

# The Supreme Court, 2011 Term

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# A surprising term

- Division
  - About 20% 5-4 decisions
  - Several significant lopsided decisions
  - In 5-4 cases, Justice Kennedy usually the swing vote this Term (unusually high %)
- Workload
  - Significantly fewer arguments (67)
  - Fewer majority opinions in argued cases (65, one per curiam)

# Where to begin?

- At the beginning?
  - Greene v. Fisher

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# Where to begin?

- At the beginning?
  - Greene v. Fisher
  - “whether ‘clearly established Federal law’ includes decisions of this Court that are announced after the last adjudication of the merits instate court but before the defendant’s conviction becomes final.”
- Or at the end?
  - Health care (NFIB v. Sebelius)

# *Health care*

- Three cases
  - Government, States, NFIB/individuals
- Four oral arguments
  - Jurisdiction
  - Minimum coverage provision (“individual mandate”)
  - Medicaid expansion
  - Severability

# *NFIB v. Sebelius*

- Minimum coverage provision
  - Everyone must have minimum essential health insurance coverage
  - Starting in 2014, those who do not must pay a “penalty” on their taxes, called the “shared responsibility payment”
    - Subject to certain exemptions

# *NFIB v. Sebelius*

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  - “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” Cl. 3.

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  - “lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.” Cl. 1.

# *NFIB v. Sebelius*

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  - “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” Cl. 3.
  - “lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.” Cl. 1.
  - “make all Laws . . . necessary and proper for carrying into Execution the foregoing Powers.” Cl. 18.

# *NFIB v. Sebelius*

- Commerce Clause arguments -- pro
  - Health care is unique – everyone consumes
  - Congress has power to regulate the method of payment (insurance)
  - Congress has power to regulate the practice of self-insurance
  - Those who do not participate substantially affect those who do

# *NFIB v. Sebelius*

- Commerce Clause arguments -- con
  - A person who refuses to buy insurance has not engaged in (interstate) commerce
  - Mandate doesn't actually regulate the purchase of health care
  - Mandate is unprecedented
  - No limiting principle

# *NFIB v. Sebelius*

- Necessary and Proper arguments -- pro
  - Necessary to make the other provisions work
    - Guaranteed issuance, community rating
    - Death spiral
    - Comprehensive scheme (Cf. Raich)
  - Addresses the substantial problems caused by uncompensated care in the current market
  - If Congress can regulate payment at the point of consumption (hospital doorstep)....

# *NFIB v. Sebelius*

- Necessary and Proper arguments -- con
  - Can't be "proper" if would lead to the obliteration of the national/local distinction
  - A federal police power is not "proper"
  - "Comprehensive scheme" matters only for as-applied challenges; it doesn't bootstrap the constitutionality of companion provisions

# *NFIB v. Sebelius*

- Tax power arguments -- pro
  - Nomenclature doesn't matter. It's in the Tax Code and it raises revenue.
    - Gambling and liquor "licenses"
  - The mandate has no consequence except as the predicate for the penalty
  - All taxes are to some degree regulatory

# *NFIB v. Sebelius*

- Tax power arguments -- con
  - Challenging the mandate, not the tax
  - A penalty for violating the law is not a tax
  - Proves too much: the tax power is not even limited to commerce, and this theory would make it truly unlimited
  - If it's a tax, it's direct and fails the apportionment requirement
    - “No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration”

# *NFIB v. Sebelius*

- Minimum coverage provision

	CJ	RBG + 3	AMK + 3
Commerce	NO	YES	NO
Nec. & Prop.	NO	YES	NO
Taxing	YES	YES	NO

- The only portion commanding a majority:  
Part III-C, the tax power

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- The only portion commanding a majority:  
Part III-C, the tax power

# *NFIB v. Sebelius*

- Commerce Clause (Chief)
  - Text: The word “regulate” in the Constitution assumes there is something already there to be regulated
    - Land and naval forces; value of money
  - Precedent: Cases uniformly describe the commerce power as reaching “activity”
  - Residuum: Don’t open a new and potentially vast domain to congressional authority

# *NFIB v. Sebelius*

- Commerce Clause (Chief)
  - At least under existing cases (Wickard) there was some way to stay outside the scope of federal regulation (don't grow wheat)
  - Any problem could be solved with a mandatory purchase

# *NFIB v. Sebelius*

- Commerce Clause (Chief)
  - Health care is no different
    - Food, clothing, transportation, shelter, or energy
  - “Active in the market for health care”
    - “An individual who bought a car two years ago and may buy another is not ‘active in the car market’ in any relevant sense”
  - The purchase of health insurance is not the purchase of health care

# *NFIB v. Sebelius*

- Commerce Clause (Chief)
  - Take-aways from the Chief Justice's opinion:
  - Activity/inactivity distinction matters
  - There are temporal as well as residual limits to the Commerce Clause
    - Consider the potential effect on moved-in-commerce regulations
  - “The Commerce Clause is not a general license to regulate an individual from cradle to grave”

# *NFIB v. Sebelius*

- Commerce Clause (Dissenters)
  - Justices Scalia, Kennedy, Thomas, Alito jointly agree that the mandate is not authorized by the Commerce Clause
  - Write their own opinion rather than join the Chief Justice's

# *NFIB v. Sebelius*

- Commerce Clause (Dissenters)
  - Act is no more comprehensive than any other industry regulation: regulation adds costs; industry then seeks artificial demand increase
    - What federal controls over private behavior couldn't be justified as necessary and proper?
  - Health care is not a universal market
    - Aspirin, maybe; but not all products required to be covered by insurance (“unwanted suite”)
    - Forgoing insurance is not activity, not commerce
      - So free-rider problem doesn't distinguish broccoli

# *NFIB v. Sebelius*

- Commerce Clause (Dissenters)
  - Not necessary & proper because it disregards the limits on federal power
  - “Article I contains no whatever-it-takes-to-solve-a-national-problem power”

# *NFIB v. Sebelius*

- Commerce Clause (Ginsburg)
  - Justice Ginsburg dissents as to the Commerce Clause, joined by Justices Breyer, Sotomayor, and Kagan
  - Everyone is a participant in the health care market, and those who don't have insurance get to free-ride
    - Unlike cars or broccoli. This isn't a blank check.
  - Health insurance is a means of payment; this is a regulation of economic activity

# *NFIB v. Sebelius*

- Commerce Clause (Ginsburg)
  - Other constitutional protections apply
  - Political safeguards
    - Congress would never ban meat

# *NFIB v. Sebelius*

- Commerce Clause (Ginsburg)
  - Anyway, this is necessary and proper
    - Minimum coverage provision is necessary to make guaranteed-issue and community-rating work
    - A national problem, not a traditional state area
    - Chief's conception of "proper" is "short on substance"; this isn't commandeering
    - "Independent" or "derivative" power? "Substantive" or "independent" power? "The instruction The Chief Justice, in effect, provides lower courts: You will know it when you see it."

# *NFIB v. Sebelius*

- Commerce Clause (Ginsburg)
  - Why are we talking about these clauses?
    - “The Chief Justice’s Commerce Clause essay” is “puzzling,” because a majority upholds the mandate under the taxing power
    - “I see no reason to undertake a Commerce Clause analysis that is not outcome determinative”
  - “Disquieting resemblance” to Lochnerism

# *NFIB v. Sebelius*

- Taxing power (Chief)
  - Minimum coverage provision can be construed as a tax
    - No one contends that an actual mandate would be a tax. That's the most straightforward reading.
    - But the avoidance doctrine requires adopting a saving construction that's "fairly possible"
    - Under that reading, "the mandate is in effect just a tax hike on certain taxpayers who do not have health insurance." Don't comply? Just pay tax.

# *NFIB v. Sebelius*

- Taxing power (Chief)
  - So construed, the minimum coverage provision survives under the taxing power
    - “Essential feature of any tax” is that “it produces at least some revenue”
    - Label (penalty, license, tax) doesn’t matter
    - Cheaper than actually buying insurance (4M estimate); no scienter requirement; collected by the IRS, but with criminal penalties off the table
    - No other negative legal consequence

# *NFIB v. Sebelius*

- Taxing power (Chief)
  - Congress need not recite which clause it's relying on
  - Taxes can seek to affect behavior (tobacco)
  - Is it a direct tax?
    - “No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration”
    - Not a capitation or tax on real or personal property
  - Limits on taxing power?
    - Taxing inactivity is OK; taxes can't be punitive

# *NFIB v. Sebelius*

- Taxing power (Dissenters)
  - It's a requirement, not a tax, and the Chief Justice's approach rewrites the statute
    - Everyone "shall" maintain insurance coverage
    - "There is hereby imposed ... a penalty" (x18)
  - A tax can be a penalty, but we've never held a penalty can be a tax
    - Absence of a scienter element is meaningless – we read them in all the time
  - How can some people be exempt from the penalty and others from the mandate?

# *NFIB v. Sebelius*

- Taxing power (Dissenters)
  - If it were a tax, we assume it would be within Congress's power
    - Except maybe it would be a direct tax
    - No discussion of taxing inactivity, or of the limits of the taxing power

# *NFIB v. Sebelius*

- Medicaid
  - Each State that participates in Medicaid must expand eligibility in various significant ways
  - If a State participates, the federal government will pay 100% of the increased cost for the first few years
  - If a State does not participate, it loses all of its Medicaid funding
  - Every court of appeals upheld the expansion
  - Court granted States' petition for cert

# *NFIB v. Sebelius*

- Medicaid
  - Chief Justice joined by Justice Breyer and Justice Kagan
  - Justice Ginsburg joined by Justice Sotomayor
  - Four dissenters

Invalidate:	Chief	RBG	AMK
NONE		2	
SOME	3		
ALL			4

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Invalidate: Chief RBG AMK

NONE

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Violation?

7 votes

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  - Four dissenters

Invalidate: Chief RBG AMK

NONE

	2
3	

Remedy?

SOME

5 votes

ALL

4

# *NFIB v. Sebelius*

- Medicaid (Chief)
  - Congress may do under the Spending Clause what it may not do directly
  - But Congress may not commandeer the States into enacting a federal program
  - Spending Clause power to provide incentives, with strings attached, because Congress sets the terms under which federal funds are made available

# *NFIB v. Sebelius*

- Medicaid (Chief)
  - At some point pressure turns into (indirect) coercion
  - That point wasn't exceeded in *South Dakota v. Dole*
  - It is exceeded here: “the financial inducement Congress has chosen is much more than ‘relatively mild encouragement’—it is a gun to the head.”
    - Medicaid is 20% of average state budget; feds cover 50% to 83%

# *NFIB v. Sebelius*

- Medicaid (Chief)
  - Congress reserved the power to “alter or amend” Medicaid
  - But this is a dramatic expansion of Medicaid, and this is not what the States signed up for
  - Can’t surprise the States with retroactive conditions

# *NFIB v. Sebelius*

- Medicaid (Chief)
  - So what's the basic problem?
    - It's a lot of money
    - The States depend on it
    - It comes with conditions, but nothing like this before
    - Now Congress has made a major change and is using the States' dependence to get them to agree to the onerous new conditions
  - So how to fix it? An eyes-open choice
    - Some States may still want the money

# *NFIB v. Sebelius*

- Medicaid (Ginsburg)
  - Congress could have repealed Medicaid and enacted Medicaid II
  - This is just an extension of Medicaid, like previous ones.
  - States have no vested expectation of receiving future Medicaid funds
  - The condition relates solely to how the federal funds themselves will be used, not to anything else the State must do

# *NFIB v. Sebelius*

- Medicaid (Ginsburg)
  - Since a majority of the Court finds the expansion coercive, I agree that the remedy should be to invalidate only the threat to existing Medicaid funds, not the expansion as applied to willing States
  - That makes 5

# *NFIB v. Sebelius*

- Medicaid (Dissenters)
  - The whole expansion is coercive and therefore invalid
    - Double taxation
    - Relative size of burden
    - Congress didn't even entertain the possibility that any State would opt out
  - The Court's opt-out remedy rewrites the statute, creates problems (higher insurance premiums), and leaves in place the divisive double-taxation problem

# *NFIB v. Sebelius*

- Severability (Dissenters)
  - The whole Act stands or falls together
  - The substantive provisions are designed to work together
  - The minor provisions were tacked on to this must-pass vehicle, and who knows whether they would have passed independently
  - Standing – no problem

# *Arizona v. United States*

- SB 1070 is Arizona's immigration statute. At issue in the litigation:
  - Section 2: Mandatory verification
  - Section 3: Penalties for failure to register
  - Section 5: Penalties for working, seeking work
  - Section 6: Arrest authority for removability
- United States sued, won a preliminary injunction on these 4 provisions; Ninth Circuit affirmed.

# *Arizona v. United States*

Ruling mostly for the U.S., per Justice Kennedy

<u>Section</u>	<u>Who wins?</u>	<u>Vote</u>
• 2	Arizona	8-0
• 3	U.S.	6-2
• 5	U.S.	5-3
• 6	U.S.	5-3

- Justice Kagan recused

# *Arizona v. United States*

- Section 2: Mandatory verification is not facially preempted
  - Even if the State sometimes makes inquiries about someone the Attorney General would not remove, that's consistent with the statute (no limits on communication)
  - Detaining someone pending inquiries might be different, but Section 2 might be read not to permit detention for that purpose alone

# *Arizona v. United States*

- Section 3: Additional penalties for failure to register are preempted
  - Federal law makes a single sovereign responsible for maintaining 1 system for keeping track of aliens in the U.S.
  - Even if States can sometimes punish violations of federal law, they can't do so when Congress has occupied the field
  - That's true even if federal and state law have the same basic aims and substantive rules
    - And here there's an arguable conflict over penalties

# *Arizona v. United States*

- Section 5: Additional penalties for working or seeking work are preempted
  - Federal law allows DHS to decide what categories of aliens are authorized to work
  - Employers are liable for hiring an unauthorized alien, unless they follow a safe-harbor process
  - But balanced, comprehensive federal framework doesn't punish employees criminally – just civilly
  - “A conflict in the method of enforcement”

# *Arizona v. United States*

- Section 6: Arrest authority is preempted
  - Federal law allows DHS to decide which aliens will be removed
  - Federal law encourages federal-state “cooperat[ion]” in the identification, apprehension, detention, and removal of aliens
  - But a State isn’t “cooperating” when it makes a unilateral decision to arrest someone purely based on perceived removability

# *Arizona v. United States*

- Justice Scalia dissents on §§ 3, 5, 6
  - Arizona has the sovereign power to exclude from its borders anyone who doesn't belong there (just as the US has sovereign power)
  - Such a core attribute of sovereignty that Congress shouldn't be read to implicitly take it away – clear statement rule
  - That sovereign power includes the power to incorporate federal prohibitions into state law, to punish people whom the feds won't, and to punish them more severely

# *Arizona v. United States*

- Justice Scalia dissents
  - Enforcement discretion doesn't preempt
  - “Are the sovereign States at the mercy of the Federal Executive's refusal to enforce the Nation's immigration laws?”

# *Arizona v. United States*

- Justice Thomas dissents on §§ 3, 5, and 6
  - Implied preemption is illegitimate

# *Arizona v. United States*

- Justice Alito dissents on §§ 5 and 6
  - Employment is a traditional state interest.
  - The presumption against preemption can't be rebutted by inferences and legislative history.
  - State officers can arrest for violations of federal law, and there's no obstacle to their doing so here. Section 6 doesn't require arrest; it merely gives permission to make such arrests.

# *Citizens United v. FEC*

- Remember this case?
  - The First Amendment allows corporations, as well as individuals, to spend unlimited sums expressly advocating for or against federal candidates

# *Am. Tradition P'ship v. Bullock*

- Supreme Court of Montana holds:
  - Not in Montana.
  - Our history of corporate influence-buying is unique
- U.S. Supreme Court grants injunction pending appeal (7-2)
- Court then summarily reverses (5-4), because “there can be no serious doubt” that CU’s holding applies to the Montana state law
  - Justice Breyer sees no realistic shot on the merits

# *Lafler v. Cooper / Mo. v. Frye*

- How does the Sixth Amendment's guarantee of effective assistance of counsel apply to the plea-bargaining process?
- More precisely: When does attorney incompetence cause a defendant an injury that the Constitution recognizes and remedies?

# *Lafler / Frye*

- Cooper: Shot a woman in the buttocks, hip, and abdomen. Charged with assault with intent to murder and other counts.
- Prosecution offers a plea deal: 51 to 85 months. Attorney advises Cooper to decline. He does.
  - “Below the waist” theory
- At trial, Cooper is convicted and sentenced to 185 to 360 months

# *Lafler / Frye*

- Cooper's Sixth Amendment claim:
  - Deficient performance: A competent lawyer would have advised me to take the plea.
  - Prejudice: I received a much longer sentence.
- Federal district court, Sixth Circuit agree
- Last year a lot of you laughed

# *Lafler / Frye*

- Frye: Charged with recidivist driving-without-a-license.
  - Plea offer extended: Felony with 10 days' shock time, or misdemeanor with 90 days
  - Counsel never told Frye; offers expired
  - Frye enters an open plea to felony, sentenced to three years of imprisonment
- Missouri Court of Appeals vacates guilty plea, remands for new trial (or new plea)

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# *Lafler / Frye*

- Supreme Court doesn't grant cert on the deficient-performance prong
- So the question is: Assuming deficient performance, does the attorney's inadequacy have any effect after the error-free trial (Lafler) or the knowing and voluntary guilty plea (Cooper)?

# *Lafler / Frye*

5-4 for defendants, per Justice Kennedy

- Lafler: The Sixth Amendment protects more than just a fair trial
- It protects the defendant at all critical stages (including pretrial and appeals)
- Trials cure some errors (violation of grand-jury rule), not others (race discrimination in grand jury selection)

# *Lafler / Frye*

- Here, the defendant was cognizably prejudiced by the outcome of the trial itself:
  - Either the conviction on more serious counts or the imposition of a more severe sentence may be prejudice
  - This is not a windfall, like Fretwell or Nix
  - There is no right to plea-bargain (or to have a bargain accepted), but here the prosecutor extended an offer

# *Lafler / Frye*

- What remedy?
  - Resentencing:
    - Evidentiary hearing into whether defendant would probably have accepted the plea
    - If so, “the court may exercise discretion” in modifying the sentence
  - Changes in charges needed:
    - Possibly “require the prosecution to reoffer the plea proposal,” and then decide whether to keep the conviction from trial or enter judgment on the plea

# *Lafler / Frye*

- Changed circumstances
  - Don't have to ignore information that came to light after the plea deal was offered
- Specific performance
  - That's what the district court ordered here
  - Here the “correct remedy” is to order the State to reoffer the plea agreement; then the state trial court can exercise its discretion

# *Lafler / Frye*

- Frye: Ours is a system of plea-bargaining, and trial is an inadequate backstop
- Deficient performance: As a general rule, defense counsel has the duty to communicate formal, favorable plea offers from the prosecution
- Prejudice: Must show a reasonable probability that the plea would have been entered, would have been accepted, would have been more favorable

# *Lafler / Frye*

- Frye: Ours is a system of plea-bargaining, and trial is an inadequate backstop
- Deficient performance: As a general rule, defense counsel has the duty to communicate formal, favorable plea offers from the prosecution
- Prejudice: Must show reasonable probability that defendant, prosecutor, and court would all have accepted/adhered to plea, and plea would have been more favorable

# *Lafler / Frye*

- Here, Frye reoffended before the date when his plea would have been entered
- So prosecution might well have withdrawn offer even if he'd accepted it
- State law affects whether prosecution may withdraw plea offer freely

# *Lafler / Frye*

- Justice Scalia dissents in both cases
- Watch out. There's a new Bill of Rights for plea-bargaining. And what's next?
- Until today, the prejudice prong of the Sixth Amendment standard focused on whether the attorney's errors call into question the basic justice of the outcome. Error-free trial is the gold standard.
- Now there's a new right to plea bargain

# *Lafler / Frye*

- Justice Scalia dissents in both cases
- Remedy: “Unheard-of in American jurisprudence”
  - The State must re-offer... but the trial court has “discretion” to reject?
  - I thought this was remedying a constitutional violation? How can there be discretion to grant no remedy at all?
  - “Squeamishness” and “incoherence”

# *Miller v. Alabama*

- 14-year-old boys convicted of murder
- Kuntrell Jackson helped to rob a video store; another boy shot the clerk when she wouldn't give up the money.  
(Capital felony murder)
- Evan Miller stole a neighbor's wallet; when the neighbor awoke, beat him into unconsciousness and set trailer afire  
(Murder in the course of arson)

# *Miller v. Alabama*

- In both cases, prosecutors decided to transfer the prosecution to adult court
- Both transfers were based on psychological evaluations and subject to pretrial appellate review
- Both defendants were convicted and received mandatory life-without-parole sentences

# *Miller v. Alabama*

- Supreme Court took these cases to decide the question whether imposition of a life without parole sentence on a 14-year-old in a homicide case violates the Eighth Amendment
- Background:
  - Stanford / Eddings / Lockett → Roper
  - Roper → Graham
  - A “meaningful opportunity to obtain release”

# *Miller v. Alabama*

5-4 for defendants, per Justice Kagan

- No mandatory LWOP for any juvenile
  - A case about 14-year-olds becomes a case about 17-year-olds
  - But a case about a categorical rule results in a rule of “sometimes”
- “Confluence” of the precedents saying “no death penalty for juveniles” and “LWOP is like death”

# *Miller v. Alabama*

- Mandatory LWOP prevents the sentencer from taking into account the very thing that makes juveniles different
  - “Immaturity, impetuosity, and failure to appreciate risks and consequences”
  - The transfer proceeding isn’t good enough for this purpose (even when, as here, a judge decides). Choice is too stark.

# *Miller v. Alabama*

- Why is mandatory LWOP “unusual”?
  - Children, not adults
  - 28 States + US, but that’s a smaller number than in *Graham*
  - Transfer statute doesn’t show legislative intent
    - “Possibly (or probably) inadvertent ... outcomes”
  - When imposing a “consider mitigation” rule, we have not looked at state consensus

# *Miller v. Alabama*

- So an LWOP sentence is still permissible
  - Individualized sentencing
  - Court opines it should be “uncommon”
    - Sounds like “unusual”

# *Miller v. Alabama*

- Justice Breyer concurs, joined by Justice Sotomayor
  - Eighth Amendment likely prohibits imposing an LWOP sentence on Jackson no matter what
  - Enmund/Tison rule for capital murder
  - Should be stricter for juveniles (no reckless disregard)

# *Miller v. Alabama*

- Chief Justice dissents, joined by Justices Scalia, Thomas, and Alito
  - Not unusual: a much higher proportion of juvenile sentences than in *Graham* (5000x)
  - Legislatures aren't so ignorant of their own laws that this outcome will surprise them
  - *Roper* and *Graham* made “false promises of restraint”; a “classic bait and switch”
  - Standards needn't always “evolve” into mercy

# *Miller v. Alabama*

- Justice Thomas dissents, joined by Justice Scalia
  - Focuses on the original understanding of the Cruel and Unusual Punishments Clause

# *Miller v. Alabama*

- Justice Alito dissents, joined by Justice Scalia
  - Graham discarded any pretense of heeding a legislative consensus; our cases are now “entirely inward looking”
  - “Do not expect this possibility [of an individualized LWOP sentence] to last very long”

# *United States v. Alvarez*

- Xavier Alvarez was a minor public official and apparently quite a liar
  - Played for the Red Wings
  - Married a starlet
  - Won the Medal of Honor
- Stolen Valor Act prohibits falsely representing oneself to have been awarded a decoration or medal authorized by Congress for the Armed Forces
  - Penalties are higher if it's the Medal of Honor

# *United States v. Alvarez*

- Alvarez pleads guilty to violating Stolen Valor Act, but preserves a First Amendment challenge
- Ninth Circuit invalidates the statute
- Judge Kozinski: people lie all the time
  - “We lie to protect our privacy (‘No, I don’t live around here’); to avoid hurt feelings (‘Friday is my study night’); to make others feel better (‘Gee you’ve gotten skinny’); . . . or to maintain innocence (‘There are eight tiny reindeer on the rooftop’).”

# *United States v. Alvarez*

(4-2)-3 for Alvarez, per Justice Kennedy

- This is a content-based restriction on speech, and “lies” aren’t one of those categories where that’s OK
  - Libel, fighting words
- We may have said over the years that falsehoods aren’t protected speech, but we meant harmful falsehoods
  - Falsity is relevant, but not sufficient
  - Really meant “true = protected,” not “false = not”

# *United States v. Alvarez*

- Fraud is harmful.
- Libel is harmful.
- Perjury is harmful.
- Even trademark dilution is harmful, which is why plaintiff must show likelihood of confusion.
- No actual evidence of brand dilution here.

# *United States v. Alvarez*

- Even on its own terms, as a response to a particular problem, the statute sweeps too broadly
  - Even private whispers are covered
- Ultimately falsity is not enough to justify censorship. We need no Ministry of Truth; we need counter-speech (e.g., database).

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# *United States v. Alvarez*

Justice Breyer concurs in the judgment,  
joined by Justice Kagan

- Apply intermediate scrutiny (not the near-automatic condemnation of strict scrutiny)
- False statements about philosophy, religion, history, the social sciences, the arts and the like are one thing. But this is another – and it's an easily verifiable fact

# *United States v. Alvarez*

- False statements do sometimes serve a useful purpose, and an unlimited license to ban them would come at too high a price
  - Chill on valuable speech
  - Weapon for government (selective prosecution)

# *United States v. Alvarez*

- On the one hand, this statute lacks important limitations (e.g., it applies to all military decorations, in all settings, without proof of harm to anyone)
- On the other hand, the military's interest in brand protection is substantial.
- Bottom line: Write a better-tailored statute, combined with a public database

# *United States v. Alvarez*

Justice Alito dissents, joined by Justices  
Scalia and Thomas

- These lies inflict real harm. People tell them for money, and they tarnish the brand
- A database isn't practical
- Even if they didn't inflict real harm and there were some kind of less restrictive alternative, lies deserve no protection

# *United States v. Alvarez*

- These lies aren't viewpoint-discriminatory
  - Can apply to people who want to disparage the government or associate themselves with it
  - Given the lack of a viewpoint bias, the political safeguards of our American system prevent Congress from really going off the rails. Not every foolish law is unconstitutional.

# Other Highlights

## *CRIMINAL*

- Right to have a jury make findings relevant to fines
- Confrontation: testifying expert
- GPS tracking
- Strip searches
- Eyewitness lineups
- Standard for harmless error

## *CIVIL*

- First Amendment challenge to public-employee union representation fees
- Ministerial exception
- Fleeting expletives on TV
- Texas redistricting
- Jerusalem passport issue
- Copyright power

# Themes?

- Incremental change; avoiding most sweeping decisions
- Political safeguards: in health care, immigration, First Amendment
  - But Miller?

# Questions or feedback?

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