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Blue Brief 2021-2022

University of San Diego School of Law

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THE BLUE BRIEF

Faculty Review of the 2021-22 U.S. Supreme Court Term

University of San Diego
SCHOOL OF LAW

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I. Introduction

The University of San Diego School of Law is pleased to announce the second annual Blue Brief, a faculty review of ten carefully selected rulings from the most recent Term of the United States Supreme Court. USD has an extraordinarily distinguished law faculty, and I believe that you will enjoy reading their assessments of cases ranging across a variety of important topics, including abortion, gun rights, prayer in the execution chamber, free speech, free exercise of religion, arbitration, administrative law, federal Indian law, climate change, and vaccine mandates.

This was indeed a momentous Term in many respects. The Court's decisions charted new paths in several significant areas of the law. This Term also marked the end of Justice Stephen Breyer's long and illustrious tenure on the Court. He was nominated by President William Clinton and has served as a Supreme Court justice since 1994. This summer witnessed the accession to the Court of a new justice, Justice Ketanji Brown Jackson, a distinguished jurist who earlier served as a judge on the United States Court of Appeals for the District of Columbia Circuit and on the United States District Court for the District of Columbia. Justice Jackson is the first Black woman to serve as a Supreme Court justice. This Term was notable for an additional, and wholly unexpected, reason — the unprecedented leak of a full draft of a Supreme Court majority opinion. The ripple effects of that event remain to be seen.

We are very happy to share the insights of nine of our eminent faculty on these ten important Supreme Court decisions. We are eagerly awaiting the opening of the Court's new Term on October 3, 2022, and we look forward to reporting back to you in the summer of 2023 with the latest developments.

Warm Regards,

Robert Schapiro

Robert A. Schapiro
Dean and C. Hugh Friedman Professor of Law

Larry Alexander

Warren Distinguished Professor of Law and a Co-Executive Director of the Institute for Law & Religion

II. *Ramirez v. Collier* and Religion in the Execution Chamber

John Ramirez was convicted of murder for the 2004 stabbing death of Pablo Castro in Corpus Christi, Texas. He was sentenced to death.

After years of unsuccessful appeals and collateral attacks, Ramirez was scheduled to be executed in September 2021. He sought to have his pastor present in the execution chamber and to be permitted to pray audibly and to touch Ramirez during the execution. When the Texas prison officials denied the audible prayer and touching requests (but not the request for the pastor's presence), Ramirez then sought a preliminary injunction to halt the execution, contending that the denial of his requests for audible prayer and a religious touch violated the federal **Religious Land Use and Institutionalized Persons Act of 2000** (RLUIPA).

RLUIPA prohibits substantial burdens on the religious exercise of prisoners, including state prisoners, even if the burden stems from a law of general applicability, unless the government demonstrates that the burden furthers a compelling governmental interest and is the least restrictive means of furthering that interest. In 1990, in ***Employment Division v. Smith***, the Supreme Court, reversing its approach of the prior twenty-seven years, held that laws of general applicability that burden religious exercises need not be shown to further a compelling interest. Congress immediately and overwhelmingly passed the **Religious Freedom Restoration Act** (RFRA) to restore the pre-*Smith* approach; but the Court in ***City of Boerne v. Flores*** held that Congress had no power to apply RFRA to the states. Nonetheless, when Congress enacted the RLUIPA, which also adopts the pre-*Smith* approach to burdens on religion, it chose to apply it to the states. And unlike RFRA, RLUIPA's application to the states has not been invalidated by the Court.

In ***Ramirez v. Collier***, the Court granted the request for a preliminary injunction, finding that Ramirez was likely to prevail on the merits of his RLUIPA claim. Ramirez's religious exercise was burdened by the denial of his

***Ramirez* illustrates how the Court will apply the compelling interest test and the least restrictive alternative test.**

requests, and the prison officials' concerns about disruption and interference with the execution, which the Court asserted were indeed compelling interests, could nevertheless be addressed without completely prohibiting any audible prayer or religious touching of Ramirez.

Eight of the nine justices signed on to Chief Justice Roberts's opinion for the Court. Justices Sotomayor and Kavanaugh, though joining the Roberts opinion, each wrote a separate concurrence.

Only Justice Thomas dissented. He believed that Ramirez had engaged in abusive litigation tactics and thus did not merit equitable relief. He chronicled the shifts in Ramirez's litigation positions that, in Thomas's opinion, were bad-faith attempts to delay the execution. Thomas also argued that Ramirez had failed to exhaust his administrative remedies, as is required by the federal **Prison Litigation Reform Act of 1995** (PLRA). (The majority had considered and rejected both of Justice Thomas's arguments.)

Ramirez v. Collier is a case that turns on its particular facts and does not establish any important precedent. At most, it serves to illustrate how the Court will apply the compelling interest test and the least restrictive alternative test—as Justice Kavanaugh pointed out in his **concurrence**, both tests are quite imprecise and require difficult judgments.

Larry Alexander

Laurence Claus

Professor of Law

III. An Expanded Right to Bear Arms in *Bruen*

Two members of the **New York State Rifle & Pistol Association** applied for unrestricted licenses to carry handguns in public for personal protection. Their applications were denied because they did not "demonstrate a special need for self-protection distinguishable from that of the general community." The applicants and their Association sought declaratory and injunctive relief, alleging that denial of their applications violated the Second Amendment to the United States Constitution, made applicable to state governments through the Fourteenth Amendment.

The Second Amendment **provides**: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." In its *Heller* and *McDonald* decisions, the Supreme Court held that the Amendment confers an individual right to possess handguns for self-defense. Those cases concerned possession in the home. Now the Court turned its attention to possession in public.

In finding that the applicants had a right to carry handguns in public, the Supreme Court in ***New York State Rifle & Pistol Association v. Bruen*** put the onus on government regulators to show that their regulations are "consistent with this Nation's historical tradition of firearm regulation." After surveying the historical evidence, the majority concluded: "Apart from a few late-19th century outlier jurisdictions, American governments simply have not broadly prohibited the public carry of commonly used firearms for personal defense. Nor, subject to a few late-in-time outliers, have American governments required law-abiding, responsible citizens to 'demonstrate a special need for self-protection distinguishable from that of the general community' in order to carry arms in public."

Justice Breyer's **dissent** drew a very different picture from the same historical evidence, arguing that this evidence well supported New York's regulatory scheme. He also questioned the majority's singular focus on a historical

record that could so readily be read in such different ways. The lower courts had been right, he argued, to consider directly in their decision making the public interests served by gun regulation.

The majority contended that "[m]uch like we use history to determine which modern 'arms' are protected by the Second Amendment, so too does history guide our consideration of modern regulations that were unimaginable at the founding." How did history inform the Court's judgment about which modern weapons are protected by the Second Amendment? The majority observed:

> At most, respondents can show that colonial legislatures sometimes prohibited the carrying of "dangerous and unusual weapons"—a fact we already acknowledged in *Heller*. See 554 U. S., at 627. Drawing from this historical tradition, we explained there that the Second Amendment protects only the carrying of weapons that are those "in common use at the time," as opposed to those that "are highly unusual in society at large." Ibid. (internal quotation marks omitted). Whatever the likelihood that handguns were considered "dangerous and unusual" during the colonial period, they are indisputably in "common use" for self-defense today. They are, in fact, "the quintessential self-defense weapon." Id., at 629. Thus, even if these colonial laws prohibited the carrying of handguns because they were considered "dangerous and unusual weapons" in the 1690s, they provide no justification for laws restricting the public carry of weapons that are unquestionably in common use today.

What brings a particular weapon into "common use" for self-defense in a particular time and place? Three factors come into play. First, technology. Second, affordability. Third, *regulation*. Not historic regulation, but regulation *now*. The Court did not acknowledge the circularity of using a criterion for permissible regulation now that has regulation now as one of its key determinants. When self-defense is the reason for arming ourselves, we will see in common use the most destructive weapons that those seeking self-defense can readily afford, on the simple arms-race logic that self-defense depends on not being outgunned by the attacker. What caps the destructive heights to which that arms race will go? *Regulation.* After the Dunblane massacre of schoolchildren, the United Kingdom largely **banned** possessing handguns. Handguns are, as a consequence, not in common use in the United Kingdom. Long before the Port Arthur massacre, Australia had largely **banned** possessing handguns. Handguns are, as a consequence, not in common use in Australia.

Gun regulation today is not being guided by the deep moral principles of our history, but by mistakes made much more recently.

The majority claimed to be drawing their vision of permissible regulation from the periods when the Second and Fourteenth Amendments were adopted, and not from the history of twentieth-century gun regulation. Yet it is only the permissiveness of twentieth-century gun

regulation in the United States that has let high-capacity handguns become "the quintessential self-defense weapon" here.

Today's high-capacity handguns are more capable of use for mass destruction than any of the crude and clumsy artifacts that our ancestors outlawed for being "dangerous and unusual." Today's handguns let their users kill many people quickly and with ease. When we see embedded in our history a principle precluding "dangerous and unusual" weapons, why wouldn't we recognize that principle to call for calibrating regulation to danger? The more potential harm a weapon can cause, the more regulated its possession should be. That is how the rest of the civilized world thinks about gun regulation. Gun regulation in a society that has **more guns than people**, and **more than one mass shooting per day**, is not being guided by the deep moral principles of our history, but by mistakes made much more recently.

Laurence Claus

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IV. Major Crimes and Major Premises in *Castro-Huerta*

Oklahoma v. Castro-Huerta held that Oklahoma courts had jurisdiction to punish non-Indian offenders for serious crimes against Indian victims in Indian country. (Following the usage of Congress and the Supreme Court, I use the term "Indian" rather than "Native American".) Oklahoma prosecutors accused Castro-Huerta of committing felony child neglect in Tulsa. The state court **convicted**, and sentenced Castro-Huerta to thirty-five years in prison.

In ***McGirt v. Oklahoma***, the Court held that much of eastern Oklahoma is "Indian Country" for purposes of jurisdiction to punish crimes. *McGirt*, an enrolled member of the Seminole tribe, was convicted in Oklahoma state court of three sexual assaults. The Court, by a five-justice majority speaking through Justice Gorsuch, reversed the convictions because the **Major Crimes Act** (MCA) confers exclusive jurisdiction over offenses by Indians in Indian country and thus ousts state court jurisdiction over criminal offenses.

Castro-Huerta is not an Indian, but his victim is. Castro-Huerta appealed his state convictions, arguing that after McGirt, Oklahoma had no jurisdiction to punish crimes by non-Indian perpetrators against Indian victims in Tulsa. The Oklahoma courts agreed and **reversed the state convictions**. The Supreme Court, again by a five-to-four vote, sided with Oklahoma and reinstated the state convictions.

Both *McGirt* and *Castro-Huerta* addressed whether federal jurisdiction over crimes in Indian country preempted state jurisdiction. If an Indian defendant is accused of certain specified serious offenses (including murder and kidnapping), federal jurisdiction preempts state jurisdiction to punish the same conduct. The MCA, does not, however, cover crimes by non-Indians against Indian victims on tribal territory. A separate statute, the **General Crimes Act** (GCA), applies the criminal laws Congress provides to govern federal enclaves, the District of Columbia excepted, such as military bases and national parks to places

within "the sole and exclusive jurisdiction of the United States."

The GCA's reference to "the sole and exclusive jurisdiction of the United States" parallels similar language in the MCA. The *Castro-Huerta* majority, however, refused to read the GCA symmetrically with the MCA. According to Justice Kavanaugh's majority opinion, the GCA "simply 'extend[s]' federal law to Indian country, leaving untouched the background principle of state jurisdiction over crimes committed within the State, including in Indian country."

In the end, *Castro-Huerta* might prove practically momentous less for what it accomplishes and more for what it catalyzes.

It might seem that **the policy behind exclusive federal jurisdiction**—protecting Indians from unfair treatment in state courts—would suggest a symmetrical reading even if the language of the GCA does not. With respect to Indian victims, however, state jurisdiction supplements federal jurisdiction under the GCA. From the majority's perspective, relying solely on federal prosecutions both taxed federal resources and provided inadequate law enforcement. The majority noted that "[a]fter having their state convictions reversed, some non-Indian criminals have received lighter sentences in plea deals negotiated with the Federal Government. Others have simply gone free."

Apart from the MCA and the GCA, a third pertinent statute is P.L. 280 (enacted in 1953 and codified **here**). The statute expressly confers state jurisdiction to punish crimes committed in Indian country in six named states. It also revoked federal jurisdiction, under the GCA and the MCA, in those same areas. Prosecutions for crimes premised on interstate commerce, such as drug trafficking under the **Controlled Substances Act** or robbery under the **Hobbs Act**, are still possible, just as they are possible throughout state territory. The overall design of P.L. 280 was to align state and federal power inside Indian country in a way that parallels the state/federal division of labor outside of it.

Oklahoma is not one of the states named in P.L. 280. As Justice Gorsuch pointed out in **dissent**, in 1968 "Congress amended Public Law 280 to require tribal consent before any State could assume jurisdiction over crimes by or against Indians on tribal lands." Oklahoma, however, neither sought tribal consent nor petitioned Congress for a statutory grant of power.

If Congress intended states to exercise general criminal jurisdiction on crimes by non-Indians against Indians on tribal territory, there would have been no need for the specific authorizations in the 1953 statute nor the tribal-consent provision in the 1968 legislation. Why grant power that, according to the majority, the states always had? Justice Kavanaugh **replied** for the majority that P.L. 280 authorizes state prosecutions of Indian *defendants*. If that were the purpose, however, there was no need to include "or against" in the text of P.L. 280, which **reads**: "Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by *or against* Indians in the areas of Indian country listed . . ." (emphasis added).

The clash over P.L. 280 reflected the fundamentally different premises of the majority and the dissenters. For the majority, the starting point was *state* sovereignty, while for the dissenters, the starting point was *tribal* sovereignty. If, in the absence of clear statutory direction from Congress, the norm is state sovereignty, the applicable statutes can be read as not displacing that state authority. If, however, one takes a different default rule—no state authority to punish crimes on tribal lands except when Congress explicitly so provides—the relevant statutes can be read as reflecting that default rule.

Both approaches are backed by precedent. McGirt followed earlier **cases** in holding that the MCA preempts state power to punish Indian defendants for crimes committed in Indian country. Other **cases**, however, have held that the state courts have jurisdiction over crimes in Indian country by non-Indians against non-Indians. As the majority noted, that holding seems to exclude treating reservations as federal enclaves.

The profound disagreement about structural premises, and the exceptional complexity of the doctrinal materials, might suggest a decision of grave consequences. That suggestion would be a mistake. Most obviously, *Castro-Huerta* did not hold that the states have jurisdiction to punish Indian offenders for crimes in Indian country. Even with respect to jurisdiction over non-Indian defendants, specific treaties and state statutes may mean that *Castro-Huerta* does not automatically apply in every state with respect to every tribe. Many states already exercise jurisdiction over Indian as well as non-Indian defendants. Prior to *Castro-Huerta,* twenty-one states already exercised criminal jurisdiction over crimes "by or against" Indians in Indian country. Permitting states to prosecute non-Indian defendants seems a less sweeping change than was worked by P.L. 280.

In the end, *Castro-Huerta* might prove practically momentous less for what it accomplishes and more for what it catalyzes. How criminal justice in Indian country should be regulated is ultimately a question for Congress. Congress hasn't revisited that subject since **2010**. In *Castro-Huerta,* the majority pointed out important weaknesses of federal prosecutions, and the dissent countered that adding state authority might very well make matters worse. The plausibility of both positions suggests the desirability of a thorough reconsideration of the roles played by the Justice Department, the tribal court systems, and the states. Only Congress can do that.

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V. The Vaccine Cases and Administrative Power

On January 13, 2022, the Supreme Court issued per curiam rulings in two cases about federal vaccine mandates. In both, the legal question boiled down to whether a federal agency—the Department of Health and Human Services in one case, the Occupational Safety and Health Administration in the other—exceeded the statutory authority that Congress has granted to it.

In ***Biden v. Missouri***, a narrowly divided Court upheld an HHS requirement that 10 million healthcare workers be vaccinated for COVID-19. In ***National Federation of Independent Business v. Department of Labor, Occupational Safety and Health Administration***, the Court struck down a similar mandate that OSHA imposed on large private companies that employ about 84 million employees across all industries.

In this pair of cases, the Court has positioned itself as a check on federal power. The majority in both interprets a congressional statute to determine the scope of an agency's power to protect public health and safety in response to a national emergency in the COVID-19 pandemic. The opposing outcomes turn on the deference that the Court affords to each agency in light of its past regulations of health and safety for the population that it is charged with protecting.

The HHS mandate in *Biden v. Missouri* applied to covered staff at facilities that receive funding from Medicare or Medicaid. Workers who failed to comply could lose their job or be fined, unless they qualified for medical or religious exemptions. A 5-4 majority held that this requirement fell within the scope of HHS's statutory authority to enact regulations that are "necessary in the interest of [public] health and safety." The Court deferred to HHS's altogether reasonable finding that vaccinating healthcare staff against COVID-19 was required to prevent transmission of the disease to the high-risk patients they served.

Justice Thomas **dissented**, joined by Justices Alito, Gorsuch, and Barrett. The dissent's focus was the absence of clear congressional delegation to issue a nationwide vaccination

mandate. Despite the health and safety provisions, Justice Thomas argued that HHS had exceeded its scope because Congress did not expressly authorize the agency to mandate vaccinations during a pandemic. Justice Alito, joined by the same three justices, **separately dissented** on procedural grounds.

The *NFIB v. OSHA* case consolidated dozens of challenges to OSHA's rule that employers with at least 100 employees must require that they be vaccinated, unless the employees abided by an alternative set of regulations. Workers who declined to be vaccinated for medical or religious reasons wouldn't be fired so long as they submitted to weekly testing at their own expense and wore a mask on the job. The only exceptions were for employees whose work was entirely remote, outdoors, or alone.

A 6-3 Court **held** that the mandate exceeded the scope of OSHA's authority to set workplace standards "to provide safe or healthful employment." The majority classified the vaccine requirement as a broad public health measure for which the agency lacked congressional authorization because COVID-19 is a hazard that extends beyond the workplace. OSHA determined that the mandate would save thousands of lives and prevent hospitalizations; the challengers argued that the mandate would cost billions of dollars and induce resignations.

In *NFIB v. OSHA*, the Court did not defer to OSHA like it did to HHS in *Biden v. Missouri*. Rather, the Court disregarded OSHA's findings, explaining that such tradeoffs should be evaluated by politically accountable actors and not unelected judges.

In a **joint dissent**, Justices Breyer, Sotomayor, and Kagan argued that the vaccine requirement fell squarely within OSHA's authority to set workplace standards designed to keep employees safe and healthy at work. In their view, the statute doesn't require that OSHA's regulations apply to hazards found *only* in the workplace. They criticized the majority for imposing this artificial limit on OSHA's authority.

The opposing outcomes of these two cases turn on the deference that the Court affords to each agency in light of its past regulations of health and safety for the population that it is charged with protecting.

Chief Justice Roberts and Justice Kavanaugh represented the decisive votes in each case. Both elected to uphold the HHS mandate but strike down the OSHA one. One reason for may be the interpretative evidence they looked to beyond the statutory text. The majority also made mention of previous HHS and OSHA regulations to inform the limits of each agency's authority. The Court noted that HHS has routinely issued regulations that obligate participating facilities to protect patient health and safety. The vaccine mandate went further than past HHS regulations—after all, the agency had previously been able to rely on compliance with state requirements—but fit within its

longstanding practice of protecting healthcare workers and patients.

OSHA lacked this historical precedent. The Court reasoned that OSHA had never before issued a regulation "addressing a threat that is untethered, in any causal sense, from the workplace," in the sense that COVID-19 is a hazard encountered wherever people gather, not just at work. That is why the Court held that the mandate exceeded OSHA's authority. Agencies' ability to respond to emergencies may now depend on the reach of their previous regulations.

Dov Fox

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VI. In *Viking River Cruises*, the Court Once Again Favors the Federal Arbitration Act

In a series of cases over the past few decades, the Supreme Court has made it easier for companies to demand arbitration from their employees and consumers. In this term's ***Viking River Cruises v. Moriana***, the Court continued its interpretation of the Federal Arbitration Act (FAA) as preemptive of any contravening state law. Passed in 1925, the FAA was designed to limit common law restrictions in the use of arbitration. As it has been interpreted by the Court in the past decades, the FAA receives primacy over state and other federal legislation.

Employees and consumers are regularly required to sign pre-dispute arbitration clauses, with class action waivers, as part of their employment contracts. In ***AT&T Mobility LLC v. Concepcion*** and ***Epic Systems Corp. v. Lewis***, the Court held that class action waivers in both consumer and employment pre-dispute arbitration agreements were enforceable. In Moriana, the Court held that the **Federal Arbitration Act** further preempts California's employee rights to assert representative claims under California's **Private Attorneys General Act of 2004 (PAGA)**. The trial plaintiff, Angie Moriana, brought action against her former employer Viking River Cruises, Inc., seeking recovery of civil penalties under PAGA for unpaid final wages and other wage and hours violations.

A PAGA representative action is a type of *qui tam* action, whereby a private individual aids the government in recovering civil penalties on behalf of the state. In a PAGA suit, the California Labor and Workforce Development Agency receives 75 percent of the award while the affected employees receive the remaining 25 percent. PAGA authorizes an aggrieved employee **to file a claim** "on behalf of himself or herself *and* other current or former employees" for violations of the Labor Code. In 2014, the California Supreme Court in ***Iskanian v. CLS Transp. Los Angeles, LLC*** invalidated contractual waivers of representative claims under PAGA. The *Iskanian* Court explained that the government entity in a PAGA action "is always the real party in interest." It further held that PAGA cases are not class actions, but bilateral

proceedings, and therefore an anti-waiver rule does not conflict with what *Epic Systems* had described as "*Concepcion's* essential insight" that "courts may not allow a contract defense to reshape traditional individualized arbitration by mandating classwide arbitration procedures without the parties' consent."

***Moriana* is yet another blow against worker collective action, in a time in which workplace regulations are notoriously underenforced, especially with regards to the most vulnerable, lowskilled workers.**

In *Moriana*, the Supreme Court rejected the California court's interpretation of PAGA and class waivers. The employer in this case moved to compel arbitration of Moriana's individual PAGA claim pertaining to a violation she alone suffered, and to dismiss her representative PAGA claims on violations that she and others experienced. The trial court denied that motion, and the California Court of Appeal affirmed, holding that categorical waivers of PAGA standing are contrary to state policy. Viking argued that the Court's FAA precedents require enforcement of contractual provisions waiving the right to bring PAGA actions because PAGA creates a form of class or collective proceeding. In its **petition** for certiorari, Viking contended that the "legal fiction" California has created by treating the aggrieved plaintiff as a state actor is a "transparent effort to avoid the FAA's preemptive effect" that attempts to avoid the FAA's reach by conceptualizing claims as "particularly intertwined with state interests." Viking claimed that the Court's FAA precedents require enforcement of contractual provisions waiving the right to bring PAGA actions because PAGA creates a form of class or collective proceeding.

The Court adopted a more complicated reasoning, but in essence rendered a win for the employer. The majority opinion, written by Justice Alito, held that PAGA actions were not like class actions where a representative plaintiff's individual claims were used as a basis to adjudicate the claims of multiple parties at once. Rather, the Court reasoned that PAGA plaintiffs represent a principal (the Labor Workforce Development Agency) and can assert a number of claims on behalf of the state. As a result, the Court reasoned that the procedural mechanisms that render class actions ill-suited to bilateral arbitration—class certification, notice to the class, and so on—do not apply to PAGA. However, the Court held that the procedural structure of PAGA, which enables a plaintiff to add claims on behalf of other employees, and the FAA were inconsistent. To that end, the Court held that the PAGA plaintiff's ability to introduce claims of other employees could require the parties to arbitrate a claim that they did not consent to, such as in the case where the parties agreed to individual arbitration. Somewhat ironically, the Court forced the employee PAGA waiver under the reasoning that other employees had not consented to a collective arbitration. The Court ruled that Viking was entitled to compel individual arbitration of Moriana's individual PAGA claim. The Court also determined that, because PAGA does not provide a mechanism for the court to adjudicate

representative PAGA claims once the individual claim has been committed to a separate proceeding (such as arbitration), Moriana lacked standing to maintain her representative claims. Accordingly, Moriana's representative PAGA claims were subject to dismissal. Because the individual and representative PAGA claims could not be split, the Court forced the plaintiff to arbitrate her individual claims and to accept her representative PAGA rights waiver.

The decision is yet another blow against worker collective action. Justice Alito, partially quoting *Epic Systems*, emphasized that the FAA "preempts any state rule discriminating on its face against arbitration" as well as any substantive rule about arbitration that "could be used to transform 'traditiona[l] individualized . . . arbitration' into the 'litigation it was meant to displace' through the imposition of procedures at odds with arbitration's informal nature."

As I have **argued** in my research, pre-dispute arbitration agreements, now typically including class waivers, alongside **other employment restrictive** covenants, including **broad non-disclosure clauses**, have the effect of suppressing employee voice, concealing valuable market information about compliance and corporate conduct, and reducing enforcement of regulatory protections. Workplace regulations are notoriously underenforced, especially with regards to the most vulnerable, low-skilled workers. However, Congress can act to reform the FAA. **The Forced Arbitration Injustice Repeal (FAIR) Act** would prohibit the enforcement of mandatory, pre-dispute arbitration contracts involving consumer, employment, antitrust, and civil rights disputes. Until then, the result of *Moriana* is that arbitration agreements can now prevent an employee from bringing a PAGA claim on behalf of other employees.

Orly Lobel

Miranda McGowan

Professor of Law

VII. In *Dobbs*, An Earthquake With Many Possible Aftershocks

"*Roe* was egregiously wrong from the start," declared Justice Alito in ***Dobbs v. Jackson Women's Health Organization***, a scathing opinion that extinguished the 50-year-old constitutional right of women to access abortion. States and the federal government can now regulate abortion as they see fit.

The right to abortion had no basis in the Court's substantive due process jurisprudence, Justice Alito wrote, either as a matter of "history and tradition" or under the Court's prior precedents protecting the right to privacy. For support, he cited liberal legal icons such as **John Hart Ely**, **Laurence Tribe**, and even the late **Justice Ruth Bader Ginsburg**.

Roe deserved no respect as precedent because it was partisan and political, only reflecting the justices' own sense of justice, charged Justice Alito. ***Casey*** deserved even less respect—it purported to reaffirm *Roe* but in fact overturned its "strict scrutiny" test with a balancing test that had sown decades of confusion about what abortion regulations did or did not constitute an "undue burden."

The fundamental flaw, Justice Alito wrote, was that the right to abortion was not based in our "history and tradition" of fundamental rights. Since the mid-twentieth century, "history and tradition" has been the test for discerning unenumerated rights and liberties; the problem is that the Court has used a variety of looser and stricter versions of this test. *Dobbs* used the narrowest and most originalist version, one that examined protected rights as they stood around the mid-1860s when **the 14th Amendment** was framed and ratified. States had begun to ban abortion in the 1830s, and by 1870 most states had banned it. This history demonstrated to the *Dobbs* majority that no one had thought that the 14th Amendment's due process clause protected the right to abortion. (It is hard to imagine that abortion would have been a protected right—maternity was viewed as women's natural state, and women, deprived of the right to vote and a separate legal existence, could not shape the

"history and tradition" of our rights.) Lacking proper pedigree, abortion restrictions will now be upheld if they are merely "rationally related to a legitimate state interest," the same standard for **upholding laws** that impinge on the "right" of employers to pay substandard wages.

This narrow, originalist history and tradition test shakes the foundation upon which rest ***Griswold*** (the right of married persons to use contraception), ***Eisenstadt*** (the right of unmarried persons to use contraception), ***Lawrence*** (the right to intimate sexual conduct in the home), and ***Obergefell*** (the right to same sex marriage). None of these were "protected rights" in 1868. (Neither was the right to "interracial marriage," but ***Loving*** held that those laws violated not only the due process clause but the equal protection clause, too.) *Dobbs*, Justice Alito reassured, does not call into question these rights: abortion is unique, he wrote, because women's right to abortion necessarily extinguishes potential life. The rights to marry, use contraception, or have sex with a consenting adult pose no like dangers.

True, but—in light of the rational basis test—beside the point. In 1868, all of these "liberties" were fair game for states or the federal government to regulate or ban, and many did so. This originalist "history and tradition" test could therefore require the Court to uphold these laws if they are "rationally related to a legitimate state interest." The types of state interests *Dobbs* held to be "rationally related to" abortion bans suggests that *Griswold, Eisenstadt, Lawrence,* and *Obergefell* may be in danger. *Dobbs* held that states could rationally ban abortion to outlaw surgical abortions by deeming abortions to be gruesome or barbaric procedures that caused fetuses pain or that ended the life of a fetus. Preserving fetal life over the interests of a pregnant woman and the conclusion that surgical abortion is barbaric are moral judgments—weighty ones, to be sure, but still moral judgments.

Dobbs **purports to bring certainty and the rule of law to a divisive and controversial issue, but it has ushered in new and grave uncertainties about many other rights.**

Alarmingly, *Dobbs* held that preserving the health or life of a woman would be a rational basis for abortion bans. That proposition stands medical science on its head. Childbirth is at least **fourteen times more dangerous** than abortion for the average American woman. Childbirth is even more dangerous for African American women, who face a maternal death rate almost **250%** higher than the American average.

The Court had struck down bans on same-sex marriage, contraception, and certain sexual conduct because states' moral justifications standing alone did not justify those regulations. *Dobbs* undercuts that reasoning. For example, some believe that some forms of contraception destroy "life." Justice Alito himself **wrote in dissent in *Obergefell*** that it was unclear whether same-sex marriage harmed children born into such a marriage (actually, **no such harms exist**) or undermined the institution of marriage itself.

Uncertainty, he wrote, should permit states to ban it if they see fit.

An opinion that purports to bring certainty and the rule of law to a divisive and controversial issue has ushered in new and grave uncertainties about many other rights. The crucial five votes may not yet exist to overrule *Griswold, Obergefell,* or *Lawrence*; Justice Kavanaugh says he has no interest in revisiting those precedents, and Chief Justice Roberts values *stare decisis.* But the key word is "yet." The aftershocks of *Dobbs* will be felt for years to come.

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VIII. Placing Limits on Administrative Agencies in *West Virginia v. EPA*

In a term with many potential blockbusters on the Supreme Court's docket, ***West Virginia v. EPA*** was anxiously anticipated as raising some of the most consequential issues. Not only did *West Virginia* raise a very important question concerning EPA's power to restrain existing coal-fired power plants from emitting carbon dioxide, it also was thought that it might lead the Supreme Court to announce a strict nondelegation doctrine or to overrule ***Chevron*** deference—each of which would have dramatic consequences on administrative law generally. In the end, the case turned out not to directly touch either the nondelegation doctrine or *Chevron*, but it still was a significant blockbuster, both because of its effect on EPA's authority and its invocation of the major questions doctrine—another doctrine likely to have significant effects on administrative law.

The main **question** raised by *West Virginia* involved the limits on the emission of carbon dioxide from existing coal-fired power plants under **section 111(d) of the Clean Air Act**. The Act authorizes EPA to issue a standard of performance for these plants. A "standard of performance" is one that "reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the [EPA] Administrator determines has been adequately demonstrated." Simplifying this definition, it basically requires the EPA to set a standard (for a category of a stationary source of air pollution) which applies the best system of emission reduction, taking costs (and other factors) into account.

Since the enactment of the Clean Air Act, the majority **wrote**, such standards have "always set emissions limits under section 111 based on the application of measures that would reduce pollution by causing the regulated source to operate more cleanly." The standards "had never devised a cap by looking to a 'system' that would reduce pollution simply by 'shifting' polluting activity from 'dirtier to cleaner' sources." For example, EPA set the standard for *new* steam

generating units by determining that they use "a combination of high-efficiency production processes and carbon capture technology." But for existing coal-fired plants, EPA set a different and historically unprecedented standard that required permissible emissions to be determined by reference to the emissions from natural gas-fired plants or wind and solar plants.

***West Virginia* was a blockbuster that clearly established, perhaps for the first time, that there is a major questions doctrine that limits interpreting statutes to confer significant delegations to the executive.**

EPA argued for its interpretation of a standard of performance based on an abstract reading of the term's definition, while West Virginia's position was supported by a reading of the term's definition based on the historical interpretation of the provision.

But while Chief Justice Roberts's opinion for the majority relied on this latter interpretation, it also employed what it termed the major questions doctrine for support. Under this doctrine, "there are 'extraordinary cases' …in which the 'history and the breadth of the authority that the agency has asserted' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress'" meant to confer such authority. In these cases, the majority stated, the major questions doctrine requires that Congress clearly indicate it intends to confer such authority.

In *West Virginia,* the six-member majority concluded that EPA's claim of authority for the power plant represented such an extraordinary case. The statutory language did not clearly indicate that EPA enjoyed such unprecedented authority. Significantly, the Court did not claim that EPA lacked authority to regulate against climate change generally. It merely concluded that the attempt to require existing coal-fired plants to reduce emissions to the level of natural gas sources or wind and solar sources exceeded its authority under section 111(d).

Some observers had predicted that *West Virginia* would lead to a revival of the strict nondelegation doctrine, which holds that broad delegations to agencies are unconstitutional, or to an overturning of *Chevron* deference, which would have denied agencies deference for their interpretation of statutes. But *West Virginia* avoided these questions. By concluding that the statute did not authorize EPA's action, the Court avoided the need to address the nondelegation doctrine. And by concluding that the statute could not be read as authorizing the agency's action, the Court avoided the need to address whether EPA should receive *Chevron* deference.

In a **concurrence**, Justice Gorsuch sought to set the major questions doctrine on a firmer footing. Gorsuch argued that the doctrine was similar to other clear statement rules that attempted to protect against Congress unintentionally violating the Constitution. Without the doctrine, it would be easier for Congress to unintentionally make an unconstitutionally broad delegation to an agency.

Justice Kagan, writing for herself and the two other progressive justices, **dissented** from the majority opinion. Kagan believed that the Clean Air Act's language conveyed significant authority and flexibility on EPA to set standards of performance, permitting EPA to adopt the standard of performance at issue here. Justice Kagan also denied that the Court's precedents adopted a major questions doctrine. Instead, she attempted to account for the cases the majority had relied upon based on ordinary statutory interpretation principles.

In the end, *West Virginia* was another blockbuster reached by the Court's new conservative majority. The case not only restricted EPA's efforts to regulate against climate change, but also clearly established, perhaps for the first time, that there is a major questions doctrine that limits interpreting statutes to confer significant delegations to the executive.

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IX. A Unanimous Court Divides over Religion and Speech in *Shurtleff*

In *Shurtleff v. City of Boston*, the Supreme Court unanimously reversed the lower federal courts and held that the City of Boston violated the Constitution when it refused to allow a Christian group to fly a Christian flag from one of three flagpoles in front of Boston's City Hall. The city had a long-standing practice of allowing groups to hold ceremonies on City Hall Plaza, and to raise a flag of their choosing for a few hours on the day of their ceremony. The city had never before refused permission to a group's flag, nor had it ever announced a policy restricting such flags or suggested that the flags "spoke" for the city rather than for the private groups using the plaza. But when Harold Shurtleff, head of a conservative Christian group, wanted to raise what he called a Christian flag for his group's event, the city refused, saying that it would violate the Constitution's prohibition on "**establishment of religion**" to fly a religious flag at City Hall. In *Shurtleff*, all the justices agreed that Boston had created a public forum for these flag raisings, and that excluding a religious flag was impermissible "viewpoint discrimination" in violation of the First Amendment.

The justices were unanimous for the outcome, but not for Justice Breyer's majority opinion. A series of concurrences from four of the more conservative justices show that there are differences of view, or at least of emphasis, on the Court, both about what is meant by a "public forum," and about what is meant by "establishment of religion."

Justice Breyer **emphasized** that the government is entitled to speak in its own name, and when it does, to control what is expressed. Boston could easily have made it clear in advance—although it never did so in this case—that the flagpole outside City Hall was for expression of Boston's official sentiments, not a forum for free expression by the public. If so, then a government body would be free to reject religious messages: perhaps it would be constitutionally obliged to do so.

Justice Kavanaugh, who also joined the Breyer majority, filed a short **concurrence** to the effect that government mustn't exclude or discriminate against religious expression when secular speakers or programs are given a public forum.

Justice Alito, joined by Justices Thomas and Gorsuch, **concurred** separately, differing from Justice Breyer about how readily to find that the government is "speaking" in its own name. These justices warned that Breyer's "holistic" consideration of whether government is "speaking" might mean that government could be deemed to "speak"—and hence to have the power to control or censor the content—when it licenses or provides a forum for private expression, even by granting a copyright or providing meeting space on a public campus. Alito's three would find government speech only when "a government purposefully expresses a message of its own through persons authorized to speak on its behalf." These justices also emphasized that religious programs or messages must not be excluded when government maintains a public forum open to other viewpoints.

Justice Gorsuch, joined by Justice Thomas, filed a further **concurrence**, citing both original understanding and numerous Supreme Court precedents from recent decades, to reject the "tests" for establishment of religion in the 1971 case of ***Lemon v. Kurtzman***, and to underscore the position that whereas government adoption of a religion offends the Constitution, "treating a church on par with secular entities and other churches does not."

The various opinions in *Shurtleff* thus reiterate longstanding differences between the Court's

***Shurtleff* marks a suitable farewell to Justice Breyer.**

left-leaning and right-leaning justices over what is meant by establishment of religion, and also mark somewhat newer differences over what is meant by government speech or a public forum. Left-leaning justices since the mid-twentieth century have been more radically "separationist" about religion and government, whereas right-leaning justices view the establishment clause as primarily a safeguard against discrimination for or against any particular religion. These opinions go on to suggest that right-leaning justices are readier to view government as creating a public forum—without power to control the content of what is expressed—than are the left-leaning justices.

But at least in this case, there was no disagreement about the outcome. In fact, **the Biden Administration** and the **American Civil Liberties Union** filed briefs supporting Harold Shurtleff, perhaps fearing what the result and the precedent might be if the Court were to divide over the City of Boston's rejection of his religious flag. Justice Breyer's majority opinion is good-natured and erudite, offering enjoyable lore about flags and architecture along the way. The unanimous result in the case, despite underlying differences of principle, marks a **suitable farewell** to Justice Breyer as his career on the Court draws to a close.

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X. A Touchdown for Prayer in Schools in *Kennedy*

Exactly what had happened was hotly contested in ***Kennedy v. Bremerton School District***: the majority opinion by Justice Neil Gorsuch and the dissenting opinion by Justice Sonia Sotomayor paint starkly different pictures. Cutting through complexities, though, this much seems clear enough: Joseph Kennedy, a football coach at Bremerton High School, adopted a practice of kneeling briefly in prayer at the 50-yard line following games. He welcomed players, of either team, who chose to join him. Perceiving Coach Kennedy's practice as a violation of the constitutional separation of church and state, the school district told him to stop. He didn't stop. He was suspended. He sued. Lower courts **sided with** the school district. But the Supreme Court reversed, 6-3, ruling that the coach's practice did not violate the First Amendment's establishment clause; on the contrary, the practice was protected by that amendment's free exercise of religion and free speech clauses.

How significant is the decision, and why?

Previous Supreme Court opinions had consistently invalidated various forms of prayer in public schools—classroom prayer, prayer at graduation ceremonies, prayers piped over the loudspeakers before football games, even a "moment of silence" for meditation or "voluntary prayer." At least technically, though, *Kennedy* does not subvert those rulings because the Court viewed Coach Kennedy's prayer as private not school-sponsored speech.

Of more general importance, the majority opinion explicitly repudiated the received doctrine of the **Establishment Clause**—the so-called ***Lemon*** test—as well as the corollary doctrine that deemed it unconstitutional for government to send messages "endorsing" religion. But just as a practical matter, as Justice Gorsuch explained, those doctrines had long been effectively defunct anyway. And if, as a leading constitutional scholar once **observed**, the amorphous *Lemon* test was "so elastic in its application that it means everything and nothing," official abandonment of the test just in

Kennedy **explicitly repudiated the received doctrine of the Establishment Clause—the so-called *Lemon* test—but only time will tell where the Court's new history and tradition test will take us.**

itself would not necessarily have any particular or significant implications.

Nonetheless, *Kennedy* is a sort of at least symbolic watershed because it makes explicit a change in constitutional direction that has been observable for a decade or more in the Court's decisions. In the American constitutional order, how are religion and government supposed to relate to each other? The question has been with us from the beginning. Over the latter half of the twentieth century, the answer that developed construed Jefferson's legendary "wall of separation between *church and state*" to require a separation of *religion* from the public sphere. Religion is a private matter that should be protected in the private domain, but governmental and public functions (including public schools) should be secular—meaning not religious. This "private religion/ secular public sphere" paradigm was (unevenly) implemented in a variety of areas—including public religious expressions and funding of parochial schools—but the **school prayer cases** were probably the leading instance.

Although the private religion paradigm has its attractions, however, as well as its ardent supporters (of whom Justice Sotomayor is probably the leading representative on the Court today), it also has significant vulnerabilities. More specifically, the paradigm misrepresents religion. Although some people may regard their faith as entirely personal, religion for many people and in its inherent character is not and never has been purely private in its scope; and the Court's repeated pronouncements could not make it so. In addition, the paradigm amounted to a significant break from the American political tradition. Governmental leaders (Washington, Lincoln, even Jefferson—not to mention Biden and Trump and Obama) have often invoked religion in their public performances. And religion has heavily and openly influenced political movements from the Revolutionary War to anti-slavery campaigns to women's suffrage to the modern civil rights movement. As a constitutional doctrine, the private religion paradigm owed less to James Madison and Thomas Jefferson than to William Brennan. Like John F. Kennedy a few years later, Justice Brennan adopted the paradigm as a personal philosophy: **challenged at his confirmation hearings** about ostensible conflicting loyalties, he explained that he could be Catholic "as a private citizen" but that religion would not influence his work as a justice. Once on the Court, Justice Brennan basically worked (often against vigorous popular resistance) to impose his personal philosophy on the nation as a whole.

Over time the paradigm's vulnerabilities have become ever more conspicuous, leading to frequent criticism of religion clause jurisprudence as illogical and incoherent. Recent decisions have accordingly moved away from the private religion paradigm. The *Kennedy* decision, with its explicit repudiation of the *Lemon* test, solidifies and confirms this movement.

But what if anything will emerge to replace the *Lemon* test and the private religion paradigm? The *Kennedy* majority indicated that it would henceforth be guided by tradition and history—a course that some justices especially including Justice Stephen Breyer had already been following for some time. But, **as Justice Sotomayor objected**, tradition and history hardly amount to a legal rule or doctrine.

Especially in an old and vast and exquisitely pluralistic nation, tradition and history are complex, and conflicting, and hence malleable sources. However wise or misguided it may have been, moreover, the private religion paradigm itself is by now an important part of American tradition and history. So then, where will tradition and history take us? As always, time will tell.

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