# NARROW UNANIMITY, STRANGE BEDFELLOWS, AND A TRANSITIONAL TERM

**by Elizabeth Slattery**

The Supreme Court delivered several unusual cross-ideological rulings and surprising unanimous (or nearly unanimous) rulings in hot button cases this term. Were the justices engaging in strategic voting patterns to deflect scrutiny or simply calling balls and strikes? It was a transitional term that continued some broad trends but also proved it's difficult to predict how the votes in individual cases will shake out.

The Supreme Court's recent term was marked by the addition of a third appointee by President Trump, calls for Justice Stephen Breyer's retirement, several unusual cross-ideological rulings, and a string of surprising unanimous (or nearly unanimous) rulings in hot button cases. Many commentators predicted the ascendance of Amy Coney Barrett to the Supreme Court would usher in an era of conservative rulings with the justices voting in lockstep according to the party of the president who nominated them. But instead, many of the biggest rulings were not decided along ideological lines, including *California v. Texas* (the Affordable Care Act case) and *Fulton v. City of Philadelphia* (the foster care case).

Some commentators view the unanimous and cross-ideological outcomes as proof that the Supreme Court does not need serious reforms while others have wondered if the justices engaged in strategic voting patterns. The justices are undoubtedly aware of the commission President Biden tasked to study court reforms as well as fervent calls from the left for Justice Breyer to retire and deliver President Biden a Supreme Court pick. Were the justices attempting to deflect scrutiny and lessen the spotlight on the Court, or just calling balls and strikes? This was a transitional term that advanced some broad themes but failed to deliver the onslaught of conservative rulings many commentators predicted.

## Narrow Unanimous Rulings

Throughout the history of the Supreme Court, many chief justices have prioritized broad agreement among the justices. The great Chief Justice John Marshall—credited as the man who made the Supreme Court—used unanimous rulings to secure the Court's equal footing with Congress and the presidency during our country's early years. More than a century later, Chief Justice William Howard Taft discouraged his colleagues from penning dissents, explaining it was "more important…to stand by the Court and give its judgment weight than merely to record [an] individual dissent where it is better to have the law certain than to have it settled either way."

Chief Justice John Roberts seems to be cut from the same cloth, often appearing to steer his colleagues in the direction of unanimous rulings whenever possible. Indeed, the Court enjoyed its highest level of unanimity since the 1940s under Chief Justice Roberts's watch during the 2013–2014 term. Perhaps, though, his fondness for unanimity is motivated less by a desire to increase the law's certainty and more by a hope to deflect criticism from the media, activists, and politicians and lessen the spotlight on the justices. After all, if Justices Clarence Thomas and Sonia Sotomayor—and everyone in between—can agree on an outcome, it's hard to characterize the Supreme Court as political, partisan, and in need of serious reform.

Looking at the recent term, the justices issued unanimous rulings in 29 cases—43 percent—which is roughly the average looking at the past several terms.[1] Adding in cases decided with only one dissent, the justices issued near-unanimous rulings in 58 percent of cases. Some of these

1 Statistics from SCOTUSblog's annual STAT PACK, https://www.scotusblog.com/wp-content/uploads/2021/07/Final-Stat-Pack-7.6.21.pdf.

 

unanimous rulings were decided so narrowly, however, that they likely won't provide much guidance to lower courts and may simply delay more contentious rulings a few years down the road. Yet, the Roberts Court often takes an initial minimalist approach, followed by a more decisive action.

In a variety of areas, the Court has taken incremental steps toward an eventual goal, firing a warning shot in one ruling before making a large jurisprudential change a few years later. For example, before invalidating the Voting Rights Act's coverage formula in 2013 in *Shelby County v. Holder*, 570 U.S. 529, the Court flagged it as constitutionally problematic in 2009, encouraging Congress to consider legislative changes. The Court also highlighted the tension between free speech and associational rights and public sector union funding in a series of cases from 2012 until its 2018 ruling in *Janus v. American Federal of State, County, and Municipal Employees, Council 31*, 138 S. Ct. 2448, that government employees could not be forced to fund public sector unions. Perhaps the narrow, unanimous rulings from the recent term are warning shots—tentative steps down the path toward larger changes to come. Or they could be "tickets good for this ride only"—one-off rulings that dispose of the case at hand without providing much clear guidance to lower courts. Consider the following examples.

In *Fulton v. City of Philadelphia*, Docket No. 19-123, the Court looked at whether Philadelphia's exclusion of Catholic Social Services (CSS) from participating in its foster care placement system violated the Constitution. CSS had a long history of helping place kids in foster homes in Philadelphia, but the city announced it would no longer allow CSS to do so unless it agreed to comply with the city's nondiscrimination policy and place foster kids with gay couples. Citing the Catholic Church's teachings on marriage, CSS refused to do so and sued the city for violating its free exercise of religion.

The Supreme Court ruled unanimously that the city violated the First Amendment. Writing for the Court, Chief Justice Roberts zeroed in on the fact that the city allowed exemptions from its nondiscrimination policy for others but would not do so for CSS. The Court previously held in *Employment Division v. Smith*, 494 U.S. 872 (1990), that religious beliefs do not excuse compliance with neutral, generally applicable laws. The *Smith* ruling, which involved sacramental use of peyote and a state's drug laws, threw out decades of free exercise jurisprudence. There has been a growing movement to overturn *Smith*, and *Fulton* seemed like the case to do it. Instead, the Court decided the case on narrow grounds. Given the city's discretionary exemptions and its failure to identify a compelling interest in denying CSS such an exemption, the Court concluded the nondiscrimination policy was not generally applicable and burdened CSS's free exercise of religion.

This ruling provides little guidance to lower courts dealing with similar controversies, where discretionary exemptions don't exist. Moreover, any relief it gives CSS may be short lived. Justice Samuel Alito explained in a concurrence, "if the City wants to get around today's decision, it can simply eliminate the…exemption power." The Court also sidestepped the most important legal issue in the case—whether to overturn *Smith*. Controversial since the day it was handed down, *Smith* has confounded lower court judges for the past 30 years. Justice Neil Gorsuch pointed out in a concurrence that lower courts "struggle to understand and apply *Smith*'s test" and the justices had to "clarify how *Smith* works" in several emergency actions challenging COVID-19 shutdown orders that burdened free exercise. And, further showing the ongoing confusion, the district and appellate courts in *Fulton* reached the opposite conclusion of the justices about whether *Smith* even applied to Philadelphia's actions.

Yet, the Court rebuffed the chance to clean up the doctrinal mess it created in *Smith*, kicking the can down the road, although there were some notable concurrences questioning *Smith*. Not a single justice wrote in defense of *Smith* and five signed onto or wrote concurrences criticizing it. That leads many to wonder: what is the Court waiting for? Is *Smith* in the Court's crosshairs, and was *Fulton* simply a warning shot? It likely won't be long before another clash between a state nondiscrimination law and religious freedom comes to the Supreme Court and the justices are asked once again to overturn *Smith*.

The Court issued another narrow, nearly unanimous ruling in *Mahanoy Area School District v. B.L.*, Docket No. 20-255,—better known as the cursing cheerleader case. Eight justices agreed that a public school violated a student's free speech rights by suspending her from the junior varsity cheerleading squad for making off-color statements on Snapchat while she was off campus. The Court held decades ago in *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969), that public schools may regulate students' speech that occurs on campus, particularly when it is disruptive to classwork. *B.L.*'s case offered the opportunity for the Court to clarify

 

whether *Tinker* extends beyond the schoolhouse gates—particularly when social media is involved.

In an opinion by Justice Breyer, the Court rejected a bright-line rule that schools cannot regulate off-campus speech. Instead, the Court found that public schools may be able to regulate *some* off-campus speech, but this wasn't one of those instances. Justice Breyer listed several factors that "often, even if not always…diminish" the "special First Amendment leeway" courts should grant public schools. In other words, Justice Breyer "knows it when he sees it," to borrow a phrase from Justice Potter Stewart. The Court acknowledged that future litigation will be necessary to resolve "where, when, and how" a student's off-campus location "will make the critical difference." The ruling gave scant guidance to lower courts and public school administrators concerning when schools enjoy "leeway" and when they've violated the First Amendment. The Supreme Court generally isn't in the business of issuing one-off rulings that simply correct a lower court's error, but that is how *B.L.*'s case comes across.

The justices also reached unanimous rulings in cases dealing with the Fourth Amendment's warrant requirement and fleeing suspects (*Lange v. California*, Docket No. 20-18), FCC regulations of media ownership rules (*National Association of Broadcasters v. Prometheus Radio Project*, Docket No. 19-1241), prosecution of servicemembers for rape (*U.S. v. Briggs* and *U.S. v. Collins*, Docket Nos. 19-108 and 19-184), and sentence reductions for crack offenders under the landmark criminal justice reform First Step Act (*Terry v. U.S.*, Docket No. 20-5904), to name a few. Even the most-anticipated ruling of the term, *California v. Texas*, Docket No. 19-840, challenging the Affordable Care Act's individual mandate, was decided 7–2. While many unanimous rulings involved issues that were not particularly divisive, the ones that did tended to result in opinions that are so narrow that we may wonder why the Court even bothered to hear the case in the first place.

## Strange Bedfellows

Although there was plenty of agreement last term, the justices decided roughly 1 in 4 cases by a margin of just one or two votes (twelve cases were decided 6-3 and six were decided 5–4). Many of these cases produced unusual pairings instead of pitting the "conservatives" against the "liberals." To be sure, a handful of cases were decided along purportedly ideological lines, including decisions upholding Arizona's law prohibiting ballot harvesting and out-of-precinct voting, finding California must pay just compensation for taking private property if it wants to force agricultural employers to allow union organizers onto their property, and striking down California's requirement that not-for-profit organizations disclose the identity of their donors to the state. But other close rulings offered up surprising pairings: Justice Thomas joined by the "liberal" justices; a majority opinion by Justice Barrett that drew dissents from Chief Justice Roberts and Justices Thomas and Alito; and Justice Barrett joined by Justices Sotomayor and Kagan in dissent. Is this evidence of strategic voting or calling balls and strikes? Consider the following cases.

In *United States v. Arthrex*, Docket No. 19-1434, the Court examined whether administrative patent judges are inferior or principal officers. The Constitution requires "principal Officers" to be nominated by the president and confirmed by the Senate and allows Congress to vest the appointment of "inferior Officers" in the president alone, the courts, or department heads. The line between inferior and principal officers is not spelled out in the Constitution, but the Court has previously ruled that one way to differentiate between them is to look at whether the officer's work is directed and supervised by another principal officer. Appointed by the secretary of commerce, administrative patent judges resolve disputes over claims on existing patents, which can result in their unreviewable decision to cancel a patent. They also enjoy limited protection from being fired. In *Arthrex*, the Court held that administrative patent judges' ability to issue final decisions on the cancelation of patents is a power inconsistent with their appointment as inferior officers.

In a 5–4 majority, Chief Justice Roberts explained that "[i]n every respect save the insulation of their decisions from review…[administrative patent judges] appear to be inferior officers." But this power is too great for an inferior officer to wield, Chief Justice Roberts reasoned, so the director of the patent office (a principal officer) must have the ability to change an administrative patent judge's decision to cancel a patent. This way "the buck stops" with an officer who is more politically accountable to the public. The majority explained that the exercise of government power "acquires its legitimacy and accountability to the public through 'a clear and effective chain of command' down from the President on whom all the people vote." Empowering administrative patent judges to make final decisions that were not subject to review by a principal officer inverted the chain of command. In the

majority's view, only a presidentially appointed and Senate confirmed officer may exercise this level of government power over private parties.

The ruling follows a series of decisions in recent years policing the separation of powers, often making it easier for political leadership to manage the administrative state. The Court has overturned Congress's effort to insulate agency officials who exercise executive power from presidential control, as in *Collins v. Yellen*, Docket No. 19-422, *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183 (2020) and *Free Enterprise Fund v. PCAOB*, 561 U.S. 477 (2010), and ensured the political branches do not skirt the Constitution's requirements through questionable recess appointments, temporary appointments, or in other creative ways, as in *National Labor Relations Board v. Noel Canning*, 573 U.S. 513 (2014), *Lucia v. Securities and Exchange Commission*, 138 S. Ct. 2044 (2018), and *National Labor Relations Board v. Southwest General, Inc.*, 137 S. Ct. 929 (2017).

While the majority's holding in *Arthex* was not surprising, the absence of one justice from the majority was unusual. Justice Thomas penned the lead dissent, joined in part by Justices Breyer, Sotomayor, and Kagan. Justice Thomas wrote that the Constitution doesn't distinguish "inferior-officer power" from "principal-officer power" so the method of appointment tells us what kind of officer they are. Since administrative patent judges were appointed consistent with the Constitution's requirement for inferior officers, that should have ended the case. Justice Thomas warned against "star[ing] deeply into the penumbras of the [Constitution's] Clauses to identify new structural limitations." Justice Thomas is right that the Constitution does not expressly distinguish between inferior-officer powers and principal-officer powers, but the existence of both types of office—with one requiring the additional scrutiny of Senate confirmation—suggests there *is* a difference. Is this case an outlier, or the beginning of a shift in Justice Thomas's approach to separation-of-powers cases?

Another instance of strange bedfellows occurred in *HollyFrontier Cheyenne Refining LLC v. Renewable Fuels Association*, Docket No. 20-472, a statutory interpretation case. While Justice Kagan has observed that the justices are "all textualists now," there is an internecine fight over the best method. For example, last term, Justices Gorsuch and Kavanaugh issued dueling textualist opinions in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), interpreting Title VII of the Civil Rights Act's ban on sex discrimination, to reach very different results. Justice Gorsuch's majority focused on the text's literal meaning and Justice Kavanaugh's dissent looked to the text's ordinary meaning. Newcomer Justice Barrett also is a textualist, and *HollyFrontier* put Justices Gorsuch and Barrett on opposite sides.

*HollyFrontier* involved a 2006 federal law requiring domestic refineries to blend ethanol and renewable fuels into their transportation fuels. Congress gave small refineries a blanket exemption from this requirement until 2011 and authorized the EPA to grant additional 2-year extensions to small refineries who could show that compliance would pose a disproportionate economic hardship. The Court was asked to decide whether the statute allows refineries to obtain an extension after their previous exemption has lapsed. Writing for the 6-3 majority, Justice Gorsuch held that they could. Since the statute does not define the term "extension," the majority concluded (after consulting several dictionaries for possible definitions), "It is entirely natural—and consistent with ordinary usage—to seek an 'extension' of time even after some lapse." Further, the statute "nowhere commands a continuity requirement." Thus, "unbroken continuity" is not required for small refineries to seek an extension of their exemption.

In a dissent joined by Justices Sotomayor and Kagan, Justice Barrett explained that based on common sense and the ordinary meaning of "extension," continuity is a key feature. She wrote, "One would not normally ask to 'extend' a newspaper subscription long after it expired. Or request, after child number two, to 'extend' the parental-leave period completed after child number one." In her view, the EPA "cannot 'extend' an exemption that a refinery no longer has." And the majority was wrong to "cater[ ] to an outlier meaning" of extension to reach its conclusion. The *HollyFrontier* and *Bostock* rulings highlight the fact that textualism is a methodology that doesn't produce predictable outcomes from a political or partisan perspective, despite what its critics may claim.

There were several other cross-ideological rulings this term, such as cases rejecting an expansive reading of a federal computer fraud law (with Justice Barrett writing the majority opinion and Justices Thomas, Roberts, and Alito dissenting); tightening the standing requirement for lawsuits seeking damages under a federal credit reporting law (with Justice Kavanaugh writing the majority and Justice Thomas and the "liberals" dissenting); and the Affordable Care Act ruling that the states and individual plaintiffs lacked standing to challenge the law's

individual mandate provision (with only Justices Alito and Gorsuch dissenting). These strange bedfellows show that the Court's coalitions are more complicated than the traditional media narrative of left versus right. The justices aren't simply guaranteed votes for the outcome preferred by the party of the president who nominated them.

## Conclusion

As Justice Byron White used to say, each new justice makes it a different court. With the retirement of Justice Anthony Kennedy, the deaths of Justices Antonin Scalia and Ruth Bader Ginsburg, and the arrivals of Justices Gorsuch, Kavanaugh, and Barrett in the span of four years, it's an understatement to say the Court is different today from what it was just a few years ago. But it's too soon to predict how much the newest justices will shift or influence the balance of power in the Roberts Court. While some broad trends are likely to continue—such as policing the separation of powers, closely scrutinizing government burdens on free speech and free exercise of religion, and placing a heavy emphasis on textualism and originalism—how the votes in individual cases shake out will remain difficult to predict.

In short, the Court is in transition and only time will tell if the shifting coalitions, strange bedfellows, and broad agreement on narrow rulings will stabilize in somewhat predictable ways or evolve in new directions. Attempting to predict what the justices will do is a risky business; recall that Justices John Paul Stevens and David Souter did not turn out to be the reliable conservatives that their Republican supporters thought they would be. Whether the current justices were engaged in strategic voting to take the wind out of the sails of the court reform movement, or simply calling balls and strikes, this term may be less predictive of the future.

As the justices head into the next term, the Court will be put to the test with cases involving guns, abortion, and possibly affirmative action. It may be more difficult for Chief Justice Roberts to persuade his colleagues to reach narrow, unanimous rulings in the highly anticipated, hot-button cases coming up, instead forcing the Court to answer tough questions. The next term could very well be the start of a new chapter for the Roberts Court, one in which the justices don't look for a narrow, easy way out of hard cases.

**Elizabeth Slattery** is a Senior Legal Fellow at the Pacific Legal Foundation and co-host of Dissed, a podcast about Supreme Court dissents. You can reach her at eslattery@pacificlegal.org.

*PREVIEW of United States Supreme Court Cases* 48, no. 8 (August 9, 2021): 6–10. 

 