

DICK HOWARD: We have a panel today of very well-informed people who'll be looking at the term that's just ended, as well as I'll give a thought or two about the term that's about to begin. We will obviously only pick selected cases as there's no way in the world we could cover everything that happens in one term, so we're not trying to do that.

Leslie Kendrick will be talking about a First Amendment case dealing with immoral or scandalous trademarks, so keep it down if you will. Rich Schragger will talk about a First Amendment religion case dealing with the cross in Maryland, which was on public land. And then finally Brian Cannon, it's just been commented, it is the first time we've had a non-faculty member ever in my recollection. And we have him because he is probably the country's leading expert on gerrymandering cases. He's very much involved in these cases himself. So welcome, Brian, nice to have you as well. We will not be doing a Q&A session as such, so when the program is complete, I imagine the panelists don't mind if you want to approach them afterwards with a question that you might have.

So before we turn to the individual cases that my three colleagues will be taking up, I want to share with you thoughts about three things. First, something about patterns and personalities in the most recent Court term. Secondly, several major cases other than those that the other panelists will be talking about. And then finally, a thought or two about prospects for the term that will begin next week.

As far as patterns and personalities, this has not been a blockbuster term. There were not that many major rulings. The Court stayed away from the sort of hot-button controversial areas for the most part, denying review in cases involving such things as abortion and gay rights. And indeed, cases it did decide it often decided on somewhat narrow grounds.

There were two instances when the Court overruled precedents, one having to do with property rights, the other having to do with whether states can sue-- be sued in courts of other states. There were two other cases, though, in which the Court retained precedents, refused to overrule rather more important precedents, one dealing with double jeopardy and the other dealing with deference to the administrative agencies. So all in all, I would say that the Court acted, in some respects, like a court in transition from the sort of era when Kennedy sat on the Court to the era of Kavanaugh.

A few numbers. In terms of output, Justice Thomas outdid them all. He wrote a total of 337 pages of opinions. That's majority concurring and dissents. In terms of quickness off the plate, getting back and finishing opinions up, Justice Ginsburg holds the prize. 71 days on the average, which is really pretty fast. She may be the oldest justice, but she's also the fastest. I was at a dinner in Washington last week in which she was the guest of honor, and the reception she got, I thought I was at a rock concert. I couldn't believe the unalloyed enthusiasm that people had for her.

In terms of unanimous opinions, it was a fairly divided term. The Court was unanimous in 28 cases. That's altogether about 39%. There have been other Roberts Court terms when there'd been more unanimity. In terms of reversals of lower courts, as would not surprise you, I suspect, it was the Ninth Circuit that took it on the chin. Altogether there were 14 decisions from the Ninth Circuit in the Supreme Court, and they were reversed in 12 of them. They probably overlooked the other two.

Personalities on the Court, as all of us know this was the term in which Justice Kavanaugh took Justice Kennedy's seat. That appointment was expected to shift the Court to the right. It was also expected to thrust Chief Justice Roberts into the ideological center of the Court, and both of those things did, in fact, happen. I think they were fair predictions. But Kavanaugh played a somewhat, for me at least, a somewhat unexpected role in the Court's balance of power.

Indeed, in many ways, his voting pattern was not all that distinguishable from that of Chief Justice Roberts. So if you like to talk about swing justices, which is a somewhat misleading concept, but if you like that idea, it may well be that Kavanaugh is approaching that role. Certainly Kavanaugh was the justice of the nine of them, the one most often in the majority.

This term he was in the majority in 91% of cases, which is quite striking, Roberts being next with 85%. And if you think of the pairings of justices, who agrees with whom, Kennedy-- I'm sorry, Kavanaugh-- and Roberts held that prize with 94%. Pretty high rate of agreement, just passing Ginsburg and Sotomayor who had 93%.

Obviously it's interesting to talk about Justice Kavanaugh and Justice Gorsuch. They agree a lot on pretty important things like gerrymandering, the census case, death penalty, religious rights, abortion rights. There are a number of areas where they seem to be in agreement, but there are some differences. They're not by any means Bobbsey Twins. Kavanaugh is as likely

to be in agreement with let's say Kagan as he is with Gorsuch, and I mentioned that he was in the majority more than any other justice.

Now, Kavanaugh and Gorsuch have remarkably similar biographical sketches. They went to Georgetown Prep, they both went to Ivy League law schools, both were law clerks to Justice Kennedy, they both worked for the Bush administration. They both were named to the Court of Appeals in the same year, 2006. Both were on the sort of favored list of the Federalist Society, so you could expect some ideological similarity. But there are enough differences that make me wonder if, as time passes, we're going to find that Gorsuch is more like Scalia was when he was on the Court, and Kavanaugh may in some respects be more like Justice Kennedy.

The agreement rate between Kavanaugh and Gorsuch was about 70% in the past term, which for two justices appointed by the same president in his first term is a fairly low percentage of agreement. Gorsuch actually agreed the most with Justice Thomas, 81% all together. I think he will prove to be on the Court an originalist like Justice Thomas. He certainly, along with Thomas, seems to be one of the justices most inclined to overturn precedent.

How about Chief Justice Roberts? I mean, it is the Roberts Court, and not only in name but maybe now in fact, in practice. The past term might be said to be the term in which Roberts took charge.

For example, he made his influence patently obvious in a stunning pair of cases. They were decided on the same day last term, one involving the census, the other involving partisan gerrymandering. Both were 5-to-4 decisions. And in the census case, he joined the liberal wing of the Court, and in the gerrymandering case joined the conservative wing of the Court. So he was the decisive vote in both cases and the only member of the Court to be in the majority in both of those cases.

Now, conservatives are quick to be upset about Chief Justice Roberts. You remember when he cast the deciding vote in the Affordable Care Act case and how people said he strayed the reservation. And one conservative, the president of the Committee for Justice, was quoted as saying, "the census decision will surely deepen the impression that Roberts is the new Justice Kennedy rather than the reliable fifth vote conservatives hoped for and liberals feared." So in both of these cases that I mentioned, census and partisan gerrymandering, the dissenters complained that Roberts' vote was warped by political considerations.

So Roberts, it's interesting that in the census case where he, you may recall, somewhat

reluctantly at the end of the case, said in effect that the rationale that was being advanced by the administration for adding the question to the census question in Roberts' term seems to have been contrived. And compare that, if you will, to his opinion in the previous decision in the Trump travel ban case, in which he talked about Trump's public statements and nevertheless was willing to set those aside and say that because the ban was neutral on its face, he would vote to uphold it.

So I think that whatever you may say, one should remember that Roberts by and large is a mainstream conservative legal movement chap. You think of cases like *DC versus Heller* or *Citizens United* or *Shelby County* or cases like that. So those are observations on the term.

Secondly, a comment about major decisions. We will hear about three of them in a moment. But I simply want to mention that besides those, we had the census opinion, which was, after all, politically important. We had the race discrimination. That was a 7-to-2 decision in which the Court held that this was a case involving peremptory challenges to jurors, and the Court held that the Constitution had been violated when peremptory challenges had been used to exclude potential black jurors in a Georgia death penalty case.

Double jeopardy, I mentioned how the Court, against this 7-to-2, refused to overrule precedents holding that to try a particular person for an offense in both state and federal courts does not violate the prohibition on double jeopardy. Finally, one other case at interest, a nonconstitutional case in the area of anti-trust. I was intrigued when the Court allowed a major anti-trust action against Apple to go forward. And here we had Kavanaugh joining the four liberals on the Court to make that possible. And in general the Roberts Court has not been very friendly to consumers, so that case seemed to be something of an aberration.

A comment about abortion cases. Obviously we know that Justice Kennedy was one of the three concurring justices in *Planned Parenthood versus Casey*, making possible the upholding of the core premise of *Roe versus Wade* and requiring a showing. You could not place an undue burden on access to abortions. And Kennedy of course is now off the Court, replaced by Kavanaugh.

And I think there are three justices on the Court, Thomas, Alito, and Gorsuch, who would probably jump at the chance to overrule *Roe versus Wade*, which leaves us to wonder where Roberts and Kavanaugh will come down on that. I think that's unclear. Roberts, for example, has proved himself to be, in at least some cases, something of an institutionalist, which is to

say he might be slow to have the Court rush to overrule *Roe versus Wade*. And there were cases this term, one from Alabama, one from Indiana, where the Court denied review of lower court opinions that had struck down restrictive measures in both of those states. So I think the Court is going slowly, if maybe *Roe versus Wade* will fall to the axe someday, but my prediction is not very soon.

Trump won one important case this summer in July. The Court gave Trump a victory in his effort to build his wall on the Mexican border. And the Court, in an unsigned, one-paragraph opinion, seemed to doubt the standing of the challengers in Sierra Club to bring the case they had brought, which probably suggests that in the end the conservatives will prevail on-- the administration will prevail in that particular case.

Finally, three cases I thought you might like to watch in the term that begins next week. First is a gay rights case. It's a statutory case, application of the Civil Rights Act of 1964, and the Court will decide whether or not that statute protects gay and transgender workers from discrimination as it protects let's say on the grounds of race or gender.

The EEOC has held that the Act does apply, and the Trump administration disagrees. So this is a curious case in which up to this point, you've had federal government lawyers on both sides of the case, one arguing for the statute's application, and the other arguing against. This case will be the Court's first test of a gay rights LGBT proposition since Kennedy's retirement. And he, as you may know, mattered enormously. He wrote I think all of the Court's major gay rights opinions starting with *Lawrence versus Texas* and coming right on through *Obergefell*.

Second case to watch is one that's going to be close, I think, and that is there is a Second Amendment case. It's very curious that since *DC versus Heller* was decided over a decade ago, how the Court has just simply not been taking Second Amendment cases. Yet Justice Thomas has been very upset. He calls the Second Amendment an orphan of the Court's jurisprudence. But the Court seems to have turned down various opportunities to place a gloss on *Heller*.

The case that's been pending is from New York City, where New York City has a very tough ordinance, or has had. It allows residents to carry licensed guns from their premises to firing ranges within the city, but not to second homes or firing ranges outside the city. It's very-- even if the firearm is just-- the ammunition is in one place and the firearm is in another.

Needless to say, that's been attacked on Second Amendment grounds. The District Court and

the Second Circuit both upheld the New York ordinance, but you can imagine how nervous New York City is with the change in personnel on the Court, with Kavanaugh now in place of Justice Kennedy. So the Court granted surety in this case, but since it did, New York City has repealed or amended the ordinance, basically giving the challengers to the ordinance what they had asked for.

So now New York City has filed a motion asking the Court to declare the case moot and therefore throw it out. And the Court was meeting in conference yesterday to decide whether or not-- how they would act on that petition. And as far as I know, this afternoon I've not heard that they've issued any order yet.

Finally, the third case to follow. Politically very important, and that's the one that involves DACA, the Deferred Action for Childhood Arrivals case that involves executive power. And it might, from one standpoint, seem to be fairly simple, namely that the DACA program was created by Obama in the year 2012. President Trump has tried to overturn, to end the program as of 2017. There was a deal that I think was in the works between Trump and Congress that collapsed when Trump insisted on some changes to immigration laws and also billions of dollars for the wall that Congress wouldn't accept.

The Ninth Circuit ruled against Trump, saying that even though in general one administration could overturn the action of an earlier administration, there were not proper legal grounds for this particular action. And the Supreme Court's decision, whichever way it goes, is likely to come down at a time where it would, I suspect, roil the 2020 presidential election. So there's a lot to watch, and of course the Court will have its first Monday in October as of next week. I'm sure they'll be adding some important cases to the docket, so it'll be a pretty exciting place to be studying.

So that gives you the sort of background and context. And with that, let's turn with great anticipation to the comments of my colleagues Leslie Kendrick, Rich Schragger, and Brian Cannon. Thank you very much.

LESLIE

KENDRICK:

So I'm going to talk about *lanca versus Brunetti*. This is a case that represents a clash between two legal areas that long coexisted. And that's federal trademark protection on one hand, and the First Amendment on the other. So when we're talking about these two things, we've got a couple different things happening that have existed for a long time. So let's talk a little bit about the Lanham Act, and then we'll talk a little bit about the First Amendment.

So the Lanham Act is a federal trademark law that provides trademark protection for folks who want to register their trademarks within the federal system. Now, if you have a mark, you have something that you claim conveys something on your behalf, you don't necessarily have to register it with the federal system. There are common law trademark protections that can apply to you, but there are certain more robust protections that come along with registering your trademark under the federal system. And the Lanham Act governs when you can do that.

And there are a few different conditions that apply here. And the one that's at issue in this case, the Lanham Act provides-- it bars registration, it bars federal registration of immoral or scandalous trademarks. So if your mark is deemed to be immoral or scandalous, you will not be able to receive federal trademark protection.

At issue in this case is a mark, a fashion designer clothing mark. It's an acronym that's supposed to stand for Friends U Can't Trust, and it's F-U-C-T, which if you pronounce it, is "fucked." So the mark that's sought is for this brand that if you pronounce it is "fucked." And perhaps unsurprisingly, under the Lanham Act, this is determined to be scandalous or immoral. And they're denied trademark protection.

So when they're denied trademark protection, FUCT goes and elevates the case to the next level, and says we should be able to get federal trademark protection because this ban on prohibition on federal marks-- federal registration for marks that are scandalous or immoral, this violates the First Amendment. So that brings us to the First Amendment side of this.

So the First Amendment has lots of different moving parts, and I'm just talking about the speech part here, and professor Schragger is going to talk a little bit about the religion clauses. But within speech, there's all sorts of things going on, but one thing is a very strong suspicion of, and kind of presumption against, any form of regulation on the part of the government that looks like viewpoint discrimination

And the Supreme Court put this very clearly and concisely in an important case, *Mosley* in 1972, where they said, "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." And that's kind of a long laundry list of things that sound somewhat similar and somewhat different. Subject matter, ideas, content. There's lots of different stuff in there, but one important part of this is the idea that for the government to penalize speech because of its viewpoint is offensive to the First Amendment.

Now, you might think about this Lanham Act thing that says you can't register an immoral or scandalous mark, and think about the First Amendment and think, well, it looks like there's a clear tension here. But in point of fact, the Lanham Act and this idea of suspicion toward content and viewpoint discrimination, they have coexisted for a really long time. Lanham Act has been around since 1946.

I would say to the extent that you can characterize the modern First Amendment jurisprudence with any one thing, this suspicion about viewpoint discrimination has been front and center. For decades, it's been cleanly articulated by the Court since the late '60s, early '70s. And yet, these two things coexisted for a long time. So partly I'm going to be unpacking why they did coexist, and now they're no longer coexisting.

So in this particular case it winds up with the Supreme Court with the Federal Circuit. So trademark cases end up in the Federal Circuit, and the Federal Circuit agreed with the mark's holder that in fact the Lanham Act, this provision of the Lanham Act did offend the First Amendment and should not be enforced. And the Supreme Court ends up agreeing with that and striking down this part of the Lanham Act on the basis of the First Amendment.

And in some ways it was no surprise that they did that, because although this clash between the Lanham Act and the First Amendment is relatively recent, this is not the first skirmish. There was a case in 2017 called *Matal versus Tam* that dealt with a different part of the Lanham Act, but another part of-- Section 2(a) of the Lanham Act. This one barred trademark protection from messages that might disparage people, whether living or dead, or institutions, beliefs, or national symbols.

And in that case, an Asian-American dance rock band called The Slants challenged their denial of trademark registration on the basis of that Lanham Act provision, and they also prevailed. The Supreme Court struck down that provision of the Lanham Act on First Amendment grounds. So that had already happened, and I think once that happened people thought this case was likely to come out the way that it did. And in fact, that is what occurred.

So we wind up with an opinion here from the Court. It's an opinion written by Justice Kagan. It's joined by Thomas, Ginsburg, Alito, Gorsuch, and Kavanaugh. So you know, to the extent that people sort of boil this down to just sort of crude poli-sci signifiers about who was appointed by Republicans and who was appointed by Democrats. This is a mixed group of justices here. And that's fairly common, I would say, in this day and age when it comes to First

Amendment speech cases. There's interesting relationships there.

But this motley crew joins this opinion of Justice Kagan that says, yeah, this is viewpoint discrimination. This is obviously viewpoint discrimination. If your mark expresses something moral, you can register it. If it expresses something immoral, you can't register it. Same with scandalous versus non-scandalous. Clearly here the government is favoring moral messages over immoral messages, non-scandalous messages over scandalous messages, that's textbook viewpoint discrimination and we're going to strike this down.

And interestingly, the entire Court joins that viewpoint, joins that position with regard to the immoral part of the Lanham Act provision. So Alito files a concurring opinion. He was already joining the majority, but he files a concurrence that says, yeah, viewpoint discrimination, that's really bad, and free speech is under attack everywhere, and we should really be on the lookout for any attempts to erode free speech protections because free speech is under attack.

Sotomayor says, well look, immoral, I get that. There's no way around the idea that the word immoral-- that there's viewpoint discrimination there. But there should be some limiting. There should be some sort of limiting construction that the Court could put on the idea of "scandalous" and this should be limited, really, to things that are just lewd or profane. Basically, words like fucked. Right? That's a word that we should not allow trademark registration for.

And in the very beginning of her opinion, she says we're going to see the floodgates open, and we're going to see bunches, bunches more trademark registration applications come in for things that say this and worse. And there's not going to be any way for the federal government to stop them, so the Court should have limited-- they should have preserved the scandalous provision and tried to construe it in some way that limited it, basically, to curse words. And Breyer and Roberts have their own concurrence-- partial concurrences, partial dissent saying the same thing. Saying immoral, that has to go, but scandalous should be narrowly construed to suggest that you cannot have something like this particular word.

So how do we wind up in this space? Because these two things, Lanham Act and the First Amendment, existed for a long time without people thinking that the prohibition on content discrimination and viewpoint discrimination had anything to do with this Lanham Act-- these Lanham Act principles or components that now have been struck twice, one in *Matal* and one

in this case. So the story here is a story about the ever-expanding scope of the First Amendment and freedom of speech.

So the Court has spoken very categorically for a really long time in the way it did in the early '70s and *Mosley*, above all else the First Amendment means the government can't do this. But that's always meant within certain spheres where the First Amendment is operating the government can't do this. And for a long time, it was just taken for granted that the Lanham Act was not part of that sphere, that the government could regulate there with a freer hand than it could in other places.

So the government can't arrest you for having a jacket that says "fuck the draft", that was well established in *Cohen versus California* in 1971. You can't be arrested for disorderly conduct for just bearing that slogan on your jacket. But do they have to give you federal trademark protection for your FUCT trademark? No.

And those two ideas were sort of-- they could coexist at the same time. Now, everyone sort of thinks that the First Amendment has-- there's no reason to say that it doesn't apply in a particular place unless you can clearly point to a reason that it doesn't apply. So it's just been kind of expanding, and now it's hit the Lanham Act. And some people might think that's good, some people might think that's bad. I'm not suggesting that the First Amendment existed in its optimal state at some particular point. The entire history of the 20th century and the First Amendment is a history of expansion.

But we might wonder whether this is some place it actually needed to go or not, if the worries that the Court had when it originally articulated these sorts of concerns about viewpoint discrimination, if those are really at issue in the trademark area. And the Court sort of doesn't engage with that. Nor do they engage with the idea, which one could take this view that federal trademark protection is a type of privilege, and the government has a freer hand in deciding when to bestow that privilege. Justice Roberts in his opinion is really the only one who deals with that.

Just a final note. I think the Court's going to have to deal with this in a variety of different other places. So another place that it's dealt with it recently is in license plates. Because you might not be surprised to know that the government also won't let you put this word on your license plate. You cannot put the F-bomb on your license plate. The government's not going to sit by and say, oh sure, you know, freedom of speech, you're allowed to do that.

But that also, as people start to see the first Amendment applying everywhere, that became a tough thing for courts to have to describe why it is that the government can limit what you say on your license plate. And Virginia has this long list of rejected slogans where people are very crafty at trying to say something lewd or profane on their license plates. And they have people who sit there and say, oh, not that, not that, definitely not that.

And the Supreme Court finally dealt with this. And the way they got around this problem on that was to say that the license plates are government speech. They actually were dealing with the design of the license plate, the sort of sponsored license plates that you see that are pro-kids' schools or pro-wildlife or whatever. There was one-- the Sons of Confederate Veterans wanted to do one of these and Texas said no, no thanks.

And the Court said they're allowed to do that, but in saying that, they were making a point also about the slogans on the license plate. And the way they got around this First Amendment thing was to say that's all government speech, that's the government talking. So whatever vanity plate you have on your car, apparently it's the government that's saying that, not you.

So you can see that there are places where we might think the government has some leeway to get engaged in some forms of discrimination and content. Once we see the First Amendment as something that occupies all those spheres, we have to explain why that is. And in this Court, they just go for it and say, yeah, you can't do that here just as you can't do it on the public streets.

RICHARD

SCHRAGGER:

The Vice Dean gets all the cool cases. That's great. This is on, right? So it turns out the case I'm talking about is also about government speech, so it's a great segue, actually. And the question in the case is when the government speaks, are there any limits to what it can say?

Traditionally, there's been at least one limit. And there are questions about some others, but the one limit has been the Establishment Clause of the US Constitution which, at least before this case, put some limitations-- and maybe after this case, we'll have to see-- some limitations on the types of religious speech that the government could engage in. And this case is about that.

So the case is *American Legion versus American Humanist Association*, and it's colloquially called the Bladensburg Cross Case. And it's about-- the case is about a 40-foot cross that was erected to memorialize World War I soldiers who had died in that conflict and had stood in Bladensburg, Maryland since it was erected. It's publicly owned and it's publicly maintained,

and it's a big, Latin cross in the middle of a busy intersection.

This was challenged by the American Humanist Association. And the case, the Court was faced with the question of whether a Latin cross of this kind is violative of the Establishment Clause. The court ruled that it was not, and that was not unexpected, actually. The court has been moving in the direction of allowing more religious content to government speech in the past couple of decades, and more generally allowing more support of religion, and sometimes specifically Christian religion. And I'll say a little bit more about that, but let me talk about the case a little bit and the background.

The Establishment Clause was not applied to the states until fairly recently. It was in the middle of the 20th century when the Establishment Clause first gets applied. Remember, the First Amendment says "Congress shall make no law" so Justice Thomas actually is of the view that the First Amendment doesn't really apply to the states. That's a minority view and continues to be so, but it is one that Justice Thomas holds.

And some of the first cases were cases about school prayer. Those were the big cases in the '60s. And the court actually struck down school prayer, which was actually a pretty controversial and dramatic move, and still in some cases is dramatic.

In the '70s and '80s, we had cases about creches and other kinds of religious displays during holidays. And the court struggled to figure out how to assess those kinds of displays. For a while, Justice O'Connor had a test called the endorsement test, which didn't quite pick up a full appreciation on the Court, but seemed like one that might be workable. Which was the government can't convey messages that send a message of outsider status to individuals that make them feel like second-class citizens. And that was the test that was sometimes applied in conjunction with some other tests that the Supreme Court applied in Establishment Clause cases to deal with cases in which governments had sponsored specific religious displays of various kinds.

This got a little messy. So the Court would start looking at, well, was the creche with the baby Jesus next to reindeer, next to a menorah, next to a Christmas tree, what does all this mean? Next to some lights. And how do we figure out whether this is endorsing a certain religious view, whether it's sending a message of outsider status?

There was lots of criticism of the endorsement test. And more generally, that the tests of the

Establishment Clause, namely what's called the Lemon Test, which was a test that was set up to deal with funding of religious institutions by the government and look to the purpose of the funding, the effects of the funding, the entanglement of government with religion, those kinds of things.

But there was dissatisfaction with these, and this dissatisfaction has always sort of been part of a broader cultural divide about what are the appropriate symbols that the government can use in terms of religious symbols? What is the appropriate place of government in funding religious schools and other religious institutions? And what's appropriate, more recently, in terms of allowing for exemptions from generally applicable laws for religious people? That's really the three areas in which we see religion clause jurisprudence in its most conflicted.

Some of those are Establishment Clause cases, some of those are Free Exercise Clause cases. In any case, we got to more recent cases involving things like Ten Commandments monuments. Judge Roy Moore famously put a giant Ten Commandments monument in the Alabama Supreme Court. They took that out. But there were some Ten Commandments cases in the Supreme Court, and the Court wasn't quite sure how to deal with these.

Justice Breyer turned out to be the swing justice on those cases. They had two Ten Commandments cases. He upheld one Ten Commandments, and he struck down another one. One was in a courthouse or in a city hall, one was on the Texas kind of legislative grounds. And he didn't have much of a theory, except what he said was the Texas monument has been around for a long time, and if we take it down, people are going to get mad.

That was basically the theory. He was pretty actually explicit about it. He didn't quite say people would get mad, but he said they might react to us ordering all these monuments to be taken down, all these Ten Commandments monuments, because there's a bunch of them all over the country. People might react to that by getting angry about religion, and that might generate the very divisiveness that the Establishment Clause or the First Amendment is supposed to prevent. So we shouldn't contribute to that divisiveness by telling local governments or state governments that they have to take down their Ten Commandments monuments.

So that sets the stage a little bit for this case. Not a Ten Commandments, a large cross. There's also a prior case, a recent case called *Town of Greece*, in which a New York town opened its city council, its town council meetings, with prayers. Now, the way they did this is

they invited local clergy to come in and give these prayers.

It turns out there really were only mainly Christian clergy in the town limits. Other clergy were outside of the town limits. The Jews were outside of the town limits, apparently, or the Muslims were not in the town, so they didn't get invited. And it turns out most of the prayers, therefore, were Christian prayers. And they were quite sectarian. That is, they invoked Jesus Christ, they made statements about the Savior, et cetera, et cetera, right before the town council would do its business.

And the court upheld those in a kind of a funny opinion. Justice Kennedy is saying, he was on the court at the time, saying different from the license plate case, this is not government speech. This is just the private speech of the ministers who've been invited up here to speak. And we can't really regulate what they say. Justice Kagan has quite a powerful dissent in that case. And so that's a 5-4 case that sets the backdrop to this case.

This case seems to be easier for the Justices. Breyer joins the majority here, and so does Kagan, actually. And so you get a pretty lopsided victory for the Bladensburg Cross, which is upheld as constitutional under the Establishment Clause. But there are two notable things, and they're quite interesting if you take a look at this opinion. The first notable thing about the opinion is that Justice Alito writes for the Court. And it's a little fractured, there's some pieces that don't all fit together.

But Justice Alito goes through and explains how the cross is not a religious symbol. Now, that's sounds a little strange, but basically what he says is, well, it's a religious symbol in some contexts, but in this context, in World War I memorials, the cross became kind of a secular symbol of memorializing the war dead. And he in fact goes through some cultural history of the World War I era, or the post-World War I era, to describe how across different communities the cross became, in many ways, secularized.

And he observes-- while doing so, he makes the following set of observations. He says meanings change over time, and sometimes the meaning of a symbol becomes different over time. And he says sometimes the purpose of a symbol changes over time too. And sometimes it's hard to figure out what the purpose of a symbol was or the meaning of a symbol is.

All of this, when he's talking about these things about meaning, and messages, and what kind of meaning is conveyed by certain symbols, a lot of this is to cast doubt on an endorsement kind of test, or a purpose-informed test, or a meaning-informed test, because he wants to say

we should probably get out of the business as a court. We should probably get out of the business of trying to ascertain the meanings, or the purpose, or the intent of these kinds of symbols. He doesn't say we're going to get out of it entirely, but he says, well.

And the Court comes up with a rule which is that there will be a presumption of constitutionality for long-standing practices, symbolic practices like these. He doesn't tell us what long-standing are. This monument, this cross is pretty long-standing, and this looks a little like Breyer's test in the Texas Ten Commandments case where he says, well, it's been there for a long time, so it's OK.

It also seems to be a way of saying, well, we're not sure about new crosses. So if Roy Moore or somebody else goes around and starts putting up crosses on the top of schools, or public buildings, courthouses, or city halls, new crosses. We might think those are different, although we're not quite sure why exactly. But it sounds like long-standing practices have attained a kind of secular meaning. They don't mean exactly what you think they might mean. And so they're OK.

The second thing that's really interesting about the opinion is that normally, what you would look at when you're looking at the messages sent by government speech, the messages conveyed, is you look to see what folks who aren't part of the dominant religion think that message is, right? The minority religionists out there, or the people without any religious commitments. And they would look at it, and do they think it's a cross? Do they think it's religious? Is this something that's offensive or alienating to them?

But the Court doesn't do that. What the Court does is say, similar to what Breyer said in the Texas case but not exactly the same, the Court says, what's the message that we would send if we were to order the removal of the cross? What's the message that we would send? Not the message of the cross itself, but the message that we would send or the Court would send in its action in removing the cross or ordering its removal? And the Court says quite clearly that could express hostility to religion. It would express hostility to religion or could be understood as hostility to religion, which is contrary to the neutrality that is required of the Establishment Clause between religion and non-religion or between religions.

So this is a pretty clever move, and I want you to see what it is. It's basically saying the Establishment Clause-- it doesn't quite say this, but it gets close-ish-- the Establishment Clause requires us to maintain the cross, as opposed to requiring us to order it to be removed.

That's pretty dramatic. It doesn't quite say that. What it says is, well, there is an Establishment Clause value to not ordering this cross to be removed.

But basically it says the majority religion and the majority culture, this majority sort of a culture, has a role, and if they would feel like this was hostility to religion by removing the cross, then that's going to be contrary to Establishment Clause values, which seems to suggest that the Establishment Clause is then a shield that protects existing religious practices of the government, or at least ones that have a long history.

And so this raises some-- for me, it raises some concerns, it raises some questions. One question is what test are you going to use to figure out what to do with new crosses or new things? Is it just that we've had crosses before, therefore we can have crosses again wherever they happen to be, or Ten Commandments, or any of these other things? What about prayer in school and other kinds of things which had a long history until they were overturned? And lots of other religious practices, especially in a polarized political environment in which religion has become part of that polarization to some extent.

Some have offered a historical test. Well, are they historic? Were these practices historically grounded? It's not clear that's the test, but there are some justices who think that no religious symbols are off-base for the government, that the government can speak in any register at once religiously, as long as it doesn't coerce individuals to practice a certain religion. This is not the majority view, but it's becoming much more plausible that the Court may continue to move in the direction of saying, hmm, these religious practices, even though they're majoritarian religious practices, even if they embrace the central religious symbol of a particular religion, are fine. And we're going to allow much more leeway for the government to speak in a religious register.

They've done this with funding as well. Religious funding is now much more broadly acceptable, in fact required in certain instances, when before it had been disallowed. That is a big change in the Establishment Clause and also the Court. You're probably aware of many cases in which the Court is dealing with religious exemptions, and they're very amenable to exemptions to existing laws for religious persons.

This has moved the Establishment Clause and the Free Exercise Clause into kind of uncharted territory, and it is a repudiation of a separatist kind of constitutional doctrine that had prevailed before this Court, before the Roberts Court and before, in some ways, the

Rehnquist Court. So we're going to see more of this, I think. Especially Alito, Gorsuch, and Kavanaugh seemed to be interested in these kinds of cases, and they seem to be willing to expand the realm in which government can speak in a religious register. Thanks.

BRIAN CANNON: So I want to talk to you. We've had an interesting decade at the Supreme Court with regard to redistricting and voting rights in general. And I want to kind of paint that picture a little bit and kind of think of it as a bit of a yellow brick road we've been on, and we just got to see the wizard in June. And there's a bit to be learned from there.

But let's go back. The two cases that ultimately we're going to be talking about that were merged into one. One is the Maryland case, *Lamone v. Benisek*, and the second one was the North Carolina case, which was *Rucho v. Common Cause*. But before we get into that, when I was in law school, Kennedy had just issued the *Vieth v. Jubelirer* opinion, in which there was a split on the Court as to whether partisan gerrymandering, or political gerrymandering, was unconstitutional.

And there were four justices who said no way, it's totally fine. The founders put these kind of political questions in the hands of the most political people, that's where it goes. There were four on the-- the four liberals thought, well, for sure this is a violation of your right, a fundamental right in our country. And then there was Kennedy in the middle saying maybe there's like a math test that could help us here, right? And so he sided with the liberals in saying that it was unconstitutional, but just, I don't know how to tell you. I don't how to call balls and strikes on that. Right?

And it is a real problem for the Court, and that put us on this kind of quest where a ton of very, very, very smart lawyers spent a ton of nonprofit money, and time, and effort, and energy to find the solution that Justice Kennedy was after. And I think what I-- I was in a meeting with a lot of these lawyers, and some of the funders, and some of the other folks who are advocates like I am in New York right after Kennedy had announced his retirement. And one of the lawyers remarked, well, thank God Kennedy is gone now, because I don't have to be disappointed by him anymore. Which I think it's a good way to look at Justice Kennedy's term in regards to this.

But let me back up to 2013 in *Shelby County v. Holder*. This is not a redistricting case, but it is an important case in voting rights. The Voting Rights Act has Section 2, mostly that's what we're dealing with in subsequent redistricting cases. We'll talk about that. But it was about

Section 5 and in preclearance, and the formula in Section 4, by which you get on what I call the naughty list where you have to be precleared.

In that case they basically gutted the formula. They kicked it back to Congress to say you guys come up with a better formula. I don't think anybody's holding their breath for that to happen anytime soon, but it has had some ripple effects, even a practical-- so first of all, it's going to have some ripple effects in 2020, where, for the first time in a very long time, a lot of states' and localities' maps will not have to be precleared.

Two, there's been a huge increase in concern among voting rights advocates. If you think about people that are not just in my space, but broadly in the voting rights community, specifically folks who are advocating for communities of color, this is a huge red flag. I mean, this is a loss anyway, but it's also a red flag for what might be coming. And third, I think it emboldened a whole series of restrictive voting laws that came after.

I do want to mention with *Shelby County* though, is I'm not sure preclearance with regard to racial gerrymandering did that good of a job. And here's what I mean about this. All the cases I'm going to talk about racial gerrymandering, and I'm going to grossly oversimplify and blow through them in order to paint the picture here. But all those other cases were precleared.

And in fact, the two Virginia cases, we've had two different sets of maps struck down in Virginia on racial gerrymandering grounds. Not only were they precleared, they were precleared by the Obama Department of Justice. And the person, the lawyer who actually signed off on the piece of paper, I couldn't believe this when I saw it, was actually Tom Perez, who's now the head of the DNC. And he will go on about how bad of a racial gerrymander these things were, and yet, he precleared them. So it's an interesting question of the effectiveness of the Voting Rights Act preclearance in this space.

So all right, racial gerrymandering. There were two cases in Virginia, but also there were cases in Texas, Georgia, and North Carolina. Mostly we're talking about African-Americans being screwed over by racial gerrymandering. In Texas it was Latinos. The Court couldn't figure that one out, but in all the other cases, especially dealing with African-Americans, the Court showed a remarkable bit of bipartisanship in a lot of cases and even some surprises.

So I want to walk through three sets of cases. One is the *Alabama Legislative Black Caucus versus Alabama*, that's 2015. SCOTUS reversed the lower court ruling, and basically the TLDR version of this case is they've changed us from a system whereby we always had to think

about majority-minority districts. You have to have at least 50% African-Americans of voting age in this district or more. And even a retrogression principle, like we have to-- if you previously had 53%, you sure as heck can't go down to 52% or 51%. That was a real concern, and it's been a moving target, but that's where it was.

And this is the case that really, I think, solidifies us on the path of not majority-minority districts, but minority opportunity districts. And that's a huge change, and I think has a hugely beneficial effect. It's something I think is really important. And what I mean by minority opportunity is this. So I live in the Fourth Congressional District of Virginia. I live in Richmond. And in Richmond, the congressional district that I'm in is 62%-ish Democrat, but it's 42% African-American.

And in Virginia, and like in most cases in the South, African-Americans vote overwhelmingly with the Democratic Party, therefore they control the nominating process. Therefore the Democrat wins as long as there's not racially polarized voting, or what you might call voting white flight, whereas if the Democrats nominate a black person that my wife and I, who are both white and live in the city, and Democrats would all of a sudden vote for the Republican just because the Republican's white.

As long as that doesn't happen, and that's not really a thing in Richmond, that kind of works. And that creates an opportunity for a minority community to elect a candidate of their choice. And that's the whole point behind *Alabama*, and that's the whole-- what the Voting Rights Act is saying with regard to this. You don't have to guarantee an African-American, in this case, wins. You just have to give a compact and cohesive racial, ethnic, or language minority community a chance to elect a candidate of their choice, and that gives you the minority opportunity language.

Then we go to *Cooper v. Harris*. That was 2017 out of North Carolina. Justice Thomas switched over and joined the four liberals-- I promised you there would be some bipartisanship here-- and he wrote a really interesting piece, but the line that I think stands up the best from that is he said "race cannot be used as a proxy for party."

So basically, the North Carolina legislature was saying we didn't draw these districts like that because they're black. We would never do that. That would be unconstitutional. We just drew them because they're Democrats. Right? So it's a, I'm getting out of racial gerrymandering by admitting to partisan gerrymandering. That's exactly what they're trying to do.

And Justice Thomas was saying no, no, no, no, no. You were doing it-- race predominated

here, and you were doing it as a proxy for party. You might-- I mean, Justice Thomas is no fan of the VRA, but he was saying you might be in this space because you were trying to comply with the Voting Rights Act, but even then, you can't let race predominate like that. Or nor can you use race as a proxy for party.

Which brings us to two cases in Virginia. The first was about the congressional districts. We have a new Fourth Congressional District that I live in because of this case. And then the second is about the House of Delegates district that I think will probably turn the House of Delegates over to Democrats for the first time in 20-some years.

And so the first one is [INAUDIBLE] and the second one is *Bethune-Hill*. They're both versus the State Board of Elections. And at issue in this case was a 55% threshold that the legislator set for how many black voting age population, B-V-AP, so BVAP, how much you had to have in each district. It was a majority-minority district, so they ratcheted it up to 55%. Keep in mind, when they were doing this, this was in 2011 and 2012 in Virginia, so it was before the *Alabama v. Legislative Black Caucus* case that said never mind on the majority-minority thing, focus on opportunity. So this was that coming up to head.

I will say, if you're wondering about the politics of this, the maps for the House of Delegates passed with just as many Democrats, percentage-wise, as Republicans voting for it, including almost every member of the Legislative Black Caucus. So while there are a lot of Democrats today, and I would be one of them, who would say that those maps were racially gerrymandered and did a lot to disenfranchise minority communities, the minority communities' representatives at the table were all in favor of them. It made their district safer just like any politician would care about.

And in Virginia we also saw an explicit, Your Honor, I did not do this because they're black, never. We did it because they're Democrats. So you see an explicit tilt towards partisan gerrymandering, and I think they knew what was available at the Supreme Court for them down the road, is that partisan gerrymandering is really hard to do. So in this same decade, there were three states that embodied different cases on partisan gerrymandering that they thought would be the way to go.

So there's three different ways of thinking about this. The first is out of Wisconsin. That's *Whitford v. Gill*, and that's the efficiency gap. You've probably heard about that if you've read anything on redistricting reform. I'm not a huge fan of it from a practical standpoint, but it's

pretty good, right?

It gets at what we're trying to get at, which is an efficient gerrymander for Team A. Make sure that they maximize their votes that are available and waste as many of team B's votes as possible. Whether you're wasting them in a 80-20 race or a 60-40 kind of race is different. And the efficiency gap gets at that from a mathematical perspective. And that's kind of, I mean they got to work on this thing exactly because Kennedy said maybe there's a math way to solve this.

The second theory is out of North Carolina, and that's more of an outlier analysis. They really leaned on some work out of Duke University, but also the folks at Tufts have done this as well. And basically they would have a supercomputer generate-- you put in your basic variables, generates 20,000 different maps, and you see this kind of nice bell curve form. Well, in the North Carolina case, they would say look, this map that the legislature passed is such an outlier that the criteria you said you abided by was-- I mean, you're lying. Right? You were doing something else.

By the way, a lot of this Justice Roberts would call sociological gobbledygook, which is worth noting. And in Maryland, this is actually my favorite one. Maryland has a First Amendment argument on this. So Maryland is actually the opposite party (y). So Democrats were screwing over Republicans, and they said that this is a-- they kind of used basic evidence, Martin O'Malley admitted to it, that kind of stuff, to say you're discriminating against us based on our political viewpoint.

OK, so what did we get when this Maryland and North Carolina case-- the Wisconsin case got sent back and dismissed subsequently-- but what do we get from when we combine these two? Here's what I thought we'd get. Well, if there's ever been a time that you could have a ruling on partisan gerrymandering, you don't need a math test for this, right?

Because what happens in North Carolina, the representative Dave Lewis who drew the map, said "we are drawing the maps to give partisan advantage to 10 Republicans and three Democrats, because I do not believe it's possible to draw a map with 11 Republicans and two Democrats." He openly admitted that. Again, very much a, this isn't racial gerrymandering, this is political gerrymandering.

And in Virginia-- I mean in Maryland, you had Governor O'Malley going under oath in a deposition saying, yeah, we were trying to rig this for four Democrats. So you've got not just

like a smoking gun, you have a signed confession, if you will. And I thought for sure this would be what could move us forward.

And instead, Chief Justice Roberts said no. It's like we pulled the curtain back on the wizard and we're all, oh, they're not going to help us. They're not going to help us solve this redistricting problem.

Basically, the takeaway is Roberts, in a coalition of 5-4 with the conservatives on the Court, said the federal courts aren't going to deal with this question of partisan gerrymandering anymore. That's concerning on a whole number of levels. I will say that he did at least give us this bone.

He said "our conclusion does not can condone excessive partisan gerrymandering. Nor does our conclusion condemn complaints about districting to echo into a void." Not condemn them to echo into a void. "The states, for example, are actively addressing the issue on a number of fronts." He mentions Florida, he mentions Missouri, Michigan, and Colorado.

And I think that's great that he was acknowledging that, because just a couple of years ago in *Arizona versus Arizona Independent Redistricting Commission*, Roberts wasn't too keen on citizens' initiatives solving this issue. He was against Ginsburg's opinion on that. So I think Kagan's dissent had the best of this.

She basically pulled no punches. "For the first time ever, this Court refuses to remedy a constitutional violation because it thinks the task is beyond its judicial capabilities." And then of course she gets to the heart of the matter, because Roberts was like, well just vote the people out if you don't like them. But she mentions it's hard to vote the people out that rigged the system to keep them. Yeah.

So all of that to say that one of the big things Roberts had trouble with was-- I'm going to defend Roberts here a little bit-- was proportionality. The idea that-- I mean a lot-- and Kagan cited in her opinion, in North Carolina, 53% of the vote went to Republicans, yet they get 10 out of 13 congressional districts. In Maryland, 65% of the vote was kind of the high water mark for Democrats, and they get seven out of eight seats.

That's crazy proportionally. I mean, we have an intuitive sense that proportionality is fair, but there's certainly no hook in our constitution that says it's there. And I think that's important to know. So they had a real problem with that.

And then I think, let me give the counterfactual to Roberts. What would he have done if he would have written everything that I would have hoped for? All we really would have, at best, from these cases, is a standard whereby if you blatantly admit it under oath or in legislative testimony, that then it's illegal. And that's, I mean for practical purposes of someone trying to solve this problem in Virginia, that's not really that helpful, because they'll just stop saying it aloud. Right?

So I think that's the way to think about it broadly. So there's no judicial remedy at the federal court level for this. He does, however, much like the end of *The Wizard of Oz*, say that you had the power all along, guys. And says it's up to the states and up to Congress-- though I don't think anybody's holding their breath for that-- up to the states to do that.

So here's what I'll leave you with. Arnold Schwarzenegger just wrote an op-ed with Dave Daley, and said that for the first time ever, or that they could come up with, a majority of Americans are living under minority rule. It's a weird place to be, right? But that's how good gerrymandering has gotten.

However, in the next round of redistricting, so in 20-- the Congress is seated in 2023, that is a result of the new maps from 2021, 2022. A majority of those congressional representatives will come from states that had redistricting reform of some kind or another. And I hope Virginia gets it. We passed an amendment in February. The first read of a constitutional amendment-- we have to-- it takes forever and a day for us to do that in Virginia. So we have to pass it again next year.

So if you are a state legislative nerd, get your popcorn, because it'll be fun. And then we'll go to the ballot in November of 2020 for you all to hopefully vote yes on. So we're going to fix this, because we apparently had the power all along. Thanks.