LLOYD TEVIS
INVESTMENTS, LLC

Securing your future through Precision Investing™

Research Note
Supreme Court Decisions June 2024

Introduction

Judicial decision making is a craft. Jurisprudential theories attempt to guide this craft in practice much as aesthetic theories may guide composers or painters. But ultimately the craft is learned as a tradition and developed through practice. One can summarize the results as wins or losses for this side or another. One can clump individual judges as strict or loose constructionists. But these summaries lose much of the nuance of reality. To estimate the true direction of judicial thought there is no substitute for watching it in action. To this purpose we review 18 cases whose decisions were handed down in June. Our hope is to give the reader some feel for the individual justices and how they approach cases. From time to time we offer our own editorial comments. These are intended to cast light on what the judges might have considered or how they might have approached cases but they chose not to. In other words, we try to see both the positive and negative shape of things. Finally, at the end, we try to build up to some general conclusions from having studied these individual cases.

List of Cases and Principal Subject Matter

1. FDA vs Alliance for Hippocratic Medicine - abortion
2. Moyle vs United States - abortion
3. Garland vs Cargill - guns
4. United States vs Zackey Rahimi – guns
5. Snyder vs the United States - bribery
6. Fischer vs United States – January 6th insurrection
7. Grants Pass vs Johnson – municipal regulation of the homeless
8. Harrington vs Purdue Pharma – powers of bankruptcy judges
9. Murthi vs Missouri – social media
10. Moody, Attorney General of Forida v NetChoice, LLC – social media
11. Vidal vs Elster - trademarks
12. Moore vs the United States – taxation of overseas investment income
13. Department of State vs Munoz - immigration

14. Ohio vs EPA – regulatory agency
15. SEC vs Jarkesy – regulatory agency
16. Loper Bright Enterprises vs Raimondo, Secretary of Commerce – regulatory agency
17. Corner Post, Inc v Board of Governors of the Federal Reserve System – regulatory agency
18. Trump vs the United States – presidential immunity

Cases

1. FDA vs Alliance for Hippocratic Medicine

In FDA vs Alliance for Hippocratic Medicine the Court rendered a unanimous decision that a group of anti-abortion doctors lacked standing to challenge the FDA's regulation of an abortion drug. This decision was mostly about reigning in a rogue Texas judge – a task which the relevant court of appeals had passed the buck on. The pharmaceutical industry is relieved that the anti-abortion advocates were not allowed to upend the industry's regulatory structure.

2. Moyle vs United States

Idaho has sought to ban abortions except when necessary to preserve the life of the mother. A case before the District Court challenges this on the grounds that an abortion is required under Federal law when necessary to preserve the health of the mother. For instance, Federal law would permit an abortion in the case of a pregnancy which threatened to destroy the woman's capacity to bear children whereas Idaho law would not. The question before the Court was which rule would apply while the matter is under judicial consideration. The Court held 6-3 that the more permissive Federal rule would apply. The majority split as to their reasoning. Sotomayor, Kagan and Jackson felt the Federal government would prevail at trial. Barrett, Kavanaugh and the Chief Justice felt that Idaho had already attained its primary purpose of banning most abortions and this matter would only effect a small percentage of abortions so the state could wait to have the matter resolved. The minority of Gorsuch, Alito and Thomas felt Idaho was likely to prevail in the end.

3. Garland vs Cargill

In Garland vs Cargill the Supreme Court sustained the appeals court in a 6-3 decision permitting less regulated sale of bump stocks. To appreciate the debate some background should be laid. In the 1930s the tommy gun (Thompson submachine gun) came it to prominence as John Dillinger discovered its utility in making bank withdrawals and Al Capone applied it to vigorous enforcement of the Volstead Act forbidding (in Capone's interpretation) supply of alcoholic beverages to Chicago by entrepreneurs not duly licensed by the "commission." Responding to public concern, Congress enacted an excise tax on sale of machine guns requiring a lot of paperwork and fixture of a $200 revenue stamp. Enforcement of this measure was turned over to the Bureau of Alcohol, Tobacco and Firearms. No - this is not the government's bureau of fun stuff. Originally it was the unit in the Department of Treasury tasked with excise tax collection. After various bureaucratic shuffles the old bureau was split into the Tobacco Tax and Trade Bureau (TTB for short) and the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF for short.) The TTB lives on in the Treasury Department and busies itself with licensing wine appellations. The ATF has moved to the Department of Justice and preoccupies itself with ways to realize the paranoid fantasies of survivalists and gun runners.

Enter bump stocks. These are devices that can be attached to semi-automatic rifles. They capture the recoil of a shot and use it to propel the gun trigger forward against the shooter's finger causing a second shot to be fired. This cycle continues until the shooter removes his finger or the magazine is emptied. A rate of fire amounting to a few hundred rounds per minute can be achieved. The US Army, for instance, has a bump stock which can be attached to its M1 carbine to create a rapid fire weapon. Enterprising entrepreneurs have created similar bump stocks which can be fitted to semi-automatic weapons permitted for sale to civilians. In 2017 a retired postal worker applied such bump stocks to his collection of 14 trusty AR-15 assault rifles and went hunting concert goers at an open air rock concert in Las Vegas. He took 60 of them to the grave with himself and injured 867 others His motivations are uncertain but apparently he wanted to be as

notorious as his dad who had briefly made the FBI's most wanted list as a bank robber. Responding to public dismay, the Trump administration decided bump stocks would be classified as a conversion kit for creating a machine gun. Long standing and unchallenged regulatory practice is that such conversion kits are regulated as machineguns.

But did the ATF err in ruling that the bump stock constituted such a conversion kit? That was the question on which the Court's opinion was sought. The opinion of the Court was delivered by Justice Thomas but he went wild with line drawings illustrating the technical details of the device and we do not feel we can do justice to his lengthy discussion here. Accordingly we turn to the much more succinct concurring opinion of Justice Alito. He was educated at Princeton (BA summa cum laude 1972) and Yale (JD 1975) where he edited the law review. He served 8 years in the US Army Reserve eventually reaching the rank of Captain. As such it can be assumed he has a basic familiarity with guns, although his branch of service – the Signal Corps – is mainly concerned with the more advanced technology of field communication networks. Alito's opinion was:

“There is little doubt that the Congress that enacted 26 USC 5845(b) would not have seen any material difference between a machinegun and a semiautomatic rifle equipped with a bump stock. But the statutory text is clear and we must follow it. The horrible shooting spree in Las Vegas in 2017 did not change the statutory text or its meaning. That event demonstrated that a semiautomatic rifle with a bump stock can have the same lethal effect as a machine gun, and it thus strengthened the case for amending 5845(b)….there is a simple remedy…Congress can amend the law and perhaps already would have done so [had the ATF not updated its regulations.]”

The minority opinion was delivered by Justice Sotomayor. She also was educated at Princeton (BA summa cum laude 1976) and Yale (JD 1979) where she also edited the law review. She served four and a half years as an assistant district attorney in New York city where we would assume she gained a basic understanding of the use of guns by criminals. Her opinion was:

"Today the Court puts bump stocks back in civilian hands. To do so it casts aside Congress's definition of machine gun and seizes upon one that is inconsistent with the ordinary meaning of the statutory text and unsupported by context or purpose....Congress adopted a definition of a machinegun that captured any weapon which shoots, or is designed to shoot, automatically..more than one shot, without manual reloading, by a single function of the trigger. National Firearms Act 48 Stat 1236. That essential definition still governs today. See 26 USC 5845(b)....a machinegun does not fire itself. The important question under the statute is how a person can fire it. A weapon is a machinegun when a shooter can (1) by a single function of the trigger (2) shoot automatically more than one shot without manual reloading....This is not a hard case. A bump stock equipped semiautomatic rifle is a machine gun because (1) with a single pull of the trigger, a shooter can (2) fire continuous shots without human input beyond maintaining forward pressure [on the trigger.] The majority looks to the internal mechanism that initiates fire, rather than the human act of the shooter's initial pull, to hold that "a single function" of the trigger means a reset of the trigger mechanism....the majority holds that continuous forward pressure is too much human input for a bump-stock-enabled continuous fire to be automatic."

By now we hope the reader is sufficiently engaged in the debate to read the governing law itself, USC 5845 (b) reads in full as:

"(b) Machinegun
The term "machinegun" means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person."

According to Alito the text is absolutely clear that “a single function of the trigger” refers to the internal mechanism of the gun, while to Sotomayor it is equally clear that it is the machine-human interface which is indicated by “the single function of the trigger.” Our view is that the National Firearms Act is primarily a public safety measure and that the 73rd Congress which enacted it was concerned about the safety of the public and not that of the shooter. Accordingly, we agree with Sotomayor that the law's concern is with the capabilities of the weapon and not with the mechanical details of the weapon. We leave it to the reader to form their own judgment as to the meaning of the law, the degree of clarity with which that meaning is expressed and how much charity should be extended by the Court to a sister institution whose utterances may not always rise to the perfect clarity they would wish for.

With respect to Alito's suggestion that Congress's amendment of the law would be a simple remedy, we take note of previous activity in this regard. Five months after the Las Vegas shooting Senators Martin Heinrich (D-New Mexico), Jeffry Lane Flake (R-Arizona), and Catherine Cortez Masto (D-Nevada) introduced to the Senate legislation to outlaw bump stocks: The Banning Unlawful Machinegun Parts (BUMP) Act (115 Congress S. 2475.) Coordinate legislation was introduced in the House by Dina Titus (D-Nevada) in whose district the precipitating massacre had occurred as Closing the Bump-Stock Loophole Act (HR 4168.) Both bills died in committee. Congress's legislative process is not ever, in our estimation, a simple remedy.

Indeed, the politics of bump stocks are as quirky as the litigation. They were invented by a solo entrepreneur in 2008 who secured patent rights and a manufacturing license from the Obama administration. Over nine years about a half million bump stocks were sold, which implies about 1 in 160 gun owners actually wanted one. Most of these purchasers simply enjoyed the thrill of savaging their hearing by rapidly emptying their gun's magazine into a target. They had no actual interest in using a rapid fire gun for other purposes. Use of bump stocks in furtherance of crime seems unremarkable prior to the 2017 massacre. Thus, flagrant

abuse of bump stocks appears limited to 1 case in 500,000; although, no doubt, copy cat criminals would now follow this example if they could. The idea of banning bump stocks was initially pushed by President Trump and was broadly supported in Congress. The NRA instead argued for regulation by the ATF. Apparently they considered that if Congress sat down to write a bump stock bill they might end up passing a much broader measure. A regulatory agency was both more likely to stick to a narrow rule and any onerous regulation which resulted would be easier to address in the courts than a piece of legislation. Indeed a hypothetical regulation which permitted a person to buy at most one bump stock on payment of a $200 revenue stamp and participation in an enhanced background check most likely would not have generated so much legal review while adequately discouraging copy cat criminals. The ATF is not, after all, an agency totally lacking in a sense of fun. They have, for instance, ruled that potato guns (a piece of light ordnance typically constructed by boys for launching potatoes) are not weapons and are to be considered destructive devices only when loaded with burning tennis balls. Unfortunately the ATF under President Trump was more gung-ho on flexing regulatory power. As the Supreme Court has felt the need to create a distinction between "continuous fire" and "automatic fire" weapons , it will now be up to Congress to amend the National Firearm Act.

We delve into this case in such detail because it illustrates the essential debate at present in the Supreme Court. In the media this decision has been reported as a red versus blue decision pitting personal liberty against public safety – which is a common sense but wholly muddled understanding of the matter. Actually the red majority on the Court is overturning the acts of a red administration which sought to tighten up the rules of a blue administration so as to protect the gun lobby from developing Congressional action. The Court never actually got around to weighing the equities of personal liberty versus public safety. Instead it engaged in a debate with itself about how accurately the 1934 Congress had crafted its legislation. The Justices did not seem to have any doubt as to what the Congress had meant to do. Nor did they think the ATF's rules inconsistent with that intention. But a

majority of them agreed both that the Congress had not succeeded in its intention and that they were not going to fix the error which they discovered it had committed. In short, we are seeing a form of extreme textual literalisim being enforced with dogmatic rigidity. As a matter of logic it seems inconsistent to us to apply a modern standard of textual liberalism upon a law from almost 100 years ago drafted under different standards of interpretation. If one is going to put great emphasis on the historic words it would seem the historic manner of reading of those words also should be considered.

4. United States vs Zackey Rahimi

In United States vs Zackey Rahimi the Court considered whether the government could require persons subject to domestic abuse orders to surrender control of their guns during the term of their orders. Clear evidence indicates that in the emotionally heightened situations in which such orders are issued the situation is five times more likely to escalate to murder if the restrained party is armed. Thus the question before the Court was whether government could enact rational public safety restrictions in conflict with the Second Amendment phrase “the right of the public to bear arms shall not be constrained.” This case comes to the Court now because its 2008 Heller decision greatly expanded the scope of the Second Amendment right and the Court's 2022 Bruen decision struck down a century old New York restriction on gun ownership in consequence. The Bruen decision held that only restrictions which existed antecedent to the drafting of the Second Amendment could be held to comport with the original understanding of the Amendment. In a 7-1 decision the Court was able to make the historical method work without undue trouble. Writing for the majority Chief Justice Roberts found that dangerous persons had been restrained from bearing arms in English law prior to the founding of the United States. His analysis touched on King Canute and leaned heavily on Blackstone's Commentaries. Having decided that dangerous persons could be restrained, Roberts was willing to accept the government's contention that persons subject to abuse orders were dangerous. In dissent Thomas picked holes in Robert's reasoning. He pointed out that domestic abuse was not a strongly

recognized concept at the founding and he argued Robert's examples of restraints were insufficiently congruent to the abuse case. In concurrence with Roberts, Sotomayor (joined by Kagan) wrote:

"The Court today emphasizes that a challenged regulation 'must comport with the principles underlying the Second Amendment' but need not have a precise historical match....I write separately to highlight why the Court's interpretation of Bruen, and not the dissent's, is the right one. In short the Court's interpretation permits a historical inquiry calibrated to reveal something useful and transferable to the present day, while the dissent would make the historical inquiry so exacting as to be useless., a too sensitive alarm that sounds whenever a regulation did not exist in an essentially identical form at the founding."

While concurring with Roberts, Gorsuch sought to mediate between him and Thomas:

"Why do we require those showings [that the regulation is consistent with historical precedent]? Through them we seek to honor the fact that the Second Amendment codified a pre-existing right [emphasis in original] ... that carries the same scope today as it was 'understood to have when the people adopted' it [quoting Heller]. [They understood that an arms bearing public had risks and benefits and judged the Second Amendment to correctly balance those concerns.]

We have no authority to question that judgment. As judges charged with respecting the people's directions in the Constitution – directions that are 'trapped in amber'... our only lawful role is to apply the cases that come before us. Developments in the world may change, facts on the ground may evolve, and new laws may invite new challenges, but the Constitution the people adopted remains our enduring guide. If changes are to be made to the Constitution's directions they must be made by the American people...We have expressly rejected arguments that courts should ... glean from historical exceptions overarching 'policies', 'purposes' or 'values' to guide them in future cases. We have rejected those paths because the Constitution enshrines the peoples choice to achieve certain policies, purposes and values 'through very specific means'... as originally understood at the time of the

founding. The court may not 'extrapolate' from the Constitution's text and history 'the values behind that right' and then enforce its guarantees only to the extent they serve (in the court's view) those underlying values.....

[The Court rightly decided this case based on practice antecedent to the founding.]

I appreciate that one of our colleagues [Thomas] sees things differently...But if reasonable minds can disagree whether [the subject law] is analogous to past practices originally understood to fall outside the Second Amendment's scope, we at least agree that is the only proper question a court may ask. Discerning what the original meaning of the Constitution requires may sometimes be difficult. Asking that question, however, at least keeps the judges in their proper lane seeking to honor the supreme law the people have ordained rather than substituting our will for theirs. And whatever indeterminacy may be associated with seeking to honor the Constitution's original meaning in modern disputes, that path offers a surer footing than any other this Court has attempted from time to time. Come to this Court with arguments from text and history, and we are bound to reason through them as best we can...Allow judges to reign unbounded by these materials, or permit them to extrapolate their own broad principles from those sources, and no one can have any idea how they might rule...Faithful adherence to the Constitution's original meaning may be an imperfect guide, but I can think of no more perfect one for us to follow."

We have quoted at length because we found this an eloquent summary of a jurisprudential theory which we are unsympathetic to and therefore feel we might not fairly express in fewer words. The difficulty we see with Gorsuch's reasoning is that under the name of judicial restraint the Court ruthlessly strikes down the decisions of the people's representatives as expressed in the laws and regulations that the judges choose to scrutinize. It thus acts exactly opposite to the reverence for the people's decisions which Gorsuch expresses and it empowers an arbitrary judicial activism. The rhetoric soars but comes closer to mendacity than we should like. True judicial restraint would place greater honor on stare decisis and would be unembarrassed to reflect on the consequences of the decisions before it.

5. Snyder vs the United States

Here the Court adopted a fairly traditional position that ambiguities in criminal statutes should be interpreted in favor of the defendant. The law in question makes it a crime for officials of state and local governments to "corruptly solicit, accept or agree to accept anything of value intending to be influenced or rewarded in connection with any official business or transaction worth $5,000 or more."

This law clearly intends to prevent bribery but does it also intend to punish officials for accepting gratuities? Bribes are arranged before the corrupt act whereas gratuities occur after the act. Historically both were punished, but bribes were punished significantly more heavily. If this law swept bribes and gratuities into a common net then their punishment would be equalized which would substantially raise the penalties for gratuities. Speaking for the majority of six, Kavanaugh held the law dealt only with bribes and not gratuities.

6. Fischer vs United States

Here again the Court read a criminal statute narrowly to favor defendants. The law in question is the Sarbanes-Oxley Act of 2002 which criminalizes obstruction or attempted obstruction of official business. The defendants are certain persons who rioted on January 6, 2021 before Congress and who were convicted of obstructing Congress's effort to certify the 2020 Presidential election. In relevant part the law reads
"(c) Whoever corruptly -

(1) alters, destroys, mutilates or conceals a record, document or other object or attempts to do so, with the intent to impair the objects integrity or availability for use in an official proceeding; or

(2) otherwise obstructs, influences or impedes any official proceeding, or who attempts to do so,

shall be fined ...or imprisoned not more than 20 years, or both"

There are two ways this statute could be read. In one reading the main clause is (c)(2) establishing a blanket protection for official proceedings. Clause (c)(1) is then just an example of

such an obstruction and is presumably given because the legislators wished to make sure that record destruction would be included in the activities proscribed by (c)(2). In the alternate reading the laws purpose is to protect records which may be important to proceedings and the otherwise clause refers to other ways of invalidating such records other than may be indicated by the verbs of (c)(1). Fischer had impeded an official proceeding by rioting but he had not messed up any paperwork, so it mattered very much to him which reading would apply. Chief Justice Roberts wrote for the majority of six that the second reading applied. In his view reading the statute as a blanket prohibition on obstruction would make pointless both the first clause calling out a particular type of obstruction and other laws dealing also with specific types of obstruction. Justice Barrett, joined by Sotomayor and Kagan, dissented. She wrote "the case that Fischer can be tried for 'obstructing, influencing or impeding an official proceeding' seems open and shut. So why does the Court hold otherwise? Because it simply cannot believe that Congress meant what it said. [Admittedly the events in question go beyond Congress's imagination when it wrote this law] but we stick to the text anyway. The Court, abandoning that approach, does textual backflips to find some way – any way – to narrow the reach of subsection (c)(2)."

We will leave the reader to savor this image of the majority in their official robes doing back flips and shall not further editorialize upon the traditions of statutory construction.

7. Grants Pass vs Johnson

This case takes up the considerable social problem of homelessness. The City of Grants Pass sought to criminalizes sleeping outdoors within city limits. Sleeping in parked cars also was forbidden. Johnson asserted this was a cruel and unusual punishment which was forbidden by the Eighth Amendment to the Constitution. In a 1962 decision the Court had found that the Amendment did place certain limitations on what could be a crime. Specifically they held that the fact of being an addict was not a crime because crimes required acts undertaken with malign intent. Grants Pass argued that sleeping was an action and not a status. Johnson replied that sleeping was a necessity and denying him anyplace to do so

was cruel. Really neither party had a perfect case. Johnson had a point that no one can resist sleep, that he had to sleep somewhere and the City would not permit him to do so lawfully which forced him into criminality without any malign intent on his part. On the other hand, finding a constitutional bar to the law would dramatically reduce the power of cities to regulate homeless encampments which are undoubtedly blighting to civic life. The obvious compromise would be to preserve the city's powers provided they designated some place for the homeless to sleep. Originalism, despite civic commons being as old as the Constitution, apparently did not allow the Court to reach that conclusion. Writing for the majority of six Justice Gorsuch upheld the municipal ordinance and earned himself the reproof for enabling cruelty penned by Sotomayor in her dissent joined by Kagan and Jackson.

8. Harrington vs Purdue Pharma

Since antiquity opium and its derivatives have been used as pain killers. Unfortunately opium is addictive and its addiction is ultimately fatal. In the nineteenth century China fought two wars with the British in an attempt to prevent the British from shipping opium to China. In our own day our government is attempting to shut down illegal shipments of fentanyl (a highly refined opium derivative) from China to the US. Medical use of opiates is essential, but historically has been closely regulated to control addiction and abuse.

Perdue Pharmaceutical developed a time released opiate Oxycontin. It aggressively marketed this product and made the false claim that the drug presented less addiction risk than standard opiates. As a result Oxycontin was widely prescribed and triggered a wave of opiate addiction. It is estimated about 250,000 people have died in consequence and many more have survived burdened with severe addiction problems.

Perdue Pharmaceutical was closely held by the Sackler family and certain family members served as executives at the company during the period in which the marketing of Oxycontin occurred. Eventually it became clear that Perdue would face a wave of lawsuits from persons alleging harm from the drug. Prudently the owners tied to salvage part of

their fortune by causing the company to pay out hefty dividends. While prudent that action also opens the owners to fraudulent conveyance claims.

Eventually Perdue filed for bankruptcy protection. In the US bankruptcy is handled by a special branch of the Federal Court system operating under its own legal code. The goal of bankruptcy administration is to gather and preserve the assets of the bankrupt and to pay them out in an orderly fashion to claimants so each claimant gets a fair share of the assets. Bankruptcy more closely resembles probate than civil tort procedure.

Under bankruptcy procedure the bankrupt party is to propose a plan for realizing and distributing assets. This plan is voted on by the different classes of claimants and ultimately it is approved or disapproved by the judge overseeing the bankruptcy. Perdue proposed a plan. Key to this plan was that the Sackler family would pay in to the bankruptcy estate 40% of the dividends they had received from Perdue. This would probably be about 70% of the after tax value of the dividends they received. In return for this voluntary contribution the Sackler's asked to be personally sheltered from lawsuits by the Perdue claimant classes. It is routine in bankruptcy matters for the court to shelter the bankrupt from such suits, but it is novel for the court to extend that protection to third parties. Accepting this proposal offered the claimants a larger payout than relying solely on the assets of Perdue and a faster and more certain recovery than attempting to litigate the Sackler family as a whole, many of whom had not served in the company in any capacity.

This plan was approved by many of the claimants but was opposed by others. The primary point of contention is the plan to shelter the Sacklers from further lawsuits. The plaintiff appearing before the Supreme Court asserted the bankruptcy court did not have the authority to grant the Sacklers the requested shelter. The relevant portion of the bankruptcy code is section 1123 (b) enumerating the powers of the bankruptcy court. After explaining that the court may exercise plenary power over the debtor and the claims against it the section further states that the court approved resolution plan may “(6) include any other appropriate provision not inconsistent with the applicable provisions of this title.” The

question then is whether this grant of authority allows the court to adjust claims against an affiliated party of the bankrupt which itself is not subject to bankruptcy administration. In a certain sense this dispute raises the same issue as Fischer vs United States – how broadly should a catchall clause be read.

The Court split 5-4 on the issue and the majority ruled that the bankruptcy court did not have the power to shelter the Sacklers from suit. Justice Gorsuch wrote for the majority and was joined by Thomas, Alito, Barrett and Jackson. Justice Kavanaugh wrote the dissent in which the Chief Justice, Sotomayor and Kagan joined. Gorsuch argued that 1123 (b)(6) had to be read as limited by the previously enumerated powers in 1123 (b)(1-5) all of which concern the debtor. Accordingly he held that the power to shelter affiliates from suit was not contained in 1123 (b)(6). Kavanaugh argued that the purpose of bankruptcy was to resolve the claims which the bankrupt had given rise to. He pointed out that affiliates were often involved in such resolutions – for instance company directors and insurers. If full and final resolution involved a monetary contribution from the affiliate and a discharge of further claims against the affiliate that was a step the minority were prepared to take. Kavanaugh further pointed out that bankruptcy has evolved as the fairest and most efficient way for addressing the mass injuries caused by flawed commercial products. He argued that justice should not be frustrated by limiting the court's powers to deal with the problem before it. Gorsuch rejected that line of thought as illegitimate consequentialist reasoning.

The battle lines in this case are familiar. The interesting development is that the Chief Justice switched sides from narrow reading of authority in Fischer to a broader reading here. An important distinction is that Fischer deals with criminal liability whereas this case deals with civil liability. That difference may have led Roberts to feel ambiguity should be resolved in the favor of the defendant in Fischer, whereas when the matter concerned the powers of a judge in a civil matter he was more prepared to resolve ambiguity expansively.

9. Murthi vs Missouri

Social media companies distribute content created by third parties. Although the companies are not liable for the content, they never the less wish to exclude content which is hate speech, libelous, obscene or otherwise objectionable to their target audience. For this purpose they have content moderation policies and teams which review content and exclude or limit some content. As private parties they may run their facilities as they choose and no free speech concerns are raised by these moderation activities. The first Amendment to the Constitution establishes very broad protection of speech – but only against regulation by the government. In general the government cannot directly or indirectly limit speech.

Social media has been heavily utilized by certain groups distributing disinformation. This has included foreign governments spreading propaganda and engaging in covert influence campaigns. It has also included private groups interested in publishing minority opinions and heterodox views, as for instance the belief that the earth is a flat plane rather than a sphere. During the Covid epidemic groups spreading disinformation about the disease were very active. This included groups whose content tended to increase hesitancy about being vaccinated and groups which pushed doubtful remedies. The Biden administration saw groups promoting vaccine hesitancy as slowing the emergence of "herd immunity" and as, in consequence, a direct threat to public health. It wanted the social media companies to apply their moderation policies to limiting the distribution of vaccine disinformation. It vigorously lobbied the social media companies to this effect and some of the lobbying was so vigorous as to border on arm twisting.

A variety of persons found they were less able to distribute their views by social media. They brought suit saying that the administration had coerced the media companies and that constituted an indirect violation of free speech.

In a 6-3 decision the Court decided the suit was not maintainable. The Court found that the specific injuries the plaintiffs complained of were too tenuously related to the government's acts for the suit to go forward. Barrett wrote for

the majority, while Alito penned a dissent joined by Thomas and Gorsuch. Barrett and Alito agreed that the plaintiff Hines had the best chance of establishing standing. They also agreed on the legal test which Hines would have to pass. Hines would need to show she faced risk of being censored in the future and that that risk could be traced back to particular government actions.

Hines has a leadership role in a public policy advocacy group which took a stand against vaccines and face masks during the pandemic. She ran several Facebook groups to which she posted various items. Some of this was legitimate content but her use of it seems to have been sensational or misleading. Other material appears to have been redistribution of misinformation developed by others. Hines was flagged for violations of Facebook's moderation policies. After repeated warnings some of her content was taken down and ultimately one of her groups was removed by Facebook. Did this amount to indirect government censorship?

In Barrett's estimation the specific moderation policies which impacted Hines could not be conclusively connected to government lobbying. Barrett was prepared to believe that Facebook could have adopted these policies of its own volition and for its own reasons. Barrett found just two instances in which Hines had possibly been censored as a result of policies the government had merely advocated. The legal test being applied required probability rather than possibility and so Barrett ruled that Hines failed the test.

Alito saw matters differently. In his view the government coerced Facebook into adopting content moderation policies and that program established adequate connection to Hines's censorship even if the specific policies applied against Hines had probably no direct connection to the government. It is notable that Barrett looks for specific acts by specific individuals whereas Alito is comfortable talking of corporate bodies such as “the government” and “Facebook.”

We think the Court as a practical matter decided that either this subject was not ripe for a judicial decision or that this

case was not suitable to that purpose. An ad hoc ruling which disposed of the matter without creating a definite safe harbor for conversations between the government and Facebook was the easiest resolution of the case.

10. Moody, Attorney General of Florida v NetChoice, LLC

This is a sprawling monster of a case about content moderation by social media companies. Florida and Texas enacted laws regulating how large media companies active in their states moderate content provided by citizens of those states. Netscape is a trade group representing a wide range of internet businesses. It includes the core social media companies as well as companies which accept user reviews (e.g. Uber, Zyelp and Etsy) and which therefore are technically engaged in social media to some extent. The Appellate Court for Florida founded the proposed law violated the free speech rights of the media companies. The Appellate Court for Texas found the social media companies were not engaged in speech and upheld the Texas law.

The Supreme Court 8-0 lost its temper with both lower courts and sent the case back for rehearing. In its view neither court had followed the necessary process for analyzing the case before it. Nor was the Court at all happy that such a sprawling case had been allowed to proceed in the first instance. Pretty much every judge wanted to see any issue which might come to the Supreme Court first distilled down to a much narrower case. Beyond that core agreement, however, the judges were all over the place in their opinions.

Kagan wrote for the Court and was joined by the Chief Justice, Sotomayor, Kavanaugh and Barrett. Jackson joined in part but contributed her separate opinion. Kagan identified the case as presenting a facial challenge of constitutionality and described the legal analysis which should be made in that case. For the benefit of the Texas appellate court she also included a brief tutorial on the First Amendment. She pointed out that editors have long recognized free speech rights to control the content of their publications. State attempts to regulate newspapers, corporate news letters, cable television services and parade

organizers to include a wider diversity of viewpoints have all been defeated on First Amendment grounds. In the US you have a right to speak but you have to bear the cost of publication yourself. There is no right to coattail off the publication efforts of others.

Thomas wrote his own opinion. He felt a facial challenge to constitutionality was an action without foundation in the law. Alito also wrote an opinion in which Thomas and Gorsuch joined. In his view the media companies were engaged in censorship, not editorship, and the states were simply trying to control this. Alito would see the media companies more as in the nature of public common carriers than as engaged in expressing a viewpoint. His opinion represented careful coaching on the case he would like to see the states bring to court.

So again the Court concluded that judicial regulation of social media is not ripe. The Court is likely to issue some regulation ultimately but the process will move in a measured fashion.

11. Vidal vs Elster

The debate continued in Vidal vs Elster. Here the trademark office denied registration of Elster's proposed trademark as it incorporated a living person's name without their consent. The government relied on the Lanham Act of 1946 in making this determination. Elster alleged that the law violated his free speech rights. He appealed to the trademark review board which upheld the original determination and then to the Federal Circuit which made an award to Elster. The Supreme Court reversed, holding that the Lanham act was constitutional in restricting use of a living person's name. Parenthetically we note that this legal structure is fundamental to a multi-billion dollar a year industry whereby celebrities license their names for use on merchandise. The Court's decision was unanimous but the Justices split along gender lines as to the rationale for the decision.

Justice Thomas delivered the opinion of the Court with which the other four male Justices concurred. Thomas traced the history of trademarks from their origin in English

common law through the present day. He concluded the Lanham Act was consistent with history and tradition and that it passed Constitutional review.

Justice Barrett disagreed vigorously:

"The Court claims that "history and tradition" settles the constitutionality of the names clause, rendering it unnecessary to adopt a standard for gauging whether a content-based trademark registration restriction abridges the right to free speech. That is wrong twice over. First, the Court's evidence, consisting of loosely related cases from the late 19th and early 20th centuries, does not establish a historical analogue for the name clause. Second, the Court never explains why hunting for forbears on a restriction-by-restriction basis is the right way to analyze the constitutional question....In my view, such restrictions, whether old or new, are permissible as long as they are reasonable in light of the trademark system's purpose."

In her historical analysis Barrett showed that the name restriction was first introduced in 1946 because the law's drafters were offended by the unauthorized use of a living person's name as in "The Duchess of Windsor's Brasseries." In her analysis of purpose Barrett found the primary mission of the trademark system was to associate goods to their manufacturer and it was therefore reasonable to prevent manufacturers to associate living unrelated persons to their goods through a trademark. Her closing volley was:

"Relying exclusively on history and tradition may seem like a way of avoiding judge-made tests. But a rule rendering tradition dispositive is itself [emphasis in original] a judge-made test...I see no reason to proceed on pedigree rather than principle."

The Court's other three female Justices concurred, although Sotomayor tendered an alternate analysis finding the Lanham Act's restrictions reasonable on other bases connected to the functioning of the trademark system. It is fair to say that the female justices were less ready than their male colleagues to conclude that long established practices were ipso facto constitutional practices.

We have two comments on the case. First, it seems to us the trademark register's purpose is to protect property rights in names. The common law is clear that persons have a right to their name and the trademark law is more than reasonable in not permitting use of the register to commercially exploit another person's name. While the Court was certainly comfortable with property rights in names, it was less than clarion in proclaiming them. In the present instance the proposed trademark was "Trump Too Small" which historically is a gibe of Mark Rubio's often taken to refer to the former president's genitalia. We feel that connecting this phrase to Barrett's concern with the source of manufactured goods or Sotomayor's with investment in goodwill is strained. But we have no difficulty in allowing Trump to control the licensing of his name – which he is rather expert in. Had Elster succeeded in registering the proposed trademark he would have had a government granted monopoly to decorate T-shirts with this phrase and thereby limit the right of everyone else seeking to express this thought by that means. It is rather unusual to see the Free Speech Amendment being used to set up a governmental process for suppressing political speech – as Elster attempted to do. The Court, however, did not notice this irony.

Our second comment is with respect to the majority's reigning jurisprudential tool of originalism. This philosophy emphasizes the original meaning of words as discovered through historical analysis. Here we see the Court struggling to apply this tool to a fairly simple case where there was no difference of opinion as to outcome. Bluntly, the tool is not delivering on its promise of sound decisions soundly arrived at. To our eyes originalism is an example of a common intellectual phenomena – an attempt to deal with a complex subject by narrowing focus to simple principles but in the process losing some of the essential aspects of the subject and ultimately going astray. As one example of the problem we would mention Skinner's psychological theories which denied (or at least ignored) internal mental state and focused just on external behaviors. As another example we would

mention some data scientists who show strong preference for nonparametric models in an effort to "let the data speak for itself." AI technologists who rely exclusively on large language models are likely falling into the same error. As Einstein said "make it simple but not too simple." We think originalism unlikely to hold its position much beyond the current cohort of Justices. Decisions strongly tied to it may prove correspondingly fragile.

12. Moore vs the United States

In Moore vs The United States the Court dealt with taxation of investment income. By long standing practice Congress taxes corporate income in two different ways. For C corporations an income tax is imposed at the corporate level and a further income tax is applied at the shareholder level when dividends are paid. Reflecting the complaint that this regime exposes income to double taxation, Congress has in recent years granted a limited relief by taxing dividends at a lower rate than ordinary income. Alternately, for S Corporations Congress levies tax only at the shareholder level but taxes the entire corporate income whether or not distributed. Taxation of undistributed income can be a very negative circumstance for investors, but in the context of S Corporations that problem is mitigated by the requirement that S Corporations be closely held within a small group of individuals. Consequently the shareholders of such corporations can usually offset the negative tax regime by causing the corporation to pay dividends at least equal to the tax liability. Finally, Congress permits limited liability corporations (LLCs) to adopt whichever tax model best suits their circumstances.

A special case is presented by foreign corporations. Here Congress cannot collect a tax at the corporate level, but it does collect tax on dividend income and it does so at the ordinary income tax rate unless a tax treaty or other special circumstance makes it eligible for the reduced rate.

For decades US corporations have availed themselves of this circumstance by forming foreign subsidiaries to carry on their business abroad. These foreign subsidiaries earn income abroad but they retain it to build up their business and do not pay it to their corporate parent as dividends.

Consequently this income escapes US taxation, although it is often taxed by the country in which it is earned.

Congress has historically been supportive of this practice because it strengthens US business and supports US exports which creates jobs in the United States. In fact, Congress enacted the Domestic International sales Corporation to further this tax treatment. The DISC permits a US corporation to carry out its export business through a domestic subsidiary (the DISC) which will be taxed as if it were a foreign subsidiary.

Progressive politicians have long attacked all these arrangements as tax evasion. The goal of progressive politicians is to impose double taxation on all corporate income at the ordinary tax rate (or higher.) This policy desire has two motivators. First it would expand (probably temporarily) government revenues and thus fund a massive increase in government spending which progressives hope would be directed to their preferred social projects. Second, some progressives are basically hostile to investment income per se and feel it should be burdened with more punitive taxation than it currently faces.

In 2017, President Trump led a successful effort to reform corporate taxation. This reform ended certain means corporations had of deferring income from taxation in return for reducing the corporate tax rate on C corporations. Corporate income tax is primarily applied to funding various government activities which support the business community. Examples of such activities include the patent and trademark office, collection and dissemination of vast amounts of statistical data, and financing of export activities. Trump balanced the reduced tax rate with significant reductions in such support services.

In political terms, Trump could be seen as siding with small and purely domestic business against big and international business. His agenda was thus part of the general turn away from global engagement.

In any case, to transition from the old regime to the new regime, Congress imposed a one time tax on the undistributed income of foreign corporations controlled by

US shareholders. This tax was expected to capture about $300 billion in taxes on the income which US corporations were retaining undistributed in their foreign subsidiaries. However it also taxed the Moores – a US couple who had a 13% stake in a small business a friend of theirs had started in India. Most individual taxation is done on a cash basis and taxation of income absent cash flow is much rarer in this context than in the corporate case. This circumstance is mostly practical – the tax authorities can track cash with far greater ease than accruals.

Naturally the Moore's were unhappy about this situation. They challenged the law as not authorized by the Sixteenth Amendment and as not conforming to the Constitution's other provisions regarding the Federal Government's tax powers.

By a 7-2 decision the Court upheld the tax. Writing for the Court Justice Kavanaugh found the long standing tax regime for S corporations provided the precedent that undistributed corporate income could be taxed. Chief Justice Roberts and Justices Barrett and Alito concurred but carefully limited their concurrence to foreign corporations controlled by US shareholders. Justice Jackson concurred but pointed to additional problems with the Moore's case not noted by Kavanaugh. Generally Jackson felt the government's powers in tax matters were plenary and subject to judicial limitation only at the margins. Finally Thomas and Gorsuch dissented. Their concern was that the Court was opening the door to the tax regime desired by progressives. They noted the majority's effort to not do so, but they feared the majority had failed. Accordingly, they would have retained distribution as an essential quality of taxable income. Doing so would have upended much of existing tax law, but they felt justices should decide on the merits and not consider the consequences.

This tax decision is an unusually nervous decision on the Court's part. On the one hand they did not want to get in the way of tax administration. On the other hand they were clearly worried (other than Jackson) about how much power they might be ceding.

13. Department of State vs Munoz

This case was brought by Sandra Munoz a US citizen who is an established attorney. She married Luis Asencio-Cordero, a citizen of El Salvador in 2010. He was at the time living in the United States as an undocumented alien. The Court's record does not explain the specifics of his status, but the opinion of Sotomayor points out that this status includes approximately 530,000 persons who entered the country as children and who reside here as undocumented aliens under the DACA program. It also includes about 680,000 persons who have been granted temporary residence under asylum programs due to breakdown of civil order in their country of origin from various causes (war, civil unrest, tyrannical government, natural disaster.) Asencio-Cordero is, therefore, representative of a substantial category of persons and marriage of such persons with citizens is a routine event. If the couple wishes to regularize the immigration status of the alien spouse there is an established procedure. The citizen spouse petitions the government to classify the spouse as a member of their immediate family. The noncitizen spouse can then apply for an immigrant visa. This application is normally made from the spouse's regular place of residence. If they are living in the US they apply here and if they are living abroad then they normally apply from their country of origin. If the alien is residing in the US, even on an expired visa and therefore in illegal status, they may still apply from within the US. However, if the alien is present in the US without ever having been inspected at the border then they cannot regularize their visa status from within the United Stares. They must return to their country of origin and apply from there. In the foreign country they are interviewed by a US consular officer. This official decides whether to issue a visa or not. In the case a visa is denied the officer's obligation is limited to stating the code section under which the denial is made. A denied applicant may reapply. However, it is at the Consular Service's discretion to decide whether reapplications will be accepted.

Generally the decisions of consular officers are nonreviewable by the Courts. The Supreme Court has adopted the Knauff rule according to which “the Attorney General has the unchallengeable power to exclude a

noncitizen." In the case Kleindienst vs Mandel (1972) the Court addressed the situation where the constitutional rights of citizens are impinged by the denial of a visa. The Court established a safe harbor for denying a visa in this situation. If the State Department provided a "facially legitimate and bona fide reason [for the decision]" then judicial review would proceed no further. The Supreme Court justifies this position on high deference to the government in this matter. However, there are also obvious practical considerations. Most visa denials occur abroad where US courts do not sit and mainly effect foreigners who lack standing before domestic courts. It is only in rare circumstances that the denial of a visa will impact a citizen in such degree as to impinge on the citizen's constitutional rights. There the Mandel rule does not absolutely shut the court house door, but it only barely leaves it ajar.

Following established procedure, in 2015 Munoz qualified her husband as a member of her immediate family and secured a finding from the US Customs and Immigration Service (USCIS) that denial of Ascenio-Cortero's visa would impose "extreme hardship" on Munoz. USCIS is the unit of the Department of Homeland Security (DHS) which processes visa applications made from within the United States. Unfortunately DHS and the Department of State are two agencies which do not play well together. It is routine for travelers to secure visas from the Consular Service, to travel to the US at substantial expense and to then be denied entry by USCIS. Hundreds of such cases occur every day. The Munoz case was destined to be the reverse case where USCIS was prepared to adjust Ascenio-Cortrero's immigration status but the Consular Service was not.

Having completed the US based paperwork, Asencio-Cordero returned to El Salvador in 2015. Here he was denied a visa. This consular action terminated Munoz's marriage for practical but not legal purposes as the husband could not rejoin his wife and child. The code section cited for the denial was "a person who the consular officer . . . knows, or has reasonable ground to believe, seeks to enter the United States to engage solely, principally, or incidentally in . . . any other unlawful activity . . . is inadmissible."
Asencio-Cordero had a spotless criminal record in both the

United States and El Salvador and it was, therefore, puzzling how the consular officer could make this determination. Munoz with the assistance of her Congressional representative petitioned the State Department for an explanation. The State Department and the El Salvador consulate refused reconsideration of the case without explanation. The State Department further denied that it had the power to overrule the consular official.

Accordingly Munoz brought suit in Federal Court. Munoz sought disclosure of why her husband was excluded and claimed she was being denied her marriage rights without due process. The District Court issued a summary judgment for the State Department. On appeal the Circuit Court found that Munoz had a constitutionally protected right in her husband's visa application. Attempting to gain the Mandel safe harbor, the State Department revealed that the consular official had formed the belief that Asencio-Cordero was a member of the MS-13 criminal gang because he bore a tattoo of the Madonna among other tattoos. The litigation record showed that Munoz had submitted expert testimony that this tattoo was common in Latin culture and that the inference of gang membership was unsupportable. However, there was no willingness on the part of the Consular Service to reconsider the case on these grounds. The Circuit Court denied the State Department the safe harbor on the grounds that the Mandel disclosure was not timely made and the delay had injured Munoz. It remanded the case to the District Court for further process.

Accordingly the State Department petitioned the Supreme Court asking for a reversal of the Circuit Court's decision. By a 5-4 vote the Court granted the reversal.

The opinion of the Court was delivered by Justice Barrett and was joined by Chief Justice Roberts and Justices Thomas and Alito. She held “a citizen does not have a fundamental liberty interest in her noncitizen spouse being admitted to the country.” Barrett had difficulty formulating what right Munoz is asserting but it would seem to be a right to have her husband's visa application processed in an orderly and rational manner as a consequence of his marital status. In

any case, Barrett engages in a lengthy historical analysis showing that entry to the United States has always been a privilege and not a right. Further she shows that there is no uniform preferential treatment for spouses. Following the historical method, much of this analysis quotes now extinct laws which probably would be regarded as at least archaic and most likely unconstitutional today, as for instance laws excluding Chinese persons or laws privileging male citizens bringing in an alien spouse but not female citizens doing the same. In the process Barrett exposes a difficulty with the historical method of originalism – it permits unconstitutional or repealed legislation to control current judicial decisions. On the other hand, Barrett did find that the special category of alien spouses had historically received special treatment, as for instance in several War Bride acts. Indeed the very process Munoz and Asencio-Cordero were following was an established procedure specific to a citizen-alien marriage. Barrett explains, however, that this special treatment remained a privilege and not a right. Further, Barrett pointed out that the government frequently takes decisions respecting persons which may collaterally impact spouses but it does not ordinarily grant the impacted spouse standing in the decision making. All of those examples, however are decisions subject to normal due process requirements (e. g. assignment of confined persons to specific facilities.)

In a concurring opinion Justice Gorsuch took exception to the majority's opinion. He pointed out that the State Department had already granted the relief sought (namely explaining why Asencio-Cordero was denied a visa.) The case was accordingly moot and the majority's decision gratuitous.

Sotomayor offered a dissenting opinion in which Kagan and Jackson joined. First, she pointed out that when citizen-alien marriages lead to review of the alien's immigration status in the United States that review is carried out by the Department of Homeland Security (DHS) applying the same law as consular officials abroad. However the DHS officials are subject to substantial due process requirements, including review by administrative law judges. Thus there are two classes of officials administering the same legal process

where in one case line officials have arbitrary nonreviewable decision making power and in the other case the full gamut of due process protections apply. That the nonreviewable consular process frequently results in decisions based on "stereotypes, ... bias and bad faith" is an admitted fact. Sotomayor found that there was an undoubted constitutional right to marry and that the government was undoubtedly burdening Munoz's exercise of that right by excluding her husband from the United States. Further Sotomayor pointed out that the doctrine of consular nonreviewability was a construct of the Court's and not Congress. Thus it could at most influence the current decision but not control it. Sotomayor concluded that the proper remedy for this burden was that mandated by Mandel. The government needed to explain its decision. In a final shot at the majority Sotomayor reviewed the Knauff case. Knauff, a soldier returning from deployment in Germany in 1950, sought to bring his German wife with him. The government sought to exclude her on national security grounds. Popular outcry resulted in Congress introducing a private bill and the Chief Justice staying the deportation process. Ultimately the government failed to validate its security concerns and Ellen Knauff was admitted. As Sotomayor notes "the full story of Ellen Knauff shows a populace and a Congress unwilling to accept the exercise of this sort of raw power [as stated by the majority to exist in the Knauff rule]." We would note that a historical analysis must decide how much history to include.

We find this a shocking case. It shows the government engaged in grossly oppressing individuals practically at the whim of unaccountable officials and using all the obfuscations of bureaucratic practice to hide its oppressive behavior. That is, sad to say, the normal functioning of the Consular Service. Normally the victims of that oppression are rightless foreigners who have no redress. In this case, the officials went a touch too far and oppressed the husband of a citizen and an attorney at that. Through nine long years of litigation the still separated couple has sought the minimal redress of opening their file so that they may confront the false conclusion it draws from absurd evidence. Americans look to their Courts to protect them from bureaucratic abuse. This is a classic instance of such and what would have been

unremarkable would have been the Court's letting stand the relief granted by the lower court based on a long established precedent. Instead the Court went out of its way to deny relief and built its decision in part on long repealed explicitly racist laws. We are dumbfounded. But then an even more puzzling thought occurs to us. The Court itself is the very pinnacle of nonreviewable governmental authority. Yet it voluntarily holds itself to the standard of explaining its thought process at length and even aspires to shape that thought by well grounded jurisprudential philosophy. Given that high standard for itself why does the Court think that consular staff, who are little more than dressed up paralegals, should be given an unaccountable unreviewable decision making power?

As a piece of judicial decision making we found Barrett's reference to the Page Act the most troubling element. Ostensibly a measure against human trafficking, the Page Act (1875) banned immigration of Chinese women to the US. Actually the purpose of the measure was probably to prevent establishment of a self reproducing Chinese population in the country. Such an explicitly racist and sexist law would almost certainly be held unconstitutional today. Yet Barrett uses it as evidence that there is no right to bring spouses into the US in our day. We wondered if in a future case the Court will revive the Fugitive Slave Act of 1850 – perhaps in the case of women crossing state lines to secure an abortion. We hope not – historians agree that the Taney Court's enforcement of the Fugitive Slave Act in 1859 was a precipitating cause of the Civil War.

This case, remarkably, has a happy ending. President Biden has ordered DHS to change its procedures for regularizing immigration status. Now, an immediate family member (spouse or child) of a US citizen who has lived in the US for ten years may apply for permanent residency from within the United States regardless of current visa status. Thus the obligation on certain applicants to return to their country of origin is dropped and as a result the entire process of status regularization is now handled by the USCIS rather than being a process spread between the USCIS and the Consular Service. Had this order been in place earlier Ascenio-Contrera would have received a green card in 2018 and he

would have been present for his child's growing up. The old procedure whereby the government stripped such applicants of due process protections by forcing them to apply from abroad is done away with.

14. Ohio vs EPA

The Court vacated an order imposed by the trial court. The Clean Air Act of 1972 requires the EPA to regulate pollution generated in one state which causes damage in a neighboring state. Ohio challenged the rule issued by the EPA. The trial Court found that the EPA was likely to prevail in the suit and ordered Ohio to comply with the rule during the adjudication. The Supreme Court struck down the rule (thus allowing Ohio to continue polluting on an at least temporary basis.) By 6-3 the Court held that the EPA rule was either not reasonable or not reasonably explained and therefore it was likely that Ohio, not EPA, would prevail at trial. Here there was no real need for the Court to second guess the outcome of a trial that has not occurred yet. The trial court is closer to the situation and can probably estimate the outcome more accurately. But the Court is generally hostile to regulatory agencies and it decided to intervene against the EPA.

15. SEC vs Jarkesy

The Court held 6-3 that a defendant has a right to a jury trial when subjected to a civil enforcement action for securities fraud by the SEC. Previously such actions had been tried before administrative law judges. Whether the decision actually helps defendants is another matter. Juries are more hostile to accused fraudsters than administrative law judges who have a better appreciation of the subtle features of security law.

The capital markets are the biggest reservoirs of wealth and that makes them a perennial target for the world's most sophisticated fraudsters. A case in point is the recent FTX scam. The well pedigreed and fashionably attired Sam Bankman-Fried started a brokerage and associated investment firm active in the little understood area of cryptocurrency. His apparent success attracted substantial funding from the globe's most sophisticated investment firms. Alas, the truth was that SBF was embezzling brokerage accounts and using them to fund market manipulations

carried out by the investment company. At least that is what it looked like after the fact. Maybe it was just software bugs as SBF claimed. Anyway he was held responsible and sentenced to 25 years. The trustee cleaning up this mess estimates the loss exposure of customers to be $2 billion on top of the $1 billion lost by FTX's capital backers.

Congress in its wisdom discerned as long ago as 1932 that there is a public interest in honest smooth running capital markets. It created the Security and Exchange Commission to police this market. The SEC sets rules for market participants and enforces them through civil suits. The primary penalties are fines and loss of business licenses. A conviction in an SEC enforcement action can often be the prelude to damage suits from customers and criminal fraud cases. Fraud is hard to define and clever fraudsters are adept at working around rules. Most SEC enforcement actions are brought before administrative law judges who are experts in this area. These actions follow a more summary procedure than civil Courts and conviction rates are higher – 90% versus 70%. Basically it is harder for fraudsters to throw dust in the eyes of experts who likely have seen the fraudster's game before than randomly assigned civil law judges. Also there are fewer delay tactics available to wear the government down and persuade it to rechannel resources to softer or more valuable targets. The SEC has basically succeeded in its core mission. The US capital markets are the world's best and SEC enforcement is dreaded by market participants. At the same time, SEC enforcement has proven fairer than that levied by civil courts. After large sums of money go missing, civil juries and judges easily jump to the conclusion that slick financiers ran off with it and the common law arms these Courts with truly draconian penalties. Unfortunately, the finance industry has its share of bumbling fools and overly optimistic investment managers. These parties would rather try explaining themselves to the SEC than to prejudiced civil courts.

In 2010 Congress extended the SEC's authority to deal with previously unsupervised areas of activity which Madoff had exploited to run a $65 billion Ponzi scheme. SEC enforcement in this new domain swept up Jarkesy in 2013. He was a bit player. His sins amounted to bill padding and

misrepresentation. Convicted before the administrative law judge, he was fined $300,000, forced to surrender his business license and his firm was forced to disgorge $685,000 in profits. Jarkesy raised a Constitutional issue.

He cllaimed that the seventh amendment to the Constitution promises him a jury trial in a civil Court and he was denied his rights.

The Supreme Court ruled 6-3 in Jarkesy's favor. Chief Justice Roberts delivered the opinion of the Court. His historical analysis reached back to efforts by the British government to evade jury trials in colonial civil courts by transferring cases to admiralty courts. This deprivation of traditional rights had been a sore point with colonials and they had sought to secure a right to a jury both in the main text of the constitution and in the amendment. The colonial government was skeptical of juries because it was engaged in trying to suppress a developing rebellion and it doubted the loyalty of the juries in politically charged cases. The SEC has its problems but questions of political loyalty are not one of them. Congress empowered the SEC to choose whether enforcement would go through civil courts or administrative courts because it did not see the narrow subject matter as putting the public's liberty at risk and it deemed expert adjudication to be required in this area. There was, therefore, plenty of substantive reasons to distinguish Congress's actions from the Colonial governments. Roberts, however, was not impressed by these differences. In his view civil fraud cases belonged in civil courts and Congress had pulled a fast one – basically taking a common law civil action, relabeling it as a regulatory matter and handing it to the SEC which denied essential protections to the accused.

Sotomayor, joined by Kagan and Jackson, dissented. In her minds there were enough differences between an SEC enforcement action and a civil fraud action that the government could proceed as it did. Although the SEC was operating in a recently expanded area of authority that expansion was simply a (tardy) updating to current market practice and administrative law judges had been hearing identical cases for 90 years. She did not see a fundamental challenge to the liberty interests the Constitution was protecting.

This case is basically a battle over turf, nominally between the civil and administrative courts, but actually between Congress and the Supreme Court. The Chief Justice has expanded his turf at the cost of engaging his court system in another area it is ill suited to and where it will gradually irritate business players with substantial political power. At least that is the kind interpretation. Progressives believe a corrupt conservative cabal is simply targeting the area in which they can execute the biggest thefts and shakedowns. Money is America's religion and emotions run high.

16. Loper Bright Enterprises vs Raimondo, Secretary of Commerce

Here the case at hand is of no importance. The Court took it solely for the purpose of striking down an earlier precedent of the Court – the Chevron doctrine. We explain what is involved. The Congress has created a whole alphabet soup of Federal agencies. Each agency is responsible for administering its specialized body of law. For instance the FAA establishes the traffic code for airplanes, imposes aircraft safety standards and licenses pilots. The FDA regulates sale of food and medicines. The OHSA is responsible for workplace safety; and so forth Typically each agency is granted rule making power within general guidelines Congress has established. As life evolves new situations or questions arise about which the existing guidelines do not speak clearly. Sometimes that ambiguity is purposeful – for instance the drafters of legislation realized that some measure was necessary but bound to be unpopular so Congress cleverly left it for the regulators to deliver the bad news rather than do so themselves. But often the ambiguity is not purposeful. It just happens due to weak drafting, unforeseen circumstances or an interaction of distinct pieces of legislation. The Administrative Practices Act (APA) of 1946 established a process for courts to review agency actions in cases where the agency might be acting beyond its guidelines. In general courts often gave a lot of deference to how the agencies interpreted the law. In the first place one part of the government customarily assumes another part of the government to be more trustworthy than a member of the public who typically is being accused of breaking some rule. In the second place the law the agencies

are administering is typically very technical and complex. It is crafted based on a deep understanding of the subject matter and not on the general principles of right and wrong and constitutionality with which the main body of law deals. Accordingly, it makes sense for judges to defer to the expertise of the agencies. This practice of deference was finally codified into the Chevron doctrine of 1982. This doctrine instructed trial judges to apply the following process to settling disputes about agency matters:

1) Is statute law unambiguous? If so, apply it.

2) Otherwise, is the agency's interpretation of the ambiguous law reasonable? If so defer to the agency decision.

Only if both 1) and 2) fail to settle the matter should the trial court itself try to resolve the dispute. Over the next 40 years a variety of refinements were added to the Chevron doctrine. For instance it was decided that the agency's ruling needed to be about a matter within its area of competence. No deference was awarded agency decisions about laws outside its domain which happened to be ambiguous. By a 6-3 decision the Court decided to revoke the Chevron doctrine as incompatible with the APA. This action left the minority wondering why if the Chevron doctrine was such a blunder Congress had never intervened during those 40 years to correct the erroneous doctrine.

Now let us look at the consequences of the decision. Primarily agencies regulate the business community. The Chevron doctrine told the business community that the agencies would in most matters be the final deciders. As a result the business community has focused its lobbying effort on the regulators. Substantial effort has gone in to explaining to key staff at the agencies how the business community sees an issue and persuading them to adopt rules not incompatible with what the business community views as key objectives. Senior staff at the agencies has often worked in the industry they regulate and often aspires to return to private employment in that industry. That circumstance has usually meant that business community could be sure of getting a fair or even friendly hearing on any matter of substantial concern. With Chevron repealed, the business community still needs to lobby the agencies. But it

can no longer do so with the assurance that the agency will deliver a final ruling. In fact, there is now a certainty that if the agency delivers a ruling one of your competitors feels disadvantaged by it will run off to Federal Court and try to get a reconsideration. That reconsideration could go through appellate review and even Supreme Court review. The matter might lie open for a decade and substantially litigation expense will be added to existing lobbying expense. Bitter experience is that in ruling on highly technical matters such as come up in agency law Federal judges are uninformed fools who make random decisions. Of course under the previous regime agencies did from time to time make bad decisions. For instance a juicy job offer might entice an administrator into writing a rule which favored a competitor. But you had recourse – you could take that matter to the Federal judge and have him rule that it was an unreasonable decision. But what do you do now if some Federal judge sticks his nose into an agency matter and makes a howlingly stupid decision? There is no easy fix for that – the appellate court is likely to defer to the trial courts fact finding and refuse to understand the matter. You have to go to Congress and try to get them to fix the mistake. That could take decades and cost millions.

In repealing Chevron the Court has guaranteed a flood of new litigation coming into the courts and lots of employment for corporate litigators. The conservative Justices on the Court imagine they are going to free the business community from onerous shackles imposed upon them by regulators and that the business community will be grateful. We predict that the business community is going to be pissed. The only thing the community hates more than regulators is litigators. The Court has crafted a remedy which is worse than the disease. We predict that in about a decades time Congress will amend the APA to codify a version of Chevron.

17. Corner Post, Inc v Board of Governors of the Federal Reserve System

The Federal Reserve System has promulgated rules under which banks collect fees from merchants for processing customer payments made with debit cards. Congress assigned this duty to the Board in 2010 and it issued its rule in

2011. A trade group sued in 2013 challenging the proposed regulation and lost the relevant part of that suit. The North Dakota Petroleum Marketers Association is a trade group which has been in existence since the mid-1950s. The North Dakota Retail Association is another trade group. In 2021 the two trade groups brought suit challenging the regulation. Their suit is brought under the Administrative Practices Act of 1946 (the APA.) That Act sets a six year window for bringing suit. The 2021 suit was thrown out for not being timely filed. The plaintiffs added Corner Post to the complaining group and refiled. Corner Post operates a truck stop convenience store in North Dakota. It commenced operation in 2018. The plaintiffs argued that Corner Post's right of action commenced when it first suffered injury from the regulation and that the right ended six years later. The District Court again disagreed and threw the suit out. The case made its way to the Supreme Court which ruled 6-3 for Corner Post and ordered the lower court to hear the case. The split on the Court is the usual conservative majority against the liberal minority. Justice Barrett wrote for the Court. Her decision is a careful parsing of the text of the APA. The dissent, penned by Jackson, brings out the long litigation history of the matter which the Court's opinion had ignored.

We find this decision a striking insult to the principal of stare decisis. That principal urges judges to open previously settled matters only for very solid reasons. The APA is 75 years old and for that entire period it has been commonly accepted that the window to challenge a regulation commences when the regulation is issued. A timely challenge was already made and adjudicated in this case. The specific lawsuit was already considered and rejected. Corner Store is basically a phony litigant added in a transparent attempt to patch a flawed suit. By no stretch of the imagination are the Board of Governors of the Federal Reserve System, either in 2011 or in 2024, a bunch of woke regulators out to crush convenience stores. Most crucially, we are not persuaded that Corner Store has suffered any injury. The regulations were issued in 2011 and the window to challenge them closed in 2017. Corner Store commenced operations a year later. It knew the rules it would operate under and had full freedom to conform its operations to a stable regulatory regime. How

it can claim to be injured by its voluntary decision to do business under these rules is completely unclear to us. The narrow focus on textual interpretation appears to have blinded the Court to basic considerations of law.

The effect of this decision is that henceforth no regulation can be regarded as final. A new litigant can always organize itself and bring a complaint about anything. From the perspective of the business community this decision is even more troubling than Chevron. Let us give an example. An agency issues a rule. A company decides to comply. It may have to invest in new capital equipment, to redesign products and to retrain staff. There could be tens of millions of dollars of cost involved in all this. But the company knows that its competitors face exactly the same costs. As a result the costs will get cranked into the cost of doing business and will be recovered from customers. Profits will be untouched. Now along comes a new competitor which does not want to follow these rules. It goes to Court and gets the rule killed. It does not have to absorb the cost of complying with the rules and so it can undercut the entire existing industry. Profits at incumbent companies could be destroyed completely. Above we wrote "Bitter experience is that in ruling on highly technical matters such as come up in agency law Federal judges are uninformed fools who make random decisions." Here we have a case in point. As Jackson points out, a speedy amendment to the APA is called for. It will be interesting to see if the business community is any more successful than victims of mass shootings in getting a bill out of committee.

18. Trump vs the United States

This case arises out of the criminal prosecution of Donald Trump for the events around the presidential election of 2020. This election led to a victory by Joseph Biden. The indictment alleges a wide ranging conspiracy by Trump with the goal of overthrowing the result of the election and leading to him retaining the office of President. Trump at the trial court level alleged that he was protected from criminal prosecution by an alleged immunity enjoyed by presidents. The trial and appellate courts rejected this theory and Trump appealed to the Supreme Court. By 6-3 the Supreme Court recognized a partial immunity from prosecution.

Chief Justice Roberts wrote for the majority and was joined in full by Thomas, Alito, Gorsuch, and Kavanaugh. Barrett wrote a separate concurring opinion agreeing in part but dissenting in an important part. Sotomayor, Kagan and Jackson dissented.

The Chief Justice noted the relative lack of precedent in this area and the foundational role the decision would play in adjusting the status of the Presidency within the constitutional structure of the United States. Roberts framed the question as what protections does the office of the President require for the constitutional vision of the framers to be realized. He answered that the acts of a president may be classified into three groups. The first group consists of acts taken under the authority of the Constitution itself as part of the duties of the office. Action as commander in chief of the military and as the director of the nation's diplomacy would be examples of such acts. Roberts held that Congress cannot criminalize actions in this sphere and the courts cannot entertain criminal trials regarding them.

The second group consists of acts taken under authority of Congress as part of the president's official duties. Here Roberts held that a criminal prosecution can be undertaken only if the prosecution can demonstrate that the prosecution does not limit the powers of the president. While this decision chills prosecution of a former president it does not absolutely immunize him against prosecution for e. g. embezzlement of public funds. The third class of acts would be those taken as a private party, candidate for office or party leader. Here Roberts stated that there was no immunity. Roberts also explicitly rejected Trump's theory that he could only be prosecuted for acts which he had been convicted of in a previous impeachment trial. Further, Roberts held that if some act of the president enjoys immunity then it is also sheltered from being used as evidence in trial of an act not sheltered by immunity. Here Barrett departed from the Chief. She argued that the protection granted was excessive and the normal rules of evidence should be followed instead. As an example she considered a hypothetical act of bribery in which the president corruptly offers a quid pro quo. If the

quid were an immune official act (e. g. appointment to office) then withholding testimony about it might render the prosecution for bribery impossible.

The Chief's decision created a remand to the trial Court to eliminate from the indictment allegations concerning immune official acts and to then determine which charges would remain adequately supported and which would have to be dropped. The Chief's decision provided guidance in this regard.

1) Trump is alleged to have requested the Acting Attorney General to file phony lawsuits to provide color that Trump's public attacks on the election had a substantive legal foundation. Trump is alleged to have threatened the Acting Attorney General with dismissal from office and his replacement by a compliant alternate if he did not proceed. Supposedly only the threat of mass resignations halted this effort to corrupt the Justice Department. The Chief indicated that supervision of his staff was an area in which the president enjoyed immunity. He could not be prosecuted for the alleged attempt at corruption nor could evidence about it be used in the wider conspiracy trial.

2) Trump is alleged to have pressured his Vice President Pence to have abuse his position as presiding officer over a joint session of Congress to corrupt the counting of electoral votes. The Chief noted that many conversations between President and Vice President were immune, but that when acting as presiding officer over the Senate or Congress the Vice President has an independent constitutional role. Accordingly, the trial court would need to consider the details of this allegation to decide whether immunity applied.

3) Trump is alleged to have suborned state officials to corrupt electoral returns from their state. The Chief stated that the president in his official capacity may discuss elections with state officials but as a matter of his office's duty and responsibilities there is very little presidential role in such elections. Again the trial court must assess the details of the situation, but immunity may well not apply.

4) Trump is alleged to have suborned private individuals into pretending to be duly constituted electors and to submit false ballots for counting by Congress. Here it would seem Trump is not acting in a presidential capacity. Also there is a question as to whether the actions amount to an effort to obstruct an official proceeding in the light of the Fischer decision. The matter is remanded.

5) Trump is alleged to have whipped a crowd to fury by telling them false stories of election theft by Biden and then encouraging them to march on Congress, knowing they were not just angry but also armed. The Chief held that the president has a broad power to discuss political matters with the public and these acts have a rebuttable presumption of immunity. If Trump was found to be speaking as a candidate and not as a President then his acts would not be immune.

In general the Court's decision makes prosecution of a president for abuse of power difficult. Most abuses of power, however, will require collaboration of agents who enjoy no immunity. A recent example is provided by the Reagan administration. Congress had forbidden the President to provide funds to the contra insurgency in Nicaragua. The Secretary of Defense Rumsfeld sold US military equipment to the Saudis at a profit. He deposited the book value of the equipment in the Treasury and paid the profits over to the contras. He was convicted of misappropriate funds belonging to the United States, but was relieved of serving time by a pardon granted by President Bush. No impeachment or prosecution of President Reagan was undertaken. Under this Court ruling the president could have been impeached for these acts (if he authorized them) but he could most likely not be criminally prosecuted.

The Trump case alleges a conspiracy which mixes abuse of power with private skulduggery. It also alleges corruption which is an act a president can commit personally without aide of collaborators.

We will have to see how this case plays out to see whether the decision of the Court is implementable or whether it creates an unworkable mess. The decision certainly ensures that the prosecution will move slowly as the trial court makes its

findings and the higher courts review them. We are inclined to agree with Barrett that the Court should not have created evidentiary restrictions before it became clear they were needed.

Sotomayor penned a dissent. She argued that the Trump case raised no questions about the President's core constitutional powers (the Chief's class one acts.) Accordingly she saw no need to rule on immunity for such acts. She also pointed out that the majority's finding of immunity is without a particle of textual foundation in the Constitution. Sotomayor points out the Constitution grants members of Congress a narrow immunity (the Speech and Debate clause) but it is silent as to any immunity for the President. The debates around the Constitution show great uneasiness about the President acquiring monarchical powers and we think Sotomayor is correct that presidential immunity was deliberately withheld. Sotomayor further points out the difficulties and lack of foundation for the evidentiary use of official acts in a criminal prosecution. Finally Sotomayor forcefully argues that the majority's decision substantially changes the accountability of the president from it historic standard.

Jackson concurred in Sotomayor's dissent and penned her own. Her reading of the majority's decision is that the president may violate any law he pleases as long as five justices on the court are prepared to bless it. As she points out, that shifts a lot of power from Congress to the Court.

It seems to us that the dissents have good points. Roberts has effectively added a clause to the Constitution based solely on his own sense of what the document requires and with the permission of the bare minimum number of his colleagues. Unquestionably we are dealing with the penumbra and emanations of presidential rights and not with constitutional text. Further he has acted with little heed for how his addition shifts the balance of power in the state. Judges have long made law, but usually they have proceeded incrementally and cautiously building up precedent, testing how it works, and if need be tearing it down again. The Court's own treatment of the Chevron doctrine is an excellent example of this process. This may be a timely moment to recall Gorsuch's words in United States vs Zackey Rahimi “Come to this Court

with arguments from text and history, and we are bound to reason through them as best we can…Allow judges to reign unbounded by these materials, or permit them to extrapolate their own broad principles from those sources, and no one can have any idea how they might rule." However, Gorsuch joined the Chief's opinion in this case.

Let us try to assess the impacts of Robert's opinion. In some respects the impacts are not great. First, the basic rule for sitting Presidents has always been that they can do whatever they consider needful as long as a third of the Senate will back them and public outrage is contained. Robert's decision has no impact there. Theoretically former Presidents have always faced the possibility of indictment and the Constitution explicitly envisions that consequence for Presidents removed from office by impeachment. But in the history of the Republic up to Trump, no former President actually has been indicted. By long standing custom former Presidents are not called to account for policy errors. The basic bargain has been "give up power constitutionally and you will be left in peace." To the extent Robert's judgment simply affirms this long standing custom it again changes nothing. But Robert's judgment extends further to all official acts and not just policies. Does this materially reduce the deterrence power of the law on Presidential action? Probably not. The Nixon case showed that a President who feared indictment could escape it as long as he could count on a pardon from his successor. In Nixon's case a compromised president was able to bargain for a blanket pardon by offeringa speedy resolution through resignation. A president has an unlimited power to pardon for Federal crimes and thus to protect co-conspirators. This power has been deployed to shelter aides who carried out a president's controversial policies from prosecution. The Rumsfeld case shows this use of the pardon power. It also highlighted that a pardon does not take away the social stigma of a conviction or help with secondary consequences such as disbarment and crushing legal bills. Robert's decision affirmed application of the pardon power as beyond legal review. A case which has not yet arisen is where a president breaks the law for private but not policy purposes and attempts to pardon his accomplices. Or alternately where a president uses a pardon to bribe someone into committing an

illegal act. Robert's decision might complicate a judicial response to such actions but probably does not place them absolutely beyond judicial review. The more common case of sale of a pardon in return for a campaign donation would probably result in campaign finance law complications.

Clearly what Robert's decision does do, however, is strengthen presidential privilege. It will be materially harder to extract testimony from under the cloak of executive privilege after the Robert's ruling. By broadly shielding official acts and limiting testimony touching on official acts Roberts is making prosecution for abuse of power substantially more difficult. It is likely that as the Trump case proceeds there will be a number of appeals from trial courts to higher courts for a clarification of principles. Final adjudication is probably put off by years in consequence. How subsequent decisions modify this decision is hard to predict.

Finally Robert's decision indicates the limits of Originalism in judicial thinking. Faced with a genuinely novel situation, Roberts boldly developed new law and carried along with him the members of the bench most wedded to Originalism. It was left to Sotomayor to point out that the majority's decision was not only untethered from the Constitution, but actually opposite to the results the historical method would have delivered. Judges making law is the common law tradition. But that tradition of law making proceeds incrementally and cautiously. The law is built up step by step through handling actual cases. Roman law also has a tradition of judicial law making. That tradition proceeds by stating broad principles and subjecting them to logical analysis. Individual cases then narrow the law by distinguishing subcases and refining concepts. It is a top down rather than bottom up approach. Robert's decision fits comfortably into this Roman law framework. What seems to be happening is that Originalism has cast enough shade on the traditional common law process for law making that the bench is reluctant to take this approach. But when the chips are down and a decision must be made, the bench falls back on Roman law solutions. How unexpected that Originalism should turn common law judges into Roman law judges!

The question before the Court was “may a former president be criminally prosecuted for allegedly attempting to retain power in defiance of the Constitution.” The answer is “yes, but we are going to keep control of this ground breaking prosecution.”

Summary

Let us now look across these various cases and try to extract some generalities.

Personalities of the Justices

Thomas is undoubtedly the judge most committed to Originalism. He sees the same need to adjust his beliefs to the modern world as a Mennonite elder. In many of the cases we reviewed Thomas filed separate dissenting or concurring opinions which state that large portions of existing law should be abolished. We have silently glided over many of these opinions not out of disrespect for them, but in recognition that they are lonely positions finding no echo among the other members of the bench. Nor do they throw much new light on Thomas. He has been a very consistent voice for many years.

Alito is the judge who most often sides with Thomas. He appears, however, to approach Originalism more as a useful tool than as a faith. Concern for the positions of political conservatism and for powers of state governments appear to be the matters close to Alito's heart. This term also he has found himself standing as a defender of the First amendment. Concern for the civil liberties of political conservatives is what animates this interest.

Gorsuch contributed an eloquent statement of Originalism. But his goal in doing so was apparently to bridge gaps between Alito/Thomas and the Chief Justice. From time to time coalitions of six judges formed and took charge of the Court's decisions. Gorsuch may be playing an important role in the formation of these coalitions.

Roberts The Chief Justice Roberts is a sometime Originalist. He appears to regard it as a useful tool, but only as one tool among many. Roberts is in some sense the boldest Justice in laying out new legal positions. He is not afraid to

lead the Court. He does not always gain the majority, but only rarely is he in a small minority. By that measure, his leadership is well judged to the possible consensus.

Kavanaugh usually joins with the Chief. In the cases reviewed here his particular interest has been business law.

Barrett also often joins with the Chief. But she also disagrees with him from time to time and is unafraid to speak with decision. In the cases reviewed here she was the most flexible Justice in terms of which group she ended up joining. She could develop into the sort of swing vote that Justice Kennedy was on an earlier court.

Sotomayor has become the great dissenter. In most of the 6-3 decisions she penned the dissent. On this Court she is a voice for respecting precedent, proceeding cautiously and eschewing radicalism. She probably does not believe in Originalism but she ably wields this tool against the majority. But overall Sotomayor sounds weary of not being listened to.

Kagan usually aligns with Sotomayor. She wrote relatively little in this group of cases and was not a distinctive voice.

Jackson also usually aligns with Sotomayor. When adding a supporting opinion it is often to emphasize the power of the Federal government.

Judicial Coalitions

There is a hard core Originalist group consisting of Thomas, Alito and Gorsuch. There is a pragmatic conservative group consisting of Roberts, Kavanaugh and Barrett. There is a status quo group of Sotomayor, Kagan and Jackson. Thus the Court is divided 3-3-3.

Strong 6-3 majorities emerge from the Roberts group swinging to join either the Sotomayor or the Thomas group. Barrett, Kagan and Gorsuch appear to be the bridge builders responsible for forming these larger alignments. We also see 5-4 divisions from time to time when the usual coalitions get shuffled by some issue.

Perennial Issues

There are certain issues which come up regularly before the Court in many varying guises.

Power – This is the Court's most fundamental issue: in the American constitutional system how is power distributed among the various components. The Court has a natural predilection for expanding the power of the Judiciary. It is actively expanding that power versus the regulatory agencies and thus implicitly against Congress. However it is restraining the Courts with respect to the President and the State Department.

Follow Ons – Another perennial issue is cases generated by prior Court actions. At present curtailment of abortion rights and expansion of gun rights are the two prior actions generating follow on issues. In both cases the Court's initial actions were highly controversial. In its handling of the follow ons the Court mostly ruled in the direction which would least heat up the controversy. The exception was the bump stock case.

Change – Change in society and the law's response is another perennial issue. This Court starts with a basic hostility to the idea that there is any linkage between the two. But of course that is an ultimately untenable position. The emerging issue is social media. The Court is punting it down the road for the moment.

Continuity– Upholding present practice against new challenges is a perennial activity of the Court. This Court is suspicious of current practice basically because it distrusts earlier Courts. Nevertheless in the matters of trademarks, bankruptcy and the homeless it was able to resist its innate radicalism.

Jurisprudential Theory – Preaching about how the Judicial System should work is one way the Court manages its subordinate Courts. This consideration makes theory and its doctrinal development a perennial topic for the Court. The Court's bright shiny new intellectual toy is Originalism. It is proving to be full of difficulties in application. Also it forces judges into tediously antiquarian researches. The

Court may continue to play with it for a few more terms, but we suspect the Justices will gradually lose interest in it.

What is Absent – Death penalty cases are a formerly perennial topic which have dropped off the calendar. As the court of final appeal the Court has a special responsibility here. The reduction in death penalty cases in part reflects a turn in society away from executing people. A steady stream of exonerations has shown that the penalty is wrongly imposed in a measurable percentage of cases. This finding undermines the moral case for the penalty and chills the public's enthusiasm for the measure. It should also motivate the Court to keep an eye on this matter. However, the present Court has no enthusiasm for that responsibility.

Investment Conclusions

We see three investment consequences from the current direction of the Court's thought.

First, the most important cases from an investment perspective are undoubtedly the ones dealing with the regulatory agencies. The Court has seized control of the agencies and by that means has put itself in charge of the US economy. This is a massive power grab which directly reduces the power of Congress and of the President. It creates considerable potential turmoil and cost for the business community. We expect there to be substantial push back from the other branches of government. Accordingly, we expect even more volatility and uncertainty in this area as Congress and President reassert their authority.

Second, the decision in the Trump case means at a minimum it will take several more years to fully adjudicate the Trump litigations. Trump is accused of mounting a coupe against the Constitution of the United States. The evidence against him comes from senior staffers and senior officials of the President's party. The evidence has not yet been subjected to cross examination. But at this point it appears to be of high quality and in toto capable of securing a conviction. It should not have taken more than two years to conclude this case. The Judicial system’s inability to adjudicate a serious Constitutional challenge is itself a serious constitutional

problem. Not clearing this matter creates considerable political uncertainty and some institutional distortions.

Third, underlying much of the Court's thinking is the Originalist jurisprudential theory. That philosophy much devalues stare decisis and thus introduces considerable volatility into the system. At present it is empowering a radical judicial activism. There have been prior periods of judicial activism of course. But past activism was closely tied to addressing problems that had arisen in society. It is not clear to us that the current activism is so tied, probably because it itself would deny such links. The activism appears to be more an antiquarian activity engaged in for philosophical reasons than a search for solutions to present problems.

Generally the direction of the Court is problematic for investors.

About Lloyd Tevis Investments, LLC

Lloyd Tevis Investments LLC is a registered investment adviser offering its services over the internet to US individual investors and their families. Our Precision investing ™ service provides clients with highly personalized investment solutions tuned to the client's specific circumstances and objectives. We believe the strategic asset allocation decision is the key decision faced by our investors. Accordingly our investment research focuses on the long term drivers of investment performance. These drivers include the institutional structures under which businesses operate and investment occurs. We review the legal climate in the US annually, usually in June or July. We analyze developments from the perspective of investors: do changes render the environment more predictable and safer for investors or is the environment growing more uncertain. We regard most business taxes and regulatory costs as ultimately passed on to customers and as having only second order impacts on profits. Our concern increases, however, when cost recovery is impaired or rational business behavior is interfered with. In general we strongly prefer a stable environment, even if modestly suboptimal, to one which changes with every shift of political winds. Finally, our assessments should always be

read as what we consider likely impacts to be and not as advocacy for particular parties, causes or results. To learn more about our firm visit us at lloydtevis.com.