**Death of a Ghost; or, scotus Sans Scalia**

 By TONY BLACKSHIELD

On 16 March President Barack Obama announced that Justice Merrick Garland, Chief Judge of the United States Court of Appeals for the District of Columbia Circuit, had been nominated to fill the Supreme Court vacancy left by Justice Antonin Scalia, who was found lying dead on the morning of Saturday 13 February (allegedly with a pillow over his head).

When Garland was appointed to his present position in 1997, the Senate had confirmed his appointment by 76 votes to 23. But this time the Republican leadership announced that, far from confirming the nomination, they would not even permit a committee hearing to consider the issue until after the November election. Instead the National Republican Senatorial Committee has launched an Internet campaign to “Stop Obama’s Liberal Justice”.

Meanwhile the eight remaining members of the Supreme Court have been busy. Over the last ten days of March – just before and after Easter – the Court announced significant steps in eight cases. At the beginning of April it added three more. And in at least two of these eleven cases, Scalia’s absence made a crucial difference.

In one case, two men in Missouri had sought a bank loan for a residential housing project, only to be met with a demand for guarantees from their wives.[[[[1]](#endnote-1)]](https://auspublaw.org/2016/03/justifications-for-initiating-a-constitutional-amendment/#_edn1) The guarantees were given; the loan was granted; but the housing project failed. Thereupon the bank sued on the guarantees. But the wives then claimed that the guarantees were void and unenforceable. They argued that since they had no direct financial or other involvement in their husbands’ business ventures, the bank had asked for their guarantees “solely because they were married to their respective husbands”.[[[2]](#endnote-2)] This was said to infringe the *Equal Credit Opportunity Act* of 1974, which makes it unlawful to “discriminate against any applicant” on the basis of marital status.

The provision was meant as a protection for wives against demands that their applications for credit be backed by guarantees from their husbands. But it was common ground that the converse demand in this case had been equally discriminatory on the basis of marital status. What was disputed was whether the phrase “discriminate against any applicant” was applicable to the wives, since the only “applicants” here were the husbands.

The Federal Reserve, in the exercise of its power to make regulations for the purposes of the statute, had tried to deal with this problem by providing that the word “applicant” “includes guarantors”; and under the so-called *Chevron* principle,[[[3]](#endnote-3)] when a regulatory agency attempts in good faith to supply an interpretation of its governing statute, the courts will defer to that interpretation so long as it is reasonably open. But in recent years the *Chevron* principle has seemed to be less in favour; and in any event it could not apply here if the word “applicant” as used in the statute had an unambiguous meaning which *could not* include a “guarantor”. Thus, the only issue was whether a wife in the situation presented here could be regarded as an “applicant”.

When the case was argued back in October, Scalia had insisted that she could not be. If, he said, I write a reference for an applicant for admission to a law school, can I be regarded as an “applicant”? “Would anybody use the English language that way?” Justice Breyer had countered that argument by giving the example of a parent applying for the admission of a seven year old child to school. “Isn’t it normal for us to refer to the parent as the applicant?”

Now, on 22 March, the Court was evenly divided. Four judges thought the wife in such a case could be regarded as an “applicant”, four thought she could not be. The result was that no judgments were given at all. Instead there was a bare announcement that the decision below (rejecting the wives’ complaint) would be affirmed.

The second case[[[[4]](#endnote-4)]](https://auspublaw.org/2016/03/justifications-for-initiating-a-constitutional-amendment/%22%20%5Cl%20%22_edn2) involved variations on the theme of compulsory unionism. Almost forty years earlier, in *Abood v Detroit Board of Education*,[[[[5]](#endnote-5)]](https://auspublaw.org/2016/03/justifications-for-initiating-a-constitutional-amendment/%22%20%5Cl%20%22_edn3) the Court had held that a trade union in the public sector (in that case a teachers’ union) could levy non-union members with an “agency fee” to support collective bargaining, though no non-member could be required “to contribute to the support of an ideological cause he may oppose as a condition of holding a job as a public school teacher”. The decision was unanimous, and was based on earlier precedents in the private sector.

Two years ago, that decision was whittled down. In *Harris v Quinn*,[[[[6]](#endnote-6)]](https://auspublaw.org/2016/03/justifications-for-initiating-a-constitutional-amendment/%22%20%5Cl%20%22_edn4) the Court held by 5:4 that no such fee could be imposed on workers in a health care union, on the ground that although their employment was publicly funded they were hired by individual patients, and were therefore not fully-fledged state employees. The usual bloc of four “liberal” Justices (Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor and Elena Kagan) protested that *Abood* should not be distinguished in this way, but should be strictly applied. By contrast, the five-judge majority launched a scathing attack on *Abood*, dismissing it as “something of an anomaly”, and “questionable on several grounds” (which were then set out at length). The Opinion of the Court was delivered by Justice Samuel Alito, predictably joined by Justice Scalia and the other two “conservative” Justices (Chief Justice John Roberts and Justice Clarence Thomas), and also by the Court’s (conservative) “swing voter”, Justice Anthony Kennedy.

The inevitable result was an immediate test case (again involving a teachers’ union) demanding that *Abood* be overruled. When the case was argued in January, Scalia was still sitting, and all nine of the Justices seemed disposed to adhere to their positions in *Harris v Quinn*. Evidently most of them went on to do so – because now, with the number of Justices reduced to eight, the outcome announced on 29 March was an evenly divided Court. Here, too, this meant that the decision below was affirmed: the union “agency fee” was valid.

Immediately there were reports that the petitioners might apply for the case to be reconsidered. Initially the efficacy of such an application seemed doubtful: for one thing, to conduct a rehearing while the number of Justices remains at eight would seem likely to make little difference. When a petition for rehearing did in fact surface on 8 April, this objection was met: the petitioners have asked that although the existing case should indeed be reheard, the Court should “hold the case … until it is capable of issuing a decision”.

Even so, the fate of the petition remains in doubt. A decision to grant a rehearing requires an affirmative vote by five Justices, including at least one who was a party to the impugned decision. How that rule should be applied to a non-decision – by an evenly divided Court – is unclear.

Perhaps even more striking than these two examples of an inconclusive 4:4 division was the Court’s attempt to avoid the same thing happening in a third case, this time in one of the endless series of cases challenging aspects of the *Affordable Care Act* *2010* (“Obamacare”). As usual, the respondent was Sylvia Burwell in her capacity as Secretary of the Department of Health and Human Services.

Initially the regulations made under the *Affordable Care Act* provided that the obligation of employers to provide health insurance coverage for their employees applied to religious organisations operating for profit, even when the health services thus covered included procedures (such as contraceptive advice) to which such organisations or their members had a religious objection. But in 2014 the Supreme Court held[[[7]](#endnote-7)] that these provisions infringed the *Religious Freedom Restoration Act 1993* – which prohibits any substantial burden on the free exercise of religion, even if it arises merely from the general application of a uniformly applicable law, unless it can be shown that the imposition of the burden “(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”

The original provision relating to profit-making religious employers was therefore defeated. But for non-profit religious organisations with religious objections to “providing coverage for some or all … contraceptive services”, those earlier regulations had already provided an alternative. Initially such an employer must “self-certify” its objections, and what happened then was summarized by the 2014 Opinion of the Court as follows:

When a group-health-insurance issuer receives notice that one of its clients has invoked this provision, the issuer must then exclude contraceptive coverage from the employer’s plan and provide separate payments for contraceptive services for plan participants without imposing any cost-sharing requirements on the eligible organisation, its insurance plan, or its employee beneficiaries.

In 2014 this existing provision for non-profit religious employers was crucial. The judicial alignment followed an all too familiar pattern. The “conservative” bloc (Chief Justice Roberts and Justices Scalia, Thomas and Alito) held that the inclusion of profit-making religious employers amounted to an impermissible burden on their religious freedom; the “liberal” bloc (Justices Ginsburg, Breyer, Sotomayor and Kagan) would have upheld it as valid. The position of the swing voter, Justice Kennedy, was decisive. Although he joined in the Opinion of the Court (written by Justice Alito), his separate concurrence made it clear that he did so on a very narrow ground.

On Justice Kennedy’s view of the *Religious Freedom Restoration Act*, the requirement that the respondents’ insurance plans include contraceptive services did satisfy the requirement of “a compelling governmental interest”, but failed because it was not “the least restrictive means” of furthering that interest. This was so because the existing arrangements for non-profit employers had provided a clear example of a *less* restrictive means. His reasoning clearly implied that the arrangement for non-profit religious employers was valid.

Accordingly, the regulations were amended, to prescribe for religious organisations operating for profit the same procedures as had previously applied to their non-profit counterparts. Under the new regulations – introduced in their final form on 14 July 2015, and taking effect from 14 September 2015 – the organisation must first adopt a resolution “establishing that it objects to covering some or all … contraceptive services on account of the owners’ sincerely held religious beliefs”, and must then “self-certify” its religious beliefs “in the form and manner specified by the Secretary of Labor or provide notice to the Secretary of Health and Human Services”. On being notified of this “self-certification”, the insurers must make alternative arrangements securing payment for the services in question, and must do so without requiring “any documentation other than a copy of the self-certification … or notification from the Department of Labor”. Ultimately “the costs of providing or arranging such payments” will be “reimbursed through an adjustment to the Federally-facilitated Exchange user fee”.[[[8]](#endnote-8)]

However, by the time these new arrangements were introduced, an interim provision to the same effect had already been challenged on the ground that the need to “self-certify” was itself an impermissible burden on religious freedom, and in seven different cases the Courts of Appeals for four different Circuits had already held, on the basis of Justice Kennedy’s 2014 concurrence, that the new arrangements were valid. On 6 November 2015 the Supreme Court granted certiorari in all seven cases.[[[9]](#endnote-9)]

Yet when the seven cases came on together for oral argument on the Wednesday before Easter,[[[10]](#endnote-10)] Justice Kennedy appeared to be doubting whether such arrangements were valid even for non-profit organisations; and if he were to resile from his earlier view, while the other seven judges adhered to the views they had taken in 2014, the result would be a 4:4 division. Its practical effect would be that the seven decisions already appealed from would stand. Moreover, apart from those seven decisions, there had by now been similar decisions by the Courts of Appeals for the Second, Sixth, Seventh and Eleventh Circuits.[[[11]](#endnote-11)]. Only two cases in the Eighth Circuit had gone the other way.[[[12]](#endnote-12)]

The looming result of an even 4:4 division would be chaotic. In the seven States comprised within the Eighth Circuit[[[13]](#endnote-13)] the “self-certification” system for religious employers would be unavailable; in most of the other States it would still be validly maintained in force. Moreover, if an appeal from one of the decisions in the Eighth Circuit came on for hearing while the Court was still evenly divided, the same untenable situation would be affirmed again. Accordingly, on the Tuesday after Easter, the Court took the unusual step[[[14]](#endnote-14)] of issuing an interim order[[[15]](#endnote-15)] directing the parties to supplement their oral arguments the previous Wednesday, by filing additional written briefs (due to be filed on 12 April) exploring ways in which “contraceptive coverage may be obtained by petitioners’ employees through petitioners’ insurance companies … in a way that does not require any involvement of petitioners beyond their own decision to provide health insurance without contraceptive coverage to their employees”.

The Court even offered its own suggestion and invited the parties to comment: What if the employers were merely to *inform* their insurers “that they do not want their health plan to include contraceptive coverage”, and the insurers would then *inform* the employees that they would provide such coverage free of charge? The employers “would not be required to submit any separate notice to their insurer, to the Federal Government, or to their employees”. Would this be enough to avoid any “burden” on their religious freedom?

It is clear that the Court is trying to establish a basis on which it might be able to arrive at a majority decision. Yet it is less clear how this might be achieved. Presumably, if no realistic alternative arrangement were to emerge, it might be possible to conclude that the present arrangement is “the least restrictive means” of achieving effective contraceptive coverage, and therefore does not infringe the *Religious Freedom Restoration Act*. Conversely, if a realistic alternative does emerge, it might follow that the present arrangement is *not* “the least restrictive means” – and that might enable the Court to rule against the present system, while also drawing attention to an alternative which the government would be likely to adopt. Whatever the answer, the judicial discussions over Easter must have been intense.

In Australia, too, when the High Court sits on appeal, an even division of opinion means that the decision below is affirmed; and here, too, the conflicting judgments establish no precedent either way.[[[16]](#endnote-16)] But our practice is that the conflicting judgments are at least delivered. In each of the two cases disposed of in March, the Supreme Court gave just a nine-word announcement: “The judgment is affirmed by an equally divided Court.”

The Australian rule is more complicated because an even division may also arise in the High Court’s original jurisdiction, where there is no judgment below; and in such a case our solution is that the Chief Justice’s view prevails. But in the United States Supreme Court such cases no longer arise, since most of that Court’s original jurisdiction is now obsolete. The main surviving cases are those involving disputes between States. In those cases the Court appoints a Master to decide the issue, and rubber-stamps his decision – but without any judgment of its own. The decisions before Easter even included a rare example of that: on 21 March the Court announced that an action by Montana against Wyoming for interference with the flow of river water had failed in relation to all except two of fifteen alleged instances.[[[17]](#endnote-17)]

In another case, the Court was unanimous – to such an extent that it felt able to allow the appeal without waiting for oral argument. A Massachusetts statute prohibiting the possession of stun guns was struck down as violating the Second Amendment guarantee of the right to bear arms. A Massachusetts court had decided that the law was valid because stun guns were not in common use in 1789 when the Second Amendment was adopted; that the Second Amendment does not extend to “dangerous and unusual weapons”; and that stun guns do not seem “readily adaptable” to military use. The Supreme Court rejected all these arguments.

Again there was no extended judgment: the unanimous result was announced in a brief one-page “per curiam” opinion – though Justices Thomas and Alito, now the Court’s most conservative members, thought it necessary to express their agreement with the result in a separate concurring opinion, protesting that the contrary view “does a grave disservice … to vulnerable individuals … who must defend themselves because the State will not”.

Presumably, despite his usual insistence on interpretive “originalism”, Scalia would have joined them. As it was, his shadow lay heavily over the case: as both the opinions delivered on 21 March reminded us, Scalia himself, when writing the Opinion of the Court in *District of Columbia v Heller*,[[[18]](#endnote-18)] had emphatically rejected the use of “originalism” to restrict the scope of the Second Amendment. As Scalia had put it in that earlier case:

Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way. Just as the First Amendment protects modern forms of communications … , the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.

Unanimity went the other way in a case decided on 22 March, involving the Omaha Reservation in the State of Nebraska.[[[19]](#endnote-19)] In the United States, as in New Zealand, the traditional willingness to recognise a form of indigenous sovereignty began as mere tokenism, but over the last half-century has come to have practical significance. In 1882 the United States Congress had authorised the Secretary of the Interior to sell off 50,000 acres of reservation land, and part of the land then sold to a private owner is now occupied by the village of Pender. In 2006 the Omaha Tribe adopted new restrictions on the sale of alcohol; retailers in the village of Pender denied that the restrictions could apply to them, since the village had not been part of the reservation since 1882.

The Supreme Court unanimously rejected the argument. The 1882 legislation had “merely opened reservation land to settlement”; it would not be read as removing the affected land from the reservation in the absence of explicit language “evidencing the present and total surrender of all tribal interests”, or “an unconditional commitment from Congress” to compensate the tribe for the loss of its land.

In another case, this time from Alaska,[[[20]](#endnote-20)] a different approach to interpretation of statutes again evoked unanimity. Under federal regulations the use of hovercraft was prohibited in national parks; but according to statute law in Alaska the regulations were “applicable solely to public lands”. It was clear that the regulations did apply in the Yukon-Charley Rivers National Preserve; but did they apply to a river flowing through the reserve? If not, the appellant was free to pilot his hovercraft up the river while hunting moose.

The statutory provisions were obscure and to some extent contradictory; but in the end the whole Court held that the hovercraft could be used on the river. The Court invoked the “fundamental canon of statutory construction that the words of a statute must be read in their context”; and the relevantly decisive context here was simply that “Alaska is different”. The needs of hunting, fishing and trapping, and for popular reliance on “snowmobiles, motorboats and other means of surface transportation” meant that “land within … conservation system units in Alaska may be treated differently from federally managed preservation areas across the country”, and that the difference between “public” and “non-public” lands must assume a special significance.

Only two of the cases decided in March saw divergent responses which nevertheless had a clear majority result. The first was an appeal from Iowa,[[[21]](#endnote-21)] where the workers in a pork processing plant had sought additional overtime payments to cover the time they spent in the donning and removal of protective uniforms. The question was whether, despite differences in the kinds of protective clothing involved, the workers’ claims were sufficiently similar to support a class action. By six judges to two the Court supported the workers, finding that a class action was justified. Predictably, Justices Thomas and Alito were the dissenters.

Presumably Justice Scalia would have joined them in dissent. When the case was argued in November last year, he had insisted that the difference between “sanitary gear” and “protective gear” was crucial: “The sanitary gear is the same for all workers. But some of them wear, what, chain mail to protect them from the knives, right?”

The other case[[[22]](#endnote-22)] also had a clear result, but the all-too-predictable voting blocs so firmly established in recent years appeared to be in disarray. When Sila Luis was charged with defrauding Medicare (by paying illegal kickbacks and billing the government for services that her health care agency had never actually provided), the prosecution secured a pretrial order prohibiting her from “dissipating, or otherwise disposing of [assets] … up to the equivalent value” of $45 million. While such orders usually relate to assets directly traceable to the alleged crime, they may also (as in this case) include other unrelated “property of equivalent value”. Ms Luis protested that such a freezing of her “untainted” property would leave her without funds to pay for legal assistance, and would thereby violate her “right to counsel” under the Sixth Amendment. By 5:3 the Court accepted her claim, and allowed her appeal.

The Opinion of the Court was delivered by the “liberal” Justice Breyer. He was joined by the “liberal” Justices Ginsburg and tSotomayor, but also by Chief Justice Roberts. They stressed that the “right to counsel” is “fundamental”, and held that earlier judgments upholding such orders[[[23]](#endnote-23)] could be distinguished because the orders made in those cases related to assets traceable to the crime. In such a case “the defendant’s ownership interest is imperfect. The robber’s loot belongs to the victim, not to the defendant.” This case was different because the relevant property “is untainted; *i.e.*, it belongs to the defendant, pure and simple.” Accordingly they expanded the reach of the Sixth Amendment to include a right to use “innocent” property to pay for the assistance of counsel.

The crucial fifth vote was provided in a separate opinion by the “conservative” Justice Thomas – rejecting Justice Breyer’s “balancing approach”, but concurring on the basis of a Scalia-like “originalist” reading of the Sixth Amendment as specifically intended to guarantee an accused the right “to employ a lawyer to assist in his defense”. From the “conservative” side there was a dissent by Justice Kennedy (joined by Justice Alito); from the “liberal” side there was a dissent by Justice Kagan.

Back when the case was argued in November, all of the Justices had initially seemed inclined to reject the idea of a distinction based on property law, arguing that there was no way such a distinction could be limited to Sixth Amendment issues. Justice Sotomayor had objected that the “logic of your argument” would suggest “that you can’t freeze untainted assets for anything, because the government has no property interest”. Justice Scalia had put the example of “a devout Muslim” who “makes an annual trip to Mecca every year.” If her assets were frozen, how could she claim a constitutional right to make the trip? In the end experienced court watchers found the result unpredictable, and so it proved to be.

All of the cases discussed so far had been dealt with during the first ten days immediately after the equinox, which this year fell on 20 March and ushered in the American spring. It looked as if the Court was heading into a long hot summer. But on Monday 4 April the Court announced three more decisions, all of them unanimous.

In one of them, as in the earlier gun control case, the appeal was allowed per curiam, without waiting for oral argument.[[[24]](#endnote-24)] The respondent, an inmate in the Chippewa Correctional Facility in Michigan, had been convicted of a drug offence, discovered when police had stopped his car as a result of an anonymous tip. He argued that at his original trial the evidence given of the tip had violated his Sixth Amendment right “to be confronted with the witnesses against him”; that his counsel, both at trial and on appeal, had unreasonably failed to raise that issue; and that, though these arguments had failed in the Michigan courts, they entitled him to federal habeas corpus relief. The Court of Appeals for the Sixth Circuit had accepted that claim,[[[25]](#endnote-25)] but now (on appeal by the prison warden) the Supreme Court reversed that result.

The second case[[[26]](#endnote-26)] involved an issue of statutory interpretation. Under federal legislation a registered sex offender who moves interstate must give notice of the change to at least one of the jurisdictions involved. A “jurisdiction” was relevantly defined as one “where the offender resides”. The Court held that a sex offender who moved from Kansas to the Philippines without giving notice of the change had not committed any offence against that legislation. The Philippines was not a relevant jurisdiction because “no foreign country is”; and Kansas was no longer a jurisdiction “where the offender *resides*”. The fact that the word “resides” was expressed in the present tense was conclusive. (The Court stressed, however, that under new federal legislation – and even under existing State legislation, including that of Kansas) [[[27]](#endnote-27)] – such cases could be more effectively policed in the future, so that the result had no real significance apart from the instant case.)

By contrast, the significance of the remaining case[[[28]](#endnote-28)] was potentially momentous, turning as it did on a reconsideration of the great cases of 1964[[[29]](#endnote-29)] establishing the principle of “one person, one vote”, with its corollary requiring electoral districts approximately equal in numbers. When Justice Lionel Murphy (in sole dissent) argued in 1975 that the same principle should apply in Australia, he explained it as “having as the standard of equality the alternatives of equal numbers of people and equal numbers of electors”.[[[30]](#endnote-30)] The American cases have never really resolved the choice between those alternatives, but this latest case had the potential to do so. In the end nothing much happened (though in the current state of American politics, the near-unanimity displayed in reaffirmation of the relevant precedents may itself be highly significant).

The whole Court reaffirmed that an electoral distribution in Texas, based on approximate equality of population numbers, was constitutionally valid; rejected the appellant’s complaint that the distribution was rendered invalid by a wide variation in the numbers of *voters* within each district; and declined to rule on a suggestion that the basic idea of “one person, one vote” might equally be satisfied by a distribution based on approximate equality of voter numbers (or more precisely, by reference to the numbers of persons *eligible* to vote). Nevertheless, it was clear that this latter issue might be divisive in the future.

The Opinion of the Court (delivered by Justice Ginsburg) argued strongly that resort to population figures rather than voting figures was a settled and well-understood practice, supported not only by precedent but by the constitutional text. The claims advanced for a valid alternative based on voting figures could be left unresolved “[b]ecause history, precedent, and practice suffice to reveal the infirmity of [such] claims”. By contrast, Justice Alito’s concurring opinion (with much of which Justice Thomas agreed) rejected the majority view of “history, precedent and practice”, and in particular dismissed the textual argument as “meretricious”. And although he agreed that the issue of reliance on numbers of eligible voters could be left to another day, he did so only because it would be more convenient to wait until a specific example of such an approach was presented for judicial appraisal:

Whether a State is permitted to use some measure other than total population is an important and sensitive question that we can consider if and when we have before us a state districting plan that, unlike the current Texas plan, uses something other than total population as the basis for equalizing the size of districts.

As for Justice Thomas, while he too concurred in the actual result, he emphasised his determination to “concur only in the judgment”. In his view any attempt to define a “best” electoral system was inherently misguided; the Court had been “wrong to entangle itself with the political process”, and should withdraw from the field altogether.

What Justice Scalia would have thought, we cannot say. When the case was argued back in December, he had remained uncharacteristically silent throughout.

Clearly there were unresolved issues here which the unanimity of the actual result did little to conceal. But part of that unanimity was a genuine consensus, in relation to the issue of a distribution using equal numbers of eligible voters, that now was not the time to resolve it.

Although the eleven cases summarised here included two where the Court divided 4:4, it is clear that all of the Justices are determined to avoid such results wherever it is possible to do so. Perhaps there was a further demonstration of this in an order made on 8 April in the case of *United States v Texas*,[[[31]](#endnote-31)] due to be argued on 18 April when the Court resumes after a brief recess. The case involves the validity of the Obama administration’s use of discretionary executive powers to grant amnesty to illegal aliens who might otherwise be deported. It cannot fail to be controversial; but at least the Court can make sure that it is fully argued. The usual strictly limited time of one hour for oral arguments has been expanded by the allowance of an extra half-hour, including fifteen minutes for counsel representing the House of Representatives as amicus curiae.

Yet it may be possible to read too much significance into such an order. An order had already been made enlarging the word limit on written briefs to 20,000 words for each side. And that order was made by Justice Scalia, on the Tuesday before his death.

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1. [] *Hawkins v Community Bank of Raymore* (argued 5 October 2005, result announced 22 March 2016). [↑](#endnote-ref-1)
2. [] *Hawkins v Community Bank of Raymore*, 761 F. 3rd 937, at 939 (2014). [↑](#endnote-ref-2)
3. [] *Chevron USA Inc v Natural Resources Defense Council*, 467 US 837 (1984). [↑](#endnote-ref-3)
4. [] *Friedrichs v California Teachers Association* (argued 11 January 2016, result announced 29 March 2016). [↑](#endnote-ref-4)
5. [] 431 US 209 (1977). [↑](#endnote-ref-5)
6. [] 134 S Ct 2618 (2014). [↑](#endnote-ref-6)
7. [] *Burwell v Hobby Lobby Stores Inc*, 134 S Ct 2751 (2014). [↑](#endnote-ref-7)
8. [] For a detailed explanation of the new provisions see *Federal Register*Vol 80, No 134 (14 July 2015), pp 41318-41347. [↑](#endnote-ref-8)
9. [] *Zubik v Burwell* (Third Circuit); *Priests for Life v Burwell* (DC Circuit); *Roman Catholic Archbishop of Washington v Burwell* (DC Circuit); *East Texas Baptist University v Burwell* (Fifth Circuit); *Little Sisters of the Poor v Burwell* (Tenth Circuit); *Southern Nazarene University v Burwell* (Tenth Circuit); and *Geneva College v Burwell* (Third Circuit). The university and college cases were brought because the new regulations were expressed to apply “to student health insurance coverage arranged by an eligible organization that is an institution of higher education … in a manner comparable to that in which they apply to group health insurance coverage”. [↑](#endnote-ref-9)
10. [] Argued 23 March 2016 (sub nom *Zubik v Burwell*). [↑](#endnote-ref-10)
11. [] *Catholic Health Care System v Burwell* (Second Circuit, decided 7 August 2015); *Michigan Catholic Conference v Burwell* (Sixth Circuit, decided 22 August 2015); *Wheaton College v Burwell* (Seventh Circuit, decided 1 July 2015); and *Eternal Word Television Network v. Burwell* (Eleventh Circuit, decided 18 February 2016). [↑](#endnote-ref-11)
12. [] In *Sharpe Holdings, Inc v United States Department of Health and Human Services* and *Dordt College v Burwell* (both decided 17 September 2015). [↑](#endnote-ref-12)
13. [] North Dakota, South Dakota, Nebraska, Minnesota, Iowa, Missouri and Arkansas. [↑](#endnote-ref-13)
14. [] The last time such an order was made was in *Brown v Board of Education*, 787 F. 3rd 483 (1954). [↑](#endnote-ref-14)
15. [] Issued 29 March 2016 (sub nom *Geneva College v Burwell*). [↑](#endnote-ref-15)
16. [] See Michael Coper, “Tied vote”, in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 671-73. [↑](#endnote-ref-16)
17. [] *Montana v Wyoming* (result announced 21 March 2016). [↑](#endnote-ref-17)
18. [] 554 US 570 at 582 (2008). [↑](#endnote-ref-18)
19. [] *Nebraska v Parker* (argued 20 January 2016, decided 22 March 2016). [↑](#endnote-ref-19)
20. [] *Sturgeon v Frost* (argued 20 January 2016, decided 22 March 2016). [↑](#endnote-ref-20)
21. [] *Tyson Foods Inc v Bouaphakeo* (argued 10 November 1215, decided 22 March 2016). [↑](#endnote-ref-21)
22. [] *Luis v United States* (argued 10 November 2015; decided 30 March 2016). [↑](#endnote-ref-22)
23. [] See especially *United States v Monsanto*, 491 US 600 (1989). [↑](#endnote-ref-23)
24. [] *Woods v Etherton* (decided 4 April 2016). [↑](#endnote-ref-24)
25. [] *Etherton**v**Rivard*, 800 F. 3d 737 (2015). [↑](#endnote-ref-25)
26. [] *Nichols v United States* (argued 1 March 2016, decided 4 April 2016). [↑](#endnote-ref-26)
27. [] It was common ground that the offender could have been convicted under Kansas state law, and during argument Justice Ginsburg had suggested that extradition should have been “sought under that [provision] which is clear and certain instead of a provision where there has to be a strained interpretation”. [↑](#endnote-ref-27)
28. [] *Evenwel v Abbott* (argued 8 December 2015, decided 4 April 2016). [↑](#endnote-ref-28)
29. [] *Wesberry v Sanders*, 376 US 1 (1964); *Reynolds v Sims*, 377 US 533 (1964). [↑](#endnote-ref-29)
30. [] *Attorney-General (Cth) (Ex rel. McKinlay) v Commonwealth* (1975) 135 CLR 1, at 70. Intriguingly, he went on (at 75) to express a preference for reliance on “numbers of electors rather than numbers of people”. He explained this as an inference from the constitutional phrase “chosen by the people” (with the emphasis on the word “chosen”). In the United States the same phrase has been used to support the opposite view (with the emphasis on the word “people”). [↑](#endnote-ref-30)
31. [] Certiorari granted 19 January 2016; on appeal from *Texas v United States*, 787 F. 3rd 733 (2015). [↑](#endnote-ref-31)