The 2012–2013 term has shown how difficult it can be to predict the holding of cases before the Supreme Court. Last term, a majority Court led by Chief Justice Roberts gave deference to Congress in upholding the Patient Protection and Affordable Care Act. This term, a different majority, once again led by Chief Justice Roberts, struck down a portion of the Voting Rights Act of 1965.

However, it can be even more difficult to predict the justice alignment on certain issues. For some controversial, or otherwise, issues, the Court often still splits along ideological lines, with Chief Justice Roberts along with Justices Scalia, Thomas, and Alito on the conservative side and Justices Ginsburg, Breyer, Sotomayor, and Kagan having a more liberal view. Justice Kennedy remains the central, or "swing," vote. Some illustrative cases this term include the constitutionality of the Defense of Marriage Act (DOMA) in *United States v. Windsor* along with several cases within the Court's search and seizure jurisprudence involving the place of detention of a person in conjunction with the execution of a search warrant, the use of a drug detection dog, and the collection of DNA from a person in police custody.

This term saw cases that further blurred the lines of predictability of judicial alignment. Alliances based on differences in interpretation and application split the court on some of the other anticipated issues this term, like the extent of the applicability of the importation provision of the Copyright Act in *Kirtsaeng v. John Wiley & Sons, Inc.*, whether facts that raise a mandatory minimum sentence should be considered by a jury in *Alleyne v. United States*, and standing in *Hollingsworth v. Perry*. While not completely unheard of, interpretation of precedent has united the liberal Justices Ginsburg, Sotomayor, and Kagan with conservative Justices Scalia, Thomas, and Alito, respectively.

The Scope of Congressional Power

The scope of congressional power is always on the docket. Last term, in *National Federation of Independent Business v. Sebelius* 567 U.S. __ (2012), the Court made clear that it is permissible within its interpretive powers to try to avoid invalidating legislation created by the nation's elected leaders. The Court did not allow a national mandate under the argument that it would stimulate interstate commerce. Since the legislation imposed a penalty for noncompliance with the mandate, the Court, led by Chief Justice Roberts, allowed the legislation to stand under Congress's powers of taxation.

In *Tarrant Regional Water District v. Herrmann* (11-889), the Court had to decide whether local Oklahoma water statutes conflicted with federal law and violated the Commerce Clause by interfering with interstate commerce in water. In 1978, after 20 years of negotiations, Arkansas, Louisiana, Oklahoma, and Texas signed the Red River Compact, which apportioned equitable amounts of water to the signatory states. Due to Texas's growing population, Tarrant Regional Water District, a state agency responsible for providing water to the north-central part of the state, failed to secure water from Oklahoma despite its varied efforts. Tarrant then filed suit, arguing that the Red River Compact preempted the Oklahoma laws. The Court concluded that because the Compact is silent as to cross-border rights, it does not create cross-border rights in signatory states. The Court further pointed out that states enjoy sovereign powers, and one such power is the absolute right to navigable waters within their jurisdiction. The unanimous Court held that Oklahoma's water statutes do not violate the Commerce Clause are not preempted by the Compact.

Then, in *McBurney v. Young* (12-17), the Court resolved a circuit split when it decided whether the Virginia Freedom of Information Act (VFOIA), which grants Virginia citizens—but not non-citizens—the right to inspect and copy public records, violates the Privileges and Immunities Clause of Article IV of the Constitution or the dormant Commerce Clause. The unanimous Court reasoned that the VFOIA merely has an incidental effect of burdening out-of-state citizens. The Court further stated that the VFOIA does not impermissibly burden a non-citizen's access to court documents because there are other ways by which to retrieve the public records sought. The Court held that the VFOIA does not violate the dormant Commerce Clause because the act does not regulate or burden interstate commerce.

Finally, Article I, section 8 of the Constitution, better known as the Necessary and Proper Clause, grants Congress the power to "make all laws which shall be necessary and proper" to execute the powers granted to it by the Constitution. In *United States v. Kebodeaux* (12-418), the Court had to decide whether the Necessary and Proper Clause granted Congress the authority to enact the Sex Offender Registration and Notification Act (SORNA) and apply it to an offender whose sentence was completed before the act's enactment. The Court held that it did. The majority reasoned that Kebodeaux was already subject to a different federal statute mandating registration requirements for convicted sex offenders, and that SORNA was a valid exercise of Congressional power under the Necessary and Proper Clause.

Justice Thomas had a different outlook on the Necessary and Proper Clause as well as SORNA, itself. Justice Thomas stated that "the Necessary and Proper clause is not a freestanding grant of congressional power," (Thomas dissent, p.3) but rather a limitation on congressional power, applicable only to the execution of express Constitutional grants of power. Justice Thomas concluded that, as applied to Kebodeaux, SORNA is unconstitutional.

Voting Rights

The Court heard two cases this term dealing with voting rights that touched on

issues of Congressional power and federalism. As previously mentioned, just last term, a narrow, mostly liberal majority Court led by Chief Justice Roberts applied congressional deference in upholding certain legislation as constitutional. The conservative dissent would have struck the legislation down as an unconstitutional reach of congressional power.

The dissent in that case held strong to that position this term when it had to decide a similar question with respect to the Voting Rights Act (VRA) of 1965. Section 5 of the VRA is the "preclearance" provision requiring states to obtain federal permission to enact new voting laws. This provision applied only to "covered jurisdictions" as set forth by section 4(b) of the act, based on a coverage formula devised by the federal government.

In *Shelby County v. Holder* (12-96), the 5-4 conservative majority, led by Chief Justice Roberts, held that section 4(b) of the VRA is unconstitutional because the burdens imposed on the selected states by that section outweigh the current needs for such restrictions. Under the principles of federalism and equal state sovereignty, the Court struck down the single provision in the VRA that did not apply equally to the states.

Justice Thomas concurred and expanded by stating that he would hold Section 5 unconstitutional also, as is inevitable. Justice Ginsburg led the dissent by arguing that, as applied to Shelby County, the statute remains constitutional because of the recurring instances of racially discriminatory proposed legislation. The dissent went on to say that the Court should have adhered to the principle of congressional deference because, in striking down Section 4(b), it has effectively deemed Section 5 unconstitutional, which is still necessary to prevent backsliding.

The National Voter Registration Act requires that states use a standard form to register voters for federal elections. This form does not require documentation of citizenship, just merely attestation upon penalty of perjury that the applicant is a U.S. citizen. At issue in *Arizona v. Inter Tribal Council* (12-71) was a state law that directed relevant officials to reject applications that were not accompanied by concrete evidence of citizenship. Justice Scalia wrote for a 7-2 Court and concluded that the federal law preempts the state statute, as the law conflicts with the purpose of the function of the standard federal form. Scalia went on to outline the proper procedure that Arizona officials should follow to gain approval of their desired mandate.

Justices Thomas and Alito dissented. Justice Thomas cited the Seventeenth Amendment as conferring upon the states the power to determine voter qualifications. This state power is limited such that the qualifications set forth for federal elections are no different than those for state elections. Justice Alito further explained that the Court should make the presumption against preemption in the absence of clearly expressed congressional intent to the contrary.

Same-Sex Marriage

While not around as long as the Voting Rights Act, the Defense of Marriage Act (DOMA), another federal statute, met its demise by a narrow margin. Section 3 of DOMA defined marriage as a union between a man and a woman, only. This definition applied to countless federal laws. In *United States v. Windsor* (12-307), and under DOMA, Windsor was ineligible for the federal marital tax exemption because same-sex spouses were not recognized under the federal law. After payment, Windsor sought a refund and challenged the constitutionality of this federal law.

Justice Kennedy wrote the opinion for the majority Court of liberal justices. The Court pointed out that this case was one of tough consideration due to the fact that the Executive Branch conceded in the unconstitutionality of Section 3 of DOMA but continued to both enforce it and not refund Windsor's payment. Because of these considerations, the majority Court concluded, first, that despite issues that remained regarding standing—Article III or prudential—"the costs, uncertainties, and alleged harm and injury" (Kennedy, p.11) that would inevitably have ensued warranted an opinion on the merits here.

Next, the Court explained that domestic relations policy has been within the states' purview. Several states have even acted to end inequality by enacting legislation to make same-sex marriage lawful. Under principles of federalism and equal protection, the Court reasoned that the purposes of DOMA were to disparage and discriminate against a class of persons that some states sought to protect: those who are joined in a same-sex marriage. Thus, the Court affirmed the Second Circuit's ruling that Section 3 of DOMA is unconstitutional because it denies equal protection guaranteed by the Fourteenth Amendment and it deprives people of liberty guaranteed by the Fifth Amendment.

Chief Justice Roberts and Justices Alito and Scalia, joined by Justice Thomas, dissented. The conservative justices all agreed that the Court lacked standing to review the decision of the Second Circuit. Justice Alito explained a position long-held by Scalia that the Constitution is silent on the topic of marriage, and so too, should be the Court. Scalia further explained that because both parties to this suit agreed with—and were seeking to affirm—the Second Circuit and the District Courts' opinions below, no justiciable controversy existed for the Court to review, regardless of whether the parties had standing. Scalia went on to say that it is the sole judgment and responsibility of Congress to alter a statutory definition that is applicable through many more federal laws.

Hollingsworth v. Perry (12-144) further proved that judicial alliances cannot be anticipated. This court was narrowly divided with Chief Justice Roberts and Justices Scalia, Ginsburg, Breyer, and Kagan in the majority leaving Justices Kennedy, Thomas, Alito, and Sotomayor in the dissent. Chief Justice Roberts once again pointed out that limits on judicial power ensure that policymaking is in the hands of elected representatives. At issue in *Hollingsworth* was Proposition 8, a referendum that amended California's constitution declaring that only marriages between men and women are recognized in the state. A District Court in California found Prop. 8 to be unconstitutional. When state and local officials refused to appeal the District Court's ruling, the official proponents of the legislation intervened to defend its constitutionality.

Article III standing requires a direct stake in the outcome of the litigation and a concrete and particularized injury. The majority Court addressed the issue of standing under principles of agency law. It reasoned that petitioners were not agents of the state because they were not elected by people of the state, nor had they taken an oath of office. As such, the court concluded that petitioners have not suffered an injury and thus have no standing on which to bring the appeal.

The dissent agreed that while standing is a question of federal law, it is state law that dictates who may appear in court on its behalf. Since California had stand-

ing because the District Court declared unconstitutional a provision of the state constitution, state law vested the right to defend that provision in proponents of the initiative when the elected representatives refused to do so.

Fourth Amendment: Search and Seizure

The Fourth Amendment to the U.S. Constitution provides for "the right of people to be secure ... against unreasonable searches and seizures." Last year, the Court analyzed the use of newer technology (GPS devices) to monitor suspects under Fourth Amendment search and seizure principles. This year, the Court divided on the use of an instrument that the police have long since used to monitor and patrol suspicious or otherwise ordinary situations—the police dog.

In *Florida v. Jardines* (11-564), the 5-4 unusually divided Court offered a majority opinion authored by Justice Scalia and joined by Justices Thomas, Ginsburg, Sotomayor, and Kagan that addressed the use of a trained police narcotics dog. The Court agreed with the Florida Supreme Court and concluded that bringing a trained police dog onto someone's porch for the purposes of obtaining evidence with which to secure a search warrant is a search in violation of the Fourth Amendment. Justice Scalia went on to say that a warrant is necessary for using a trained police dog within the curtilage of one's home.

Justice Alito, writing for the dissent, did not give much weight to the majority's reasoning that the dog is a trained instrument utilized by police as opposed to man's best friend, and focused on the duration that the officer-accompanied drug-detection dog actually spent on the porch. The dissent reasoned that the length of stay was short enough in duration to not amount to a Fourth Amendment search. Justice Alito stated that no search occurred because a police officer is well within his rights to approach a home's door and knock, much like any other citizen, regardless of his being accompanied by a trained police dog.

However, the Court was unanimous regarding another Florida Supreme Court decision and the use of a trained police narcotics dog. In *Florida v. Harris* (11-817), a police officer pulled over Respondent Harris for a routine traffic stop. Upon noticing Harris' behavior, the officer used a drug detection dog that correctly alerted to the narcotics in the vehicle. During a subsequent routine stop when Harris was out on bail, the same drug detection dog once again alerted to narcotics, this time incorrectly. Harris challenged the reliability of the evidence that was being used against him, and the Florida Supreme Court said that extensive field records on the dog's performance in training, including records for the dog's false alerts, are necessary to establish the dog's reliability for probable cause. Justice Kagan wrote for the Court and disagreed with the Florida Supreme Court by stating that a drug detection dog's certification by way of training records are sufficient to establish that dog's reliability with respect to probable cause.

The Court split on two more Fourth Amendment cases that provided more guidance to lower courts and police officers regarding exceptions to the warrant requirement. In *Bailey v. United States* (11-770), Justice Kennedy wrote for the Court joined by Justices Roberts, Scalia, Ginsburg, Sotomayor, and Kagan. In *Bailey*, the Court resolved a circuit split concerning the scope of a 1981 opinion, which held that officers may detain an occupant of a location described in a search warrant for the purposes of ensuring officer safety, facilitating the completion of the search, and preventing flight. The Court held that the authority to detain a suspect pursuant to the execution of a search warrant must be limited to the immediate vicinity of the location to be searched. The dissent, written by Justice Breyer and joined by Justices Thomas and Alito, affirmed the Second Circuit's reasoning based on "what is reasonably practicable" as opposed to the majority's "indeterminate" geographical approach.

Likewise, in *Missouri v. McNeely* (11-1425), the Court split 5-4 once again when answering the question of whether a nonconsensual, warrantless blood draw violates a person's right to be free from unreasonable searches and seizures. The majority, led by Justice Sotomayor, affirmed the Missouri Supreme Court, holding that the nonconsensual, warrantless blood draw violates the person and therefore violates their Fourth Amendment rights. The Court refused to make a general exception regarding drunk driving incidents and warrantless blood draws and stated that a "totality of the circumstances" analysis should still be conducted on a case-by-case basis.

Finally, in *Maryland v. King* (12-207), the Court debated over the constitutionality of the scope of Maryland's DNA Collection Act, which authorizes law enforcement officers to collect DNA from persons charged with violent crimes or burglary while they are in custody. The majority, written by Justice Kennedy and joined by Justices Roberts, Thomas, Breyer, and Alito, equated the harmless cheek swab at issue here with fingerprinting, a legitimate police procedure employed for decades. The Court reasoned that suspects in custody have lower expectations of privacy. The dissent, written by Justice Scalia, and joined by Justices Ginsburg, Sotomayor, and Kagan, called the majority's logic into question by pointing out that the DNA collected at issue here was used for purposes beyond identification, which is a violation of the DNA Collection Act itself.

Fifth Amendment: Takings

The Constitution's Fifth Amendment provides, among other things, that private property shall not be taken for public use without just compensation, better known as the "takings clause" or "eminent domain." *Koontz v. St. Johns River Water Management District* (11-1447) reviewed a case out of the Florida Supreme Court that held that where a local government denies necessary land-use permits, the applicant must exhaust all possible administrative remedies before raising a claim of impropriety. The more conservative justices, led by Justice Alito, did not agree. The 5-4 Court applied *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) as carving out a Fifth Amendment just compensation claim for property taken by the government during the land-use permit application process.

The dissent of the liberal justices, led by Justice Kagan, stated that the majority Court went too far, effectively requiring local government to meet the nexus and proportionality tests outlined in Nollan and Dolan in complete disregard of local land-use regulations. The dissent agreed with the majority in that the requirements laid out are applicable where the government has conditioned the permit on something that it would otherwise have to pay for. But the dissent saw no such conditions in this case, thus rendering the Nollan and Dolan analysis inapplicable.

Finally, in *Arkansas Game & Fish Commission v. United States* (11-597), the Court had to decide whether govern-

ment actions that caused repeated floodings, without compensating the town for the resulting damages, constituted a taking of property under the Fifth Amendment. The unanimous Court held that recurring takings, though only temporary in nature, are not automatically exempt from a takings clause analysis.

Sixth Amendment: Speedy Trial and Assistance of Counsel

The Sixth Amendment of the Constitution guarantees citizens "the right to a speedy ... trial" by "an impartial jury." Nearly the last three decades of justices have gone back and forth on the application of this guarantee. Although they seem to have resolved the anomaly, it is hard to be certain if there will be consistency in the future.

In *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), the 5-4 Court, led by former Chief Justice Rehnquist, held that sentencing factors are facts that are not found by a jury that can still increase the defendant's punishment. More than a decade later, in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the plurality court went the other way and held that a fact must be submitted to the jury if it increases the punishment above what is otherwise prescribed. Justices Scalia, Thomas, and Ginsburg joined in that majority opinion. Justice Breyer joined former Justice O'Connor's dissent, which cautioned the Court that its ruling effectively overruled *McMillan*. Justice Breyer also filed his own dissent and chided the Court for imposing limits on sentencing discretion through judicial fact-finding.

Two years later, in *Harris v. United States*, 536 U.S. 545 (2002), the plurality court clarified the *Apprendi* holding as applicable only to judicial fact-finding that increases the statutorily prescribed maximum sentence, as distinguished from the mandatory minimum. The Court split flipped back with Justices Scalia and Breyer joining the majority. Justice Breyer concurred by announcing some adverse legal consequences in extending the *Apprendi* holding to mandatory minimum sentencing. Justice Thomas filed a dissenting opinion, in which Justice Ginsburg joined, stating that the irreconcilable problems lie with the *McMillan* precedent and that fact-finding by a jury should include instances raising the mandatory minimum sentence.

This term, in *Alleyne v. United States* (11-9335), the Court revisited the question of whether fact-finding that increases the mandatory minimum sentence is a right conferred in the jury by the Sixth Amendment. Justice Thomas wrote the 5-4 majority opinion joined once again by Justice Ginsburg, as well as Justices Sotomayor and Kagan, and this time by Justice Breyer, also. The Court overruled *Harris* because it was inconsistent with *Apprendi*. It held that a fact that increases even the mandatory minimum sentence is an element of the crime that must be submitted to a jury. The Court made clear that this decision is not a sweeping statement to replace all instances of judicial sentencing discretion informed by judicial fact-finding. Justice Scalia was in the dissent, joining Justice Kennedy, in opposition to Justice Thomas's opinion once again. The dissent stated that the majority's ruling defends judges, and therefore has no bearing on the Sixth Amendment. The dissent went on to say that the *Alleyne* jury authorized the sentence of five years to life in prison, which completed the role of the jury, and then the doctrine of judicial discretion allowed the judge to consider relevant facts, including facts not found by the jury, consistent with *Apprendi.*

Also worth mentioning is the Court's dismissal of *Boyer v. Louisiana* (11-9953) due to certiorari having been "improvidently granted." While it is not unheard of for a "lame" case to make it past the rigorous certiorari review process, Boyer was that case this term. The per curiam Court found that, while continuances filed by Boyer caused a delay in funding, there was no failure of funding, and Boyer ended up receiving a lesser sentence. Justice Sotomayor dissented, joined by Justices Ginsburg, Breyer, and Kagan, setting forth a four-part analysis to determine if a petitioner's right to a speedy trial was violated. These four factors include: (1) length of delay, (2) reason for the delay, (3) defendant's assertion of his right, and (4) prejudice to the defendant. Justice Sotomayor indicated that there is empirical evidence of recurring problems within the Louisiana judicial system that would only have been helped had the Court addressed the issue.

Patents

Some of the most anticipated cases this term concerned issues of patent law: the patentability of human genes and reverse payments. The Court unanimously decided the case concerning the patentability of human genes, but it split 5-3 on the issue of reverse payments.

Patent law provides that a new invention or discovery is patent-eligible, with the exception of naturally occurring phenomena. In *Association for Molecular Pathology v. Myriad Genetics, Inc.* (12-398), the Court had to decide whether the discovery of a particular, isolated gene sequence as well as its use for the creation of a composite DNA not found in nature are patent-eligible. The unanimous Court found that mere discovery of a particular gene sequence by isolating it from the entire DNA sequence is a naturally occurring phenomenon not eligible for patentability. However, the Court affirmed that Myriad's composite DNA is patent-eligible because it is an alteration of the nucleotides within the DNA sequence, which is an entirely new invention not found in nature.

Under patent law, and within the drug manufacturing industry, a reverse payment occurs when, based upon settlement agreement, a brand-name-drug patent holder pays an alleged generic-brand-drug patent infringer to not produce the generic product until the term of the patent expires. Such settlement agreements must be reported to the Federal Trade Commission as well as the Antitrust Division of the Department of Justice. In *Federal Trade Commission v. Actavis, Inc.* (12-416), the Court had to decide whether reverse payment settlement agreements diminish competition in violation of antitrust laws.

Respondent Watson Pharmaceuticals (Actavis) is a generic drug manufacturer that settled with the patent holder of a brand-name drug under the agreement that the generic version would delay entering the market. The Eleventh Circuit dismissed the FTC's antitrust claim by reasoning settlements are a desirable result. Justice Breyer, writing for the majority, concluded that "large and unjustified" (Breyer, p.19) payments are suspect and tend to have an anticompetitive effect, a consideration that can outweigh the desirability of settlements, and should be reviewed by the proper authority.

Chief Justice Roberts, along with Justices Scalia and Thomas, disagreed and noted that the monopolies that are sometimes created in patent law are the exception to the applicability of antitrust laws. The dissent stated that the rule announced by the majority will not stand the test of time because it not only discourages settlements, but will leave patent holders to reconsider actions against

alleged patent infringers, even when acting within the scope of their patents.

Affirmative Action

After a previous litigation involving the use of race as an admissions factor and relevant subsequent legislation, the University of Texas' admissions policy automatically granted admission to qualifying Texas students in the top 10 percent of their high school classes. In addition, the university used a rubric to plot each applicant's academic and personal achievement indexes on a grid. Students falling above a certain score are also granted admission. While the university does not assign point values for race, it is a meaningful factor in consideration of a student's application. Here, a Caucasian student whose application was rejected from the university, challenged this admissions policy as a violation of the Equal Protection Clause.

In *Grutter v. Bollinger*, 539 U.S. 306 (2003), the Court decided that admissions policies that include race as a factor are subject to judicial review and must withstand an application of strict scrutiny. The Court went on to say that, while deference is given to the university's conclusion of the benefits from a diverse student body, to satisfy strict scrutiny, the university must demonstrate that its interest in such diversity furthers compelling governmental interests and is both substantial and constitutionally permissible. To be precise, this Court said that the university must demonstrate that it evaluates each applicant as an individual, not focusing on race, in addition to the university proving that any race-neutral alternatives would not suffice to satisfy its purpose.

The 7-1 Court ultimately concluded that the Fifth Circuit Court of Appeals incorrectly presumed that the university's admission process used race as a factor in good faith, transferring the burden to the petitioner to rebut that presumption. As such, the Fifth Circuit applied the wrong standard for reviewing the university's admissions process. The Court vacated the decision and remanded the case to the court of appeals for application of the strict scrutiny standard against the university's admissions policy.

Justice Thomas agreed with the Court that the Fifth Circuit did not apply the correct standard of scrutiny. In his *Grutter* dissent, Justice Thomas stated that the continued practice of such admissions policies can have collateral consequences. In *Fisher*, Justice Thomas adhered to his belief and expressed his view that *Grutter* should be overruled because a state's use of race as a factor in a higher education admission policy is both irrelevant to education and a violation of the Equal Protection Clause.

Immigration

The reach of the Sixth Amendment also had implications on immigration jurisprudence. In a 2010 opinion, the Court held that attorneys are required to disclose the risks of deportation arising from a guilty plea to their non-citizen clients (*Padilla v. Kentucky*, 559 US __). Chaidez's petition alleging ineffective assistance of counsel was pending when the Court announced this new rule. In *Chaidez v. United States* (11-820), the Court had to decide whether the *Padilla* holding applied retroactively to an alleged Sixth Amendment violation. The 7-2 Court, led by Justice Kagan, held that *Padilla* does not apply retroactively because it set forth a new rule. Justice Thomas concurred, stating that Sixth Amendment rights should not extend to "advice concerning the collateral consequences arising from guilty pleas."

The Court further expanded on immigration issues surrounding deportation in *Moncrieffe v. Holder* (11-702). Moncrieffe, found in possession of a small amount of marijuana, was convicted of possession with intent to distribute under Georgia law. The Controlled Substances Act labels this conviction as a felony. For the purposes of the Immigration and Nationality Act, this type of conviction is an aggravated felony, an offense that renders a non-citizen both deportable and ineligible for discretionary relief. Justice Sotomayor wrote for a 7-2 Court to resolve a circuit split by reconciling deportation for an aggravated felony conviction under the Immigration and Nationality Act subject to the Controlled Substances Act's definition of aggravated felony with a state law conviction. The justification rested on the quantity in possession of the offender with regard to the understood meanings of statutorily defined terms. The Court decided that a state statute that criminalizes conduct that the Controlled Substances Act treats as a misdemeanor cannot be a deportable offense under the Immigration and Nationality Act.

Copyright

Under section 106 of the Copyright Act, the owner of a copyrighted work enjoys certain, enumerated exclusive rights, including the right to transfer ownership to the public by way of a sale. These exclusive rights are limited by section 109, better known as the "first sale" doctrine, which provides that a lawful owner of such a work has the right to dispose of that copy without the authority of the copyright owner. At issue in *Kirtsaeng v. John Wiley & Sons, Inc.* (11-697) was section 602(a)(1) of the Copyright Act, the "importation" provision, which states that a work lawfully acquired outside of the United States and then imported into the United States, without the authority of the copyright holder, infringes on the copyright holder's exclusive rights to distribute copies of the work.

In a 1998 decision, *Quality King Distributors v. L'anza Research Int'l, Inc.*, 523 U.S. 135, the Court held that copies of a work manufactured in the United States, then sold and purchased abroad, can later be brought back into the United States without infringing upon the rights of the copyright holder. In *Kirtsaeng*, the Court focused on the phrase "lawfully made under this title" within Section 109, and its applicability with respect to the importation provision, to decide if the first sale doctrine applies where copies of a work are made and sold abroad, and then later imported into the United States. Justice Breyer, writing for the majority, employed a non-geographical interpretation of the phrase "lawfully made under this title" held that the first sale doctrine applies to copyrighted works lawfully made abroad.

Justice Kagan filed a concurring opinion, joined by Justice Alito, and agreed that the Court was right to not remove first-sale protection from copies of protected works manufactured abroad. Kagan went on to explain that the problem lies with the *Quality King* holding because it effectively removed from the purview of the importation ban any copies receiving first-sale protection.

Justice Ginsburg dissented, joined by Justices Kennedy and Scalia, to explain that the Court ignored, altogether, a trusted meaning of the word "under," which, when considering the meaning of the phrase "lawfully made under this title," would crumble the foundation of the majority's reasoning. ⊙

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