The Supreme Court of the United States (SCOTUS) – Week 3

Nils Pedersen & Joyce Francis
Fall 2021, Jefferson County Library

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Question from Last Week

- **Question from *Brnovich v. DNC*** – *How many minority, out-of-precinct ballots were thrown out relative to non-minority ballots?*
  - **Hispanic Ballots = 1→2%** (~10,000→20,000 ballots)

    NOTE: Hispanics represent 24% of ~4 million eligible voters
  - **Black Ballots = ~1%**
  - **Native American Ballots = ~1%**
  - **Non-Minority Ballots = ~0.5%**
- **Alito's Majority Opinion** – *"A policy that appears to work for 98% or more of voters to whom it applies—minority and non-minority alike—is unlikely to render a system unequally open."*

Source: https://supreme.justia.com/cases/federal/us/594/19-1257/#tab-opinion-4446158

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November 2020 - *Roman Catholic Diocese of Brooklyn v. NY Gov. Cuomo*

- **Question** – Are religious entities entitled to a preliminary injunction on the basis of showing that their 1st Amendment claims are likely to prevail, that denying them relief would lead to irreparable injury, and that granting relief would not harm the public interest?
- **Facts of the Case** – Cuomo issued an executive order identifying clusters of COVID-19 cases and restricting the immediate surrounding area ("red" zone) where attendance at worship services is limited to10 people, a larger concentric area ("orange" zone) where worship services were limited to 25, and an even larger concentric ("yellow" zone) where worship services were limited to 50% of the building's capacity. Some secular businesses deemed "essential" were permitted to remain open in these zones, subject to different restrictions.

https://www.youtube.com/watch?v=Efo2sQYyKMA, 16:50→25

3

November 2020 – RCDB et al v. *Cuomo (cont.)*

- **Ruling** – 5:4 (5 conservatives v. 3 liberals + Roberts). Injunctive relief granted. New York was enjoined from enforcing fixed numerical restrictions on occupancy against the applicants (including 2 Orthodox Jewish Synagogues.)
- **Majority** argued that "*a minimum requirement of neutrality*" required equal restrictions on religious and secular entities and that any delay meant "*the loss of 1st Amendment freedoms, for even minimal periods of time, [which] unquestionably constitutes irreparable injury.*"
- Roberts argued for the **minority** that injunctive relief under the present circumstances were unnecessary, as none of the applicants were currently subject to the restrictions they challenged.
- Breyer further argued that the Court's own precedents recognized the importance of granting elected officials broad discretion when they must act on the basis of uncertain and rapidly changing medical and scientific information.

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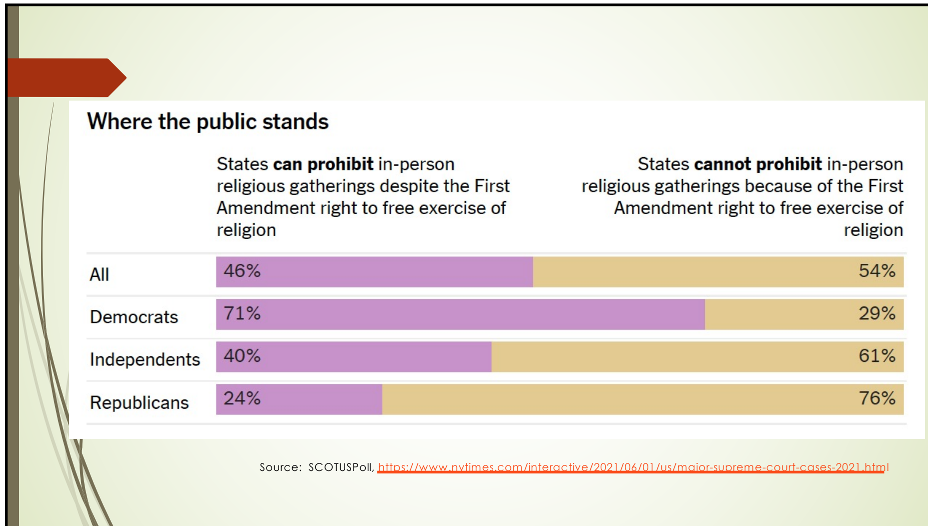

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April, 2021
Jones v. Mississippi

- **Question** – Does the 8th Amendment (against cruel and unusual punishment) require a sentencing authority to find that a juvenile is permanently incorrigible before it may impose a sentence of life without the possibility of parole?
- **Petitioners** – 15-year-old Brett Jones stabbed his grandfather to death. He was convicted of murder in Mississippi and given a mandatory life sentence, ineligible for parole.
- **Respondent** – Supreme Court of Mississippi
- **Lower Court** – 5th Circuit upheld the sentence.

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April, 2021
Jones v. Mississippi (cont.)

- **Ruling** – 6:3 (along ideological lines) for Mississippi.
- Kavanaugh argued for the **Majority** that the Court expressed neither agreement nor disagreement with the sentence, only that a discretionary sentencing system is both constitutionally necessary and sufficient. Its decision does not preclude states from imposing additional sentencing limits in such cases.
- Sotomayor argued for the **Minority** that precedents require a judgement that the juvenile is one of those rare children for whom life without parole is constitutionally permissible.

https://www.youtube.com/watch?v=Efo2sQYyKMA, 1:00:00→1:01:30

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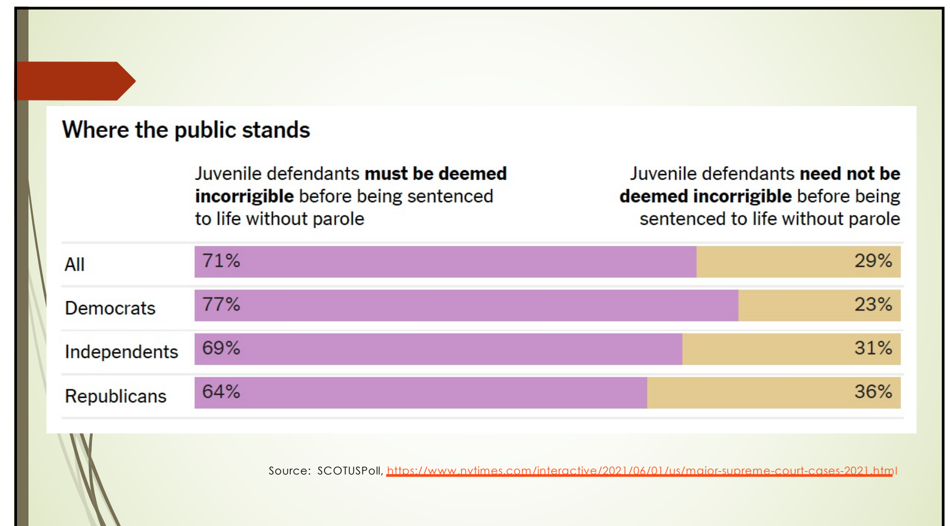

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July 2021
Americans for Prosperity v. Bonta

- **Question** – Does the policy of the California attorney general's office requiring charities to disclose the names and addresses of their major donors violate the First Amendment of the U.S. Constitution?
- **Petitioners** – Americans for Prosperity (AFP) founded in 2004, is a libertarian, conservative political advocacy group funded by David and Charles Koch. Case was consolidated with Thomas More Law Center, a conservative law firm based in Ann Arbor, MI, which seeks to *"preserve America's Judeo-Christian heritage, defend the religious freedom of Christians…"*
- **Respondent** – CA Attorney General Rob Bonta
- **Lower Court** – 9th Circuit ruled for CA

July 2021 - *Americans for Prosperity v. Bonta (cont.)*

- **AFP alleged** that the filing requirement unconstitutionally burdened their 1st Amendment right to free association by deterring individuals from financially supporting them.
- **AFP submitted evidence** that, while the state was required to keep donor names private, the state's data base was vulnerable to hacking and donor names were repeatedly released to the public.
- **CA AG submitted evidence** that AFP failed to file/filed redacted lists that differed from complete lists filed with the IRS under federal law.
  - District Court found for AFP, reasoning that CA's filing demands were not the *"least restrictive means of obtaining the information and thus did not satisfy **"strict scrutiny."***
  - 9th Circuit found for CA, basing its decision on ***"exacting scrutiny"*** as the appropriate standard, which requires the government to show that the disclosure and reporting requirements are justified by a compelling government interest and that the legislation is narrowly tailored to serve that interest.

https://www.acslaw.org/video/the-2020-2021-supreme-court-review/, 34:20→41:14

July 2021 - *Americans for Prosperity v. Bonta (cont.)*

- **Ruling** – 6:3 decision (along ideological lines) for AFP. CA's disclosure requirement is facially invalid because it burdens donors' 1st Amendment rights and is not narrowly tailored to an important government interest.
- Chief Justice Roberts wrote for the **majority**, noting that CA's requirement is "*dramatically mismatched*" to the state's interest in preventing charitable fraud and self-dealing, imposing and unjustifiable "*widespread burden on donors' associational rights.*"
- Justice Sotomayor wrote for the **dissent**, arguing that the majority accepts, without requiring the plaintiffs to show, an actual 1st Amendment burden, in effect allowing regulated entities to avoid obligations "*by vaguely waving toward 1st Amendment 'privacy concerns.'*"

Where the public stands

	Requiring nonprofits to report their major donors to the state **does not violate** their First Amendment rights.	Requiring nonprofits to report their major donors to the state **violates** their First Amendment rights.
All	60%	40%
Democrats	74%	26%
Independents	61%	39%
Republicans	44%	56%

Source: SCOTUSPoll, https://www.nytimes.com/interactive/2021/06/01/us/major-supreme-court-cases-2021.html

NCAA v. Alston

Is the NCAA an illegal monopoly?
Well of course! But I may be biased.

The Facts of the Case

- Colleges and Universities leverage sports to bring in revenue, attract attention, boost enrollment and raise money from alumni.
- This relies on 'amateur' student-athletes who compete under rules restricting how schools may compensate them for their play.
- The National Collegiate Athletic Association (NCAA) issues and enforces these rules.
- This case came up in the context of, not direct pay for play, or athletic scholarships, but other education related benefits that schools may make available to their student athletes.
- Numerous college athletes sued the NCAA over restrictions on this type educational compensation for athletes. This case is limited to this type of compensation in view of what happened in the lower courts.

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NCAA v. Alston (cont.)

The District Court

- The District Court (ND CA) ruled that the NCAA restrictions on 'non-cash education related benefits' violated anti-trust law under the Sherman act and required the NCAA to allow for certain benefits beyond full scholarships, such as computers, science equipment, musical instruments etc.
- The ruling barred the NCAA from preventing athletes from receiving post-eligibility scholarships, vocational scholarships, tutoring, study-abroad support and post-eligibility internships.
- NCAA conferences may set other allowances (and the ruling did not limit what individual athletic conferences might do), and the NCAA may still limit cash awards for academic purposes.

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NCAA v. Alston (cont.)

The Ninth Circuit

- The NCAA appealed to the Ninth Circuit, who found that the NCAA has an interest in preserving amateurism and improving 'consumer choice' by maintaining a distinction between college and pro sports. But they still violate antitrust law as the 'treatment of student athletes is not the result of free market competition…it is the result of a cartel of buyers (colleges) acting in concert to artificially depress the price that sellers (students) could otherwise receive for their services.

The Law of the Case

- S. 1 of the Sherman act prohibits contracts, combinations or conspiracies in restraint of trade or commerce. Restraint of trade is read as "undue restraint."
- A "rule of reason analysis" governs what is an undue restraint. That manner of analysis generally requires a court to "conduct a fact-specific assessment of market power and market structure" to assess a challenged restraint's "actual effect on competition."
- The goal is to distinguish between restraints with anti-competitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest.

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NCAA v. Alston (cont.)

The Supreme Court

- Gorsuch delivered the **unanimous** opinion; Kavanaugh wrote a concurring opinion.
- *"The parties do not challenge the district court's definition of the relevant market. They do not contest that the NCAA enjoys monopoly … control in that labor market such that it is capable of depressing wages (educational benefits) below competitive levels and restricting the quantity of student-athlete labor. Nor does the NCAA dispute that its member schools … remain subject to NCAA-issued-and-enforced limits on what compensation they can offer. … this suit involves admitted horizontal price fixing in a market where the defendants exercise monopoly control."*
- *"No one disputes that the NCAA's restrictions in fact decrease the compensation that student-athletes receive compared to what a competitive market would yield. No one questions either that decreases in compensation also depress participation by student-athletes in the relevant labor market so that price and quantity are both suppressed."*
- The NCAA's main argument is that its compensation restrictions should not be subject to a rule of reason analysis and that the courts should have given its restrictions at most an "abbreviated deferential review" before approving them.

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NCAA v. Alston (cont.)

The Supreme Court

- Basically, the court said that such a 'quick look' is inappropriate given the dominant monopoly power of the NCAA and the complexity of the situation. Some intercollegiate restraints may be entirely appropriate and deferred to, but others may not (like here).
- The court also distinguished a previous case (*Board of Regents*) where they ruled that the restraints related to broadcast rights were OK as essentially necessary to the TV contract.
- The amateur argument was not persuasive: *"the economic significance of the NCAA's nonprofit character is questionable at best"* given that *"the NCAA and its member institutions are in fact organized to maximize revenues."* The court also took clear notice of the amount of money in college sports.
- All this to arrive at the conclusion that the court should apply their usual 'rule of reason' analysis.

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NCAA v. Alston (cont.)

The Supreme Court

- Under that analysis, the district court properly found that the NCAA's restraints were *"patently and inexplicably stricter than is necessary."*
- The district court also properly did not defer to the NCAA's conception of amateurism: *"a party cannot declare a restraint 'immune from s. 1 scrutiny by relabeling it a product feature."* The NCAA has also not been consistent about the meaning of 'amateur.'
- The NCAA disagreed that it could achieve the same pro-competitive benefits with less restrictive alternatives, but the court did not buy this. The court said that enjoining certain restraints would not blur the distinction between college and pro sports (impairing demand) but would be a less restrictive way of getting the 'pro-competitive benefits' of the NCAA's rules.
- And there is still considerable leeway for the NCAA as well as individual conferences.

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NCAA v. Alston (cont.)

Fallout

- This ruling only dealt with education-related payments and did not deal with direct compensation payments to athletes.
- Several states are considering laws to give student athletes more control over the use of their likenesses.
- Congress has been mulling legislation to provide better compensation for student athletes as well.
- Both Biden and Cantwell have expressed general support for this.
- Kavanaugh's concurrence leads some to believe that more NCAA regulation could be on the chopping block under antitrust laws.
- Antitrust cases get very fact specific…

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NCAA v. Alston (cont.)

Questions - What do you think?

- Should college athletes be compensated (paid) for playing sports, if the school wants to pay them? (not addressed in this case)
- Antitrust law has not come up in the US in a major or significant way perhaps since the breakup of AT&T. We occasionally hear of FTC review of potential mergers, for example, which most often go through. The EU has engaged in more active enforcement in recent years, and there are rumblings in the US with the new administration. Biggest targets: Apple, Google, FB, Amazon. Do you think they need to be broken up? If so, how?

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Mahanoy Area School District v. B.L.

1st Amendment Rights and Student Speech

"F… school, f… softball, f… cheerleading, f… everything"

This is a case balancing the free speech rights of students vs. the interest of the school in regulating that speech.

The Facts of the Case

- 9th grader Brandi Levy did not make the varsity cheerleader squad for next year. Worse yet, an 8th grader did!
- Levy and a friend went to the Cocoa Hut to commiserate, took a selfie with middle fingers raised, and posted the selfie on SnapChat with the above text to 250 of her closest friends.
- At the time they probably did not realize that their actions would drop them into a distinguished line of 1st Amendment freedom of speech cases.

Mahanoy Area School District v. B.L. (cont.)

The Facts of the Case (cont.)

- As a condition of being a cheerleader, she had signed an agreement to show respect for her teammates, coaches, school etc. It also forbade the use of profanity.
- While the snapchat message self-deletes, screen shots were taken, the school found out, some cheerleaders were upset, and within a week Brandi was suspended by the school from the cheerleading squad.

The Law of the Case

- The school is an organ of the state, and the 1st Amendment of the U.S. constitution applies to the states through the 14th Amendment.
- The 1st Amendment reads simply: *"Congress (and thus the states) shall make no law … abridging the freedom of speech..."*

Mahanoy Area School District v. B.L. (cont.)

The Law of the Case

- ***West Virginia … v. Barnette***: students could not be required to say the pledge of allegiance or salute the flag (Jehova's Witnesses).
- ***Tinker v. Des Moines Independent Community School:*** the school could not ban the wearing of black armbands to protest the Viet Nam war by students. Students did not lose their 1st Amendment rights to freedom of speech when they stepped onto school property, and the action did not *"materially and substantially interfere"* with the operation of the school.
- ***Bethel School District v. Fraser***: the school **could** regulate a student speech at the school for content when laced with double entendres and sexual innuendo. The same was held true later for school newspapers.
- The idea that a school's ability to regulate speech ends at the schoolhouse gate was taken up in ***Morse v. Frederick***, the infamous 'BONG HiTS 4 JESUS' case.

Mahanoy Area School District v. B.L. (cont.)

The Law of the Case

- In ***Morse***, At a school-supervised event, Joseph Frederick held up a banner with the message *"Bong Hits 4 Jesus."* Principal Deborah Morse took away the banner and suspended Frederick for ten days. She justified her actions by citing the **school's policy** against the display of material that promotes the use of illegal drugs.
- The Court reversed the Ninth Circuit by a 5-4 vote, ruling that school officials can prohibit students from displaying messages that promote illegal drug use. Chief Justice John Roberts's majority opinion held that although students do have some right to **political** speech (see Tinker) even while in school, this right does not extend to pro-drug messages that may undermine the school's important mission to discourage drug use.
- There was an argument that the 'speech' took place outside of school, but it was a school sanctioned event under school supervision.

Mahanoy Area School District v. B.L. (cont.)

The District Court

- Found for Levy because the speech (1) was not disruptive as implicitly required by ***Tinker*** and (2) was not on school grounds as in ***Fraser***.

The Third Circuit

- Upheld the District Court, relying largely on the fact that this was off campus speech. One issue it addressed was if modern communication effectively expands the reach of the 'schoolhouse gate.'
- They also noted that Levy had little or no control (after posting) how this might come to the attention of school officials.

Mahanoy Area School District v. B.L. (cont.)

The Supreme Court

- This was an 8-1 decision written by Breyer in favor of Levy, with Thomas dissenting.
- Amicus briefs were filed on Levy's behalf by both free speech advocacy groups and religious groups concerned over regulating student speech with religious content.
- Briefs on the school district's behalf included groups fighting cyber-bullying.
- The court did recognize that **there may be situations where a school has a legitimate interest in restricting off-campus speech, such as in relation to harassment and bullying**, but did not try to make a broad rule or discuss:

  "how ordinary First Amendment standards must give way off campus to a school's special need to prevent substantial disruption of learning-related activities or the protection of those who make up a school community."

Mahanoy Area School District v. B.L. (cont.)

The Supreme Court (continued)

- Breyer did identify three factors to be considered related to off-campus speech:
  - Off-campus speech is usually the responsibility of the student's parents
  - Off-campus speech covers virtually any activity outside of the school facility, and
  - The school has a responsibility to protect unpopular ideas by students:

    "The school itself has an interest in protecting a student's unpopular expression, (because) America's public schools are the nurseries of democracy."
- He also noted that there was no evidence that Levy's post created the type of disruption that *Tinker* addressed, it was of limited distribution (?), and did not name or target the school or individuals specifically.
- *"Sometimes it is necessary to protect the superfluous in order to preserve the necessary."*

Mahanoy Area School District v. B.L. (cont.)

Dissent

- Thomas was the lone dissenter; he wanted to look at how the 1st Amendment would have been applied at the time the 14th amendment was ratified and suggested that schools historically could discipline students in this type of situation.

Questions

- What do you think of this case?
- Where do you think the line should be?
- Is it substantially different if Levy had posted this while **in** the school? Or at a school event?
- How much turns on the *reaction* to the post, rather than the post itself?

Next Week's 'Preview' of the 2021 Term

- **ABORTION:** *Dobbs v. Jackson Women's Health* (19-1392) is a direct challenge to Roe v. Wade and Planned Parenthood v. Casey, the Supreme Court's major decisions over the last half-century that guarantee a woman's right to an abortion nationwide.
- **GUNS:** *New York State Rifle & Pistol Assn. v. Bruen* (20-843) is a case that could expand gun rights in the United States and involves the right to carry a firearm in public.
- **STATE SECRETS:** *United States v. Zubaydah* (20-827) and *FBI v. Fazaga* (20-828) are two cases that involve what the government claims are "state secrets," information that if disclosed would harm national security.
- **TAXPAYER FUNDING OF RELIGIOUS SCHOOLS:** *Carson v. Makin* (20-1088) is the court's latest case over discrimination based on religion. Parents in Maine are suing over the state's exclusion of religious schools from a tuition program for families who live in towns that don't have public schools.
- **BOSTON MARATHON BOMBING:** *United States v. Tsarnaev* (20-443) is the Biden administration's effort to have the death sentence reinstated for Boston Marathon bomber Dzhokhar Tsarnaev.
- **CAMPAIGN FINANCE:** *Federal Election Commission v. Ted Cruz for Senate* (21-12) is a challenge by Sen. Ted Cruz, R-Texas, to rules about limits on repaying a candidate for federal office who loans his or her campaign money.