in cabining President Trump's immigration policies, noting judges had used them to protect hundreds of thousands of individuals in the DACA program.

- Senator Mike Lee (R-UT) noted that Republicans in both the Senate and the House had previously introduced bills that would prohibit trial judges from issuing injunctions that extend beyond the parties in the case or the geographic limits of their court. He said: "If we don't act, it may be years or even decades, possibly, before the courts act."

- Senator Richard Blumenthal (D-CT) doubted whether Congress could do a better job than the Supreme Court of establishing criteria for injunctions and concluded that, realistically, Congress would direct courts to handle the problem.