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2013

Hidden Gems in the Historical 2011-2012 Term, and Beyond

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Supreme Court Issue

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HIDDEN GEMS IN THE HISTORICAL 2011–2012 TERM, AND BEYOND

John C. Eastman*  

There was a small, little case decided on June 28, 2012, the last day of the Supreme Court’s October 2011 Term. No, I’m not talking about First American Financial v. Edwards,¹ dismissed as improvidently granted (DIG’d) on the last day, but that other little case involving some rather arcane aspects of the nation’s health care system that seems to have diverted attention, both political and legal, from almost every other case the Court decided. So before the deluge of law review articles and symposia addressing National Federation of Independent Business v. Sebelius² (the title itself hardly does justice to the case, which, among other things, pitted twenty-six States against the United States), let me address some of the lesser publicized but very significant cases from the term before, offering a few comments of my own on the health care decision, lest those other decisions get completely lost in the shuffle. That will, I hope, lay a foundation for the remainder of this issue of the law review, which bridges the term just passed and the term that lies ahead by way of a rare carry-over case.

Among the more significant cases the Court decided last term that risk being swamped into obscurity by the health care

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decision are: Knox v. Service Employees International Union, Local 1000; Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC; the twin ineffective assistance of counsel cases, Lafler v. Cooper and Missouri v. Frye; and the twin juvenile life without parole cases, Miller v. Alabama and Jackson v. Hobbs. These cases have dramatically changed the landscape of existing law and, together with Arizona v. United States (which is admittedly not one of the cases obscured by the health care decision), are likely to generate a great deal of litigation in coming years.

Let me start briefly with the Arizona decision. The contrasting headlines tell an interesting tale about the fate of Arizona’s immigration enforcement law, Arizona Senate Bill 1070. “Blocking Parts of Arizona Law, Justices Allow Its Centerpiece,” reported the New York Times shortly after the decision was released. But the Los Angeles Times and NPR touted a different story, “Supreme Court Strikes Down Key Parts of Arizona Immigration Law.” USA Today reported that “In

Arizona Law’s Wake, Other States to Forge Ahead,” while the New York Times backtracked a bit from its earlier post to note that “Arizona Ruling Only a Narrow Opening for Other States.”

So much confusion.

Here’s what really happened. Arizona’s statute, the “Support Our Law Enforcement and Safe Neighborhoods Act,” actually contains ten operative sections and about another dozen major subsections. Although the Obama Administration’s Department of Justice sought to enjoin the entire statute, the district court, affirmed by the Ninth Circuit, preliminarily enjoined only four of the more than twenty substantive provisions. The Supreme Court upheld the preliminary injunction with respect to three of those provisions, dissolved the preliminary injunction with respect to the fourth, and remanded for further proceedings.

Granted, the centerpiece of the law—the provision that had generated the most controversy—was upheld (or, more precisely, had the preliminary injunction against it lifted). That provision, section 2(B), directed Arizona law enforcement to ascertain, when practical, the immigration status of anyone they had lawfully stopped if they had reasonable suspicion unrelated to the individual’s race or ethnic background that the individual was unlawfully present in the United States—hence the New York Times’ first headline.

But the L.A. Times and NPR headlines were also correct. The preliminary injunctions against sections 3, 5(C), and 6 were upheld. Section 3 created a state crime for failure to carry the immigration papers mandated by federal law, and although it imposed a criminal penalty virtually identical to that imposed by federal law, the Court ruled that section 3 supplemented federal

15. United States v. Arizona, 641 F.3d 339, 344 (9th Cir. 2011).
17. Id.
20. See Peralta, supra note 10; Savage, supra note 10.
22. Ariz. S.B. 1070 § 3.
law and was therefore preempted by the comprehensive federal regulatory scheme—known as “field” preemption.\textsuperscript{23} Section 5(C) imposed criminal penalties on employees who unlawfully sought work in the United States,\textsuperscript{24} but the Supreme Court found that subsection preempted because it created an obstacle to the purpose of federal law, which imposed criminal penalties on employers but only civil penalties on employees—the so-called “obstacle” preemption.\textsuperscript{25} Section 6 authorized local law enforcement to make warrantless arrests whenever they had probable cause to believe that someone was an illegal immigrant subject to removal from the United States,\textsuperscript{26} and although the Supreme Court recognized that federal law explicitly envisions enforcement cooperation from the states, it held that the federal scheme did not countenance unilateral enforcement by state officials; that, too, would apparently serve as an obstacle to the federal law, particularly as manifested by non-enforcement policy being set by the executive branch with increasing frequency.\textsuperscript{27} Although not as controversial as section 2(B), these were “key provisions” of the Arizona statute, as the L.A. Times and NPR noted.\textsuperscript{28}

The most controversial provision of Arizona’s law was upheld by the Supreme Court, and the lower court decision upholding most of the rest of the statute—or, technically, not preliminarily enjoining—was not even part of the appeal.\textsuperscript{29} Those provisions include the anti-sanctuary parts of the statute, sections 2(A) and 2(F)–(J), which prohibit all officials and agencies in the State from limiting enforcement of federal immigration laws, and even allow individual Arizonans to sue officials and agencies who violate the prohibition and to recover attorneys’ fees and costs if successful (in addition to the $1,000–$5,000 daily fine that would be assessed and deposited into the Gang and Immigration Enforcement Fund).\textsuperscript{30} Other provisions still in effect include the

\begin{itemize}
\item \textsuperscript{23} Arizona, 567 U.S. at ___, 132 S. Ct. at 2503.
\item \textsuperscript{24} Ariz. S.B. 1070 § 5(C).
\item \textsuperscript{25} Arizona, 567 U.S. at ___, 132 S. Ct. at 2505.
\item \textsuperscript{26} Ariz. S.B. 1070 § 6.
\item \textsuperscript{27} Arizona, 567 U.S. at ___, 132 S. Ct. at 2507.
\item \textsuperscript{28} See Peralta, supra note 10; Savage, supra note 10.
\item \textsuperscript{29} Arizona, 567 U.S. at ___, 132 S. Ct. at 2492.
\item \textsuperscript{30} Ariz. S.B. 1070 § 2(A), (F)–(J).
\end{itemize}
following: Section 5, which makes it illegal to hire (or hire and pick up) passengers for work with a motor vehicle if doing so impedes traffic, or to transport, conceal, or harbor illegal aliens, and which provides that vehicles used to do so may be impounded;31 and section 9(A), which expands the e-verify employment eligibility provisions of prior Arizona law.32 No wonder USA Today found reason for other States to be forging ahead.33

And yet, the New York Times’ revised headline that the Court’s ruling provided only a “narrow” opening for the States was also correct.34 Although it vacated the preliminary injunction against section 2(B), Justice Kennedy’s opinion for the Court is hardly a ringing endorsement of that provision.35 Indeed, the opinion all but invites further litigation alleging that the provision, as implemented, is resulting in racial profiling.36 Arizona will have to provide impeccable training to its officers to forestall that onslaught, as will other States who choose to venture into the “narrow” opening that the Court’s decision left them in their efforts to deal with the significant collateral costs of the federal government’s increasingly deliberate refusal to fully enforce the nation’s immigration laws.

The next major case I want to discuss is Knox v. Service Employees International Union, Local 1000.37 Although it did not receive nearly as much attention as the Arizona case, the decision was dramatic, and will likely have a profound impact on our political system. The case arose out of California Governor Arnold Schwarzenegger’s attempt, in 2005, to reign in the power of public employee unions via a couple of proposed initiatives—Propositions 75 and 76—which would respectively have obliged unions to obtain annual consent from employees before union dues could be used for political purposes, and given the Governor the authority to reduce state appropriations for public-employee

31. Id. § 5.
32. Id. § 9(A).
34. Preston, supra note 10.
36. See id. at ___, 132 S. Ct. at 2510.
compensation when circumstances warranted.\textsuperscript{38} The unions had already set their political budget for the year, but these were “live or die” initiatives, and they found themselves with insufficient funds to wage a successful campaign against them.\textsuperscript{39} So without seeking approval from “rank and file” union members (or even giving them notice and an opportunity to opt-out) or, even more troubling, compelling non-union members to contribute to the unions under so-called “agency shop” rules, the unions increased payroll deductions by 25%, raising somewhere between $10 and $15 million that went directly into the campaign to defeat the initiatives.\textsuperscript{40}

Some non-union employees—twenty-eight thousand of them—challenged the non-consensual assessment.\textsuperscript{41} The Supreme Court ruled 7 to 2 that it was illegal and a violation of the Court’s prior decision in \textit{Chicago Teachers Union v. Hudson},\textsuperscript{42} which required, among other things, that unions provide notice and an opportunity to opt-out before collecting dues that will be used for political purposes.\textsuperscript{43}

But that part of the decision, significant in itself, is not what makes the case so dramatic. Justice Alito, writing for a Court majority of five Justices, grappled with the common practice of requiring objecting employees to opt out rather than opt in to the unions’ political funds. The Court held that, at least with respect to the special assessments at issue, an opt-out mechanism was an unconstitutional infringement of the employees’ First Amendment right not to be coerced to support political speech they chose not to support.\textsuperscript{44} The reasoning in support of that holding, though, strongly suggests that the common opt-out practice, recognized in prior cases without much analysis, was itself unconstitutional. “By authorizing a union to collect fees from nonmembers and permitting the use of an opt-out system for the collection of fees levied to cover nonchargeable expenses [e.g.,

\begin{itemize}
  \item Id. at ___, 132 S. Ct. at 2285.
  \item Id. at ___, 132 S. Ct. at 2285–86.
  \item Id.
  \item Id. at ___, 132 S. Ct. at 2286.
  \item Id. at ___, 132 S. Ct. at 2295–96; Chicago Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292, 307–11 (1986).
  \item Chicago Teachers Union, 475 U.S. at 307–11.
  \item Knox, 567 U.S. at ___, 132 S. Ct. at 2295–96.
\end{itemize}
political expenses], our prior decisions,” the Court noted, “approach, if they do not cross, the limit of what the First Amendment can tolerate.” That sentence had to send shock waves through the executive suites of the union halls, and the grand irony is that the proposition, which was defeated by virtue of the illegally obtained funding, would have eliminated the opt-out system. Now the Court has strongly suggested that a voter initiative is not required; the First Amendment may already forbid the opt-out mechanism for public employee unions.

Next up on the overlooked, but nonetheless earth-shattering docket is Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC. There are a number of federal employment laws, such as Title VII and the Americans with Disabilities Act (ADA), preventing discrimination in employment on various grounds such as race, gender, religion, and disability. When applied to churches, those laws can sometimes interfere with the constitutionally protected free exercise of religion, so the lower courts developed a ministerial exception to the federal statutory requirements. A church can “discriminate” on the basis of religion when making decisions about whom to employ as its minister, for example, or on the basis of gender when church doctrine limits ordination to men.

The issue presented by Hosanna-Tabor was, first, whether the Supreme Court would similarly recognize a ministerial exception, and if so, whether, contrary to the holding of the Sixth Circuit below, it was broad enough to cover a teacher at a religious school. Cheryl Perich worked at the Hosanna-Tabor Lutheran Church and School as a “called” teacher rather than a

45. Id. at ___, 132 S. Ct. at 2291 (emphasis added).
49. See, e.g., Spencer v. World Vision, Inc., 633 F.3d 723, 755–56 (9th Cir. 2011) (discussing ministerial exception to Title VII); Rweyemamu v. Cote, 520 F.3d 198, 204–06 (2d Cir. 2008) (tracing the use and evolution of the ministerial exception in different circuits); McClure v. Salvation Army, 460 F.2d 553, 558–61 (5th Cir. 1972) (concluding that Congress did not intend to “regulate the employment relationship between church and minister” through Title VII).
50. See, e.g., Spencer, 633 F.3d at 756.
51. 565 U.S. at ___, 132 S. Ct. at 699.
“lay” teacher, and had the title of “Minister of Religion, Commissioned.” In addition to teaching secular subjects, she taught a religion class, led students in daily prayer and devotional exercises, and took students to a weekly school-wide chapel service, which she sometimes led herself. She was ultimately placed on medical disability, and after five months, sought to return to work—but was informed that the school had hired a replacement for the remainder of the school year and in any event, the school felt that she was not ready to return to work. After Perich threatened to sue (apparently in violation of the Church’s doctrinal policy in favor of internal, non-adversarial dispute resolution) and refused to leave the building, the religious congregation that ran the school rescinded Perich’s “call,” and terminated her from the teaching position. Perich filed a charge with the Equal Employment Opportunity Commission (EEOC), claiming that the Church/School had discriminated against her because of her disability in violation of the ADA, and retaliated against her because of her assertion of her legal rights under the ADA. The EEOC ultimately brought suit against the Church on her behalf, alleging unlawful retaliation in violation of the ADA.

The Supreme Court, in a unanimous decision by Chief Justice Roberts, held that there was a ministerial exception, compelled by both the Free Exercise Clause and the Establishment Clause of the First Amendment. "Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, . . . interferes with the internal governance of the church," it held, “depriving the church of

52. Id. at ___, 132 S. Ct. at 699–700 (“Called’ teachers are regarded as having been called to their vocation by God through a congregation. . . . ‘Lay’ or ‘contract’ teachers, by contrast, are not required to be trained by the Synod or even to be Lutheran.”).
53. Id. at ___, 132 S. Ct. at 707.
54. Id. at ___, 132 S. Ct. at 708.
55. Id. at ___, 132 S. Ct. at 700.
56. Id.
57. Id. at ___, 132 S. Ct. at 701.
58. Id.
59. Id. at ___, 132 S. Ct. at 702.
control over the selection of those who will personify its beliefs.”

Significantly, the Court rejected, as having “no merit,” the EEOC’s contention that the law should be upheld under Employment Division v. Smith as a law of general applicability, holding that there was a significant difference between a law that regulated outward conduct and one that interfered with the internal operations of the Church.

The Court then held that the ministerial exception was not limited to the head of a religious congregation, but extended beyond the pulpit to people like Perich who were in “called” ministerial positions, noting that Perich herself claimed the parsonage deduction on her tax returns—a deduction available only to ministers—and listing a slew of other indicia that she was performing duties as a minister. Just how far beyond the pulpit the exception extends, and which of the litany of indicia it provided are necessary to demonstrate that the exception applies, the Court did not say. Nor did it indicate whether the ministerial exception would bar other kinds of lawsuits, such as breach of contract or torts by religious employers. Both of these open issues are likely to spawn a new generation of litigation in coming years as the lower courts grapple with the full implications and meaning of the Court’s decision.

Continuing with the theme of cases that are going to generate a lot of new litigation, we have the term’s two ineffective assistance of counsel cases, Lafler v. Cooper and Missouri v. Frye. Both involved the plea bargaining process, in which ineffective claims had heretofore not been entertained. Lafler involved erroneous advice provided by the attorney that led his client to reject a plea offer, and Frye involved an attorney’s failure to deliver a prosecutor’s plea offer before it expired. Justice Kennedy’s opinions for the Court in both cases,

60. Id. at ___, 132 S. Ct. at 706.
63. Id. at ___, 132 S. Ct. at 707–08.
66. Id.; Lafler, 566 U.S. at ___, 132 S. Ct. at 1376.
67. 566 U.S. at ___, 132 S. Ct. at 1383.
68. 566 U.S. at ___, 132 S. Ct. at 1405.
by a slim 5 to 4 majority, emphasized the need for ineffective assistance claims at the plea bargaining phase because so many cases in the criminal justice system are resolved with plea bargains.69 Justice Scalia wrote stinging dissents in both cases, and uncharacteristically read them from the bench.70 Never one to mince words, Justice Scalia accused the majority of creating an entirely new area of constitutional law, with a standard that required “retrospective crystal-ball gazing posing as legal analysis, which will confound lower courts and result in a flood of litigation.”71 And that was with respect to Frye, the factual circumstances of which are probably rare. The potential explosion of litigation after Lafler is even greater. How many predictions by defense attorneys to their clients about the strength of the prosecution’s case or the prosecution’s ability to prove one of the elements of a crime will be deemed, after the fact, to have been sufficiently wrong to qualify as ineffective assistance? I expect that the lower courts will grapple with these questions for a long time before we know how broad an impact these cases will have.

The next set of cases are also going to generate a lot of litigation, but at least the pool of potential claimants is finite (unlike with Lafler and Frye). In Miller v. Alabama, the Court once again confronted juvenile sentencing policies of the States.72 Previously, in Roper v. Simmons, the Court had ruled that imposing a death penalty on juvenile murderers was unconstitutional and a violation of the Eighth Amendment’s Cruel and Unusual Punishment Clause because of the uniquely harsh nature of the death penalty.73 Then, in Graham v. Florida, the Court extended that ruling to prohibit life without parole sentences for juveniles who committed non-homicidal crimes.74

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69. Id.; Frye, 566 U.S. at __, 132 S. Ct. at 1399.
70. Frye, 566 U.S. at __; Lafler, 566 U.S. at __, 132 S. Ct. at 1391 (Scalia, J., dissenting).
71. Frye, 566 U.S. at __, 132 S. Ct. at 1413 (Scalia, J., dissenting).
73. 543 U.S. 551, 578 (2005).
Miller extended those rulings even further. Miller confronted two cases involving juvenile murderers, one from Alabama, the other from Arkansas. Both states, like twenty-six other states and the federal government, required a mandatory life without parole sentence for murders committed under certain circumstances. Miller's circumstances were especially egregious. He and a friend followed Cole Cannon to his home after Cannon had purchased drugs from Miller's mother. They all smoked marijuana and drank together until Cannon passed out. Miller then stole Cannon's wallet and removed $300 in cash, but when he attempted to put the empty wallet back in Cannon's pocket, Cannon awoke and grabbed him. Miller's accomplice hit Cannon over the head with a baseball bat, but Miller then took the bat and repeatedly beat Cannon back into unconsciousness with it. The two "boys" then left, but returned to the scene to destroy the evidence of their crime by burning down the house. Cannon was still inside and died of smoke inhalation. Miller was subsequently tried as an adult and, like more than two thousand other inmates currently inhabiting state or federal prisons for murders they committed before their eighteenth birthdays, received a mandatory sentence of life without parole.

The Court, in a 5 to 4 decision written by Justice Kagan, held that the mandatory sentence violated the Eighth Amendment because "juveniles have diminished culpability and greater prospects for reform." The case was remanded for an individualized assessment—the kind of assessment previously applied only in death penalty contexts—about the appropriateness of a life without parole sentence, with a strong cautionary flag that the Court would not view a re-imposition of such a

76. Id. at ___, 132 S. Ct. at 2461–62. (2012).
77. Id.
78. Id. at ___, 132 S. Ct. at 2462.
79. Id.
80. Id.
81. Id.
82. Id.
83. Id.
84. Id. at ___, 132 S. Ct. at 2463.
85. Id. at ___, 132 S. Ct. at 2464.
sentence with favor in most instances. Two thousand cases will now be reopened to revoke the “mandatory” aspect of the existing sentence and to conduct hearings about the individualized appropriateness of life without parole for the juvenile convicted of murder. As I said, that pool of cases is at least finite. But the individualized assessment will itself undoubtedly spawn a new cottage industry in habeas corpus challenges, and that aspect of the case is not limited to the existing inmates sent away for life under mandatory sentencing schemes.

One of the sleeper cases from the past term that, alas, remained a sleeper, was the aforementioned First American Financial Corp. v. Edwards. Heard back in November, the Court waited until the last day of its term to dismiss what could have been an extremely important decision on Article III standing to litigate cases based only on technical statutory violations without evidence of any individualized financial, reputational, or physical injury. First American owned a 17.5% interest in a home mortgage escrow company that routinely referred its customers’ title insurance work to First American. First American was alleged to have paid much more for its stake in the escrow company than it was worth, leading to the implication that its purchase price amounted to a kickback for the anticipated referrals, an alleged violation of federal law for “federally related” (aren’t they all?) home loans that would yield treble the price of the title insurance in damages for the individual members of the class on whose behalf the suit was brought and an (undoubtedly large) attorneys’ fee for the enterprising lawyers who brought the suit. The district court, affirmed by the Ninth Circuit, rejected First American’s

86. Id. at ___, 132 S. Ct. at 2469–75.
90. First Am. Corp., 610 F.3d at 516.
91. Id. at 517.
contention that Edwards’ failure to allege any actual harm deprived her of standing to bring the case, the statutory damages claim notwithstanding.92 Because there was not a split among the Circuit Courts of Appeal on the issue, the general view among Supreme Court watchers was that the Court took the case to reverse and establish some clarity on Article III standing derived from statutory causes of action. But it was not to be. The case was dismissed as improvidently granted, leaving the issue to be addressed in a future case.

Kiobel v. Royal Dutch Petroleum was also unresolved, but unlike First American, it was granted a reprieve—an order for re-briefing and re-argument—set for the first day of next term, October 1, 2012.93 Kiobel involves whether a foreign corporation can be sued in a United States Court under the Alien Tort Statute for conduct that allegedly occurred entirely in a foreign nation.94 During oral argument, several Justices raised the more basic question of whether the Alien Tort Statute actually authorized any foreign national—real person or corporation—to bring suit in a United States Court for conduct that allegedly occurred in foreign nations, and if so, whether such a broad assertion of jurisdiction was constitutional.95 That question, unanswered, is what yielded the rare order for re-briefing and re-argument.

Both of these cases are addressed in the pages that follow. Jonathan Massey addresses them both in The Two That Got Away, and my colleague at Chapman University School of Law, Michael Bazyler, together with his co-author, University of Minnesota Professor Jennifer Green, add another perspective on the Kiobel case in Nuremberg-Era Jurisprudence Redux.

Then there are the dog-sniffing cases, both fittingly scheduled to be heard on Halloween. Florida v. Jardines, addressed by Professor Stephen Simon, presents the question whether the Fourth Amendment precludes use of drug-sniffing dogs on the

92. Id. at 518.
exterior of a home in order to gain the probable cause necessary for a warrant to search that most protected of inner sanctums, a man’s castle.96 Florida v. Harris tackles drug-sniffing dogs in the context of a man’s ride.97 Because the Court has already upheld sniffing of the exterior chrome,98 this case presents the question of the sniffing dog’s pedigree.99 The Florida Supreme Court threw out Harris’s plea conviction, holding that absent evidence of how the dog was trained, whether that training had been certified by an expert, and how the dog (and its handler) had actually performed on duty, the dog’s pedigree was simply not reliable enough to constitute probable cause for the subsequent search (the fact that drugs were found notwithstanding, apparently).100

Next up in the 2012 term is the big affirmative action case out of Texas, Fisher v. University of Texas.101 There is the apocryphal story about a law school professor who once gave the same essay question on an exam that he had given previously. When confronted with the apparent problem, he acknowledged that he had, but noted that, courtesy of Justice O’Connor, the answer had changed. So, too (perhaps), with Fisher. One of Justice O’Connor’s parting shots a few years before her retirement was her set of split decisions in Gratz v. Bollinger102 and Grutter v. Bollinger,103 effectively upholding race-based admissions policies, at least for a while, if a University was not too open and methodical about it. The University of Michigan’s law school had purportedly used a holistic, black-box approach to

99. Harris, 71 So. 3d at 762.
100. Id. at 775.
101. 631 F.3d 213 (5th Cir. 2011), cert. granted, 132 S. Ct. 1536 (Feb. 21, 2012) (No. 11-345).
103. Grutter v. Bollinger, 539 U.S. 306, 337–38 (2003) (holding the University of Michigan Law School’s admission policy of considering race as permissible because the plan was flexible and each applicant was considered individually).
achieve so-called critical mass diversity at the school, whereas the undergraduate college, facing a much larger applicant pool that made such an approach unrealistic, had the temerity to actually award points for various racial and ethnic back-grounds. The latter offended the sensibilities of the good Justice, who cast the deciding vote to strike it down. The former was found by her to pass constitutional muster, however, under the most deferential version of strict scrutiny ever applied by the Court, albeit with the expectation that the rationale used to uphold the racial preference had a shelf-life of only twenty-five years. Well, we are nearing the half-way mark on that time clock, but Abigail Fisher decided she could not wait. She wanted acceptance to the University of Texas at Austin now, during her formative college years rather than waiting until she was thirty or thirty-five (go figure). And she wanted to be judged by the content of her character and the grades she had earned, not by the color—or lack of color—in her skin. Texas stood its ground in defense of its race-based admissions policy that went even further than Michigan’s, seeking to ensure diversity not just at the University as a whole, but in every classroom and program (except, undoubtedly, in its football and basketball programs, but I digress). In the interim, of course, Justice Alito has replaced Justice O’Connor, and he has already demonstrated that he is less persuaded than she was by the argument that the constitutional guarantee of equal protection for all persons allows

104. Id. at 337–38.
105. Gratz, 539 U.S. at 255.
106. See id. at 276–80 (O’Connor, J., concurring).
108. See Fisher v. Univ. of Tex. at Austin, 631 F.3d 213, 217 (5th Cir. 2011), cert. granted, 132 S. Ct. 1536 (Feb. 21, 2012) (No. 11-345).
109. Id.
110. See Univ. of Texas: 2012 Football Roster, http://www.mackbrown-texasfootball.com/sports/m-footbl/mtt/tex-m-footbl-htt.html (roster includes sixty-one African-American players, fifty-two non-Hispanic white players (including, perhaps, some of Mediterranean and Middle-Eastern descent), only three players (a mere 2.5%) with Hispanic surnames, and none with surnames indicating an Asian-American or Native-American heritage); see also 2012-13 Men’s Basketball Roster, Univ. of Texas, http://www.texasports.com/sports/m-baskbl/mtt/tex-m-baskbl-htt.html.
111. Fisher, 631 F.3d at 217–18.
some to be given favorable treatment, and others unfavorable treatment, in college admissions merely because of the color of their skin.112 Whether the Court upholds Texas’s policy under Grutter, invalidates it by distinguishing Grutter, or outright overrules Grutter and restores a more vibrant strict scrutiny to its place in the Equal Protection pantheon is the subject of the Article by Joshua Thompson and Adam Pomeroy of the Pacific Legal Foundation.

So what’s left to discuss? Oh, yes. The Chief Justice’s opinion in the Obamacare case.113 My purpose here is not to give a full analysis of the opinion’s reasoning, but to address the speculation that the Chief Justice appears to have switched his vote sometime after the initial court conference on the case, and after the President of the United States launched an unprecedented attack against the Court, claiming that the Court would be exceeding its constitutional role if it invalidated an act of the Congress.114

Even before Jan Crawford, a highly regarded Supreme Court reporter for CBS News, published her explosive piece claiming, based on “two sources with specific knowledge of the [Court’s internal] deliberations,”115 that Roberts switched his vote, there were telltale signs in the opinions themselves strongly indicating that a “switch in time” had indeed occurred. The dissenting opinion by Justices Scalia, Kennedy, Thomas, and Alito is unsigned, for example—an unusual thing.116 It refers to Justice Ginsburg’s concurring opinion as a “dissent.”117 It expends a con-

117. Id. at ___, 132 S. Ct. at 2648.
siderable amount of ink responding to Justice Ginsburg’s “dissent,” yet not a drop responding to the Chief Justice’s opinion announcing the judgment of the Court.\footnote{See id. at __, 132 S. Ct. at 2648–50.} It is written as though it were the majority opinion, using phrasings such as: “[t]hat clear principle carries the day here;”\footnote{Id. at __, 132 S. Ct. at 2643.} “[n]either theory [offered by the Government] suffices to sustain [the] validity” of the individual mandate;\footnote{Id. at __, 132 S. Ct. at 2644.} “we cannot rewrite the statute to be what it is not;”\footnote{Id. at __, 132 S. Ct. at 2651.} “the nail in the coffin;”\footnote{Id. at __, 132 S. Ct. at 2655.} etc. In addressing the taxing power issue that turned out to be dispositive for the Chief Justice, it repeatedly refers to the Government’s alternative argument rather than the Chief Justice’s holding for the Court, with only an oblique reference—“and those who support its view on the tax point”\footnote{Id. at __, 132 S. Ct. at 2652.}—to suggest that this point actually carried the day for the Chief Justice.\footnote{See id. at __, 132 S. Ct. at 2642–77.} Finally, and most conclusively, the opinion’s discussion of the tax issue concludes with this:

[R]ewriting [the individual mandate] as a tax in order to sustain its constitutionality would force us to confront a difficult constitutional question: whether this is a direct tax that must be apportioned among the States according to their population. Perhaps it is not (we have no need to address the point).\footnote{Id. at __, 132 S. Ct. at 2655 (citations omitted).}

Similarly, the beginning of the discussion in the next section of the opinion, discussing whether the Court would lack jurisdiction under the Anti-Injunction Act to even hear the case if the individual mandate was really a tax, includes this: “Having found that [the minimum-coverage provision] is not [a tax], we have no difficulty in deciding that these suits [are not barred by the Anti-Injunction Act].”\footnote{Id. at __, 132 S. Ct. at 2656.}

These are truly extraordinary statements. The use of the sub-
junctive tense, “would force us to confront,” and even more clearly, the parenthetical phrase, “we have no need to address the point,” and the “having found” phrase in the next section, all indicate, quite strongly, that the Court had rejected the Government’s contention that the individual mandate could alternatively be upheld under Congress’s taxing power. And yet, that is precisely the ground upon which the Chief Justice upheld the statute. The subjunctive tense, the parenthetical, and the “finding” are nevertheless left in the opinion, punctuated by what appears to be a couple of phrases added after the original draft as though to highlight the dissenters’ pique at what had transpired. “[P]erhaps because, until today, no federal court has accepted the implausible argument” seems to have been added after “[t]he Government’s opening brief did not even address the question,” for example. And the concluding sentence of the section is the only one in the whole opinion that actually reads like a vintage-Scalia dissent: “One would expect this Court to demand more than fly-by-night briefing and argument before deciding a difficult constitutional question of first impression.” Fly by night indeed.

Other evidence of a switch includes the fact that Justice Ginsburg’s concurring opinion reads almost entirely like a dissent. And a fairly strident one at that, even bringing out that old bug-a-boo, *Lochner v. New York*. Only at the very end of the discussion, as if an afterthought, does she add a paragraph and footnote acknowledging that she concurred because “[u]ltimately, the Court upholds the individual mandate as a proper exercise of Congress’ power to tax and spend.” That is certainly not the norm in tone or substance for an opinion agreeing with the outcome of the case, and certainly not one agreeing with the

127. *Id.* at ___, 132 S. Ct. at 2655.
128. *Id.*
129. *Id.* at ___, 132 S. Ct. at 2656.
130. *See id.* at ___, 132 S. Ct. at 2601.
131. *Id.* at ___, 132 S. Ct. at 2655.
132. *Id.*
133. *See id.* at ___, 132 S. Ct. at 2609–42 (Ginsburg, J., concurring).
135. *Id.*
outcome of the most significant case to reach the Court in decades.

The Chief Justice’s opinion is itself uncharacteristically weak at critical points, even contrived. The Constitution authorizes Congress to raise taxes, but they must originate in the House of Representatives, as this law did not. That constitutional process of taxes is important. It insures that our lawmakers are accountable to the people for their actions (the unaccountability of the King and Parliament for imposing taxes on the colonists was the principal reason we had a revolution). The requirement that tax measures originate in the House was designed because the House is most directly accountable to the people. Its members have to face the voters every two years (rather than every six, as in the Senate), which is a pretty serious political check on raising taxes. The House originally proposed to pass the Affordable Care Act as a tax, but it failed. It was the Senate that introduced the mandate/penalty language that ultimately became law. The opinion does not even address that potential infirmity, or whether the Senate’s manipulative “gut and amend” use of an existing House bill having nothing to do with health care as the vehicle for introducing its tax was sufficient to meet the Constitution’s mandate.

More significant, though, is the Chief Justice’s weak discussion of the critical direct tax issue. The Constitution authorizes Congress to impose several kinds of taxes, but each comes with its own limitations. Imposts, excises, and duties, for example, must be uniform, and the individual mandate’s penalty/tax has none of the attributes of any of them. Direct taxes, on the other hand, can be levied directly on individuals as the individual mandates penalty/tax is, but Article I, Section 9, Clause 4 of the Constitution requires that such taxes be appor-

140. Id.
142. Id.
tioned by State according to population. This one is assuredly not so apportioned.

How does Chief Justice Roberts address this problem? Well, he ducks it. In a great bit of circular reasoning, he contends that the tax is not a direct tax because it doesn’t apply to everyone, as the Constitution requires. But that says nothing about whether it is a direct tax or not; it merely admits that if this is a direct tax, it is unconstitutional.

So I think the evidentiary record demonstrates, or at least raises a strong presumption, that the Chief Justice switched his vote sometime after the initial conference. The next question is, “Why?” It is not common, but not rare either, for a Justice to switch his vote after the initial conference. Those initial votes are tentative only, and the final disposition comes after opinions are drafted, circulated, and their legal reasoning is given full consideration. Sometimes, the strength of another Justice’s draft opinion is persuasive enough to garner additional votes (or, conversely, weak enough to lose votes). But this vote switch, if indeed one occurred, could not have been caused by a persuasively-reasoned opinion by one of the other Justices, as the other opinions barely mention, must less persuasively argue, the tax authority point.

It is also possible that the Chief Justice, upon further review of the briefs in the case and the discussion at oral argument, came around to the tax argument. That, too, seems implausible, given the utter paucity of discussion in either the briefs or the oral argument about the issue. As the joint dissent noted, the issue was not even raised in the government’s opening brief; it garnered only twenty-one lines of discussion in the reply brief, and occupied only a few minutes of time out of the six and a half

145. See generally, Daniel E. Ho & Kevin M. Quinn, Did a Switch in Time Save Nine, 2 J. OF LEGAL ANALYSIS 69 (2010).
146. Sebelius, 567 U.S. at ___, 132 S. Ct. at 2655.
hours of oral argument devoted to this case.\footnote{148. See Transcript of Oral Argument at 55, \textit{Sebelius}, 567 U.S. \textsection, 132 S. Ct. 2566 (2012) (No. 11-393).} That is hardly the stuff that would cause a Chief Justice of the United States to be persuaded to change his vote.

An alternative explanation is both more plausible and more troubling. After the President threatened to put the Court into the cross-hairs of a contentious political campaign,\footnote{149. Meckler & Lee, \textit{supra} note 114.} perhaps the Chief Justice went out of his way to craft a rationale by which he could uphold what he believed to be an unconstitutional act of Congress. If that is indeed what happened, then the Chief Justice’s motive was to prevent the Court from being “politicized” and its legitimacy undermined. But the fact that this switched-vote scenario is so evident from the opinions themselves, and confirmed by extraordinary leaks from within the Court, means that his vote switch yielded just the opposite of what was intended.

The Court is structurally designed to be independent of the political processes so that it can withstand political pressure and faithfully uphold the Constitution when confronted with assertions of power that exceed the Constitution’s authority. As the great Chief Justice John Marshall recognized more than two centuries ago in \textit{Marbury v. Madison}, it is “the very essence of judicial duty,”\footnote{150. \textit{Marbury v. Madison}, 5 U.S. (1 Cranch) 137, 178 (1803).} the reason a “judge swear[s an oath] to discharge his duties agreeably to the constitution,”\footnote{151. \textit{Id}. at 180.} that the judge must find “that a law repugnant to the constitution is void.”\footnote{152. \textit{Id}.} Then again, in \textit{McCulloch v. Maryland}, he added: “[S]hould Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal . . . to say, that such an act was not the law of the land.”\footnote{153. \textit{McCulloch v. Maryland}, 17 U.S. (1 Wheat.) 316, 423 (1819).}

So did the Chief Justice initially accept the argument that Congress could impose the individual mandate as a tax? Or was he persuaded to that position after tentatively voting to find the
Act unconstitutional? Or did the Chief Justice of the United States shy away when confronted with the painful duty that the Constitution assigns uniquely to the Justices of the Supreme Court? We will undoubtedly be debating that point for many years to come.