

University of  
California, Irvine  
**School of Law**

**5th Annual  
Supreme Court Term in Review**



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## Panelists



**Erwin Chemerinsky**  
*UC Irvine School of Law*

Erwin Chemerinsky is the founding Dean and Distinguished Professor of Law, and Raymond Pryke Professor of First Amendment Law, at UC Irvine School of Law, with a joint appointment in Political Science. Prior to assuming this position in 2008, he was the Alston & Bird Professor of Law and Political Science at Duke University from 2004-2008. Chemerinsky was a professor at the University of Southern California Gould School of Law from 1983-2004, including as the Sydney M. Irmas Professor of Public Interest Law, Legal Ethics, and Political Science. He is the author of eight books, including “The Case Against the Supreme Court,” published by Viking in 2014, and more than 200 law review articles.

He frequently argues appellate cases, including in the United States Supreme Court. In January 2014, National Jurist magazine named Chemerinsky as the most influential person in legal education in the United States. He is a graduate of Northwestern University and Harvard Law School.



**Linda Greenhouse**  
*Yale Law School/The New York Times*

Linda Greenhouse covered the Supreme Court for The New York Times between 1978 and 2008 and writes a biweekly column on law. She has received several major journalism awards, including the Pulitzer Prize (1998), the American Political Science Association Carey McWilliams Award for “a major journalistic contribution to our understanding of politics (2002),” and the Goldsmith Career Award for Excellence in Journalism from Harvard University’s Kennedy School (2004). Her latest book, “Before Roe v. Wade: Voices That Shaped the Abortion Debate Before the Supreme Court’s Ruling” (with Eva B. Siegel), was published in 2010. Currently, Greenhouse is the Knight Distinguished

Journalist in Residence and Joseph Goldstein Lecturer in Law at Yale Law School. She also lectures frequently to law school and judicial audiences and has been awarded nine honorary degrees. She is a graduate of Radcliffe College (Harvard), and earned her Master of Studies in Law degree from Yale Law School.



**Song Richardson**  
*UC Irvine School of Law*

Professor Song Richardson’s interdisciplinary research uses lessons from cognitive and social psychology to study criminal procedure, criminal law, and policing. Currently, she is working on a book that examines the legal and moral implications of mind sciences research on policing and criminal procedure. Her scholarship has been published by law journals at Yale, Cornell, Northwestern, Southern California and Minnesota, among others. Her article, “Police Efficiency and the Fourth Amendment,” was selected as a “Must Read” by the National Association of Criminal Defense Attorneys. Her co-edited book, “The Future of Criminal Justice in America,” was published by Cambridge

University Press in 2014. Richardson’s legal career has included partnership at a boutique criminal law firm and work as a state and federal public defender in Seattle. She was also an assistant counsel at the NAACP Legal Defense and Educational Fund, Inc. Immediately upon graduation from law school, Richardson was a Skadden Arps Public Interest Fellow with the National Immigration Law Center in Los Angeles and the Legal Aid Society’s Immigration Unit in Brooklyn, N.Y. She has been featured in numerous local and national news programs, including “48 Hours.” Richardson is the 2011 recipient of the American Association of Law School’s Derrick Bell Award, which recognizes a junior faculty member’s extraordinary contribution to legal education through mentoring, teaching and scholarship. She frequently presents her work at academic symposia, as well as at non-academic legal conferences. Richardson graduated with a B.A. *cum laude* from Harvard University and a J.D. from Yale Law School. She is a member of the American Law Institute.





**Kannon K. Shanmugam**  
*Williams & Connolly LLP*

Kannon Shanmugam heads Williams & Connolly LLP's Supreme Court and appellate litigation practice. He has been recognized by numerous publications as one of the nation's leading Supreme Court and appellate advocates. In 2015, Lawdragon magazine named him one of the 500 leading lawyers in America. Shanmugam has argued 17 cases before the Supreme Court, including three cases in the current 2014-2015 term. Currently, he is representing NASDAQ in its appeal to the Second Circuit from the denial of a motion to dismiss claims arising from Facebook's initial public offering, and Sprint in its appeal to the New York Court of Appeals concerning the taxation of interstate mobile-telephone services. He is co-chair of the American Bar Association's Appellate Practice Committee, past president of the Edward Coke Appellate Inn of Court, the principal bench-bar organization for appellate judges and lawyers in the Washington area, and is a member of the Advisory Committee on Procedures for the U.S. Court of Appeals for the D.C. Circuit. He holds his A.B. *summa cum laude* from Harvard College; his M. Litt. from the University of Oxford, where he was a Marshall Scholar; and his J.D. *magna cum laude* from Harvard Law School, where he was also executive editor of the Harvard Law Review.



**Hon. Jeffrey S. Sutton**  
*U.S. Court of Appeals for the Sixth Circuit*

Jeffrey S. Sutton is a judge for the United States Court of Appeals for the Sixth Circuit. Prior to this, he was a partner with the law firm of Jones, Day, Reavis & Pogue, Columbus, Ohio, branch, since 1996. Before that he was an associate with the firm where he specialized in commercial litigation, constitutional litigation and appellate practice. Since 1993, Judge Sutton has been an Adjunct Professor of Law at the Ohio State University College of Law, teaching seminars on the United States Constitution and State Constitutional Law. Since 2012, Judge Sutton has taught a class on State Constitutional Law at Harvard Law School. From 1995-1998, he was State Solicitor of Ohio, overseeing all appellate litigation on behalf of the Attorney General and participating in complex litigation on her behalf at the trial level. In 1991 and 1992, Judge Sutton worked as a law clerk to the Honorable Lewis F. Powell, Jr., Associate Justice (Ret.) and the Honorable Antonin Scalia, Associate Justice for the Supreme Court of the United States. Judge Sutton has argued 12 cases in the United States Supreme Court. Judge Sutton received his B.A. from Williams College and his J.D. from the Ohio State University College of Law.

**Moderator—Rick Hasen**  
*UC Irvine School of Law*



Richard L. Hasen is the Chancellor's Professor of Law and Political Science. He is a nationally recognized expert in election law and campaign finance regulation, and is co-author of a leading casebook on election law. From 2001-2010, he served alongside Dan Lowenstein as founding co-editor of the quarterly peer-reviewed publication, Election Law Journal. He is the author of more than 80 articles on election law issues, published in numerous journals including the Harvard Law Review, Stanford Law Review and Supreme Court Review. He was elected to the American Law Institute in 2009, and he was named one of the 100 most influential lawyers in America by The National Law Journal in 2013. His op-eds and commentaries have appeared in many publications, including The New York Times, The Washington Post, Politico and Slate. Hasen also writes the often-quoted Election Law Blog. His book, "The Voting Wars: From Florida 2000 to the Next Election Meltdown," was published in summer 2012 by Yale University Press; his new Campaign Finance Book, "Plutocrats United," will be published in early 2016. Hasen holds a B.A. degree (with highest honors) from UC Berkeley and a J.D., M.A. and Ph.D. (Political Science) from UCLA. He clerked for the Honorable David R. Thompson of the United States Court of Appeals for the Ninth Circuit and then worked as a civil appellate lawyer at the Encino firm Horvitz and Levy. Hasen has taught at the Chicago-Kent College of Law and Loyola Law School, Los Angeles, where he was named the William H. Hannon Distinguished Professor of Law in 2005. He joined the UC Irvine School of Law faculty in July 2011 and is a faculty member of the UC Irvine Center for the Study of Democracy.

# Supreme Court Term in Review: October Term 2014

Erwin Chemerinsky

University of California, Irvine School of Law

July 13, 2015

## SELECTED CASES

### I. Criminal Procedure and Criminal Law

#### A. Fourth Amendment

Heien v. North Carolina, 135 S.Ct. 530 (2014). The Fourth Amendment is not violated when a police officer makes a mistake of law to justify a traffic stop.

Rodriguez v. United States, 135 S.Ct. 1609 (2015). An officer may not extend an already completed traffic stop for a canine sniff without reasonable suspicion or other lawful justification.

City of Los Angeles v. Patel, 135 S.Ct. \_\_\_\_ (June 22, 2015). Los Angeles Municipal Code § 41.49, which requires hotel operators to record and keep specific information about their guests on the premises for a ninety-day period and to make those records available to "any officer of the Los Angeles Police Department for inspection" on demand, is facially unconstitutional because it fails to provide the operators with an opportunity for pre-compliance review.

#### B. Confrontation clause

Ohio v. Clark, 135 S.Ct. \_\_\_\_ (June 18, 2015). The introduction at trial of statements made by a three-year-old boy to his teachers identifying his mother's boyfriend as the source of his injuries did not violate the Confrontation Clause, when the child did not testify at trial, because the statements were not made with the primary purpose of creating evidence for prosecution.

#### C. Death penalty

Glossip v. Gross, 135 S.Ct. \_\_\_\_ (June 29, 2015). Plaintiffs have not shown a substantial likelihood of prevailing on the merits in showing that the use of midazolam as the first drug in a three-drug cocktail constitutes cruel and unusual punishment under the Eighth Amendment.

#### D. Federal criminal statutes

Johnson v. United States, 135 S.Ct. \_\_\_\_ (June 26, 2015). The residual clause in the Armed Career Criminal Act is unconstitutionally vague.

Yates v. United States, 135 S.Ct. 1074 (2015). For purposes of 18 U.S.C. § 1519, which imposes criminal liability on anyone who "knowingly . . . destroys . . . any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States," a "tangible object" is one used to record or preserve information.

### II. Constitutional rights

#### A. Freedom of Speech

Williams-Yulee v. Florida State Bar, 135 S.Ct. 1656 (2015). A rule of judicial conduct that prohibits candidates for judicial office from personally soliciting campaign funds does not violate the First Amendment.

Elonis v. United States, 135 S.Ct. 2001 (2015). As matter of statutory interpretation, conviction for threatening another person under 18 U.S.C. § 875(c) requires proof of the defendant's subjective intent to threaten.

Reed v. Town of Gilbert, Arizona, 135 S.Ct. \_\_\_\_ (June 18, 2015). The provisions of a municipality's sign code that impose more stringent restrictions on signs directing the public to the meeting of a non-profit group than on signs conveying other messages are content-based regulations of speech that cannot survive strict scrutiny.

Walker v. Texas Division, Sons of Confederate Veterans, 135 S.Ct. 2239 (June 18, 2015). Because Texas's specialty license plate designs constitute government speech, it was entitled to reject a proposal for plates featuring a Confederate battle flag.

## **B. Religion**

Holt v. Hobbs, 135 S.Ct. 853 (2015). Application of a prison policy to keep a Muslim inmate from growing a half inch beard violates the Religious Land Use and Institutionalized Persons Act because it is not the least restrictive alternative to serve a compelling government interest.

## **C. Marriage**

Obergefell v. Hodges, 135 S.Ct. \_\_\_\_ (June 26, 2015). State laws that prohibit same-sex marriage violate the due process and equal protection clauses of the Fourteenth Amendment.

## **D. Voting**

Alabama Legislative Black Caucus v. Alabama, and Alabama Democratic Conference v. Alabama, 135 S.Ct. 1257 (2015). Whether there was impermissible packing of African-American voters into already majority Black districts should be determined on a district-by-district basis, not on the state as a whole.

Arizona State Legislature v. Arizona Independent Redistricting Commission, 135 S.Ct. \_\_\_\_ (June 29, 2015). An independent commission in a state to draw election district lines is constitutional and does not violate the Elections Clause of the Constitution. Statutory civil rights litigation

## **III. Statutory civil rights**

### **A. Employment discrimination**

Young v. United Parcel Service, 134 S.Ct. 1338 (2015). Under the Pregnancy Discrimination Act, a woman must show that she that she asked to be accommodated in the workplace when she could not fulfill her normal job because of pregnancy; that the employer refused to do so, and that the employer did actually provide an accommodation for others who are just as unable to do their work temporarily. Once the employee does this, the burden shifts to the employer to show that it had a neutral business reason for its decision and was not biased against pregnant workers. The employee then gets to respond and can argue that the neutral reason was not a real one, but only a pretext for bias, and can attempt to show that the workplace policy puts a “significant burden” on female workers.

EEOC v. Abercrombie & Fitch Stores, Inc., 135 S.Ct. 2028 (2015). To prevail in a disparate-treatment claim under Title VII of the Civil Rights Act of 1964, an applicant need show only that his need for an accommodation was a motivating factor in the employer’s decision, not that the employer actually knew of his need.

### **B. Housing discrimination**

Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc., 135 S.Ct. \_\_\_\_ (June 25, 2015). Disparate-impact claims are cognizable under the Fair Housing Act.

## **IV. Affordable Care Act**

King v. Burwell, 135 S.Ct. \_\_\_\_ (June 25, 2015). The Internal Revenue Service may permissibly promulgate regulations to extend tax-credit subsidies to coverage purchased through exchanges established by the federal government under Section 1321 of the Patient Protection and Affordable Care Act.

## **V. Separation of powers**

Zivotofsky v. Kerry, 135 S.Ct. 2076 (June 8, 2015). Because the power to recognize foreign states resides in the president alone, Section 214(d) of the Foreign Relations Authorization Act of 2003 – which directs the Secretary of State, upon request, to designate “Israel” as the place of birth on the passport of a U.S. citizen who is born in Jerusalem – infringes on the executive’s consistent decision to withhold recognition with respect to Jerusalem.

Wellness Int’l Network, Limited v. Sharif, 135 S.Ct. 1932 (2015). Article III permits the exercise of the judicial power of the United States by the bankruptcy courts on the basis of litigant consent. Implied consent based on a litigant’s conduct is sufficient to satisfy Article III.

# A court of one: Anthony Kennedy

By Richard L. Hasen

Los Angeles Times, June 30, 2015

Forget the debate over whether the Supreme Court has taken a liberal turn. It is not a liberal court or a conservative court. It's a Kennedy court. On major constitutional and statutory questions, Justice Anthony M. Kennedy's views matter more than anything else.

Liberals do have more to celebrate this term than in the recent past, from the same-sex marriage and Obamacare decisions, to a major housing discrimination case, to a surprising win for minority plaintiffs in a voting rights lawsuit. In all of those cases, Kennedy was in the majority, and all but one — Obamacare — were decided 5-4.

But there were some victories for conservatives as well. The court blocked a key environmental rule on mercury pollution. It upheld Oklahoma's lethal injection method. And it rejected an attempt to put a Texas voter identification law on hold even after a federal court found that the legislature intended to discriminate against minority voters. Kennedy was in the majority in these rulings.

Indeed, there were only a handful of important cases this term in which Kennedy was on the losing side of a 5-4 split, such as the Williams-Yulee case, in which Chief Justice John G. Roberts Jr. sided with the four liberals against Kennedy and three conservatives to uphold Florida's ban on judicial candidates personally soliciting campaign contributions.

Looked at over the long run, Kennedy's influence seems even greater. Think of the Supreme Court's 5-4 decision in the 2010 Citizens United case striking down the ban on corporate spending in elections, which has opened the floodgates to "super PACs" and big money in politics. Or consider the court's 5-4 decision in the 2013 Shelby County case, which eviscerated a key provision of the Voting Rights Act. Kennedy was in the majority in each instance.

His power won't lessen any time soon. This week the court said it would review a case that could kill public sector unions, overturning long-standing precedent. Kennedy will probably cast the crucial fifth vote. And, no doubt, the court's upcoming decision on how far states can go in restricting abortion will depend on Kennedy's view of what constitutes an "undue burden" on a woman's right to choose.

It is no surprise, as professor Nan Hunter of Georgetown remarked, that Supreme Court advocates often write their briefs for an audience of one: Kennedy.

How does the court's swing voter choose sides? The evidence suggests that Kennedy goes with his gut and personal sense of morality rather than a well-thought-out and consistent jurisprudential theory.

Consider, for example, the contrast between the court's decision last term in an affirmative action case called Schuette and its decision last week in the Obergefell case finding a constitutional right to same-sex marriage.

In Schuette, Kennedy wrote that Michigan voters could pass a ballot measure banning the use of affirmative action in college admissions. Arguing in favor of judicial restraint, he said the decision was best left to the democratic process. Kennedy wrote: "Were the court to rule that the question addressed by Michigan voters is too sensitive or complex to be within the grasp of the electorate ... or that these matters are so arcane that the electorate's power must be limited because the people cannot prudently exercise that power even after a full debate, that holding would be an unprecedented restriction on the exercise of a fundamental right held not just by one person but by all in common."

Yet when it came to same-sex marriage, Kennedy was just as content to take the question away from the voters. He wrote for a different 5-4 majority in Obergefell: "It is of no moment whether advocates of same-sex marriage now enjoy or lack momentum in the democratic process. The issue before the court here is the legal question whether the Constitution protects the right of same-sex couples to marry."

How to reconcile the two cases? The answer seems to lie in Kennedy's psychology. He is skeptical of race-based preferences but not of gay rights. When to trust the voters? When they are likely to agree with Kennedy.

Driven by feeling over theory, Kennedy also has the frustrating habit of taking nondefinitive positions as he makes up his mind. He's skeptical of racial preferences, but not so skeptical that he's willing to completely jettison affirmative action. And so the law remains uncertain. He's troubled by partisan gerrymandering, but is reluctant to police legislatures. And so the law remains uncertain.

It's crazy to have major social and public policy questions depend so much on Kennedy's whim, not to say what he had for breakfast. But it could be worse. As much as liberals would love to see Kennedy retire and be replaced by another Elena Kagan or Sonia Sotomayor, depending on the next election, we could get another Samuel A. Alito Jr. or Antonin Scalia. Then we'll be pining for the days when Kennedy ruled America.



# The Supreme Court at Stake

## Overturing Obamacare Would Change the Nature of the Supreme Court

By Linda Greenhouse

The New York Times, February 5, 2015

In the first Affordable Care Act case three years ago, the Supreme Court had to decide whether Congress had the power, under the Commerce Clause or some other source of authority, to require individuals to buy health insurance. It was a question that went directly to the structure of American government and the allocation of power within the federal system.

The court very nearly got the answer wrong with an exceedingly narrow reading of Congress's commerce power. As everyone remembers, Chief Justice John G. Roberts Jr., himself a member of the anti-Commerce Clause five, saved the day by declaring that the penalty for not complying with the individual mandate was actually a tax, properly imposed under Congress's tax power.

I thought the court was seriously misguided in denying Congress the power under the Commerce Clause to intervene in a sector of the economy that accounts for more than 17 percent of the gross national product. But even I have to concede that the debate over structure has deep roots in the country's history and a legitimate claim on the Supreme Court's attention. People will be debating it as long as the flag waves.

But the new Affordable Care Act case, *King v. Burwell*, to be argued four weeks from now, is different, a case of statutory, not constitutional, interpretation. The court has permitted itself to be recruited into the front lines of a partisan war. Not only the Affordable Care Act but the court itself is in peril as a result.

At the invitation of a group of people determined to render the Affordable Care Act unworkable (the nominal plaintiffs are four Virginia residents who can't afford health insurance but who want to be declared ineligible for the federal tax subsidies that would make insurance affordable for them), the justices have agreed to decide whether the statute as written in fact refutes one of the several titles that Congress gave it: "Quality, Affordable Health Care for All Americans."

If the Supreme Court agrees with the challengers, more than seven million people who bought their insurance in the 34 states where the federal government set up the marketplaces, known as exchanges, will lose their tax subsidies. The market for affordable individual health insurance will collapse in the face of shrinking numbers of insured people and skyrocketing premiums, the very "death spiral" that the Affordable Care Act was designed to prevent.

It seems counterintuitive to describe a statutory case as having implications as profound as a constitutional one, but this one does. It hasn't received the attention it deserves, probably because the dispute over phraseology that the case purports to present strikes many people as trivial or, at least, fixable if the court gives the wrong answer. Actually, it's neither. (Has anyone noticed that the House of Representatives voted on Tuesday for the 56th time to repeal the law?)

The precise statutory issue is the validity of the Internal Revenue Service rule that makes the tax subsidies available to those who qualify by virtue of their income, regardless of whether the federal government or a state set up the exchange on which the insurance was bought. The challengers' argument that the rule is invalid depends on the significance of two sub-clauses of the act that refer to "an exchange established by a state," seemingly to the exclusion of the federally established exchanges.

But other parts of the complex and interlocking description of how the subsidies work suggest no such limitation. They point strongly in the opposite direction. For example, if a state chooses the option not to set up its own exchange, an option 34 states have exercised, the law requires the United States Department of Health and Human Services to "establish and operate such exchange within the state." (Justice Antonin

Scalia loves to quote dictionaries, and the government's brief obliges him by quoting the definition of "such" from Black's Law Dictionary, a standard legal reference: "that or those, having just been mentioned.") The government argues that in this exercise of "cooperative federalism," the federal government simply acts as the state's surrogate; functionally, the federal exchange "is an exchange established by the state." The law's other relevant sections support that interpretation. For example, one section provides that any "applicable taxpayer," defined by income, will be eligible for the subsidy, making no reference to where the taxpayer purchased the insurance.

I could go on about the intricacies of the statute, but the intricacies aren't my point. Statutory interpretation is something the Supreme Court does all the time, week in and week out, term after term. And while the justices have irreconcilable differences over how to interpret the Constitution, they actually all agree on how to interpret statutory text. (They do disagree on such matters as the legitimacy of using legislative history, or on what weight to give a law's ostensible purpose; I'm referring here to how they actually read a statute's words.)

Every justice subscribes to the notion that statutory language has to be understood in context. Justice Scalia said it from the bench just last month, during an argument about the proper interpretation of the federal Fair Housing Act. "When we look at a provision of law, we look at the entire provision of law, including later amendments," Justice Scalia said. "We try to make sense of the law as a whole." (Justice Scalia was addressing a lawyer for the state of Texas, who was arguing for a very narrow reading of the Fair Housing Act. The justice's skepticism toward the state's statutory argument has been, in my opinion, widely misinterpreted to mean that Justice Scalia will rule for those seeking to preserve the law's current broad meaning. I believe, rather, that Justice Scalia will accept the broad statutory reading and then go on to find that the Fair Housing Act so interpreted is unconstitutional. That important case is *Texas Department of Housing and Community Affairs v. the Inclusive Communities Project*.)

Across the ideological spectrum, the court's opinions are filled with comments like Justice Scalia's. Justice Clarence Thomas wrote in a 1997 opinion that in a statutory case, courts have to look at "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."

Chief Justice John G. Roberts Jr., arguing for contextual interpretation in a 2009 opinion, observed that "the sun may be a star, but 'starry sky' does not refer to a bright summer day."

Justice Anthony M. Kennedy wrote in a 2006 opinion that an interpretation of a single statutory provision "is persuasive only to the extent one scrutinizes the provision without the illumination of the rest of the statute." These examples all come from a brief filed on the government's behalf by a group of law professors who are specialists in statutory interpretation, administrative law or constitutional law. One is Charles Fried, a law professor at Harvard who served as solicitor general during the second Reagan administration. (Another signer of this brief is my Yale colleague, William N. Eskridge Jr., one of the country's leading authorities on statutory interpretation.)

Readers of this column may recall my expression of shock back in November when the court agreed to hear *King v. Burwell*. A three-judge panel of the federal appeals court in Richmond, Va., had unanimously rejected the challenge to the law, and the plaintiffs' appeal didn't meet the normal criteria for Supreme Court review. A defeat for the government — for the public at large, in my opinion — seemed all but inevitable.

While I'm still plenty disturbed by the court's action, I'm disturbed as well by the defeatism that pervades the progressive community. To people who care about this case and who want the Affordable Care Act to survive, I have a bit of advice: Before you give up, *read the briefs*. (Most, although not all, are available on the website of the American Bar Association.) Having read them this week, I'm beginning to think for the first time that the government may actually prevail.

The challengers have submitted a bunch of me-too arguments from the usual ideological suspects that offer various versions of the narrative concocted to validate the acontextual reading of the law that eliminates subsidies on the federal exchanges. That narrative depicts a highly implausible scenario in which the states —

*(continued on next page)*

which under the Constitution couldn't actually be compelled to set up their own exchanges — were given a powerful incentive: Set up your exchange or, if you exercise your choice to default to the feds, your citizens will lose their right to the tax subsidies that will enable them to afford insurance.

The problem for the challengers is that the statute itself nowhere says that, and no one in a position of power appears to have believed at the time that the law would do any such thing. In recent weeks, supporters of the law have had a great deal of fun digging up old statements and video clips demonstrating the contemporaneous belief of prominent Republicans that the subsidies would be available to everyone. The website Talking Points Memo posted one such revelation the other day about Representative Paul Ryan, who at the time was the ranking Republican on the House Budget Committee.

Beyond what various people hoped or expected, there is a deeper issue that the challengers ignore but on which the government's briefs are utterly persuasive. A fascinating brief filed in support of the government by an unusual coalition of 23 red-state and blue-state attorneys general (some from states with their own exchanges and others from federal-exchange states) maintains that the challengers' narrative would "violate basic principles of cooperative federalism by surprising the states with a dramatic hidden consequence of their exchange election."

This brief, written in the Virginia attorney general's office, continues: "Every state engaged in extensive deliberations to select the exchange best suited to its needs. None had reason to believe that choosing a federally facilitated exchange would alter so fundamental a feature of the A.C.A. as the availability of tax credits. Nothing in the A.C.A. provided clear notice of that risk, and retroactively imposing such a new condition now would upend the bargain the states thought they had struck."

There are abundant Supreme Court precedents that require Congress to give states "clear notice" of the consequences of the choices a federal law invites them to make. Justice Samuel A. Alito Jr. invoked that principle in a 2006 case interpreting the Individuals With Disabilities Education Act, a case cited by the 23 attorneys general. The government's own brief, filed by Solicitor General Donald B. Verrilli Jr., observes that "it would be astonishing if Congress had buried a critically important statewide bar to the subsidies under this landmark legislation" in technical sub-clauses.

To accept the challengers' narrative, the government's brief asserts, "the court would have to accept that Congress adopted that scheme not in a provision giving states clear notice of the consequences of their choice, but instead by hiding it in isolated phrases." The court should interpret the statute "to avoid the disrespect for state sovereignty" inherent in that unlikely account.

Among the two dozen other "friend of the court" briefs filed on the government's behalf is one from a group of small business owners (significant because the earlier case against the Affordable Care Act was brought by a small-business federation) and several from the health care industry. The Catholic Health Association, representing 600 Catholic hospitals, along with Catholic Charities, filed a brief explaining the significance of the Affordable Care Act for health care providers that serve, as the Catholic hospitals do, a high proportion of low-income patients.

So will the Affordable Care Act survive its second encounter with the Roberts court? I said earlier that this case is as profound in its implications as the earlier constitutional one. The fate of the statute hung in the balance then and hangs in the balance today, but I mean more than that. This time, so does the honor of the Supreme Court. To reject the government's defense of the law, the justices would have to suspend their own settled approach to statutory interpretation as well as their often-stated view of how Congress should act toward the states.

I have no doubt that the justices who cast the necessary votes to add *King v. Burwell* to the court's docket were happy to help themselves to a second chance to do what they couldn't quite pull off three years ago. To those justices, I offer the same advice I give my despairing friends: *Read the briefs*. If you do, and you proceed to destroy the Affordable Care Act nonetheless, you will have a great deal of explaining to do — not to me, but to history.

# The Roberts Court's Reality Check

By Linda Greenhouse

The New York Times, June 25, 2015

Sometimes the Supreme Court moves in mysterious ways. The health care decision was not one of those times.

A case that six months ago seemed to offer the court's conservatives a low-risk opportunity to accomplish what they almost did in 2012 — kill the Affordable Care Act — became suffused with danger, for the millions of newly insured Americans, of course, but also for the Supreme Court itself. Ideology came face to face with reality, and reality prevailed.

The 6-to-3 vote to reject the latest challenge means that one or perhaps two of the justices who grabbed this case back in November had to have jumped ship. Here's why: It takes at least four votes to add a case to the court's docket. Given that the decision to hear this case, *King v. Burwell*, was entirely gratuitous — the Obama administration had won in the lower court, and an adverse decision in a different appeals court had been vacated — we can assume the votes came from the four justices who nearly managed to strangle the law three years ago in *National Federation of Independent Business v. Sebelius*.

These four were Justices Anthony M. Kennedy, Antonin Scalia, Clarence Thomas and Samuel A. Alito Jr. Maybe Chief Justice John G. Roberts Jr., excoriated in right-wing circles for having saved the statute with a late vote switch last time, also agreed to hear the new case. Or maybe his four erstwhile allies were trying to put the heat on him. It's a delicious question without, at least for now, an answer.

When I think of this case on its trajectory toward the court, the image that comes to mind is of the great white shark in "Jaws," swimming silently under the water, its lethal teeth bearing down on the statutory language freshly discovered by the administration's enemies: "Exchange established by the State."

Do "words no longer have meaning," as Justice Scalia put it in his angry dissenting opinion? What, after all, could be clearer? The state, not the federal government. The two are not the same. They are different! So poor and middle-class people in the 34 (mostly red) states that refused to set up their own insurance exchanges, defaulting that task to the federal government, are just out of luck. They aren't eligible for tax subsidies to help them buy insurance, subsidies that are critical to making the law work. End of story, end of case, end of the Affordable Care Act (or *Scotuscare*, as Justice Scalia said the law should be re-named).

The chief justice's masterful opinion showed that line of argument for the simplistic and agenda-driven construct that it was. Parsing the 1,000-plus-page statute in a succinct 21-page opinion, he deftly wove in quotations from recent Supreme Court opinions.

Who said that we "must do our best, bearing in mind the fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme"? Why, it was Justice Scalia (actually quoting an earlier opinion by Justice Sandra Day O'Connor) in a decision just a year ago.

And who said that "a provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme" because "only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law"? Why, Justice Scalia again.

"In this instance," Chief Justice Roberts wrote, "the context and structure of the Act compel us to depart from what would otherwise be the most natural reading of the pertinent statutory phrase." He concluded: "A fair reading of legislation demands a fair understanding of the legislative plan." Among the chief justice's silent partners in the six-justice majority opinion was Justice Kennedy, by most accounts the driving force behind the near miss three years ago.

# Persuasion

## Kannon Shanmugam on making his case before the Supreme Court

By Lana Birbrair '15  
Harvard Law Bulletin, May 4, 2015

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Many lawyers dream of the day that they can stand in front of the justices of the U.S. Supreme Court and argue a case. For Kannon Shanmugam '98, a partner at Washington, D.C., litigation powerhouse Williams & Connolly, that milestone came just six years out of law school, after he clerked for Justice Antonin Scalia '60 and joined the U.S. solicitor general's office. It has now been followed by 16 other arguments, three of them in the 2014-2015 term. This spring, he spoke with a Bulletin reporter about the challenges and exhilaration of Supreme Court advocacy.

### **Was appellate law a path you planned to pursue since your first day of law school?**

It was only after clerking and spending some time in private practice that I really decided to focus on appellate work. If you had told me when I was in law school that one day I'd wake up and have argued a number of cases in front of the Supreme Court, I would have said you were crazy.

### **You had your first argument before the Supreme Court when you were just 31 years old. What was it like to be so young and in that position?**

I was too young to realize just how scared I probably should have been. It's a great privilege to have that opportunity, and one of the reasons is that there have been so many great advocates at that bar. The first Supreme Court argument I ever saw was by now Chief Justice Roberts ('79), and I remember thinking, There's no way I could possibly do that, because he was just so good.

### **What do you mean by "good"? What makes an appellate advocate effective?**

The best Supreme Court advocates are the ones who have just an overwhelming command of the law and the facts and who are able to answer the hardest questions in a way that advances the client's cause. That is a rare skill: the ability to persuade a court in cases where, almost by definition, there are good arguments on both sides. The best arguments are by those who are able to acknowledge that there are weaknesses in their positions, but show that their preferred outcome is the right one.

### **How do you prepare for oral argument?**

There's no substitute for the work that goes into preparing for oral argument. It involves reading the briefs multiple times and reading everything that is cited in the briefs, but also spending a lot of time just thinking through the contours of my client's position and undergoing moot courts where people simulate the experience of the oral argument and ask the hardest possible questions. It is a demanding process, and often it's less than the most enjoyable part of the process, but it's essential in the Supreme Court because it is such a smart court. If there is any weakness in the position, it will be exposed at oral argument, and you have to be prepared to deal with that and address any weaknesses you can.

**What's the difference between working on an appellate brief as a writer and being the person at the lectern at oral argument?**

Oral argument is the time that the Court gets to ask the questions that don't get answered in the briefing. It's the one opportunity justices or judges have to pin down questions that parties may not have been willing to volunteer answers to in their briefs. It forces the parties to answer the very hardest questions for their side. Sometimes it's really only at oral argument that you see the parties come together on an issue.

**What was the most memorable case you worked on?**

Maryland v. King, which was about the constitutionality of collecting DNA from arrestees. There was a moment during oral argument when Justice Alito said he thought it might be the most important criminal procedure case the Court had heard in decades, and that was an electric moment. The case was very close, as it turned out, and unfortunately, we were on the losing end. It still was a great professional experience to work on a case like that, even if you're disappointed by the result.

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