

SUPREME COURT REVIEW

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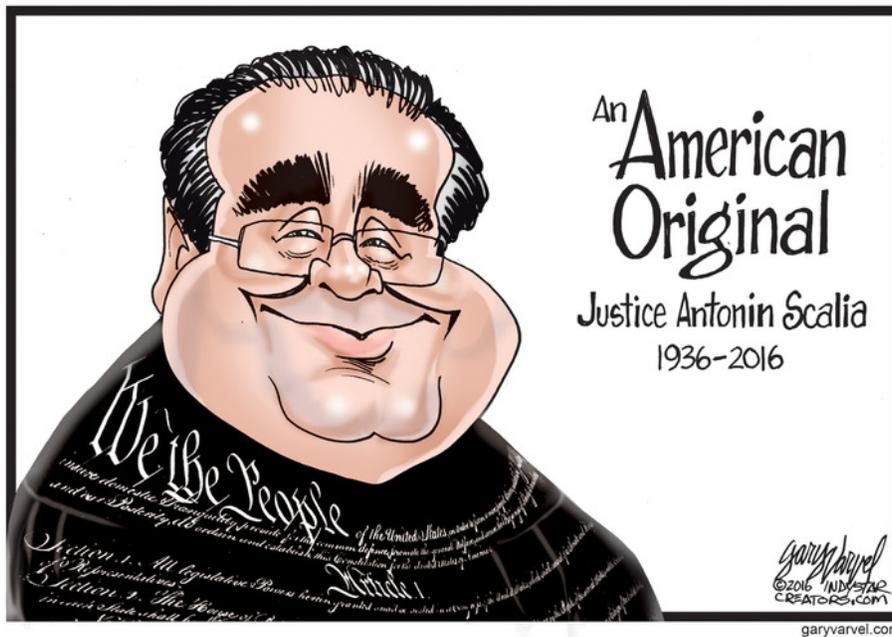
June 30, 2016

Featured Speaker: Professor Paul Bender

SIGNIFICANT DEVELOPMENTS IN THE OCTOBER 2015 TERM

Antonin Scalia, 1936-2016

Justice Scalia died suddenly on February 13, 2016. At 79, he was not the Court's oldest member nor was he thought to be the least healthy, though reports after his death indicated that he suffered from a heart condition and high blood pressure. Assessments of his time on the Court have been mixed. To conservatives he was a rock star. As some commentators observed, Justice Scalia "championed the right's view of gun rights, abortion, campaign finance, voting rights, gay rights, capital punishment, gender equality, racial equality, access to justice, separation of church and state, and federalism." Liberals were not so enamored of Scalia. Citing the close alignment of Scalia's conservative policy preferences with his judicial votes, and the scathing rhetoric in his opinions, some questioned the sincerity and virtues of Scalia's originalist and textualist methods.



After Scalia

Immediately after Scalia's death, Senate Majority Leader Mitch McConnell announced that the Senate would not consider any nomination to fill the vacancy on the Court until a new President is

elected. Unfazed, President Obama nominated Merrick Garland, Chief Judge of the D.C. Circuit Court of Appeals, to fill the vacancy. A number of senators from both parties have met with Garland, but the Republican-controlled Senate has refused to hold hearings on his nomination. Meanwhile, the Supreme Court completed its term with eight justices. Some observers thought, at least initially, that the eight-person Court functioned reasonably well as the justices seemed to find narrow grounds on which to decide some cases. But 4-4 deadlocks and the inability to reach a majority in other cases led many to conclude that an eight-person Court is dysfunctional.

By the Numbers

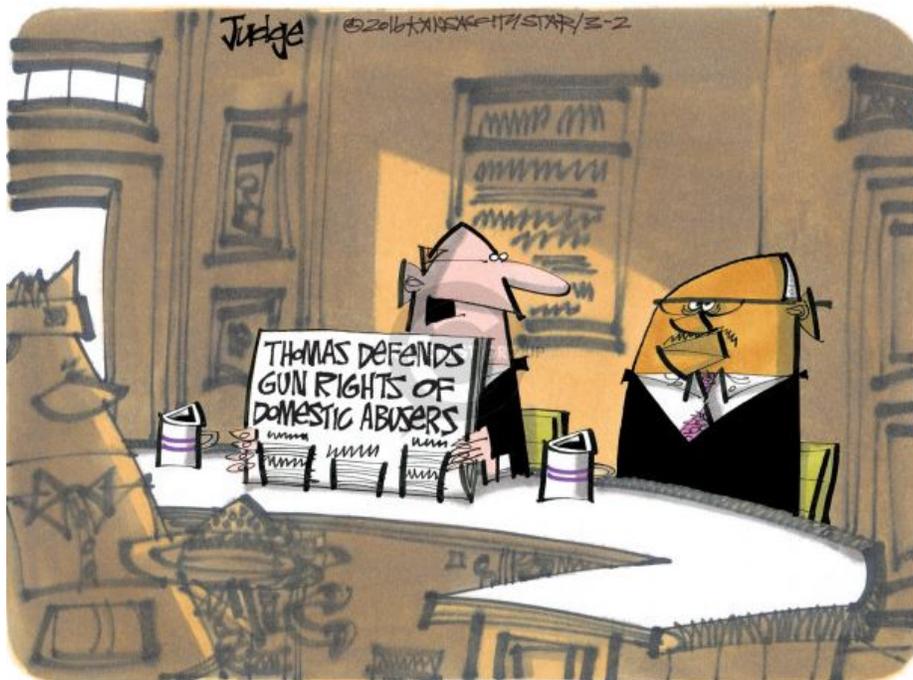
The Court decided 68 cases this term. Most of the decisions came after Justice Scalia's death when the Court was down to eight members. The total includes the four cases in which the judgment under review was "affirmed by an equally divided court," which for all practical purposes is the same as if the Court had not heard the case at all. Overall, the Court reversed in approximately two-thirds of its cases while affirming one-third. Of the cases from the Ninth Circuit, the Court reversed eight and affirmed two. Of the state court decisions it reviewed, the Court reversed 17 and affirmed only three. The Court issued unanimous decisions in 38 cases.

Swing Justice?

In recent years, with the Court fairly evenly divided between conservatives and liberals, Justice Anthony Kennedy was often been viewed as the "swing justice"—the one whose vote could swing a close decision one way or the other. This term, with the Court at eight justices most of the time and fewer close cases, Kennedy rarely controlled the swing vote. Even so, he played a key role in two of the most closely watched cases. In both the affirmative-action case and the abortion case, Justice Kennedy's vote made the difference in obtaining a majority.

Justice Thomas Speaks

In late February, the Court heard argument in *Voisine v. United States*, which involved the interpretation of a federal statute banning possession of a gun under certain conditions. Facing a quiet bench, the government's attorney said, "If there are no further questions," and was about to sit down when Justice Clarence Thomas announced that he had "one question." His one question turned into nine, all relating to the Second Amendment even though the Court had denied certiorari on constitutional issues and granted review only on the statutory question.



"THEN AGAIN, MAYBE IT'S BETTER IF YOU **DON'T** SPEAK."

Recent Books About the Supreme Court and Constitution

Michael J. Graetz & Linda Greenhouse, *The Burger Court and the Rise of the Judicial Right* (2016)

<http://books.simonandschuster.com/The-Burger-Court-and-the-Rise-of-the-Judicial-Right/Michael-J-Graetz/9781476732503>

Jeffrey Rosen, *Louis D. Brandeis: American Prophet* (2016)

<http://yalebooks.com/book/9780300158670/louis-d-brandeis>

Robert J. McWhirter, *Bills, Quills, and Stills: An Annotated, Illustrated, and Illuminated History of the Bill of Rights* (2015)

https://www.amazon.com/Bills-Quills-Stills-Illustrated-Illuminated/dp/1614383804/ref=sr_1_3?s=books&ie=UTF8&qid=1466797726&sr=1-3&keywords=robert+j+mcwhirter

Stephen Breyer, *The Court and the World: American Law and the New Global Realities* (2015)

<http://www.penguinrandomhouse.com/books/253016/the-court-and-the-world-by-stephen-breyer/9781101946190/>

Iris Carmon & Shana Knizhnik, *Notorious RBG: The Life and Times of Ruth Bader Ginsburg* (2015)

<http://www.barnesandnoble.com/w/notorious-rbg-irin-carmon/1121228374?ean=9780062415837>

Stephen Gottlieb, *Unfit for Democracy: The Roberts Court and the Breakdown of American Politics* (2016)

<https://www.amazon.com/Unfit-Democracy-Breakdown-American-Politics/dp/0814732429>

Susan-Mary Grant, *Oliver Wendell Holmes, Jr.: Civil War Soldier, Supreme Court Justice* (2015)

<http://www.barnesandnoble.com/w/oliver-wendell-holmes-jr-susan-mary-grant/1121016082?ean=9781135133375>

Richard Hasen, *Plutocrats United: Campaign Money, the Supreme Court, and the Distortion of American Elections* (2016)

<http://yalebooks.com/book/9780300212457/plutocrats-united>

Wil Haygood, *Showdown: Thurgood Marshall and the Supreme Court Nomination That Changed America* (2015)
<http://www.penguinrandomhouse.com/books/215001/showdown-by-wil-haygood/9780307957191/>

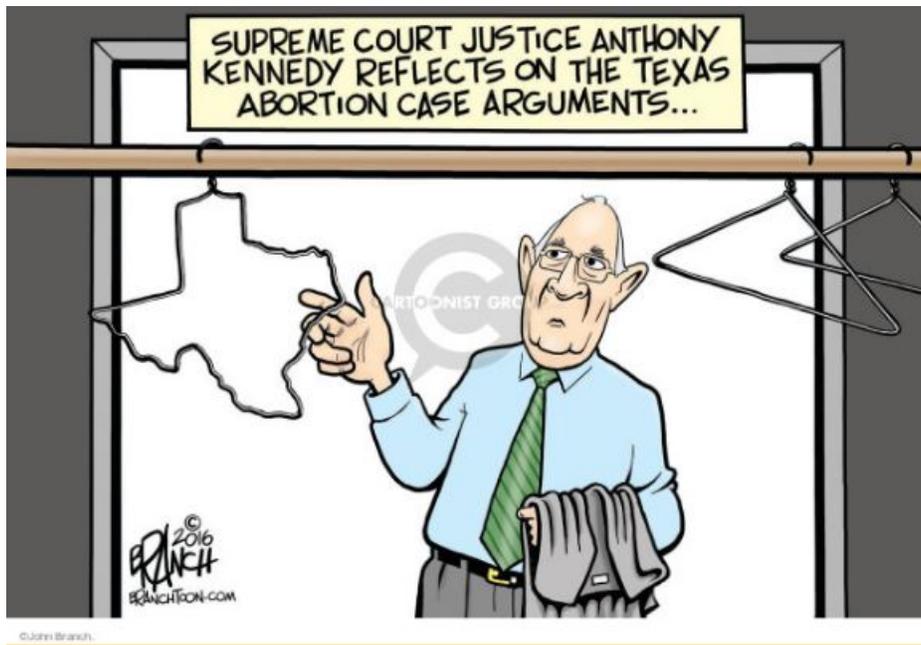
Linda Hirshman, *Sisters in Law: How Sandra Day O'Connor and Ruth Bader Ginsburg Went to the Supreme Court and Changed the World* (2015)
<https://www.harpercollins.com/9780062238481/sisters-in-law>

Christopher Smith, *John Paul Stevens: Defender of Rights in Criminal Justice* (2015)
https://www.amazon.com/John-Paul-Stevens-Defender-Criminal/dp/1498523730?ie=UTF8&keywords=John%20Paul%20Stevens&qid=1438088636&ref=sr_1_5&s=books&sr=1-5

Melvin Urofsky, *Dissent and the Supreme Court: Its Role in the Court's History and the Nation's Constitutional Dialogue* (2015)
<http://www.penguinrandomhouse.com/books/205141/dissent-and-the-supreme-court-by-melvin-i-urofsky/9780307379405/>

INDIVIDUAL RIGHTS, POLITICS, AND CIVIL RIGHTS ACTIONS

Abortion – In 2013, Texas passed a law imposing major restrictions on abortion clinics, ostensibly to protect women's health. One provision of the law required clinics to have facilities comparable to outpatient surgical centers, and another provision required abortion doctors to have hospital admitting privileges. Before the law, Texas had 41 abortion providers. Now the state has 19, and if the law is allowed to take full effect, 10 more will close. The remaining nine would be in major cities (Austin, Dallas, Fort Worth, Houston, and San Antonio), far from women living near the border or in rural west Texas. Do these provisions constitute an undue burden on the right to an abortion? *Whole Woman's Health v. Hellerstedt*.



Affirmative Action – In 2008, Abigail Fisher applied for admission to the University of Texas at Austin but was denied. She believed she was turned down solely because she is white, so she filed suit challenging what she thought was a flawed, race-based admissions policy. In making undergraduate admissions decisions, the university uses a “holistic” plan that examines all of the contributions that each individual freshman applicant might bring

to campus, including race. In *Fisher v. University of Texas*, the Court held that the university's use of racial preferences does not violate equal protection.

Legislative Redistricting – For purposes of redistricting in state and local elections, do states need to count all the people who live in the districts or just eligible voters? Like most states, Texas complies with the “one person, one vote” rule by counting everyone. In *Evenwel v. Abbot*, a unanimous Court held that a state or locality may draw its legislative districts based on total population, though the Court stopped short of saying that they were required to do so.

Redistricting/Partisan Gerrymandering – A group of voters challenged the redistricting map drawn by Arizona's Independent Redistricting Commission, arguing that it did not distribute Arizona residents evenly among the state legislative districts. The challenger claimed that the map benefited Democrats by placing too many people in some Republican districts while putting too few people in some Democratic districts. In *Harris v. Arizona Independent Redistricting Commission*, the Court unanimously upheld the map. Writing for the Court, Justice Breyer explained that the Constitution requires states to try to distribute residents evenly among legislative districts, but it “does not demand mathematical perfection.”

First Amendment/Public Sector Unions – In *Friedrichs v. California Teachers Association*, the Court granted review to consider whether public employees who are not members but are represented by unions may be required to pay “fair share fees” to the union. The Court had previously given its blessing to the practice in 1977 case called *Abood v. Detroit Board of Education*. The Court heard argument on the case in January and by all accounts the Court's conservatives appeared ready to overrule *Abood*. But before the Court issued a decision, Justice Scalia died. Consequently, the Ninth Circuit's judgment upholding fair share fees based on *Abood* was “affirmed by an equally divided court.”

Second Amendment/Gun Control – In *Caetano v. Massachusetts*, the Court issued a unanimous, two-page per curiam opinion vacating a decision of the Supreme Judicial Court of Massachusetts which held that stun guns are not protected by the Second Amendment. The Court did not address the extent to which stun guns may be regulated. Also during this term, the Court denied petitions to review gun bans enacted in Illinois, New York, and Connecticut.

First Amendment/Political Association – Heffernan, who worked for the city police department, picked up a lawn sign supporting a candidate running for mayor. Heffernan did not himself support the candidate but was only picking up the sign as a favor for his bedridden mother. He was seen with the sign by a member of the incumbent mayor's security detail, and the next day Heffernan was demoted from detective to patrol officer. He filed suit claiming that the demotion violated his First Amendment rights to freedom of speech and association. In *Heffernan v. City of Paterson*, the Court held that a government employer violates the First Amendment when it discharges or demotes an employee for engaging in political activity, even if the employer's actions are based on a factual mistake about the employee's behavior. 6-2 decision.

Gay Rights – In a brief per curiam opinion, the Court held that the Alabama Supreme Court erred by denying full faith and credit to a judgment by a Georgia court making a woman the legal parent of children she had raised since birth with her lesbian partner. The unanimous decision in *V.L. v. E.L.* restored the woman's right to be a mother.

Standing – Several cases raised issues about the standing of parties to sue but the Court's decisions provided little clarity on the subject. In a closely watched business case, an individual brought suit against the people-search website Spokeo claiming its profile of him was inaccurate. Spokeo contended that he suffered no real harm and should not be allowed to sue. In *Spokeo, Inc. v. Robins*, the Court ruled 6-2 that the Ninth Circuit did not properly analyze the standing issue but did not say much more beyond reiterating

that a plaintiff must have a concrete injury. Some observers thought that the challenge to the immigration program and the affirmative action case also presented substantial questions about standing but the Court did not address standing in either of those cases.

GOVERNMENTAL POWERS AND IMMUNITY

Immigration/Executive Power – In November 2014, the Obama administration announced a plan that would allow some undocumented immigrants to stay in the country for three years. This deferred action program known by the acronym DAPA never went into effect because Texas, joined by 26 other states, filed suit to stop it. A U.S. District Court judge in Brownsville, Texas, granted an injunction halting the program, and a divided Fifth Circuit affirmed. The case presented several issues: (1) did Texas and the other states have standing to sue the federal government to challenge how it enforces a federal law, (2) did the executive branch exceed its powers in relation to federal immigration laws, (3) was the deferred action plan illegal under the law because the general public was not given a chance to react before the program was announced, (4) did President Obama “take care to faithfully execute” the existing immigration laws? The Court decided none of these questions, as the judgment was merely “affirmed by an equally divided court.” *United States v. Texas*.

Obamacare – The regulations implementing the Affordable Care Act generally mandate employers that provide health insurance to their employees to provide plans that include contraception coverage with zero deductibles. An exemption is available to religious non-profits that oppose covering some or all of the contraceptive services on religious grounds. A non-profit may invoke the exemption and opt out of the contraception-coverage requirement by self-certifying its eligibility on a form provided by the Department of Labor or by notifying the Department of Health and Human Services in writing. Some non-profits challenged this regulatory accommodation, contending that the structure of the opt-out is a substantial burden on their religious liberty. After oral argument, the Court asked for supplemental briefing on the question of how religious non-profits could be spared from any role in providing birth control services to their employees even while assuring that those services are available. Then, without deciding any of the legal questions raised, the Court issued an order remanding the cases to lower courts to issue new rulings. *Zubik v. Burwell*.

Indian Law/Sovereignty – Dollar General operates a store on the Choctaw reservation in Mississippi. The store’s manager allegedly molested a thirteen-year-old tribal member who was interning at the store as part of a youth job training program. The child and his parents brought suit against the store and its manager in tribal court, contending the store was liable for the manager’s conduct. Dollar General then filed suit in U.S. District Court to enjoin the boy and others from adjudicating tort claims against it in tribal court. Do tribal courts have jurisdiction over defendants, like Dollar General, who are not members of the tribe? The district court and the Fifth Circuit both said yes. The Supreme Court “affirmed by an equally divided court.” *Dollar General Corp. v. Mississippi Band of Choctaw Indians*.

Sovereign Immunity – Gilbert Hyatt invented the microprocessor chip, obtained a patent on it, and made a lot of money from his interest in the chip. In the 1990s, he moved from California to Nevada to take advantage of lower tax rates, though he continued to live part of the year in California. California’s taxing agency audited Hyatt’s tax return and concluded that he owed about \$10 million in unpaid taxes. Hyatt thought the tax board’s auditing techniques were aggressive and intrusive, so he filed suit against the board in Nevada state court and obtained a \$490 million verdict, though a state appeals court took away much of that victory and ordered a new trial on damages. The California tax board argued that: (1) it was immune from suit in Nevada courts, and that a 1979 case holding that a state may be sued in another state’s courts should be overruled; and (2) in any event, the Nevada courts were required to give the tax board the same treatment that a Nevada state agency would receive in Nevada courts (meaning a cap on damages). The Supreme Court deadlocked 4-4 on the sovereign immunity issue, but held by a 6-2 vote that the Full Faith and Credit Clause does not permit Nevada to apply a rule of Nevada law that awards damages against California that are greater than it could award against Nevada in similar circumstances. *Franchise Tax Board of California v. Hyatt*.

Environmental Law – The Court issued several noteworthy decisions relating to the environment. In *Federal Energy Regulatory Commission v. Electric Power Supply*, the Court upheld (by a 6-2 vote) a demand-response rule requiring that power users be paid for committing to scale back electricity use at times of peak demand. In *CPV Maryland v. Talen Energy Marketing*, the Court ruled unanimously that a controversial program to boost power production was illegal because it was preempted by federal law. In *U.S. Army Corps of Engineers v. Hawkes Co.*, the Court held that landowners could challenge Corps decisions on what is a federally protected wetland without first having to apply for or obtain a permit from the Corps to dredge and fill in wetlands. In *Sturgeon v. Frost*, the Court vacated a Ninth Circuit judgment allowing the National Park Service to ban an Alaskan moose hunter from riding his hovercraft in a national preserve, but the Court punted on most of the case’s complicated legal questions. Also, shortly before Justice Scalia’s death, the Court surprisingly issued a stay of the EPA’s Clean Power Plan, the Obama administration’s most ambitious effort to control greenhouse gas emissions. The vote was 5-4 along ideological lines. The order halting the Clean Power Plan was not a decision on the merits but it blocks the plan while legal challenges are pending in lower courts. The ultimate fate of the landmark climate regulation could depend on Scalia’s replacement.

Public Corruption – Former Virginia governor Bob McDonnell was convicted for violating federal laws that make it a felony to take “official action” in exchange for money, campaign contributions, or anything else of value. The Court unanimously overturned the convictions, holding that a political-corruption requires proof that a government official took formal action; political favors such as arranging meetings are not enough. *McDonnell v. United States*.

CRIMINAL LAW AND PROCEDURE

Fourth Amendment/Exclusionary Rule – After receiving an anonymous tip that a particular house was being used to sell narcotics, police watched the house on and off over the next week. The detective saw some short-term foot traffic in and out of the house but nothing really suspicious. He decided to stop the next person who left the house and ask him some questions. This turned out to be Strieff. The detective stopped him, asked for his ID, and had dispatch run a warrant check, which showed there was a “small traffic warrant” out for Strieff. The detective arrested Strieff on the warrant, searched him, and found meth and drug paraphernalia in his pockets. Strieff was charged with drug-related offenses, and he moved to suppress the evidence obtained during the search. Generally, when police illegally stop an individual on the street without reasonable suspicion, any fruits of the stop (such as the discovery of drugs) must be excluded. The State conceded that the initial stop was illegal, but argued that the exclusionary rule should not apply because the discovery of the warrant broke the chain of causation between the constitutional violation and the discovery of evidence. In *Utah v. Strieff*, the Court agreed with the State and held that the evidence was admissible. 5-3 vote (Breyer joined with the conservatives), prompting a dissent by Justice Sotomayor that has been described as “extraordinary for its breadth and intensity.”

Fourth Amendment/Drunk Drivers – Twelve states impose criminal penalties on suspected drunk drivers who refuse to submit to testing to measure their blood-alcohol levels. Do those penalties violate the Fourth Amendment, which only allows police to search someone if they have a warrant or one of the exceptions to the warrant requirement applies? In *Birchfield v. North Dakota*, the Court held, by a 7-1 vote (Thomas dissenting), that the Fourth Amendment permits warrantless *breath* tests but not warrantless *blood* tests.

Raced-Based Jury Strikes – In 1987, a young black man, Timothy Foster, went on trial for the murder of an elderly white woman. During jury selection, the prosecution used peremptory challenges to strike all four black prospective jurors qualified to serve on the jury. Foster was convicted by an all-white jury. Decades later, he obtained the prosecutor's notes through an open-records request and learned that the prosecutor had marked in green highlighter the name of every black person in the jury pool and written a "B" next to their names. Foster initiated a state habeas proceeding to challenge the validity of his conviction, contending that the prosecution's use of peremptory strikes was racially motivated in violation of *Batson v. Kentucky*. The state court denied relief, finding that Foster had not shown purposeful discrimination. In *Foster v. Chatman*, the Supreme Court reversed, concluding that the state court's determination was clearly erroneous. 7-1 vote (Thomas dissenting).

Capital Sentencing – Four notable cases: In *Hurst v. Florida*, the Court held that Florida's capital-sentencing scheme, in which a jury renders an advisory sentence but a judge must independently weigh the aggravating and mitigating factors before entering a sentence, violates the Sixth Amendment. In *Kansas v. Carr*, the Court held that the Eighth Amendment does not require capital-sentencing courts to instruct a jury that mitigating factors need not be proved beyond a reasonable doubt. In *Williams v. Pennsylvania*, the Court held that under the Due Process Clause, there is an impermissible risk of actual bias when a judge earlier had significant personal involvement as a prosecutor in the defendant's case. In *Lynch v. Arizona*, the Court held that when the state has put the defendant's future dangerousness at issue and acknowledged that the only possible sentences besides death is life without parole, the defendant has the right to inform the jury of that fact.

Speedy Trial – The Court held that the Sixth Amendment's speedy trial guarantee does not apply to sentencing. *Betterman v. Montana*.

Right to Counsel of Choice – The Court held that the pretrial freeze of a criminal defendant’s legitimate, untainted assets violates the Sixth Amendment right to counsel of choice. *Luis v. United States*.

Firearms Possession – Two individuals were charged with violating a federal law that prohibits the possession of firearms and ammunition by individuals who have previously been convicted of a misdemeanor crime of domestic violence. Several years earlier, the individuals had both pleaded guilty to misdemeanor assaults on their respective domestic partners, but they argued that their prior state convictions did not automatically qualify as misdemeanor crimes of domestic violence because the state-law provisions could be violated by conduct that is merely reckless rather than intentional. By a 6-2 vote, the Court rejected their argument and upheld their convictions on the federal charge. *Voisine v. United States*.

Paul Bender

Professor of Law Dean Emeritus

Paul Bender teaches courses on U.S. and Arizona constitutional law. He has written extensively about constitutional law, intellectual property and Indian law, and is coauthor of the two-volume casebook/treatise, *Political and Civil Rights in the United States*. Professor Bender has argued more than 20 cases before the U.S. Supreme Court, and actively participates in constitutional litigation in federal and state courts.

Professor Bender served as Dean of the College of Law from 1984-1989, during which time he was instrumental in starting its Indian Legal Program. Prior to joining the College faculty, he was law clerk to 2nd U.S. Circuit Court of Appeals Judge Learned Hand and to U.S. Supreme Court Justice Felix Frankfurter, and spent 24 years as a faculty member at the University of Pennsylvania Law School. Professor Bender served as Principal Deputy Solicitor General of the United States from 1993-1997, with responsibility for Supreme Court and federal appellate litigation in the areas of civil rights, race and sex discrimination, freedom of speech and religion, and tort claims against the federal government.

Professor Bender has served as a member of the Hopi Tribe's Court of Appeals, and is currently Chief Justice of the Fort McDowell Nation Supreme Court, and the San Carlos Apache Court of Appeals.