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# Supreme Court October Term 2018: A Review of Selected Major Rulings

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SUMMARY

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# Supreme Court October Term 2018: A Review of Selected Major Rulings

The Supreme Court term that began on October 1, 2018, was a term of transition, with the Court issuing a number of rulings that, at times, suggested but did not fully adopt broader transformations in its jurisprudence. The term followed the retirement of Justice Kennedy, who was a critical vote on the Court for much of his 30-year tenure and who had been widely viewed as the Court's median or "swing" Justice. As a result, the question looming over the October 2018 Term was how the replacement of Justice Kennedy with Justice Kavanaugh would alter the Court's jurisprudence going forward.

Notwithstanding the alteration in the Court's makeup, observers have generally agreed that the October 2018 Term largely did not produce broad changes to the Court's jurisprudence. Although a number of cases presented the Court with the opportunity to rethink various areas of law, the Court largely declined those invitations. In other cases, a majority of the Justices did not resolve potentially far-reaching questions, resulting in the Court either issuing more narrow rulings or simply not issuing an opinion in a given case. Nonetheless, much of the low-key nature of the October 2018 Term was a product of the Court's decisions to not hear certain matters. And for a number of closely watched cases that it did agree to hear, the Court opted to schedule arguments for the next term.

While the Supreme Court's latest term generally did not result in wholesale changes to the law, its rulings were nonetheless important, in large part, because they provide insight into how the Court may function following Justice Kennedy's retirement. For the fourth straight year at the Court, the number of opinions decided by a bare majority increased, with 29% of the Court's decisions being issued by a five-Justice majority. While a number of decisions saw the Court divided along what are perceived to be the typical ideological lines, the bulk of the Court's closely divided cases involved heterodox lineups in which Justices with divergent judicial philosophies joined to form a majority in a given case. Collectively, the voting patterns of the October 2018 Term have led some commentators to suggest that the Court has transformed from an institution that was largely defined by the vote of Justice Kennedy to one in which multiple Justices are now perceived to be the Court's swing votes.

Beyond the general dynamics of the October 2018 Term, the Court issued a number of opinions of importance for Congress. Of particular note are five opinions from the October Term 2018: (1) *Kisor v. Wilkie*, which considered the continued viability of the Auer-Seminole Rock doctrine governing judicial deference to an agency's interpretation of its own ambiguous regulation; (2) *Department of Commerce v. New York*, a challenge to the addition of a citizenship question to the 2020 census questionnaire; (3) *Rucho v. Common Cause*, which considered whether federal courts have jurisdiction to adjudicate claims of excessive partisanship in drawing electoral districts; (4) *American Legion v. American Humanist Association*, a challenge to the constitutionality of a state's display of a Latin cross as a World War I memorial; and (5) *Gundy v. United States*, which considered the scope of the long-dormant nondelegation doctrine.

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The Supreme Court term that began on October 1, 2018,[1] was a term of transition, with the Court issuing a number of rulings that, at times, signaled but did not fully adopt broader transformations in its jurisprudence. The term followed the retirement of Justice Kennedy,[2] who was a critical vote on the Court for much of his 30-year tenure and who had been widely viewed as the Court's median or "swing" Justice.[3] In nine out of the last 12 terms of the Roberts Court, he voted for the winning side in a case more often than any of his colleagues.[4] Justice Brett Kavanaugh replaced Justice Kennedy one week into the October 2018 Term.[5] The Court's newest member had served on the U.S. Court of Appeals for the District of Columbia (D.C. Circuit)[6] for over a decade before his elevation to the Supreme Court.[7] Empirical evidence suggests the Court can change with the retirement and replacement of one its members.[8] As a result, the question looming over the October 2018 Term was how Justice Kennedy's departure and Justice Kavanaugh's arrival would alter the Court's jurisprudence going forward. Indeed, one member of the Court, Justice Ruth Bader Ginsburg, predicted Justice Kennedy's retirement to be "the event of greatest consequence for the current Term, and perhaps for many Terms ahead."[9]

Notwithstanding the alteration in the Court's makeup, observers have generally agreed that the October 2018 Term largely did not produce broad changes to the Court's jurisprudence.[10] Although a number of cases presented the Court with the opportunity to rethink various areas of law, the Court largely declined those invitations. For instance, the Court in *Gamble v. United States* opted not to overrule a 170-year old doctrine concerning the reach of the Double Jeopardy Clause of the Fifth Amendment.[11] In other cases, a majority of the Justices did not resolve

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[1] *See* J. OF THE SUPREME COURT OF THE UNITED STATES 1 (Oct. 1, 2018), https://www.supremecourt.gov/orders/journal/Jnl18.pdf.

[2] *See Kennedy, Anthony M.*, BIOGRAPHICAL DIRECTORY OF FEDERAL JUDGES, FED. JUDICIAL CTR., https://www.fjc.gov/history/judges/kennedy-anthony-mcleod (last visited Aug. 21, 2019) (indicating that Justice Kennedy assumed senior status on July 31, 2018).

[3] *See* CRS Report R45256, *Justice Anthony Kennedy: His Jurisprudence and the Future of the Court*, by Andrew Nolan, Kevin M. Lewis, and Valerie C. Brannon, at 1-2.

[4] *See* CRS Legal Sidebar LSB10159, *Justice Kennedy Retires: Initial Considerations for Congress*, by Andrew Nolan and Michael John Garcia (noting that, save for the October 2017, 2014, and 2007 terms, Justice Kennedy was the most frequent Justice to be part of the deciding majority in cases decided each term by the Roberts Court).

[5] *See* SUPREME COURT NOMINATIONS, PRESENT-1789, U.S. SENATE, https://www.senate.gov/pagelayout/reference/nominations/Nominations.htm (last visited Aug. 21, 2019) (indicating that the Senate confirmed Justice Kavanaugh on October 6, 2018).

[6] This report references a significant number of decisions by federal appellate courts of various regional circuits. For purposes of brevity, references to a particular circuit in the body of this report (e.g., the D.C. Circuit) refer to the U.S. Court of Appeals for that particular circuit.

[7] *Kavanaugh, Brett M.*, BIOGRAPHICAL DIRECTORY OF FEDERAL JUDGES, FED. JUDICIAL CTR., https://www.fjc.gov/history/judges/kavanaugh-brett-m (last visited Aug. 21, 2019).

[8] *See* Nolan, Lewis, & Brannon, *supra* note 3, at 30 (discussing the jurisprudential effects of the retirements of Justices Lewis Powell and Sandra Day O'Connor).

[9] Hon. Ruth Bader Ginsburg, *Remarks for the Second Circuit Judicial Conference*, (June 7, 2019), https://www.supremecourt.gov/publicinfo/speeches/RBG%202019%20Second%20Circuit%20Judicial%20Conference%20Remarks%20June%207%202019.pdf.

[10] *See, e.g.*, Mark Sherman and Jessica Gresko, *Roberts' Supreme Court Defies Easy Political Labels,* ASSOC. PRESS (June 29, 2019), https://www.apnews.com/222dd32b7609458f98a811cb00c44848 (noting the "lack of high-profile cases" before the Court); Henry Glass, *In the Shadows: Supreme Court's Offstage Moves May Matter More,* CHRISTIAN SCIENCE MONITOR (July 2, 2019), https://www.csmonitor.com/USA/Justice/2019/0702/In-the-shadows-Supreme-Court-s-offstage-moves-may-matter-more (maintaining that "the past term has been relatively quiet on merits cases").

[11] Gamble v. United States, 139 S. Ct. 1960, 1964 (2019).

potentially far-reaching questions, resulting in the Court either issuing more narrow rulings[12] or simply not issuing an opinion in a given case.[13] Nonetheless, much of the low-key nature of the October 2018 Term was a product of the Court's decisions to *not hear* certain matters. For instance, save for a three-page, per curiam opinion upholding an Indiana law regulating the disposal of fetal remains,[14] the Court refrained from hearing cases touching on the subject of abortion during the October 2018 Term.[15] The Court also declined to review cases addressing a number of other high-profile matters, including a challenge to the federal ban on bumpstocks,[16] a dispute over whether business owners can decline on religious grounds to provide services for same-sex weddings,[17] a case concerning President Trump's authority to impose tariffs on imported steel,[18] and a challenge to the continued detainment of enemy combatants at Guantanamo Bay.[19] And for a number of closely watched cases it *did agree* to hear, the Court opted to schedule arguments for the October 2019 Term, including several cases concerning whether federal law prohibits employers from discriminating on the basis of sexual orientation or gender identity[20] and the lawfulness of the Department of Homeland Security's decision to wind down the Deferred Action for Childhood Arrivals (DACA) policy.[21]

While the Supreme Court's latest term generally did not result in wholesale changes to the law, its rulings were nonetheless important, in large part, because they may provide insight into how the Court will function following Justice Kennedy's retirement. For the fourth straight year at the Court, the number of opinions decided by a bare majority increased, with 29% of the Court's decisions being issued by a five-Justice majority.[22]

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[12] *See, e.g.,* Gundy v. United States, 139 S. Ct. 2116, 2131 (2019) (Alito, J., concurring) (declining to join a dissent that wholly reconsidered the Court's modern approach toward the nondelegation doctrine it has used "for the past 84 years" because the Court lacked a fifth vote for the dissent's view).

[13] *See, e.g.,* Carpenter v. Murphy, 139 S. Ct. 626 (2018) (asking for supplemental briefing prior to restoring the case for reargument for the October 2019 Term).

[14] *See* Box v. Planned Parenthood of Ind. & Ky., Inc., 139 S. Ct. 1780, 1781-82 (2019) (upholding an Indiana law regulating the disposition of fetal remains by abortion providers, while noting that the case did "not implicate our cases applying the undue burden test to abortion regulations").

[15] *See id.* at 1782 (declining to hear an appeal of lower court decision invalidating an Indiana law prohibiting the "knowing provision of sex-, race-, and disability selective abortions by abortion providers"); *see also* Harris v. W. Ala. Women's Ctr., 139 S. Ct. 2606, 2606 (2019) (declining a petition for a writ of certiorari to consider the constitutionality of an Alabama law criminalizing a particular abortion procedure during the second trimester of a pregnancy); *cf.* Gee v. Planned Parenthood of Gulf Coast, Inc., 139 S. Ct. 408, 408 (2018) (denying a request asking the Court to decide whether Medicaid recipients have a private right of action to challenge a state's determination as to who is a "qualified" provider under the Medicaid Act, so that recipients could challenge a state's decision to deny Medicaid funds to Planned Parenthood).

[16] *See* Guedes v. BATFE, 139 S. Ct. 1474, 1474 (2019).

[17] *See* Klein v. Oregon Bureau of Labor & Indus., No. 18-547, 2019 WL 2493912, at *1 (U.S. June 17, 2019); *see also* CRS Legal Sidebar LSB10311, *Supreme Court Vacates Another Opinion Applying Antidiscrimination Laws to Religious Objectors*, by Valerie C. Brannon.

[18] *See* Am. Inst. for Int'l Steel, Inc. v. United States, No. 18-1317, 2019 WL 1674342, at *1 (U.S. June 24, 2019).

[19] *See* Al-Alwi v. Trump, 139 S. Ct. 1893, 1893 (2019).

[20] *See* Bostock v. Clayton Cty., Ga., 139 S. Ct. 1599 (2019) (following the filing of a petition for certiorari in May 2018, granting certiorari in April 2019 and consolidating the case with *Altitude Exp., Inc. v. Zarda* and *R.G. & G.R. Harris Funeral Homes, Inc. v. E.E.O.C.*).

[21] *See* Dep't of Homeland Sec. v. Regents of the Univ. of California, No. 18-587, 2019 WL 2649834, at *1 (U.S. June 28, 2019) (following the filing of a petition for certiorari in November 2018, granting certiorari in June 2019 and consolidating the case with *Trump v. NAACP* and *McAleenan v. Vidal*).

[22] *See* ADAM FELDMAN, SCOTUSBLOG, FINAL STAT PACK FOR OCTOBER TERM 2018 19 (Jun. 28, 2019, 5:59 PM), https://www.scotusblog.com/wp-content/uploads/2019/07/StatPack_OT18-7_30_19.pdf. This count includes cases such

Some of these decisions saw the Court divided along what are perceived to be the typical ideological lines, with Justices appointed by Republican presidents on one side and those appointed by Democrats on the other.[23] These 5-4 splits occurred in several appeals concerning the death penalty[24] and in three cases where the Court expressly or implicitly overturned several of the Court's previous precedents regarding sovereign immunity,[25] property rights,[26] and redistricting.[27]

Nonetheless, such divisions proved to be the exception rather than the rule in closely divided cases during the last term. Of the 21 cases decided by a single vote, seven cases saw 5-4 splits between what have been viewed to be the conservative and liberal voting blocs on the Court.[28] Instead, the October 2018 Term witnessed a number of heterodox lineups at the Court. For instance, Justice Kavanaugh joined the perceived liberal wing of the Court in a major antitrust dispute,[29] and Justice Gorsuch voted with that same voting bloc in several cases involving Indian[30] and criminal law.[31] Justice Breyer joined the more conservative wing of the Court in the term's biggest Fourth Amendment case.[32] And, as discussed in more detail below, in cases concerning the inclusion of a citizenship question on the 2020 Census questionnaire[33] and judicial

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as *Gundy v. United States*, 139 S. Ct. 2116 (2019), that were rendered by an eight-member Court.

[23] *See id.*

[24] *See, e.g.*, Bucklew v. Precythe, 139 S. Ct. 1112, 1116 (2019) (rejecting by a 5-4 vote petitioner's Eighth Amendment challenge to the method of his execution); Dunn v. Ray, 139 S. Ct. 661, 661 (2019) (rejecting by a 5-4 vote a petitioner's request to stay his execution on the grounds that the prison refused to allow a Muslim imam to be at his side during the execution).

[25] *See* Franchise Tax Bd. of Cal. v. Hyatt, 139 S. Ct. 1485, 1490 (2019) (holding by a 5-4 vote that the Constitution prohibits a state from being sued by a private party without its consent in the courts of a different state and overruling *Nevada v. Hall*, 440 U.S. 410 (1979)).

[26] Knick v. Twp. of Scott, 139 S. Ct. 2162, 2167 (2019) (holding by a 5-4 vote that a property owner maintaining a Taking Clause lawsuit against a local government need not first seek a remedy in a state court before pursuing his claim in federal court and overruling *Williamson Cty. Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985)).

[27] Rucho v. Common Cause, 139 S. Ct. 2484, 2491 (2019) (holding by a 5-4 vote that claims of excessive partisanship in districting are nonjusticable and overruling sub silentio *Davis v. Bandemer*, 478 U.S. 109 (1986)).

[28] *See* FELDMAN, *supra* note 22, at 44-47.

[29] *See* Apple Inc. v. Pepper, 139 S. Ct. 1514, 1519 (2019) (holding that consumers of iPhone apps could pursue an antitrust lawsuit against Apple, notwithstanding the direct purchaser rule set forth in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977)).

[30] *See, e.g.*, Herrera v. Wyoming, 139 S. Ct. 1686, 1691 (2019) (holding that a treaty providing the Crow Tribe with certain hunting rights survived Wyoming's entrance into the Union as a state and that the federal government's establishment of a national reserve on the land in question did not result in the land becoming occupied as a categorical matter); Wash. State Dep't of Licensing v. Cougar Den, Inc., 139 S. Ct. 1000, 1004 (2019) (concluding that an 1855 treaty between the United States and the Yakama Nation forbids the State of Washington from imposing a tax upon fuel importers who are members of the Yakama Nation).

[31] *See, e.g.*, United States v. Davis, 139 S. Ct. 2319, 2324 (2019) (holding that the residual clause of 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague); United States v. Haymond, 139 S. Ct. 2369, 2373 (2019) (concluding that, as applied to the case before the Court, 18 U.S.C. § 3583(k), which required the imposition of a mandatory minimum sentence upon a judicial finding by the preponderance of the evidence that a criminal defendant on supervised release committed certain crimes, violated the Fifth and Sixth Amendments).

[32] *See* Mitchell v. Wisconsin, 139 S. Ct. 2525, 2531 (2019) (concluding that the exigent-circumstances exception to Fourth Amendment's warrant requirement generally permits warrantless blood tests where driver suspected of drunk driving is unconscious and therefore cannot be given a breath test).

[33] *See* Dep't of Commerce v. New York, 139 S. Ct. 2551, 2576 (2019) (affirming the lower court's decision to vacate the challenged administrative action because the evidence before the agency told "a story that does not match the Secretary's explanation for his decision.").

deference afforded to interpretations of agency regulations,[34] the Chief Justice voted with the perceived liberal voting bloc. Underscoring the new dynamics of the Roberts Court, three Justices with fairly distinct judicial approaches voted most frequently with the majority of the Court last term: Justice Kavanaugh (voting with the majority 88% of the time), Chief Justice Roberts (85%), and Justice Kagan (83%).[35] Collectively, the voting patterns of the October 2018 Term have led some legal commentators to suggest that the Court has transformed from an institution that was largely defined by the vote of Justice Kennedy to one in which multiple Justices are now the Court's swing votes.[36]

Beyond the general dynamics of October 2018 Term, the Court issued a number of opinions of particular importance for Congress. While a full discussion of every ruling from the last Supreme Court term is beyond the scope of this report, **Table 1** and **Table 2** provide brief summaries of the Court's written opinions issued during the October 2018 Term. The bulk of this report highlights five notable opinions from the October Term 2018 that could affect the work of Congress: (1) *Kisor v. Wilkie*, which considered the continued viability of the *Auer-Seminole Rock* doctrine governing judicial deference to an agency's interpretation of its own ambiguous regulation; (2) *Department of Commerce v. New York*, a challenge to the addition of a citizenship question to the 2020 census questionnaire; (3) *Rucho v. Common Cause*, which considered whether federal courts have jurisdiction to adjudicate claims of excessive partisanship in drawing electoral districts; (4) *American Legion v. American Humanist Association*, a challenge to the constitutionality of a state's display of a Latin cross as a World War I memorial; and (5) *Gundy v. United States*, which considered the scope of the long-dormant nondelegation doctrine.

# Administrative Law

## Deference and Agency Regulations: *Kisor v. Wilkie*[37]

In *Kisor v. Wilkie*,[38] the Supreme Court considered whether to overrule the *Auer* doctrine (also known as the *Seminole Rock* doctrine),[39] which generally instructs courts to defer to agencies' reasonable constructions of ambiguous regulatory language.[40] In a 5-4 decision, the Supreme Court upheld the deference doctrine on *stare decisis* grounds.[41] However, while the Court in

[34] *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2424 (2019) (declining to overturn *Auer v. Robbins*, 519 U.S 452 (1997), but remanding the case to the lower court to reexamine whether *Auer* deference should be afforded to the challenged interpretation of the agency's regulation).

[35] *See* FELDMAN, *supra* note 22, at 17.

[36] *See, e.g.*, Amelia Thomson-Devaux, *The Supreme Court Might Have Three Swing Justices Now*, FIVETHIRTYEIGHT (July, 2, 2019), https://fivethirtyeight.com/features/the-supreme-court-might-have-three-swing-justices-now/ ("Based on how they have ruled this year, there are now three justices who could reasonably be seen as 'swing' votes of one kind or another: Roberts, Kavanaugh and Gorsuch. And it's possible to argue that all—or none—of these justices have replaced Kennedy as the court's 'swing' justice."); Jacqueline Thomsen, *Conservative Justices Surprise Court Watchers with Swing Votes*, THE HILL (July 2, 2019), https://thehill.com/regulation/court-battles/451262-conservative-justices-surprise-court-watchers-with-swing-votes ("Collectively, we may have the three of them [Chief Justice Roberts and Justices Gorsuch and Kavanaugh] acting as swing votes in a number of different areas") (quoting Georgetown University Law Professor Susan Bloch).

[37] Legislative Attorney Daniel Sheffner authored this section.

[38] 139 S. Ct. 2400 (2019).

[39] *See* Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945).

[40] *See Kisor*, 139 S. Ct. at 2408.

[41] *Id.* at 2422-23.

*Kisor* declined to overrule *Auer*, it emphasized that the doctrine applies only in limited circumstances.[42] These limitations on the doctrine's scope could bear consequences for future courts' review of agency action and affect the manner in which agencies approach their decisionmaking.

**Background:** The Supreme Court has established several doctrines that guide judicial review of agency action.[43] Perhaps the most well known is the *Chevron* doctrine, which generally instructs courts to defer to an agency's reasonable interpretation of an ambiguous statute that it administers.[44] *Auer* deference, which takes its name from the Supreme Court's 1997 decision in *Auer v. Robbins*,[45] has roots in the Court's 1945 decision in *Bowles v. Seminole Rock & Sand Co.*[46] *Auer* generally instructs courts to defer to an agency's interpretation of ambiguous regulatory language "unless," as the Court framed the test in *Seminole Rock*, that interpretation "is plainly erroneous or inconsistent with the regulation."[47] While *Chevron* deference applies to agency interpretations of *statutes* that are contained in agency statements that have the force of law (e.g., regulations promulgated following notice-and-comment rulemaking procedures),[48] *Auer* deference has been applied to a range of nonbinding agency memoranda and other materials that construe ambiguous regulatory language.[49] While the doctrine has long-standing roots, in the wake of *Auer*, several Members of the Court began to criticize the doctrine on policy, statutory, and constitutional grounds.[50]

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[42] *Id.* at 2414-18.

[43] *See* CRS Report R44699, *An Introduction to Judicial Review of Federal Agency Action*, by Jared P. Cole.

[44] *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 843 (1984). For more information on the *Chevron* doctrine, see CRS Report R44954, *Chevron Deference: A Primer*, by Valerie C. Brannon and Jared P. Cole.

[45] 519 U.S. 452 (1997).

[46] According to some Members of the Court, the doctrine may have even earlier antecedents. *See Kisor*, 139 S. Ct. at 2411-2412 (plurality opinion) (writing that "[b]efore the doctrine was called *Auer* deference, it was called *Seminole Rock* deference," and remarking that "[d]eference to administrative agencies traces back to the late nineteenth century, and perhaps beyond") (citing United States v. Eaton, 169 U.S. 331, 343 (1898)).

[47] *Seminole Rock*, 325 U.S. at 414. Prior to *Kisor*, the Court had limited the application of *Auer* in various cases. For example, the Court had previously held that deference is not owed when an agency interprets a regulation that simply "restate[s] the terms of the statute" being administered. Gonzales v. Oregon, 546 U.S. 243, 257 (2007). This limitation is known as the "anti-parroting canon." *See* Hanah Metchis Volokh, *The Anti-Parroting Canon*, 6 NYU J. L. & LIBERTY 290, 290 (2011). In addition, the Court had, prior to *Kisor*, explained that deference is not warranted when an agency's interpretation is not the product of its "fair and considered judgment." Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 155 (2012) (internal quotation marks and citation omitted).

[48] United States v. Mead Corp., 533 U.S. 218, 226-27 (2001); *see* 5 U.S.C. § 553.

[49] *See, e.g.*, *Seminole Rock*, 325 U.S. at 417 (bulletin issued by Office of Price Administration); *Auer*, 519 U.S. at 461 (amicus brief submitted by Secretary of Labor); Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 557 U.S. 261, 283-84 (2009) (Environmental Protection Agency memorandum).

[50] Justice Scalia, the author of *Auer*, *see* 519 U.S. 452, eventually became one of the doctrine's most outspoken critics. Explaining his concerns in a concurring opinion in *Talk America, Inc. v. Michigan Bell Telephone Co.*, 564 U.S. 50 (2011), Justice Scalia wrote that "[i]t seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well." *Id.* at 68 (Scalia, J., concurring). He further opined that *Auer* "frustrates the notice and predictability purposes of rulemaking[] and promotes arbitrary government" by "encourag[ing] . . . agenc[ies] to enact vague rules which give [them] the power, in future adjudications, to do what [they] please[]." *Id.* at 68-69. For an overview of Justice Scalia's evolving views on *Auer*, see Kevin O. Leske, *A Rock Unturned: Justice Scalia's (Unfinished) Crusade Against the* Seminole Rock *Deference Doctrine*, 69 ADMIN. L. REV. 1 (2017).

Prior to *Kisor*, several current Members of the Court criticized or expressed possible interest in reconsidering *Auer*. *See, e.g.*, Decker v. Nw. Envtl. Def. Ctr., 568 U.S. 597, 615-16 (2013) (Roberts, C.J., concurring in part); Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1225 (2015) (Thomas, J., concurring in the judgment); *id.* at 1210-11 (Alito, J., concurring in part and concurring in the judgment). Last year, Justice Gorsuch joined Justice Thomas's dissent from a

The *Kisor* case arose after the Department of Veterans Affairs (VA) denied James L. Kisor's request for retroactive disability compensation benefits.[51] The agency determined that records he supplied were not "relevant" within the meaning of the governing regulation.[52] On appeal, the Federal Circuit held that the term "relevant" as used in that regulation was ambiguous and, applying *Auer* deference to the VA's interpretation, affirmed the agency's decision.[53] The Supreme Court granted the petitioner's request for review to consider whether to overturn *Auer*.[54]

**Supreme Court's Decision:** While the Supreme Court unanimously agreed to vacate the Federal Circuit's decision, the Justices fractured on whether to overrule *Auer*, with a bare majority voting to uphold it. Writing on behalf of five Members of the Court, Justice Kagan—joined by Chief Justice Roberts and Justices Breyer, Ginsburg, and Sotomayor—grounded the decision to uphold *Auer* on *stare decisis* principles.[55] The doctrine of *stare decisis* typically leads the Court to follow rules set forth in prior decisions unless there is a "special justification" or "strong grounds" for overruling that precedent.[56] Justice Kagan concluded that the petitioner's arguments did not justify abandoning *Auer* deference in light of the extensive body of precedent, going back at least to *Seminole Rock*, which supported the continued use of a doctrine that "pervades the whole corpus of administrative law."[57] The *Kisor* majority also expressed concern that abandonment of *Auer* deference could result in litigants revisiting any of the myriad cases that applied the doctrine.[58] And, the Court continued, "particularly 'special justification[s],'" which had not been offered by the petitioner, were necessary to overturn *Auer*, given that Congress has left the doctrine undisturbed for so long, despite the Court's repeated assertions that the doctrine rests on a presumption "that Congress intended for courts to defer to agencies when they interpret their own ambiguous rules."[59]

Although the Court did not overrule *Auer*, it took "the opportunity to restate, and somewhat expand on," the doctrine's limitations.[60] In so doing, the Court formulated a multistep process for determining whether *Auer* deference should be afforded to an agency's interpretation of a regulation. First, a reviewing court may defer under *Auer* only after determining that the regulation is "genuinely ambiguous," a conclusion the court may reach only after "exhaust[ing]

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denial of certiorari that asked the Court to overrule *Auer*. Garco Construction, Inc. v. Speer, 138 S. Ct. 1052 (2018) (Thomas, J., dissenting from denial of certiorari). And prior to joining the High Court, Justice Kavanaugh once predicted favorably that the Court would one day overrule the doctrine. *See* Brett M. Kavanaugh, Justice Scalia and Deference, Keynote Address at the C. Boyden Gray Center for the Study of the Administrative State, Rethinking Judicial Deference: History, Structure, and Accountability, at 17:28-19:12 (June 2, 2016), https://vimeo.com/169758593.

[51] Kisor v. Shulkin, 869 F.3d 1360, 1362-65 (Fed. Cir. 2017), *vacated & remanded*, 139 S. Ct. 2400.

[52] *Id.* at 1364-65; 38 C.F.R. § 3.156(c)(1).

[53] *Kisor*, 869 F.3d at 1367-69.

[54] Kisor v. Wilkie, 139 S. Ct. 657 (2018) (order granting certiorari).

[55] *Kisor*, 139 S. Ct. at 2422-23.

[56] Arizona v. Rumsey, 467 U.S. 203, 212 (1984); Janus v. Am. Fed. of State, Cty. & Mun. Emps., 138 S. Ct. 2448, 2478 (2018). *See also* CRS Report R45319, *The Supreme Court's Overruling of Constitutional Precedent*, by Brandon J. Murrill, at 4.

[57] *Kisor*, 139 S. Ct. at 2422.

[58] *Id.*

[59] *Id.* at 2415; *id.* at 2422-23 (citing Martin v. Occup. Safety & Health Rev. Comm'n, 499 U.S. 144, 151 (1991)). The Court also deemed it notable that Congress had left *Auer* undisturbed "even after Members of th[e] Court began to raise questions about the doctrine." *Id.* at 2423 (citing *Talk America*, 564 U.S. at 67-69 (Scalia, J., concurring)).

[60] *Id.* at 2415.

all the 'traditional tools' of construction."[61] Second, even if ambiguity exists, *Auer* will not apply unless the court determines that the agency's interpretation is "reasonable"—that is, the interpretation "must come within the zone of ambiguity" that the court uncovered in its interpretation of the regulation.[62] And third, even if a court determines that the agency has reasonably interpreted a genuinely ambiguous regulation, it must still independently assess "whether the character and context of the agency interpretation entitles it to controlling weight."[63] Though the Court cautioned that this examination is unable to be reduced "to any exhaustive test,"[64] the Court indicated that *Auer* deference shall not extend to interpretations that (1) are not the official or authoritative position of the agency;[65] (2) do not somehow "implicate [the agency's] substantive expertise";[66] or (3) do not represent the agency's "fair and considered judgment."[67] The Court remanded the case to the Federal Circuit after concluding that the court of appeals did not adequately assess whether the regulation at issue was ambiguous, nor "whether the [VA's] interpretation is of the sort that Congress would want to receive deference."[68]

Two portions of Justice Kagan's opinion defended *Auer* on grounds other than *stare decisis* principles but did not gain the support of a majority of the Court. Joined by Justices Breyer, Ginsburg, and Sotomayor, Justice Kagan argued that *Auer* deference follows from "a presumption that Congress would generally want [agencies] to play the primary role in resolving regulatory ambiguities."[69] Justice Kagan wrote that this presumption was justified on several grounds, including agencies' significant substantive expertise, the relative political accountability of agencies subordinate to the President, and the view that the agency responsible for issuing a regulation is often best situated to determine the meaning of that regulation.[70] The four Justices also disagreed with the petitioner's statutory, policy, and constitutional arguments for overruling *Auer*.[71]

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[61] *Id.*

[62] *Id.* at 2415-16.

[63] *Id.* at 2416.

[64] *Id.*

[65] *Id.* The Court acknowledged that not all agency interpretations stem from the head of the agency or his or her "chief advisers," but wrote that, for *Auer* to apply, an "interpretation must at the least emanate from those actors, using those vehicles, understood to make authoritative policy in the relevant context." *Id.*

[66] *Id.* at 2417. The Court said that deference will not apply "[w]hen the agency has no comparative expertise in resolving a regulatory ambiguity" in relation to a federal court. *Id.* The Court cited the anti-parroting canon mentioned above, *supra* note 47, in support of this point, *Kisor*, 139 S. Ct. at 2417 n.5.

[67] *Kisor*, 139 S. Ct. at 2417 (internal quotation marks and citation omitted). The Court explained that, under this standard, courts should not accord deference to interpretations that simply represent a "convenient litigating position" or "*post hoc* rationalizatio[n]" intended "to defend past agency action against attack." *Id.* (internal quotation marks and citation omitted) (alteration in original). The Court explained that "[t]he general rule," therefore, is that courts should refrain from deferring "to agency interpretations advanced for the first time in legal briefs." *Id.* at 2417 n.6. It stopped short, however, from removing such interpretations from *Auer*'s ambit in all cases. *Id.*

The Court also explained that the "fair and considered judgment" limitation applies to interpretations that cause "unfair surprise." *Id.* at 2417-18; *cf.* Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 144 (2012). For this reason, the Court explained that it has not often deferred to agency interpretations that are contrary to earlier interpretations. *Kisor*, 139 S. Ct. at 2418. *Cf.* Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 170 (2007) (declaring that "as long as interpretive changes create no unfair surprise . . . the change in interpretation alone presents no separate ground for disregarding the Department's present interpretation").

[68] *Kisor*, 139 S. Ct. at 2423-24.

[69] *Id.* at 2412 (plurality opinion).

[70] *Id.* at 2412-13.

[71] *Id.* at 2418-2422. In short, the petitioner in *Kisor* argued that the Court should overrule *Auer* because, in his view, the

**Concurring Opinions:** Justice Gorsuch authored an opinion in which he disagreed with the majority's refusal to overrule *Auer*.[72] Justice Gorsuch agreed with the petitioner that *Auer* violates the Constitution, arguing that the doctrine runs afoul of the separation of powers by demanding that courts accede to the legal judgments of the executive branch and placing "the powers of making, enforcing, and interpreting laws . . . in the same hands."[73] He also agreed with the petitioner that *Auer* violates the judicial review and rulemaking provisions of the Administrative Procedure Act (APA).[74] Instead of affording deference under *Auer*, Justice Gorsuch argued that judges should employ the so-called "*Skidmore* doctrine" when attempting to discern the meaning of an agency regulation.[75] Under that doctrine—named after the Court's 1944 decision in *Skidmore v. Swift & Co.*[76]—courts independently interpret the text of a regulation, but may accord nonbinding weight to an administrative interpretation, consistent with "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade."[77]

The Chief Justice, who provided the crucial fifth vote to uphold *Auer*, authored a partial concurrence contending that the "distance" between the controlling portion of Justice Kagan's opinion and the position put forth by Justice Gorsuch "is not as great as it may initially appear."[78] He noted that the limitations on *Auer* deference announced by the *Kisor* majority—that an interpretation must, among other things, be based on the agency's "authoritative, expertise-based, and fair and considered judgment"—were not so different from those factors that Justice Gorsuch believed may persuade a court to follow an interpretation under *Skidmore*.[79] And, perhaps anticipating a future legal challenge to the continuing viability of the *Chevron* doctrine, the Chief Justice also wrote that the *Auer* and *Chevron* doctrines are analytically distinct,[80] maintaining that the Court's refusal to overrule *Auer* had no bearing on the distinct issues associated with *Chevron*.[81]

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doctrine was inconsistent with the rulemaking and judicial review provisions of the Administrative Procedure Act, 5 U.S.C. §§ 553, 706, encouraged agencies to draft vague regulations, and violated the constitutional separation of powers by allowing agencies to both write and authoritatively interpret laws, *see* Brief for Petitioner at 26-36, 37-40, 43-45, *Kisor*, 139 S. Ct. 2400. Justice Kagan rejected all of these arguments. *Kisor*, 139 S. Ct. at 2418-2422 (plurality opinion).

[72] *Kisor*, 139 S. Ct. at 2425 (Gorsuch, J., concurring in the judgment). The opinion was joined in full by Justice Thomas and in substantial part by Justices Alito and Kavanaugh.

[73] *Id*. at 2438-39.

[74] *Id*. at 2432-35 (citing 5 U.S.C. §§ 553, 706).

[75] *Id.* at 2447.

[76] 23 U.S. 134 (1944).

[77] *Id.* at 140.

[78] *Kisor*, 139 S. Ct. at 2424 (Roberts, C.J., concurring in part).

[79] *Id.*

[80] *Id.* at 2425.

[81] *Id.* The Chief Justice did not elaborate on the reasons he believed the doctrines are distinct. But the High Court has recognized that *Chevron* is based on a presumption that Congress sometimes intends agencies to fill gaps in ambiguous statutes they administer. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837. 843-44 (1984); Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000). Some commentators and Justices have argued that *Auer* is not premised on a similar presumption about legislative intent. *See* Jonathan Adler, *Government Agencies Shouldn't Get to Put a Thumb on the Scales*, SCOTUSBLOG (Jan. 31, 2019), https://www.scotusblog.com/2019/01/symposium-government-agencies-shouldnt-get-to-put-a-thumb-on-the-scales/; Decker v. Nw. Envtl. Def. Ctr., 568 U.S. 597, 619-20 (2013) (Scalia, J., concurring in part and dissenting in part). Notably, the Chief Justice did not join the portion of Justice Kagan's opinion that argued that *Auer* deference is based on such a presumption. *See Kisor*, 139 S. Ct. at 2412 (plurality opinion); *id.* at 2424 (Roberts, C.J., concurring in part).

**Implications for Congress:** While the Court did not overrule the *Auer* doctrine in *Kisor*, the framework it elucidated for assessing whether deference is appropriate may provide further guidance and, perhaps, constrain lower courts deciding whether to defer to an agency's regulatory interpretation.[82] Legal commentators have drawn various conclusions about *Kisor*'s potential impact,[83] but it ultimately remains to be seen whether courts will be more hesitant to conclude that deference is warranted after *Kisor*, and whether the *Kisor* Court's elaborations on the limits on *Auer* deference will inform agency decisionmaking.[84] In any event, the Court in *Kisor* made clear that *Auer* deference is not constitutionally required, and Congress may opt to memorialize, abrogate, or modify application of the doctrine by statute.[85] For example, Congress could amend the judicial review provision of the APA to explicitly provide that judicial review of agency interpretations of regulations shall be accorded no deference (i.e., shall be reviewed "de novo")[86] or instead be subject to some other standard.[87] More narrowly, Congress could also provide in

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In addition, Justice Kavanaugh filed an opinion, joined by Justice Alito, concurring in the judgment. *See Kisor*, 139 S. Ct. at 2448 (Kavanaugh, J., concurring in the judgment). Like Justice Gorsuch, Justice Kavanaugh believed that *Auer* should be overruled. *Id.* He also agreed with the Chief Justice that the *Kisor* majority and Justice Gorsuch's approaches may not be that far apart. *Id.* Justice Kavanaugh contended that the *Kisor* majority's instruction that courts exhaust the traditional canons of construction before concluding that a regulation is ambiguous "will almost always [lead a court to] reach a conclusion about the best interpretation of the regulation at issue." *Id.* In addition, he agreed with the Chief Justice that the majority's refusal to overturn *Auer* is not relevant to the issue of *Chevron*. *Id.* at 2449.

[82] *See* Christopher J. Walker, *Procedural Politicking and* Auer *Deference*, 36 YALE J. ON REG.: NOTICE & COMMENT (2019), https://yalejreg.com/nc/procedural-politicking-and-auer-deference/ (suggesting that *Kisor* "will lead lower courts to be much less deferential to agency regulatory interpretations going forward"). *But see* Jennifer Huddleston, Kisor *and the Future of Agency Deference*, MERCATUS CENTER (June 27, 2019), https://www.mercatus.org/bridge/commentary/kisor-and-future-agency-deference (writing that *Kisor* "changes the way the courts will consider administrative actions by putting new emphasis on determining if and when such deference is appropriate," but noting that "[w]hether this change truly impacts the way courts consider such decisions by the administrative state remains to be seen").

[83] *See, e.g.*, Thomas Merrill, *Shadow Boxing with the Administrative State*, SCOTUSBLOG (June 27, 2019), https://www.scotusblog.com/2019/06/symposium-shadow-boxing-with-the-administrative-state/ (remarking that Justice "Kagan's new contextualized *Auer*, although it draws upon roughly the same factors as *Skidmore*, is an unknown animal at this point" and "[c]onsequently, it is likely to produce significant uncertainty among lower court judges, agencies and persons contemplating a challenge to agency interpretations"); Daniel E. Walters, *A Turning Point in the Deference Wars*, REG. REV. (July 9, 2019), https://www.theregreview.org/2019/07/09/walters-turning-point-deference-wars/ (writing that "there does not appear to be anything genuinely new about any of this except the clarity the [*Kisor*] opinion engrafts on the doctrine"); Walker, *supra* note 82 (predicting that "courts [will] be less deferential" after *Kisor*). *Cf.* Ronald Levin, Auer *Deference—Supreme Court Chooses Evolution, not Revolution*, SCOTUSBLOG (June 27, 2019), https://www.scotusblog.com/2019/06/symposium-auer-deference-supreme-court-chooses-evolution-not-revolution/ (opining that the types of limitations imposed on *Auer* by *Kisor* "are an inherent feature of the doctrine" and that "the doctrine has proved susceptible of gradual evolution over the years"); Aaron Nielson, Kisor *Deference*, 36 YALE J. ON REG.: NOTICE & COMMENT (2019), https://yalejreg.com/nc/kisor-deference/ (writing "that *Kisor* deference differs from *Auer* deference" and that "[w]hat we have [now] . . . is *Kisor* deference").

[84] Lower courts have already begun to apply *Kisor* to agency regulatory interpretations. *See, e.g.*, Am. Tunaboat Ass'n v. Ross, Case No. 1:19-cv-01011 (TNM), 2019 WL 3458641, at *7-10 (D.D.C. July 31, 2019) (deferring to agency's regulatory interpretation after applying *Kisor*'s multistep test); Spencer v. Macado's, Inc., Case No. 6:18-cv-00005, 2019 WL 2931304, at *5-6 (W.D. Va. July 8, 2019) (determining that agency's interpretation did not stem from its "fair and considered judgment" and remarking that, under *Kisor*, "it would be inappropriate to apply *Auer* deference" in the case) (internal quotation marks and citation omitted).

[85] *See Kisor*, 139 S. Ct. at 2422-23.

[86] *Id.*; 5 U.S.C. § 706.

[87] There is legislation in Congress that would require de novo review of agency interpretations. *See* Separation of Powers Restoration Act, H.R. 1927, 116th Cong. § 2(3) (2019) (amending § 706 to require that courts "decide de novo all relevant questions of law, including the interpretation of constitutional and statutory provisions, and rules made by agencies"); Separation of Powers Restoration Act, S. 909, 116th Cong. § 2(2)(B) (2019) (amending § 706 to provide de novo review of agency interpretations and state that, "[i]f the reviewing court determines that a statutory or regulatory

particular statutes governing specific agency actions whether *Auer* deference or some other standard of judicial review should be applied to regulatory interpretations.[88]

# Election Law

## Census: *Department of Commerce v. New York*[89]

On the last day that the Supreme Court sat for the October 2018 Term, the Court issued its decision in *Department of Commerce v. New York*[90]—a case involving the legal challenges to the decision by the Secretary of the Department of Commerce, Wilbur Ross, to add a citizenship question to the 2020 census questionnaire.[91] The Court's opinion resolved important questions of constitutional, statutory, and administrative law. The Court concluded that adding a citizenship question to the 2020 census questionnaire did not violate the Enumeration Clause of the U.S. Constitution or the Census Act. But the Court also—at least temporarily—prohibited the Department of Commerce from adding the citizenship question to the 2020 census questionnaire because it determined that Secretary Ross had violated the APA by failing to disclose his actual reason for doing so.

**Background:** Article I, § 2 of the U.S. Constitution, as amended by the Fourteenth Amendment, requires Congress to take an "actual Enumeration" of "the whole Number of . . . persons" in each State "every . . . Term of ten Years, in such Manner as [Congress] shall by Law direct."[92] Through the Census Act,[93] Congress delegated this responsibility to the Secretary of Commerce. That law requires the Secretary of Commerce to "take a decennial census of population" and grants the Secretary discretion to do so "in such form and content as he may determine" and to "obtain such other census information as necessary."[94]

The Census Act places limits on how the Secretary of Commerce may conduct the census. Though the Secretary is authorized to "determine the inquires" and to "prepare questionnaires" for obtaining demographic or other information,[95] Section 6(c) of the Census Act instructs the Secretary to first attempt to obtain such information from federal, state, or local government administrative sources "[t]o the maximum extent possible" and "consistent with the kind, timeliness, quality and scope" of the information needed.[96] Moreover, to facilitate congressional oversight, Section 141(f) of the act directs the Secretary to "submit [reports] to the [appropriate] committees of Congress" (1) identifying the "subjects proposed to be included" and "types of

provision relevant to its decision contains a gap or ambiguity, the court shall not interpret that gap or ambiguity as an implicit delegation to the agency of legislative rule making authority and shall not rely on the gap or ambiguity as a justification for interpreting agency authority expansively or for deferring to the agency's interpretation on the question of law").

[88] *Kisor*, 139 S. Ct. at 2422-23.

[89] Legislative Attorney Benjamin Hayes authored this section.

[90] 139 S. Ct. 2551 (2019).

[91] *Id*. at 2561-62.

[92] U.S. CONST. art. I, § 2, cl. 3; *id*. amend. XIV, § 2.

[93] 13 U.S.C. §§ 1-402.

[94] *Id*. § 141(a).

[95] *Id*. § 5.

[96] *Id*. § 6(c).

information to be compiled"; (2) describing "the questions proposed to be included in [the] census"; and (3) if "new circumstances exist," modifying the prior two reports.[97]

On March 26, 2018, Secretary Ross issued a memorandum stating that the Census Bureau would add a citizenship question to the 2020 decennial census questionnaire.[98] Secretary Ross stated that he made this decision because the Department of Justice (DOJ) had asked that the citizenship question be added to the 2020 census to obtain citizenship data that would be used for enforcement of Section 2 of the Voting Rights Act (VRA).[99] In the memorandum, Secretary Ross explained that he had considered four options in deciding how to respond to DOJ's request: (A) not adding the citizenship question; (B) adding the citizenship question; (C) relying solely on administrative records to obtain citizenship data; and (D) relying on both administrative records and a citizenship question to obtain citizenship data.[100]

While the Census Bureau concluded that Option C would produce the most accurate citizenship information because noncitizens and Hispanics would be less likely to respond to a census questionnaire including a citizenship question,[101] Secretary Ross chose option D.[102] He stated that reliance on administrative records alone was "a potentially appealing solution," but noted that it would provide "an incomplete picture" because the Census Bureau did not have a complete set of administrative records for the entire population.[103] In response to concerns that "reinstatement of the citizenship question . . . would depress response rate[s]" among Hispanics and noncitizens,[104] Secretary Ross stated the Department of Commerce had "not [been] able to determine definitively how inclusion of a citizenship question . . . will impact responsiveness" and determined that, in any event, "the value of more complete and accurate data derived from surveying the entire population outweighs such concerns."[105]

Secretary Ross's decision was challenged in federal district courts in California,[106] Maryland,[107] and New York.[108] Two of these courts concluded that the addition of a citizenship question violated the Enumeration Clause[109] of the U.S. Constitution because "its inclusion would materially harm the accuracy of the census without advancing any legitimate governmental

[97] *Id*. § 141(f).

[98] Memorandum of Secretary Wilbur Ross, U.S. Department of Commerce, Reinstatement of a Citizenship Question on the 2020 Decennial Census Questionnaire (Mar. 26, 2018), https://www.commerce.gov/sites/default/files/2018-03-26_2.pdf.

[99] *Id*. at 1. Section 2 of the VRA prohibits voting practices that dilute minority voting power. 52 U.S.C. § 10301; *see* Thornburg v. Gingles, 478 U.S. 30, 47-48 (1986). A plaintiff making a "vote dilution" claim must show, among other things, that the "eligible voters" of a minority group are "sufficiently large and geographically compact to constitute a majority in a single-member district" capable of electing their candidate of choice. *See* LULAC v. Perry, 548 U.S. 399, 425, 429 (2006). Because (generally) only citizens may vote, improved citizenship data could theoretically assist with Section 2 enforcement.

[100] Memorandum of Secretary Wilbur Ross, *supra* note 98, at 2-5.

[101] *See* Dep't of Commerce v. New York, 139 S. Ct. 2551, 2750 (2019); *see also id*. at 2588-89 (Breyer, J., dissenting).

[102] Memorandum of Secretary Wilbur Ross, *supra* note 98, at 5.

[103] *Id*. at 4.

[104] *Id*. at 5.

[105] *Id*. at 7.

[106] *See* California v. Ross, 358 F. Supp. 3d 965 (N.D. Cal. 2019).

[107] *See* Kravitz v. Dep't of Commerce, 366 F. Supp. 3d 681 (D. Md. 2019).

[108] *See* New York v. Dep't of Commerce, 351 F. Supp. 3d 502 (S.D.N.Y. 2019).

[109] *See supra* note 92 and accompanying text.

interest."[110] Two courts also determined that Secretary Ross violated Sections 6(c) and 141(f) of the Census Act.[111] As to Section 6, those courts found that administrative records alone would produce more accurate citizenship data than when used in combination with a citizenship question, and therefore the addition of a citizenship question would violate Section 6(c)'s directive to rely on administrative records "[t]o the maximum extent possible."[112] The same two courts also determined that Secretary Ross violated Section 141(f) because he had not included citizenship as a "subject" in the first report that he submitted to Congress.[113] Finally, all three district courts held that Secretary Ross had violated the APA—the law requiring that agency action be based on "'reasoned decisionmaking.'"[114] In particular, these courts concluded that Secretary Ross's decision was—among other things—contrary to the evidence before him.[115] They also determined that the Secretary's decision was unlawful because his sole stated reason for adding the citizenship question—providing DOJ with citizenship data for VRA enforcement—was pretextual.[116]

**Supreme Court's Decision:** Chief Justice Roberts wrote the opinion for the Court in *Department of Commerce v. New York*.[117] Though this opinion garnered a majority for each issue addressed, the Justices comprising the majority for each issue varied.

On the merits,[118] Chief Justice Roberts—joined by Justices Thomas, Alito, Gorsuch, and Kavanaugh—concluded that adding a citizenship question to the census did not violate the Enumeration Clause.[119] Noting that the Court's "interpretation of the Constitution is guided by Government practice that 'has been open, widespread, and unchallenged since the early days of the Republic,'"[120] the Court observed that "demographic questions have been asked in *every*

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[110] *Kravitz*, 366 F. Supp. 3d at 751-52; *California*, 358 F. Supp. 3d at 1046-49.

[111] *New York*, 351 F. Supp. 3d at 636-47; *California*, 358 F. Supp. 3d at 1037-40; *see also Kravitz*, 366 F. Supp. 3d at 748-49 (finding an APA violation because Secretary Ross did not "acknowledge or comply with" Section 6(c)).

[112] *New York*, 351 F. Supp. 3d at 636-41; *California*, 358 F. Supp. 3d at 1037-38.

[113] *New York*, 351 F. Supp. 3d at 641-43; *California*, 358 F. Supp. 3d at 1038-40. Secretary Ross submitted the first report required by Section 141(f) prior to DOJ's request to add a citizenship question. Dep't of Commerce v. New York, 139 S. Ct. 2551, 2572 (2019). He submitted the second report required by Section 141(f) after DOJ's request, and that report did identify citizenship as a "question." *Id*.

[114] *Dep't of Commerce*, 139 S. Ct. at 2569 (quoting Baltimore Gas & Elec. Co. v. Nat'l Res. Def. Council, Inc., 462 U.S. 87, 105 (1983)). The APA authorizes judicial review of agency action and allows courts to overturn agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2).

[115] *New York*, 351 F. Supp. 3d at 647-51; *California*, 358 F. Supp. 3d at 1041-44; *Kravitz*, 366 F. Supp. 3d at 744-47.

[116] *New York*, 351 F. Supp. 3d at 660-64; *California*, 358 F. Supp. 3d at 1040, 1044; *Kravitz*, 366 F. Supp. 3d at 749-51.

[117] 139 S. Ct. 2551 (2019). The Supreme Court agreed to directly review the New York court's decision—rather than requiring that it first be reviewed by the Second Circuit—based on the United States' representation that the census questionnaire had to be finalized by the end of June 2019. *See* Dep't of Commerce v. New York, 139 S. Ct. 953, 953 (2019) (granting certiorari); Brief for Petitioner at 13-14, Dep't of Commerce v. New York, 139 S. Ct. 2551 (2019) (No. 18-966) ("[T]he government must finalize the decennial questionnaire for printing by end of June 2019."). After federal district courts in California and Maryland issued their decisions, both of which found an Enumeration Clause violation, the Supreme Court ordered the parties in the New York case to also address the Enumeration Clause issue. *See* Orders in Pending Cases, No. 18-966, Dep't of Commerce v. New York (Mar. 15, 2019).

[118] The Court began by concluding that the plaintiffs had satisfied Article III's standing requirements. *Dep't of Commerce*, 139 S. Ct. at 2565-66. The Court also concluded that the Secretary's decision to add a citizenship question to the census was reviewable under the APA because it was not "committed to agency discretion by law." *Id*. at 2567-69 (citing 5 U.S.C. § 701(a)).

[119] *Id*. at 2566-67. No member of the Court authored a written dissent with respect to this part of the Court's opinion.

[120] *Id*. at 2567 (quoting NLRB v. Noel Canning, 573 U.S. 513, 572 (2014) (Scalia, J., concurring in the judgment)).

census since 1790" and that "questions about citizenship in particular have been asked for nearly as long."[121] Relying on this "early understanding" and "long practice," the Court determined that the Enumeration Clause does not prohibit inquiring about citizenship on the census questionnaire.[122]

These same Justices also determined that Secretary Ross's decision was supported by the evidence before him and therefore did not violate the APA on that ground.[123] The Court ruled that the Secretary's decision to rely on both administrative records and a citizenship question to obtain citizenship data for DOJ was a reasonable exercise of his discretion in light of the available evidence.[124] While the Census Bureau had found that administrative records alone would produce the most accurate citizenship data, it acknowledged that each option "entailed tradeoffs between accuracy and completeness," and that it "was not able to 'quantify the relative magnitude of the errors" in each of Options C and D.[125] The Court concluded that where the "choice [is] between reasonable policy alternatives in the face of uncertainty," the Secretary has discretion to choose.[126]

The Court also determined that the Secretary reasonably weighed the costs and benefits of reinstating the citizenship question, particularly "the risk that inquiring about citizenship would depress census response rates . . . among noncitizen households."[127] The Court observed that the Secretary had explained why the "risk[s] w[ere] difficult to assess," concluding that he had reasonably "[w]eigh[ed] that uncertainty against the value of obtaining more complete and accurate citizenship data" through a citizenship question.[128] In the end, and "in light of the long history of the citizenship question on the census," the Court was unwilling to second-guess the Secretary's conclusion as "the evidence before [him] hardly led ineluctably to just one reasonable course of action."[129]

The same Justices also ruled that the Secretary's decision did not violate the Census Act.[130] The Court first determined, "for essentially the same reasons" underlying its ruling that Secretary Ross's decision was supported by the evidence,[131] that Secretary Ross reasonably concluded that relying solely on administrative records to obtain citizenship data "would not . . . provide the

[121] *Id*. at 2566-67.

[122] *Id*. at 2567. The Court also determined that it would not review the addition of a citizenship question under the standard that it applied to assess "decisions about the population count itself"—asking whether the challenged action "b[ears] a 'reasonable relationship to the accomplishment of an actual enumeration.'" *Id*. at 2566 (quoting Wisconsin v. City of New York, 517 U.S. 1, 19 (1996)). The Court determined that applying this standard to evaluate the constitutionality of demographic questions on the census questionnaire "'would lead to the conclusion that it is unconstitutional to ask *any* demographic question on the census' because 'asking such questions bears no relationship whatsoever to the goal of an accurate headcount.'" *Id*. The Court was thus unwilling to "measure the constitutionality of the citizenship question by a standard that would seem to render every census since 1790 unconstitutional." *Id*. at 2567.

[123] *Id*. at 2569-71.

[124] *Id*. at 2569.

[125] *Id*. at 2569, 2570. While the Census Bureau had stated that it could develop "an accurate model for estimating the citizenship of the 35 million people for whom administrative records were not available," that model had not been developed by the time the Secretary was making his decision. *Id*. at 2570.

[126] *Id*. at 2570.

[127] *Id*.

[128] *Id*. at 2570, 2571.

[129] *Id*. at 2571.

[130] *Id*. at 2571-73.

[131] *Id*. at 2572.

more complete and accurate data that DOJ sought."[132] Thus, because administrative records alone would not supply the "kind," "quality," and "scope" of "'statistics required,'" the Court held that Secretary Ross had complied with Section 6(c)'s requirement to rely "[t]o the maximum extent possible" on administrative records.[133] The Court also determined that the Secretary complied with Section 141(f) of the Census Act.[134] Though Secretary Ross had not included "citizenship" as a "subject" in his initial report to Congress, the Court determined that by listing "citizenship" as a "question" in the second report, the Secretary had adequately "informed Congress that he proposed to modify the original list of subjects" from his initial report.[135]

Finally, the Chief Justice—joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan—held that the Secretary's decision violated the APA because his sole stated reason for adding the citizenship question to the census questionnaire was not the real reason for his decision.[136] The Court began by reaffirming the "settled proposition[]" that "in order to permit meaningful judicial review, an agency must 'disclose the basis' of its action."[137] Moreover, while acknowledging that courts normally accept an agency's stated reason for its action, the Court recognized that courts may review evidence outside the agency record to probe the justifications of an agency's decision when there is a strong showing of bad faith or improper behavior.[138]

After concluding that it could review the extra-record evidence on which the district court had relied,[139] the Court conducted its own review of the evidence regarding Secretary Ross's reason for adding the citizenship question to the census. It began by noting that while the Secretary had "tak[en] steps to reinstate a citizenship question about a week into his tenure," there was "no hint that he was considering VRA enforcement" at that time.[140] In addition, the Court observed that the Department of Commerce had itself gone "to great lengths to elicit the request from DOJ (or any other willing agency)" to add the citizenship question.[141] In the end, "viewing the evidence as a whole," the Court concluded that "the decision to reinstate a citizenship question [could not] be adequately explained in terms of DOJ's request for improved citizenship data to better enforce the VRA."[142] Given this "disconnect between the decision made and the explanation given," the Court held that the Secretary's decision violated the APA.[143] However, the Court was clear that it

[132] *Id*.

[133] *Id*.; 13 U.S.C. § 6(c).

[134] *Dep't of Commerce*, 139 S. Ct. at 2572-73.

[135] *Id*. at 2572. The Court also reasoned that any violation "would surely be harmless," as "the Secretary nonetheless fully informed Congress of, and explained, his decision." *Id*. at 2573.

[136] *Id*. at 2573-76.

[137] *Id*. at 2573 (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 167-69 (1962)).

[138] *Id*. at 2573-74.

[139] *Id*. at 2574. During the district court proceedings, the plaintiffs had argued that the Department of Commerce did not include all relevant materials in the administrative record, and, as a result, they asked that the district court (1) order the Department of Commerce to complete the administrative record, and (2) allow extra-record discovery to further explore whether Secretary Ross's explanation for adding the citizenship question was pretextual. *Id*. The district court granted both requests. *Id*. Though the Supreme Court ultimately determined that the district court should not have granted extra-record discovery at the time it did, the Court also concluded that extra-record discovery was justified *after* the administrative record had been completed, as the additional materials showed "that the VRA played an insignificant role in the decisionmaking process." *Id*. Thus, the Supreme Court "review[ed] the District Court's ruling on pretext in light of all the evidence in the record before the [district] court, including the extra-record discovery." *Id*.

[140] *Id*. at 2575.

[141] *Id*.

[142] *Id*.

[143] *Id*.

was "not hold[ing] that the [Secretary's] decision . . . was substantively invalid," but was only requiring the Secretary to disclose the reason for that decision.[144] And to give Secretary Ross that opportunity, the Court directed the district court to remand the case back to the Department of Commerce.[145]

**Concurring and Dissenting Opinions:** Every Justice (other than Chief Justice Roberts) dissented from some portion of the Court's opinion.[146] Among the most notable dissents were those of Justice Thomas and Justice Breyer.[147] Justice Thomas—joined by Justices Gorsuch and Kavanaugh—dissented from the Court's holding that Secretary Ross's decision was based on a pretextual rationale.[148] Justice Thomas began by criticizing the majority for relying on evidence outside the administrative record.[149] Under the APA, Justice Thomas explained, judicial review of an agency decision is generally based on "'the agency's contemporaneous explanation'" for its decision, and courts normally may not invalidate the agency's action even if it "ha[d] other, unstated reasons for the decision."[150] Justice Thomas acknowledged that review of extra-record materials may be permissible upon a showing of bad faith,[151] but he disagreed with the Court's assessment that this case met that standard.[152] Even if review of extra-record materials were appropriate, Justice Thomas concluded that none of the evidence established that Secretary Ross's stated basis for his decision "did not factor at all into [his] decision."[153] In his view, the evidence showed "at most, that leadership at both the Department of Commerce and DOJ believed it important—for a variety of reasons—to include a citizenship question on the census."[154] Finally, Justice Thomas criticized the Court's decision as being the "the first time the Court has ever invalidated an agency action as 'pretextual,'"[155] contending that the Court had "depart[ed] from traditional principles of administrative law."[156]

Justice Breyer—joined by Justices Ginsburg, Sotomayor, and Kagan—dissented from the Court's conclusion that Secretary Ross's decision was supported by the evidence before the agency.[157] Justice Breyer contended that Secretary Ross inaccurately stated that he was "'not able to determine definitively how inclusion of a citizenship question on the decennial census will impact

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[144] *Id*. at 2576.

[145] *Id*.

[146] *Id*. at 2576-84 (Thomas, J., joined by Gorsuch and Kavanaugh, JJ., concurring in part and dissenting in part); *id*. at 2584-95 (Breyer, J., joined by Ginsburg, Sotomayor, and Kagan, JJ., concurring in part and dissenting in part); *id*. at 2596-2606 (Alito, J., concurring in part and dissenting in part).

[147] Justice Alito also dissented, but only from the Court's holding that the Secretary's decision to add a citizenship question was reviewable under the APA. *Id*. at 2596-2606 (Alito, J., concurring in part and dissenting in part). In his view, the decision of whether to add a citizenship question to the census was a choice "committed to agency discretion by law"—specifically, the Census Act. *Id*.; 5 U.S.C. § 701(a)(2). However, assuming Secretary Ross's decision was reviewable, Justice Alito stated that he agreed with the Chief Justice's opinion, with the exception of its conclusion on pretext. *Dep't of Commerce*, 139 S. Ct. at 2606 & n.15 (Alito, J., concurring in part and dissenting in part).

[148] *Id*. at 2576-84 (Thomas, J., concurring in part and dissenting in part).

[149] *Id*. at 2580-81.

[150] *Id*. at 2578, 2579 (Thomas, J., concurring in part and dissenting in part).

[151] *Id*. at 2579.

[152] *Id*. at 2580-81.

[153] *Id*. at 2581 (emphasis omitted).

[154] *Id*. at 2582.

[155] *Id*. at 2583.

[156] *Id*. at 2584.

[157] *Id*. at 2584-95 (Breyer, J., concurring in part and dissenting in part).

responsiveness.'"[158] Specifically, the dissent observed that the experts within the Census Bureau itself had found that "adding the question would produce a less accurate count because noncitizens and Hispanics would be less likely to respond to the questionnaire,"[159] finding there was "nothing significant" in the record "to the contrary."[160] Moreover, Justice Breyer criticized Secretary Ross's conclusion that the addition of the citizenship question would produce more complete and accurate data.[161] According to Justice Breyer, the administrative record showed that inclusion of the citizenship question would, for a large segment of the population, "be no improvement over using administrative records alone," and for 35 million people, it "would be no better, and in some respects would be worse, than using [only] statistical modeling."[162] On these grounds, four Justices concluded that Secretary Ross's decision was arbitrary and capricious.[163]

**Implications for Congress:** The Supreme Court's decision in *Department of Commerce* is significant, both for its immediate impact on the 2020 census and for how it may affect administrative law more broadly. The Court's decision barred the Trump Administration from adding the citizenship question to the 2020 census without disclosing the Secretary's actual reason for doing so. Though the Trump Administration initially sought to cure the legal error identified by Court's opinion, it ultimately abandoned these efforts and confirmed that a citizenship question will not be on the 2020 census questionnaire.[164] Nonetheless, because the Court did not deem the addition of a citizenship question "substantively" unlawful, it is possible that the Department of Commerce could add a citizenship question to a future census questionnaire, as long as the Secretary of Commerce discloses the actual reasons for doing so.[165] Notably, the Trump Administration recently issued an executive order related to the collection of citizenship data, which, among other things, instructs the Secretary of Commerce to "consider initiating any administrative process necessary to include a citizenship question on the 2030 decennial census."[166]

Separately, the Supreme Court's decision could lay the groundwork for pretext-based challenges to agency decisions. The Court's opinion recognized that while "a court is ordinarily limited to evaluating the agency's contemporaneous explanation in light of the existing administrative record," it may inquire further into the motive underlying an agency's action where there is "a 'strong showing of bad faith or improper behavior.'"[167] Though this rule preexisted the Court's decision in *Department of Commerce*, some plaintiffs could view that decision as signaling a greater receptiveness by the Court to such challenges. This was the view taken by Justice Thomas, who asserted in his dissenting opinion that the Court's decision "opened a Pandora's box of pretext-based challenges" to agency action because "[v]irtually every significant agency action is vulnerable to the kinds of allegations the Court credit[ed]" in its opinion.[168] Some

[158] *Id*. at 2587.

[159] *Id*.

[160] *Id*. at 2590.

[161] *Id*. at 2590-92.

[162] *Id*. at 2591-92.

[163] *Id*. at 2595.

[164] *Id*. at 2576 (majority opinion); *see* The White House, Remarks by President Trump on Citizenship and the Census (July 11, 2019), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-citizenship-census/.

[165] *See Dep't of Commerce*, 139 S. Ct. at 2576.

[166] *See* Exec. Order No. 13880, 84 Fed. Reg. 33,821, 33,825 (July 11, 2019).

[167] *Dep't of Commerce*, 139 S. Ct. at 2573-74.

[168] *Id*. at 2583 (Thomas, J., concurring in part and dissenting in part).

commentators have echoed Justice Thomas's prediction.[169] Perhaps responding to Justice Thomas's concerns, the Court's opinion emphasized that judicial inquiry into an agency's stated reason for its decision should be "rare," explaining that this case involved "unusual circumstances" and was not "a typical case."[170] This limiting language could discourage potential litigants from raising pretext-based challenges to agency action.[171]

## Redistricting: *Rucho v. Common Cause* and *Lamone v. Benisek*[172]

Partisan gerrymandering, "the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power,"[173] is an issue that has vexed the federal courts for more than three decades.[174] On June 27, 2019, by a 5-to-4 vote, the Supreme Court ruled that claims of unconstitutional partisan gerrymandering are not subject to federal court review because they present nonjusticiable political questions, thereby removing the issue from federal courts' purview.[175] In *Rucho v. Common Cause* and *Lamone v. Benisek* (hereinafter *Rucho*), the Court viewed the Elections Clause[176] of the Constitution as solely assigning disputes about partisan gerrymandering to the state legislatures, subject to a check by the U.S. Congress.[177] Moreover, in contrast to one-person, one-vote and racial gerrymandering claims, the Court determined that no test exists for adjudicating partisan gerrymandering claims that is both judicially discernible and manageable.[178] However, the Court suggested that Congress, as well as state legislatures, could play a role in regulating partisan gerrymandering going forward.[179]

**Background:** Prior to the 1960s, the Supreme Court had determined that challenges to redistricting plans presented nonjusticiable political questions that were most appropriately addressed by the political branches of government, not the judiciary.[180] In 1962, however, in the landmark ruling of *Baker v. Carr*, the Court held that a constitutional challenge to a redistricting plan is justiciable, identifying factors for determining when a case presents a nonjusticiable political question, including "a lack of [a] judicially discoverable and manageable standard[] for resolving it."[181] Since then, while invalidating redistricting maps on equal protection grounds for

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[169] *See, e.g.*, Chris Walker, *What the Census Case Means for Administrative Law: Harder Look Review?*, 36 YALE J. ON REG.: NOTICE & COMMENT (June 27, 2019), https://yalejreg.com/nc/what-the-census-case-means-for-administrative-law-harder-look-review/.

[170] *Dep't of Commerce*, 139 S. Ct. at 2575-76.

[171] *See* Nicholas Bronni, *Census Symposium: Unusual Facts Make for Unusual Decisions*, SCOTUSBLOG (Jun. 28, 2019, 11:51 AM), https://www.scotusblog.com/2019/06/census-symposium-unusual-facts-make-for-unusual-decisions/ ("[T]he court's analysis underscores just how hard it is to justify [examining an agency's motives] because there will rarely be such an extraordinarily extensive administrative record. Indeed, it's highly unlikely 'these unusual circumstances' will exist again.").

[172] Legislative Attorney L. Paige Whitaker authored this section.

[173] Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2658 (2015).

[174] *See, e.g.*, Davis v. Bandemer, 478 U. S. 109, 116-117 (1986) (plurality opinion) (holding that the case was justiciable, but splintering as to the proper standard to apply with respect to partisan gerrymandering claims).

[175] *See* Rucho v. Common Cause, 139 S. Ct. 2484 (2019).

[176] U.S. CONST. art. I, sec. 4, cl. 1.

[177] *See Rucho*, 139 S. Ct. at 2496.

[178] *See id.* at 2501.

[179] *See id.* at 2508.

[180] *See, e.g.*, Colegrove v. Green, 328 U.S. 549, 556 (1946) ("To sustain this action would cut very deep into the very being of Congress. Courts ought not to enter this political thicket.").

[181] 369 U.S. 186, 217 (1962).

other reasons—based on inequality of population among districts or one-person, one-vote and as racial gerrymanders—the Court has not nullified a map because of partisan gerrymandering.[182]

In part, the Court has been reluctant to invalidate redistricting maps as impermissibly partisan because redistricting has traditionally been viewed as an inherently political process.[183] Moreover, critics of federal court adjudication of partisan gerrymandering claims have argued that such lawsuits would open the floodgates of litigation and that it would be judicially difficult to police because it is unclear how much partisanship in redistricting is too much.[184] On the other hand, critics of this view have argued that extreme partisan gerrymandering is "incompatible with democratic principles"[185] by entrenching an unaccountable political class in power with the aid of modern redistricting software—using "pinpoint precision" to maximize partisanship—thereby necessitating some role by the unelected judiciary.[186]

In earlier cases presenting a claim of unconstitutional partisan gerrymandering, the Court left open the possibility that such claims could be judicially reviewable, but did not ascertain a discernible and manageable standard for adjudicating such claims.[187] In those rulings, Justice Kennedy cast the deciding vote, leaving open the possibility that claims could be held justiciable in some future case, under a yet-to-be-determined standard.[188] Last year, the Supreme Court considered claims of partisan gerrymandering raising nearly identical questions to those in *Rucho*, but ultimately issued narrow rulings on procedural grounds specific to those cases.[189] *Rucho* marked the first opinion on partisan gerrymandering since Justice Kennedy left the Court.

Prior to the Supreme Court's consideration, three-judge federal district courts in North Carolina and Maryland invalidated congressional districts as unconstitutional partisan gerrymanders under standards they viewed to be judicially discernible and manageable.[190] In the North Carolina case, the court determined that a redistricting map violates the Equal Protection Clause as an unconstitutional partisan gerrymander when (1) the map drawer's predominant intent was to entrench a specific political party's power; (2) the resulting dilution of voting power by the

[182] For discussion of Supreme Court's redistricting case law addressing inequality of population among districts and racial gerrymandering, see CRS Report R44798, *Congressional Redistricting Law: Background and Recent Court Rulings*, by L. Paige Whitaker.

[183] *See* Vieth v. Jubelirer, 541 U.S. 267, 306 (2004) (Kennedy, J., concurring) ("A decision ordering the correction of all election district lines drawn for partisan reasons would commit federal and state courts to unprecedented intervention in the American political process.").

[184] *See* Davis v. Bandemer, 478 U. S. 109, 133 (1986) ("Inviting attack on minor departures from some supposed norm would too much embroil the judiciary in second-guessing what has consistently been referred to as a political task for the legislature, a task that should not be monitored too closely unless the express or tacit goal is to effect its removal from legislative halls.").

[185] *Vieth*, 541 U.S. at 292.

[186] Gill v. Whitford, 138 S. Ct. 1916, 1941 (2018) (Kagan, J., concurring).

[187] *See Vieth*, 541 U.S. at 305-06; League of United Latin Am. Citizens (LULAC) v. Perry 548 U.S. 399, 423 (2006).

[188] *See Vieth*, 541 U.S. at 306 (Kennedy, J., concurring); *LULAC*, 548 U.S. at 492-511 (Roberts, C.J., concurring in part, concurring in the judgment in part, & dissenting in part, joined by Alito, J.).

[189] *See Gill*, 138 S. Ct. at 1933 (holding that to establish standing to sue for a claim of unconstitutional partisan gerrymandering on the basis of vote dilution, challengers must allege injuries to their interests as voters in individual districts); Benisek v. Lamone, 138 S. Ct. 1942, 1945 (2018) (per curiam) (holding that a district court did not abuse its discretion by denying a preliminary injunction to challengers claiming that a Maryland congressional district was an unconstitutional partisan gerrymander). *See also* CRS Legal Sidebar LSB10164, *Partisan Gerrymandering: Supreme Court Provides Guidance on Standing and Maintains Legal Status Quo*, by L. Paige Whitaker.

[190] For further discussion of the lower court rulings in this case, see CRS Legal Sidebar LSB10276, *Supreme Court Once Again Considers Partisan Gerrymandering: Implications and Legislative Options*, by L. Paige Whitaker.

disfavored party was likely to persist in later elections; and (3) the discriminatory effects were not attributable to other legitimate interests.[191] Further, the court determined that a partisan gerrymandered map may violate provisions in Article I requiring "the People" to select their representatives and limiting the states to determining only "neutral provisions" regarding the "Times, Places, and Manner of holding Elections."[192] Both courts concluded that a redistricting map violates the First Amendment if the challengers demonstrate that (1) the map drawers specifically intended to disadvantage voters based on their party affiliation and voting history; (2) the map burdened voters' representational and associational rights; and (3) the map drawers' intent to burden certain voters caused the "adverse impact."[193] Under a provision of federal law providing for direct appeals to the Supreme Court in cases challenging the constitutionality of redistricting maps, North Carolina legislators and Maryland officials appealed to the Supreme Court.[194]

**Supreme Court's Decision:** In *Rucho*, the Supreme Court held that, based on the political question doctrine, federal courts lack jurisdiction to resolve claims of unconstitutional partisan gerrymandering, vacating and remanding the North Carolina and Maryland lower court rulings with instructions to dismiss for lack of jurisdiction.[195] In an opinion written by Chief Justice Roberts, the Court began by addressing the Framers' views on gerrymandering.[196] According to the majority opinion, at the time of the Constitution's drafting and ratification, the Framers were well familiar with the controversies surrounding the practice of partisan gerrymandering.[197] "At no point" during the Framers' debates, the Court observed, "was there a suggestion that the federal courts had a role to play."[198] Instead, the Chief Justice viewed the Elections Clause as a purposeful assignment of disputes over partisan gerrymandering to the state legislatures, subject to a check by the U.S. Congress.[199] In this vein, the Court noted that Congress has in fact exercised its power under the Elections Clause to address partisan gerrymandering on several occasions, such as by enacting laws to require single-member and compact districts.[200]

Nonetheless, the Court acknowledged that there are two areas relating to redistricting where the Court has a unique role in policing the states—claims relating to (1) inequality of population among districts or "one-person, one-vote" and (2) racial gerrymandering.[201] However, the Court distinguished those claims from claims of unconstitutional partisan gerrymandering, reasoning that while judicially discernible and manageable standards exist for adjudicating claims relating to one-person, one-vote and racial gerrymandering, partisan gerrymandering cases "have proved far more difficult to adjudicate."[202] This difficulty stems from the fact, the Court explained, that while it is illegal for a redistricting map to violate the one-person, one-vote principle or to engage

[191] *See* Common Cause v. Rucho, 318 F. Supp. 3d 777, 861 (M.D.N.C. 2018).

[192] *Id.* at 937-38.

[193] *Common Cause*, 318 F. Supp. 3d at 929; Benisek v. Lamone, 348 F. Supp. 3d 493, 515 (D. Md. 2018).

[194] 28 U.S.C. § 1253.

[195] *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2508 (2019).

[196] *See id.* at 2494-96.

[197] *See id.* at 2494-95. Providing an example, the Court referenced the first congressional election cycle where George Washington and his Federalist allies accused Patrick Henry of attempting to gerrymander Virginia districts. *See id.*

[198] *Id.* at 2496.

[199] *See id.*

[200] *See id.* at 2495.

[201] *See id.* at 2496-97.

[202] *Id.* at 2497.

in racial discrimination, at least some degree of partisan influence in the redistricting process is inevitable and, as the Court has recognized, permissible.[203] Hence, according to the Court, the challenge has been to identify a standard for determining how much partisan gerrymandering is "too much."[204]

The Chief Justice's opinion focused on three concerns regarding what he viewed as the central argument for federal adjudication of partisan gerrymandering claims: "an instinct" that if a political party garners a certain share of a statewide vote, as a matter of fairness, courts need to ensure that the party also holds a proportional number of seats in the legislature.[205] First, the Court stated that this expectation "is based on a norm that does not exist in our electoral system."[206] For example, noting her extensive experience in state and local politics, the Court quoted Justice O'Connor's 1986 concurrence that maintained that "[t]he opportunity to control the drawing of electoral boundaries through the legislative process of apportionment is a critical and traditional part of politics in the United States."[207] Furthermore, the *Rucho* Court observed that the nation's long history of states electing their congressional representatives through "general ticket" or at-large elections typically resulted in single-party congressional delegations.[208] As a result, the Chief Justice explained, for an extended period of American history, a party could achieve nearly half of the statewide vote, but not hold a single seat in the House of Representatives, suggesting that proportional representation was not a value protected by the Constitution.[209] Second, even if proportional representation were a constitutional right, determining how much representation political parties "deserve," based on each party's share of the vote, would require courts to allocate political power, a power to which courts are, in the view of the majority, not "equipped" to exercise.[210] For the Court, resolving questions of fairness presents "basic questions that are political, not legal."[211] Third, even if a court could establish a standard of fairness, the Court determined that there is no discernible and manageable standard for identifying when the amount of political gerrymandering in a redistricting map meets the threshold of unconstitutionality.[212]

In so concluding, the Supreme Court rejected the tests that the district courts adopted in ascertaining unconstitutional partisan gerrymandering in North Carolina and Maryland.[213] As to the North Carolina case, the Court criticized the "predominant intent" prong of the test adopted by the district court in holding the map in violation of the Equal Protection Clause.[214] As the Chief Justice explained, although this inquiry is proper in the context of racial gerrymandering claims because drawing district lines based predominantly on race is inherently suspect, it does not apply in the context of partisan gerrymandering where some degree of political influence is

[203] *See id.*

[204] *Id.* at 2501.

[205] *Id.* at 2499.

[206] *Id.*

[207] *Id.* at 2498 (quoting Davis v. Bandemer, 478 U. S. 109, 145 (O'Connor, J., concurring)).

[208] *Id.* at 2499.

[209] *See id.* For example, the Court observed that in 1840, although the Whig Party in Alabama won 43% of the statewide vote, it did not receive a single seat. *See id.*

[210] *Id.*

[211] *Id.* at 2498.

[212] *See id.* at 2500.

[213] *See id.* at 2502-05.

[214] *Id.* at 2502-03.

permissible.[215] Moreover, responding to the aspect of the test requiring challengers to demonstrate that partisan vote dilution "is likely to persist," the Court concluded that it would require courts to "forecast with unspecified certainty whether a prospective winner will have a margin of victory sufficient to permit him to ignore the supporters of his defeated opponent."[216] That is, according to the Court, judges under this test would "not only have to pick the winner—they have to beat the point spread."[217] The Court also disapproved of the test the district courts adopted in both the North Carolina and Maryland cases in holding that the maps violated the First Amendment's guarantee of freedom to associate.[218] As a threshold matter, the Court determined that the subject redistricting plans do not facially restrict speech, association, or any other First Amendment guarantees, as voters in diluted districts remain free to associate and speak on political matters.[219] More directly, the Court concluded that under the premise that partisan gerrymandering constitutes retaliation because of an individual's political views, "any level of partisanship in districting would constitute an infringement of their First Amendment rights."[220] As a consequence, the Court viewed the First Amendment standard as failing to provide a manageable approach for determining when partisan activity has gone too far.[221] In addition, the Court rejected North Carolina's reliance on Article I of the Constitution as the basis to invalidate a redistricting map, concluding that the text of the Constitution provided no enforceable limit for considering partisan gerrymandering claims.[222]

Nonetheless, Chief Justice Roberts acknowledged that excessive partisan gerrymandering "reasonably seem[s] unjust," stressing that the ruling "does not condone" the practice.[223] However, he maintained that the Court cannot address the problem simply "because it must," viewing any solutions to extreme partisan gerrymandering to lie with Congress and the states, not the courts.[224] Characterizing the dissent and the challengers' request that the Court ascertain a standard for adjudication as seeking "an unprecedented expansion of judicial power," the Chief Justice cautioned that such an "intervention would be unlimited in scope and duration . . . recur[ring] over and over again around the country with each new round of redistricting."[225] Instead, he observed that many states have constitutional provisions and laws providing standards for state courts to address excessive partisan gerrymandering, which have been invoked with successful results.[226] Furthermore, citing examples of past and pending federal legislation, the Court reiterated that "the Framers gave Congress the power to do something about partisan gerrymandering in the Elections Clause."[227]

**Dissenting Opinion:** Justice Kagan wrote a dissent on behalf of four Justices arguing that the Court has the power to establish a standard for adjudicating unconstitutionally excessive partisan

[215] *See id.*

[216] *Id.* at 2503.

[217] *Id.*

[218] *See id.* at 2504-05.

[219] *See id.* at 2504.

[220] *Id.*

[221] *See id.*

[222] *See id.* at 2506.

[223] *Id.* at 2506-07.

[224] *Id.* at 2507.

[225] *Id.*

[226] *See id.* at 2507-08.

[227] *Id.* at 2508.

gerrymandering and that its "abdication" in *Rucho* "may irreparably damage our system of government."[228] According to the dissent, the standards proposed by the challengers and the lower courts are not "unsupported and out-of-date musings about the unpredictability of the American voter," but instead are "evidence-based, data-based, statistics-based."[229] Moreover, responding to the Court's suggestion that Congress and the states have the power to ameliorate excessive partisan gerrymandering, the dissent maintained that the prospects for legislative reform are poor because the legislators who currently hold power as a result of partisan gerrymandering are unlikely to promote change.[230] Instead, for the dissent, the solution to what they viewed as a crisis of the political process is a means to challenge extreme partisan gerrymandering outside of that process, through the unelected federal judiciary.[231]

**Implications for Congress:** As a result of *Rucho*, federal courts lack subject-matter jurisdiction to resolve claims of unconstitutional partisan gerrymandering.[232] However, *Rucho* suggests that Congress and the states may have the power to address extreme partisan gerrymandering should they so choose.[233] For example, as observed by the Court, several bills that take various approaches to address partisan gerrymandering have been introduced in the 116th Congress.[234] For example, H.R. 1, the For the People Act of 2019, which passed the House of Representatives on March 8, 2019, would eliminate legislatures from the redistricting process and require each state to establish a nonpartisan, independent congressional redistricting commission, in accordance with certain criteria.[235] H.R. 44, the Coretta Scott King Mid-Decade Redistricting Prohibition Act of 2019, would prohibit states from carrying out more than one congressional redistricting following a decennial census and apportionment, unless a state is ordered by a court to do so in order to comply with the Constitution or to enforce the Voting Rights Act of 1965.[236] (At least one scholar has argued that limiting redistricting to once per decade renders it "less likely that redistricting will occur under conditions favoring partisan gerrymandering.")[237] H.R. 131, the Redistricting Transparency Act of 2019, would, based on the view that public oversight of redistricting may lessen partisan influence in the process, require state congressional redistricting entities to establish and maintain a public internet site and conduct redistricting under procedures that provide opportunities for public participation.[238] Notably, the Court in *Rucho* specifically stated that it expressed "no view" on any pending proposals, but observed "that the avenue for reform established by the Framers, and used by Congress in the past, remains open."[239]

With regard to the states, *Rucho* does not preclude state courts from considering such claims under applicable state constitutional provisions. For example, in 2015, the Florida Supreme Court invalidated a Florida congressional redistricting map as violating a state constitutional provision

[228] *Id.* at 2509 (Kagan, J., dissenting).

[229] *Id.* at 2519.

[230] *See id.* at 2524.

[231] *See id.* at 2525.

[232] *See id.* at 2508 (majority opinion).

[233] *See id*. at 2507-08.

[234] *See id.* at 2508.

[235] For the People Act of 2019, H.R. 1, 116th Cong. §§ 2411-2413 (2019).

[236] Coretta Scott King Mid-Decade Redistricting Prohibition Act of 2019, H.R. 44, 116th Cong. § 2 (2019).

[237] *See* Adam Cox, *Commentary: Partisan Fairness and Redistricting Politics*, 79 N.Y.U.L. REV. 751, 755 (2004).

[238] Redistricting Transparency Act of 2019, H.R. 131, 116th Cong. §§ 2-6 (2019).

[239] *See Rucho*, 139 S. Ct. at 2508.

addressing partisan gerrymandering.[240] Similarly, in 2018, the Pennsylvania Supreme Court struck down the state's congressional redistricting map under a Pennsylvania constitutional provision.[241] Looking ahead, as a result of *Rucho*, such state remedies, coupled with any congressional action, will likely be the primary means for regulating excessive partisan influence in the redistricting process.

# First Amendment

## Religious Displays: *American Legion v. American Humanist Association*[242]

In *American Legion v. American Humanist Association*, the Supreme Court held that the Bladensburg Peace Cross, a public World War I memorial in the form of a Latin cross, did not violate the First Amendment's Establishment Clause.[243] A divided Court also limited the applicability of *Lemon v. Kurtzman*,[244] a long-standing—but often-questioned[245]—precedent that had previously supplied the primary standard for evaluating Establishment Clause claims.[246] However, the separate opinions from the Court gave rise to a number of significant questions. In particular, there was no single majority opinion agreeing on what test should apply in future Establishment Clause claims.[247] Further, the Court left open the possibility that the *Lemon* test, and the specific considerations it suggests courts should take into account, may continue to govern certain types of Establishment Clause challenges.[248]

**Background:** The First Amendment's Establishment Clause provides that the government "shall make no law respecting an establishment of religion."[249] The Court has long interpreted this requirement to require the government to be "neutral" toward religion—but over the years, the Supreme Court has employed a variety of different inquiries to determine whether challenged government practices are sufficiently neutral.[250] In *Lemon*, decided in 1971, the Court synthesized

[240] *See* League of Women Voters of Fla. v. Detzner, 172 So. 3d 363, 413-14 (Fla. 2015).

[241] *See* League of Women Voters of Pa. v. Commonwealth, 175 A. 3d 282, 284 (Pa. 2018) (per curiam).

[242] Legislative Attorney Valerie Brannon authored this section.

[243] 139 S. Ct. 2067, 2074 (2019).

[244] 403 U.S. 602, 612–13 (1971).

[245] *See, e.g.*, *Am. Legion*, 139 S. Ct. at 2080 (plurality opinion) (citing cases where the Supreme Court "has either expressly declined to apply the [*Lemon*] test or has simply ignored it"); Van Orden v. Perry, 545 U.S. 677, 685 (2005) (plurality opinion) (stating that *Lemon* is "not useful" in analyzing a "passive monument"); Lee v. Weisman, 505 U.S. 577, 644 (1992) (Scalia, J., dissenting) (describing *Lemon* as a "formulaic abstraction[]" that is inconsistent with "our long-accepted constitutional traditions"); Wallace v. Jaffree, 472 U.S. 38, 108–10 (1985) (Rehnquist, J., dissenting) (arguing that *Lemon* is theoretically and practically flawed).

[246] *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 668 (2002) (O'Connor, J., concurring) (describing *Lemon* as "a central tool" in Establishment Clause analysis); Doe v. Elmbrook Sch. Dist., 687 F.3d 840, 849 (7th Cir. 2012) (stating *Lemon* is the prevailing test for Establishment Clause claims); Newdow v. Rio Linda Union Sch. Dist., 597 F.3d 1007, 1017 (9th Cir. 2010) (same); Freiler v. Tangipahoa Parish Bd. of Educ., 185 F.3d 337, 344 (5th Cir. 1999) (same).

[247] *Cf., e.g.*, *Am. Legion*, 139 S. Ct. at 2389 (plurality opinion).

[248] *Cf. id.* at 2097 (Thomas, J., concurring in the judgment) (explaining that he did not join the plurality opinion because it did not "overrule the *Lemon* test in all contexts").

[249] U.S. CONST. amend. I. The First Amendment was "made applicable to the states" by the Fourteenth Amendment. Everson v. Bd. of Educ., 330 U.S. 1, 5 (1947).

[250] *See, e.g.*, McCreary Cty. v. ACLU, 545 U.S. 844, 860 (2005) ("When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious

its prior Establishment Clause decisions into a three-part test, saying that to be considered constitutional, government action (1) "must have a secular legislative purpose"; (2) must have a "principal or primary effect . . . that neither advances nor inhibits religion"; and (3) "must not foster an excessive government entanglement with religion."[251]

However, the Court has not always applied the *Lemon* test to analyze Establishment Clause challenges.[252] For instance, in cases evaluating the constitutionality of government-sponsored prayer before legislative sessions, the Court has asked whether the disputed prayer practice "is supported by this country's history and tradition."[253] The Court has also adopted variations on *Lemon*, most notably using an "endorsement" test[254] that asks "whether the challenged governmental practice either has the purpose or effect of 'endorsing' religion."[255] Thus, in 2018, Justice Thomas said that the Court's "Establishment Clause jurisprudence is in disarray."[256] Justice Thomas and other Justices have argued that the Court should abandon *Lemon* and instead adopt a single approach to interpreting the Clause—one that can be applied consistently.[257]

The Court's divergent approaches to evaluating Establishment Clause claims were apparent in two cases, issued on the same day in 2005, that involved government-sponsored displays containing religious symbols. In the first case, *McCreary County v. ACLU*, the Court applied the *Lemon* test and held that Ten Commandments displays in two Kentucky courthouses likely violated the Establishment Clause.[258] In the second, Van Orden v. Perry, a plurality of the Court argued that like legislative prayers, religious displays should be evaluated primarily by reference to "our Nation's history."[259] Justice Breyer concurred in the Court's judgment in *Van Orden*, providing the fifth vote to uphold a Ten Commandments display on the grounds of the Texas State

neutrality . . . ."); Zelman v. Simmons-Harris, 536 U.S. 639, 652 (2002) (describing factors that render "a government aid program . . . neutral with respect to religion" and "not readily subject to challenge under the Establishment Clause"); *Everson*, 330 U.S. at 18 (1947) ("[The First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers . . . .").

[251] 403 U.S. 602, 612–13 (1971).

[252] *See, e.g.*, Van Orden v. Perry, 545 U.S. 677, 685–86 (2005) (plurality opinion) ("Over the last 25 years, we have sometimes pointed to *Lemon v. Kurtzman* as providing the governing test in Establishment Clause challenges. Yet, just two years after *Lemon* was decided, we noted that the factors identified in *Lemon* serve as 'no more than helpful signposts.'" (quoting Hunt v. McNair, 413 U.S. 734, 741 (1973)) (citations omitted)); Lynch v. Donnelly, 465 U.S. 668, 679 (1984) (noting the Court's "unwillingness to be confined to any single test or criterion in this sensitive area").

[253] Rowan Cty. v. Lund, 138 S. Ct. 2564, 2564–65 (2018) (Thomas, J., dissenting from denial of certiorari) (citing Town of Greece v. Galloway, 572 U.S. 565 (2014), and Marsh v. Chambers, 463 U.S. 783 (1983)).

[254] In *Lynch v. Donnelly*, Justice O'Connor wrote a concurring opinion saying that *Lemon*'s first prong "asks whether government's actual purpose is to endorse or disapprove of religion," while the second "asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval." 465 U.S. 668, 690 (1984) (O'Connor, J., concurring). The Court as a whole later employed this "endorsement" analysis in a number of decisions. *E.g.*, Allegheny Cty. v. ACLU, 492 U.S. 573, 592–93 (1989) (describing decisions).

[255] *Allegheny Cty.*, 492 U.S. at 592.

[256] *Rowan Cty.*, 138 S. Ct. at 2564. *See also, e.g.*, Kondrat'Yev v. City of Pensacola, 903 F.3d 1169, 1179 (11th Cir. 2018) ("The Court's Establishment Clause jurisprudence is, to use a technical legal term of art, a hot mess.").

[257] *See, e.g.*, Van Orden v. Perry, 545 U.S. 677, 692–93 (2005) (Thomas, J., concurring) ("This case would be easy if the Court were willing to abandon the inconsistent guideposts it has adopted for addressing Establishment Clause challenges, and return to the original meaning of the Clause."); *supra* note 245.

[258] *See* McCreary Cty. v. ACLU, 545 U.S. 844, 871 (2005); *see also id.* at 861–63 (defending the continued use of the "purpose" prong of *Lemon* test).

[259] *See* Van Orden v. Perry, 545 U.S. 677, 685 (2005) (plurality opinion) (holding that a Ten Commandments display did not violate the Establishment Clause under an analysis "driven both by the nature of the monument and by our Nation's history").

Capitol.[260] Justice Breyer stated that that while he believed the particular monument did "satisfy [the] Court's more formal Establishment Clause tests," including *Lemon*, his view of the case was also driven by a number of other factors, including the monument's history and physical setting.[261] In particular, he emphasized that the monument had gone legally unchallenged for 40 years.[262] Under the circumstances, Justice Breyer argued that removing or altering the monument would likely be "divisive" in a way that the monument itself was not, exhibiting "a hostility toward religion that has no place in our Establishment Clause traditions."[263]

The plaintiffs in *American Legion* argued that Maryland violated the Establishment Clause by maintaining a war memorial known as the Bladensburg Peace Cross.[264] The monument is a 32-foot Latin cross that sits on a large base containing a plaque with the names of 49 Prince George's County soldiers who died in World War I.[265] The Fourth Circuit had agreed with the challengers and held that after looking to the *Lemon* test and giving "due consideration" to the "factors" set forth in Justice Breyer's *Van Orden* concurrence, the memorial violated the First Amendment.[266]

**Supreme Court's Decision:** The Supreme Court reversed the Fourth Circuit's decision.[267] But while seven Justices ultimately approved of the Peace Cross, they did so in six different opinions,[268] reflecting disagreement about how, exactly, to resolve the case. Justice Alito wrote the opinion for the *American Legion* Court, although certain portions of that opinion represented only a plurality. Writing for five members of the Court, Justice Alito's majority opinion relied on some of the factors highlighted by Justice Breyer's concurring opinion in *Van Orden*—namely, the fact that this particular monument had "stood undisturbed for nearly a century" and had "acquired historical importance" to the community.[269] The Court acknowledged that the cross is a Christian symbol, but viewed the symbol as taking on "an added secular meaning when used in World War I memorials."[270] Under these circumstances, the Court concluded that requiring the state to "destroy[] or defac[e]" the Peace Cross "would not be neutral" with respect to religion "and would not further the ideals of respect and tolerance embodied in the First Amendment."[271]

**Concurring and Dissenting Opinions:** A different majority of Justices voted to limit the applicability of the *Lemon* test—although no five Justices agreed just how far to limit *Lemon*. Justice Alito, writing for a four-Justice plurality,[272] suggested that "longstanding monuments,

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[260] *Id.* at 705 (Breyer, J., concurring in the judgment).

[261] *Id.* at 701–03. Justice Breyer said that while *Lemon*'s three prongs might "provide useful guideposts," he believed that in the "fact-intensive" application of the Establishment Clause, there could be "no test-related substitute for the exercise of legal judgment." *Id.* at 700.

[262] *Id.* at 702.

[263] *Id.* at 703–04.

[264] Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2074 (2019).

[265] *Id.* at 2077.

[266] Am. Humanist Ass'n v. Md.-Nat'l Capital Park & Planning Comm'n, 874 F.3d 195, 212 (4th Cir. 2017).

[267] *Am. Legion*, 139 S. Ct. at 2074.

[268] Justices Breyer, Kagan, and Kavanaugh each filed concurring opinions, while Justices Thomas and Gorsuch filed opinions concurring in the judgment only.

[269] *Am. Legion*, 139 S. Ct. at 2089–90.

[270] *Id.* at 2089.

[271] *Id.* at 2090.

[272] Justice Kagan declined to join this portion of the opinion. *Id.* at 2094 (Kagan, J., concurring in part). While she "agree[d] that rigid application of the *Lemon* test does not solve every Establishment Clause problem," she defended *Lemon*'s first two prongs, stating, "that test's focus on purposes and effects is crucial in evaluating government action in this sphere." *Id.*

symbols, and practices" should not be evaluated under *Lemon*,[273] but should instead be considered constitutional so long as they "follow in" a historical "tradition" of religious accommodation.[274] Justices Thomas and Gorsuch wrote separate concurrences disapproving of *Lemon* more generally.[275] Justice Thomas argued that the Court should "overrule the *Lemon* test in all contexts"[276] and instead analyze Establishment Clause claims by reference to historical forms of "coercion."[277] Justice Gorsuch viewed *Lemon* as a "misadventure," expressing concerns about that test and suggesting instead that the Court should look to historical practice and traditions in Establishment Clause challenges.[278] Therefore, it appears that *Lemon* will no longer be used to assess the constitutionality of "longstanding monuments, symbols, and practices."[279]

Justice Ginsburg dissented, joined by Justice Sotomayor. She stressed the cross's religious nature, observing that it has become a marker for Christian soldiers' graves "precisely because" the cross symbolizes "sectarian beliefs."[280] Her analysis did not expressly invoke the three-part *Lemon* test, but applied the "endorsement" test developed from *Lemon*, asking whether the display conveyed "a message that religion or a particular religious belief is favored or preferred."[281] Looking to the memorial's nature and history, Justice Ginsburg believed that the Peace Cross did convey a message of endorsement.[282] Ultimately, she concluded that by maintaining the monument, the state impermissibly "elevate[d] Christianity over other faiths, and religion over nonreligion."[283]

**Implications for Congress:** While *American Legion* was ostensibly concerned with the constitutionality of a single monument, the Court's decision raises a number of questions

[273] *Id.* at 2081–82 (plurality opinion); *see also id.* at 2081 ("[T]he *Lemon* test presents particularly daunting problems in cases, including the one now before us, that involve the use, for ceremonial, celebratory, or commemorative purposes, of words or symbols with religious associations."). In his separate opinion, Justice Gorsuch expressed practical and theoretical concerns about presuming that "*longstanding* monuments, symbols, and practices" are constitutional, stating that both old and new practices should be assessed for their "compliance with ageless principles." *Id.* at 2102 (Gorsuch, J., concurring in the judgment) (emphasis added).

[274] *Id.* at 2089 (plurality opinion). Justice Breyer joined this portion of the opinion. But while he agreed that "the Court appropriately 'looks to history for guidance,'" he emphasized in a separate opinion that he did not understand the majority "to adopt a 'history and tradition test' that would permit any newly constructed religious memorial on public land" to stand regardless of the monument's "particular historical context." *Id.* at 2091 (Breyer, J., concurring) (citations omitted).

[275] Justice Kavanaugh joined the plurality but also wrote separately to state his belief that *Lemon* "does not explain the Court's decisions" in Establishment Clause cases, suggesting that instead, the cases have looked to "principles based on history, tradition, and precedent." *Id.* at 2092, 2093 (Kavanaugh, J., concurring).

[276] *Id.* at 2097 (Thomas, J., concurring in the judgment).

[277] *Id.* at 2096. In his view, the display of the Peace Cross did not share "any of the historical characteristics of an establishment of religion" because the state did not attempt "to control religious doctrine or personnel, compel religious observance, single out a particular religious denomination for exclusive state subsidization, or punish dissenting worship." *Id.*

[278] *Id.* at 2101–02 (Gorsuch, J., concurring in the judgment). While Justice Gorsuch expressed concerns about the substance of the *Lemon* test, his primary objections to the decision were based on procedural grounds. *See id.* at 2102–03. He argued that the plaintiff in *Lemon*, and any other plaintiffs alleging that they were "offended" by observing religious displays, lacked standing to assert their claims. *Id.* at 2100–01.

[279] *Id.* at 2081–82 (plurality opinion). The plurality opinion is narrower than the concurring opinions because it would only have partially limited *Lemon*, likely making it controlling in the future. *See* Marks v. United States, 430 U.S. 188, 193 (1977) (explaining that when "no single rationale explaining the result [of a case] enjoys the assent of five Justices," the position representing the narrowest grounds is the holding of the Court).

[280] *American Legion*, 139 S. Ct. at 2104 (Ginsburg, J., dissenting).

[281] *Id.* at 2105 (quoting *Allegheny Cty.*, 492 U.S. at 593) (internal quotation mark omitted).

[282] *Id.* at 2106–07.

[283] *Id.* at 2104.

regarding future interpretations of the Establishment Clause. First, while the plurality opinion said that "monuments, symbols, and practices with a longstanding history" should now be evaluated by reference to historical practices rather than the *Lemon* test, it is not clear what qualifies as a long-standing symbol or practice.[284] Further, it is unclear whether the historical practice test will apply outside of the context of challenges to monuments or legislative prayer. Indeed, two of the Justices who joined the plurality opinion—Justices Breyer and Kavanaugh—wrote separate opinions suggesting that other factors in addition to historical practice may be relevant to evaluating Establishment Clause challenges.[285] More broadly, however, regardless of the particular test employed, the opinions in *American Legion* suggest that the Roberts Court may be adopting a view of the Establishment Clause that is more accommodating of government sponsorship of religious displays and practices—even where those practices are aligned with a particular religion.[286] Given that a majority of Justices agreed in *American Legion* that at least with respect to government use of religious symbols, "[t]he passage of time gives rise to a strong presumption of constitutionality,"[287] it seems likely that courts will view Establishment Clause challenges to long-standing monuments with significant skepticism moving forward.[288]

# Separation of Powers

## Nondelegation Doctrine: *Gundy v. United States*[289]

In affirming the petitioner's conviction for violating the Sex Offender Registration and Notification Act (SORNA), a divided Supreme Court in *Gundy v. United States* upheld the constitutionality of Congress's delegated authority to the U.S. Attorney General to apply registration requirements to offenders convicted prior to SORNA's enactment.[290] In a plurality opinion written on behalf of four Justices, Justice Kagan concluded that SORNA's delegation "easily passes constitutional muster" and was "distinctively small-bore" when compared to the other broad delegations the Court has upheld since 1935.[291] Justice Gorsuch's dissent, joined by Chief Justice Roberts and Justice Thomas, highlighted an emerging split on the Court's approach in reviewing authority Congress delegates to another branch of government.[292] Providing the fifth vote to affirm Gundy's conviction, Justice Alito concurred in the judgment only, declining to join Justice Kagan's opinion and indicating his willingness to rethink the Court's approach to the

[284] *Id.* at 2089 (plurality opinion).

[285] *See id.* at 2090–91 (Breyer, J., concurring) (reiterating that "there is no single formula for resolving Establishment Clause challenges" and outlining relevant factual circumstances); *id.* at 2093, n* (Kavanaugh, J., concurring) (outlining factors that create a "safe harbor" for government actions but stating that other factors may come into play).

[286] *See id*. at 2090 (majority opinion) ("The cross is undoubtedly a Christian symbol, but that fact should not blind us to everything else that the Bladensburg Cross has come to represent."); *see also* Town of Greece v. Galloway, 572 U.S. 565, 578 (2014) ("An insistence on nonsectarian or ecumenical prayer as a single, fixed standard is not consistent with the tradition of legislative prayer outlined in the Court's cases.").

[287] *Am. Legion*, 139 S. Ct. at 2085 (majority opinion).

[288] At least one federal court of appeals has since concluded that *Lemon* did not govern its analysis in an opinion approving of a county seal containing a Latin cross, stating instead that *American Legion* created a presumption of constitutionality for the seal. Freedom From Religion Found. v. Lehigh Cty., No. 17-3581, 2019 WL 3720709, at *1 (3d Cir. Aug. 8, 2019).

[289] Legislative Attorney Linda Tsang authored this section.

[290] 139 S. Ct. 2116, 2121 (2019) (plurality opinion).

[291] *Id.* at 2121, 2130.

[292] *Id.* at 2131-48.

nondelegation doctrine, which seeks to bar Congress from delegating its legislative powers to other branches of government.[293] After *Gundy*, whether the Court revives the long-dormant nondelegation doctrine likely depends on Justice Kavanaugh's views on the doctrine. (Justice Kavanaugh, who was not confirmed to the Court at the time of oral arguments, took no part in the *Gundy* decision.[294])

**Background:** Article I, Section 1 of the Constitution provides that "[a]ll legislative Powers herein granted" will be vested in the United States Congress.[295] The Supreme Court has held that the "text in [Article I's Vesting Clause] permits no delegation of those powers."[296] The nondelegation doctrine, as crafted by the courts, exists mainly to prevent Congress from ceding its legislative power to other entities and, in so doing, maintain the separation of powers among the three branches of government.[297] At the same time, the Court has recognized that the nondelegation doctrine does not require complete separation of the three branches of government, permitting Congress to delegate certain powers to implement and enforce the law.[298] To determine whether a delegation of authority is constitutional, the Court has required that Congress lay out an "intelligible principle" to guide the delegee's discretion and constrain its authority.[299] Under the lenient "intelligible principle" standard that has its origins in the 1928 decision *J.W. Hampton, Jr., & Co. v. United States*, the Court has relied on the nondelegation doctrine twice, in 1935, to invalidate two provisions in the National Industrial Recovery Act delegating authority to the President,[300] rejecting every nondelegation challenge thereafter.[301]

*Gundy*, the latest nondelegation challenge at the Supreme Court, centered on the application of registration requirements under SORNA to pre-act offenders. Enacted as Title I of the Adam Walsh Child Protection and Safety Act of 2006, SORNA's stated purpose is "to protect the public from sex offenders and offenders against children" by establishing a comprehensive national registration system of offenders.[302] To this end, SORNA requires convicted sex offenders to register in each state where the offender resides, is employed, or is a student.[303] Section 20913(d)

[293] *Id.* at 2130-31 (concurring, Alito, J.).

[294] *Id.* at 2120 (plurality opinion).

[295] U.S. CONST. art. I, § 1.

[296] Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001). *See also* United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 85 (1932) ("[T]he legislative power of Congress cannot be delegated.").

[297] *See* Loving v. United States, 517 U.S. 748, 758 (1996) ("Another strand of our separation-of-powers jurisprudence, the delegation doctrine, has developed to prevent Congress from forsaking its duties.").

[298] Mistretta v. United States, 488 U.S. 361, 372 (1989); Field v. Clark, 143 U.S. 649, 692 (1892); Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42 (1825).

[299] J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928). *See, e.g.*, Panama Ref. Co. v. Ryan, 293 U.S. 388, 421 (1935) ("The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply.").

[300] *See* Fed. Power Comm'n. v. New England Power Co., 415 U.S. 345, 352-53 (1974) (Marshall, J., concurring in part and dissenting in part) (remarking that the nondelegation doctrine has "been virtually abandoned by the Court for all practical purposes").

[301] The Supreme Court's consistent response to nondelegation doctrine challenges is reflected by the fact that "the combined vote in the Supreme Court on nondelegation issues from *Mistretta* [in 1989] through *American Trucking* [in 2001] was 53-0." Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 330 (2002).

[302] Sex Offender Registration and Notification Act, Pub. L. No. 109-248, §§ 101-155, 120 Stat. 587 (2006) (codified at 34 U.S.C. § 20901).

[303] 34 U.S.C. § 20913(a). The statute requires each state receiving funding under SORNA to specify a minimum one-year imprisonment penalty for failure to comply with registration requirements. *Id.* § 20913(e).

of SORNA authorizes the Attorney General to "specify the applicability" of the registration requirements "to sex offenders convicted before the enactment" of the act and to "prescribe rules for the registration of any such sex offenders" and for other offenders unable to comply with the initial registration requirements.[304] As decided by the Court in *Reynolds v. United States*, the law's registration requirements did not apply to pre-SORNA offenders until the Attorney General so specified.[305] Accordingly, in a series of interim and final rules and guidance documents issued between 2007 and 2011, the Attorney General specified that SORNA's requirements apply to all sex offenders, including sex offenders convicted before the statute's enactment.[306]

Before the enactment of SORNA, petitioner Herman Gundy was convicted of a sex offense in Maryland.[307] After serving his sentence, Gundy traveled from Maryland to New York.[308] Subsequently, he was arrested and convicted for failing to register as a sex offender in New York under SORNA.[309] In his petition to the Supreme Court, Gundy argued, among other things, that SORNA's grant of "undirected discretion" to the Attorney General to decide whether to apply the statute to pre-SORNA offenders is an unconstitutional delegation of legislative power to the executive branch.[310]

**Supreme Court's Decision:** In *Gundy,* Justice Kagan announced the judgment of the Court, affirming the lower court, and authored a plurality opinion joined by Justices Ginsburg, Breyer, and Sotomayor that followed the modern approach toward the nondelegation doctrine,[311] rejecting Gundy's argument that Congress unconstitutionally delegated "quintessentially legislative powers" to the Attorney General to decide whether to apply the statute to pre-SORNA offenders.[312] Relying on *Reynolds*, Justice Kagan read SORNA as requiring the Attorney General to "apply SORNA's registration requirements as soon as feasible to offenders convicted before the statute's enactment."[313] Based on this interpretation, the plurality decided that Congress did

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[304] *Id.* § 20913(d).

[305] Reynolds v. United States, 565 U.S. 432, 445-46 (2012) (holding that SORNA does not apply registration requirements to pre-SORNA sex offenders until after the Attorney General exercised his authority to give SORNA retroactive effect).

[306] *See* Applicability of the Sex Offender Registration and Notification Act; Interim Rule and Request for Comment, 72 Fed. Reg. 8,894, 8,896 (Feb. 28, 2007) ("SORNA applies to all sex offenders (as the Act defines that term) regardless of when they were convicted."); The National Guidelines for Sex Offender Registration and Notification Final Guidelines, 73 Fed. Reg. 38,030, 38,063 (July 2, 2008) ("SORNA applies to all sex offenders, including those convicted of their registration offenses prior to the enactment of SORNA or prior to particular jurisdictions' incorporation of the SORNA requirements into their programs."); Applicability of the Sex Offender Registration and Notification Act; Final Rule, 75 Fed. Reg. 81,849, 81,850 (Dec. 29, 2010) (finalizing the interim rule "to eliminate any possible uncertainty or dispute concerning the scope of SORNA's application") (codified at 28 C.F.R. § 72.3); Supplemental Guidelines for Sex Offender Registration and Notification; Final Guidelines, 76 Fed. Reg. 1,630, 1,639 (Jan. 11, 2011) (clarifying that SORNA requirements apply to previous sex offenders "have fully exited the justice system, i.e., those who are no longer prisoners, supervisees, or registrants" who have been subsequently convicted of a new non-sex felony offense).

[307] United States v. Gundy, 695 Fed. Appx. 639, 640 (2d Cir. 2017).

[308] *Id.*

[309] *Id.*

[310] Brief for Petitioner at 15, Gundy v. United States, No. 17-6086 (U.S. May 25, 2018), 2018 WL 2441585.

[311] Gundy v. United States, 139 S. Ct. 2116, 2121 (2019).

[312] Brief for Petitioner at 15, 23-25, Gundy v. United States, No. 17-6086 (U.S. May 25, 2018), 2018 WL 2441585.

[313] *Gundy*, 139 S. Ct. at 2121 (plurality opinion). Although the delegation in Section 20913(d) does not refer to a feasibility standard, Justice Kagan relied on the legislative history, definition of "sex offender," and SORNA's stated purpose (i.e., to establish a "comprehensive" registration system) as an "appropriate guide" to limit the Attorney General's discretion. *Id.* at 2127.

not violate the nondelegation doctrine based on the Court's "long established law" in upholding broad delegations.[314] The plurality explained that under the intelligible principle standard, so long as Congress has made clear the "general policy" and boundaries of the delegation, such broad delegations are permissible.[315] Compared to very broad delegations upheld in the past (e.g., delegations to agencies to regulate in the "public's interest"), the plurality concluded that the Attorney General's "temporary authority" to delay the application of SORNA's registration requirements to pre-act offenders due to feasibility concerns "falls well within constitutional bounds."[316]

**Dissenting and Concurring Opinions:** In contrast, in his dissent, Justice Gorsuch, joined by Chief Justice Roberts and Justice Thomas, viewed the plain text of the delegation as providing the Attorney General limitless and "vast" discretion and "free rein" to impose (or not) selected registration requirements on pre-act offenders.[317] In concluding the delegation to be unconstitutional, Justice Gorsuch distinguished his analysis from the plurality and the Court's precedents by focusing on the separation-of-powers principles that underpin the nondelegation doctrine. In the dissent's view, the nondelegation doctrine used to serve a vital role in maintaining the separation of powers among the branches of government by assuring that elected Members of Congress fulfill their constitutional lawmaking duties.[318] Justice Gorsuch warned that delegating Congress's constitutional legislative duties to the executive branch bypasses the bicameral legislative process, resulting in laws that fail to protect minority interests or provide political accountability or fair notice.[319] Consequently, the dissent faulted the "evolving intelligible principle" standard and increasingly broad delegations as pushing the nondelegation doctrine further from its separation-of-powers roots.[320] Arguing for a more robust review of congressional delegations, Justice Gorsuch outlined several "guiding principles."[321] According to the dissent, Congress could permissibly delegate (1) authority to another branch of government to "fill up the details" of Congress's policies regulating private conduct; (2) fact-finding to the executive branch as a condition to applying legislative policy; or (3) nonlegislative responsibilities that are within the scope of another branch of government's vested powers (e.g., assign foreign affairs powers that are constitutionally vested in the President).[322]

Applying these "traditional" separation-of-powers tests in lieu of the plurality's "intelligible principle" approach, Justice Gorsuch concluded that SORNA's delegation was an unconstitutional breach of the separation between the legislative and executive branches.[323] He

[314] *Id.* at 2129.

[315] *Id.*

[316] *Id.* at 2129-30.

[317] *Id.* at 2132 (Gorsuch, J., dissenting).

[318] *Id.* at 2133-34.

[319] *Id.* at 2134-35.

[320] *See id.* at 2138 (discussing A.L.A. Schechter Poultry Corp. v. United States, 295 U. S. 495 (1935) and Panama Refining Co. v. Ryan, 293 U. S. 388 (1935)). In the dissent's view, when the Court introduced the concept of the "intelligible principle" in 1928 in *J.W. Hampton, Jr., & Co. v. United States*, the test was rooted in the "traditional" separation-of-powers tests that drew the line between "policy and details, lawmaking and fact-finding, and legislative and non-legislative functions" in determining whether the delegation was constitutional. *Id.* at 2138-39. Only in later years, Justice Gorsuch noted, the "mutated" version of the intelligible principle test lost its "basis in the original meaning of the Constitution" because courts took "isolated" or "passing" phrases or comments from judicial precedents out of context to uphold broad delegations as constitutional. *Id.* at 2139.

[321] *Id.* at 2138-39.

[322] *Id.* at 2136-37.

[323] *Id.* at 2143-48.

argued that SORNA lacked a "single policy decision concerning pre-Act offenders" and delegated more than the power to fill the details to the Attorney General.[324] The dissent disputed the plurality's comparison of SORNA's delegation to other broad delegations that the Court has upheld, reasoning that "there isn't . . . a single other case where we have upheld executive authority over matters like these on the ground they constitute mere 'details.'"[325] Further, he asserted that the delegation is neither conditional legislation subject to executive fact-finding nor a delegation of powers vested in the executive branch because determining the rights and duties of citizens is "quintessentially legislative power."[326] In "a future case with a full panel," Justice Gorsuch hoped that the Court would recognize that "while Congress can enlist considerable assistance from the executive branch in filling up details and finding facts, it may never hand off to the nation's chief prosecutor the power to write his own criminal code. That 'is delegation running riot.'"[327]

Although Justice Alito voiced "support [for the] effort" of the dissent in rethinking the Court's approach to the nondelegation doctrine, he opted to not join that effort without the support of the majority of the Court.[328] As a result, Justice Alito concurred in the judgment of the Court in affirming the petitioner's conviction.[329] In his brief, five-sentence concurring opinion, Justice Alito viewed a "discernable standard [in SORNA's delegation] that is adequate under the approach this Court has taken for many years."[330]

**Implications for Congress:** The divided opinions in *Gundy* signal a potential shift in the Court's approach in nondelegation challenges and potential resurrection of the nondelegation doctrine. With three Justices and the Chief Justice in *Gundy* willing to reconsider or redefine the Court's "intelligible principle" standard, Justice Kavanaugh, who did not participate in *Gundy*, appears likely to be the critical vote to break the tie in a future case considering a revitalization of the nondelegation principle.[331]

If the Court were to replace the modern intelligible principle approach, new challenges may arise in determining when Congress crosses the nondelegation line.[332] A more restrictive nondelegation standard could invite constitutional challenges to many other statutory provisions that delegate broad authority and discretion to the executive branch to issue and enforce regulations.[333] The

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[324] *Id.* at 2143.

[325] *Id.* He noted that the plurality "reimagined" SORNA in a "new and narrower way" to include a feasibility standard that is not specified explicitly in the statute. *Id.* at 2145-46.

[326] *Id.* at 2144.

[327] *Id.* at 2148.

[328] *Id.* at 2130-31 (Alito, J., concurring).

[329] *Id.*

[330] *Id.* at 2131.

[331] Prior to his elevation to the Supreme Court, then-Judge Kavanaugh on the D.C. Circuit, while never opining on the merits of the modern approach toward nondelegation issues, stressed both the importance of the separation of powers and the judiciary's role in enforcing the Framers of the Constitution clear structural and procedural designs for our government. *See generally* CRS Report R45293, *Judge Brett M. Kavanaugh: His Jurisprudence and Potential Impact on the Supreme Court*, coordinated by Andrew Nolan, at 145-161 (discussing then-Judge Kavanaugh's jurisprudence related to the separation of powers).

[332] Indeed, the dissent in *Gundy* acknowledged the inherent difficulty in defining the precise boundaries between the three branches of government and the "exact line" between legislative and nonlegislative functions. *Gundy*, 139 S. Ct. at 2135-39 (Gorsuch, J., dissenting). *See also* Kristin E. Hickman, Gundy, *Nondelegation, and the Never-Ending Hope*, THE REGULATORY REV. (July 8, 2019), https://www.theregreview.org/2019/07/08/hickman-nondelegation (discussing key obstacles to more rigorous enforcement of the nondelegation doctrine).

[333] *See* Hickman, Gundy, *supra* note 332 (discussing key obstacles to more rigorous enforcement of the nondelegation

significance of these challenges was the subject of a debate between the *Gundy* plurality and dissent. Justice Kagan cautioned that striking down SORNA's delegation as unconstitutional would make most of Congress's delegations to the executive branch unconstitutional because Congress relies on broad delegations to executive agencies to implement its policies.[334] However, Justice Gorsuch countered that "respecting the separation of powers" does not prohibit Congress from authorizing the executive branch to fill in details, find facts that trigger applicable statutory requirements, or exercise nonlegislative powers.[335]

A future case[336] may provide the Court with the opportunity to provide guidance to the courts and Congress on how precise Congress must be in its delegation and how best to draw the line between permissible and impermissible delegations.[337] For now, however, the current intelligible principle standard in use since 1935 survives while the nondelegation doctrine continues to remain "moribund."[338]

doctrine).

[334] *Gundy*, 139 S. Ct. at 2130 (quoting *Mistretta*, 488 U. S. at 416) (plurality opinion).

[335] *Id.* at 2145 (Gorsuch, J., dissenting).

[336] The American Institute for International Steel (AIIS) is appealing the U.S. Court of International Trade's decision that rejected a constitutional challenge of Section 232 of the Trade Expansion Act of 1962, which allows the President to restrict imports found to be a threat to national security. Brief for the Plaintiffs-Appellants, AIIS, Inc. v. United States, No. 19-1727 (Fed. Cir. Aug. 9, 2019). In its appeal to the Federal Circuit, AIIS argues that Section 232 violated the nondelegation principle because it fails to limit or guide the discretion of the president's authority. *Id.* at 2. In June 2019, prior to AIIS's appeal to the Federal Circuit, the Supreme Court rejected the AIIS's petition to review the U.S. Court of International Trade decision. AIIS, Inc. v. United States, No. 18-1317 (S. Ct. June 24, 2019). Depending on the Federal Circuit's decision, the Supreme Court may have an opportunity to review the nondelegation issue in Section 232.

[337] The Court could narrow the intelligible principle standard in other ways by limiting when a court may infer intelligible principles from legislative history or policy statements, or define stricter standards for delegations that involve criminal sanction or retroactivity of a law. Further, as noted in the *Gundy* dissent and by some legal scholars, even if the Court does not revisit the nondelegation doctrine, other principles from administrative and constitutional law may limit the reach of Congress's ability to delegate its powers to administrative agencies. *Id.* at 2141-42 (Gorsuch, J., dissenting). *See also* Kevin M. Stack, *The Constitutional Foundations of* Chenery, 116 YALE L.J. 952, 990-91 (2007) (describing as an alternative to enforcing the "intelligible principle" standard the doctrines of statutory interpretation and judicial canons).

[338] Eric A. Posner & Adrian Vermeule, *Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008*, 76 U. CHI. L. REV. 1613, 1630 (2009) ("[T]he nondelegation doctrine is largely moribund at the level of constitutional law.").

## Table 1. Cases Heard by the Supreme Court in the October 2018 Term

| Name of Case | Case Number | Date of Oral Argument | Date of Opinion | *Question(s) Presented* (as Quoted from SCOTUSBlog.com)<br>**Opinion's Central Holding** (as Quoted from Supreme Court Syllabus with Minor Alterations) | Area(s) of Law |
|---|---|---|---|---|---|
| *Air and Liquid Systems Corp. v. DeVries* | 17-1104 | 10/10/18 | 3/19/19 | *Whether products-liability defendants can be held liable under maritime law for injuries caused by products that they did not make, sell or distribute.*<br>**Held: In the maritime tort context, a product manufacturer has a duty to warn when its product requires incorporation of a part, the manufacturer knows or has reason to know that the integrated product is likely to be dangerous for its intended uses, and the manufacturer has no reason to believe that the product's users will realize that danger.** | Admiralty & Maritime Law<br>Torts |
| *American Legion v. American Humanist Association; Maryland-National Capital Park and Planning Commission v. American Humanist Association*[b] | 17-1717; 18-18 | 2/27/19 | 6/20/19 | *(1) Whether a 93-year-old memorial to the fallen of World War I is unconstitutional merely because it is shaped like a cross; (2) whether the constitutionality of a passive display incorporating religious symbolism should be assessed under the tests articulated in* Lemon v. Kurtzman, Van Orden v. Perry, Town of Greece v. Galloway *or some other test; and (3) whether, if the test from* Lemon v. Kurtzman *applies, the expenditure of funds for the routine upkeep and maintenance of a cross-shaped war memorial, without more, amounts to an excessive entanglement with religion in violation of the First Amendment.*<br>**Held: The Bladensburg Cross does not violate the Establishment Clause.** | Constitutional Law |
| *Apple Inc. v. Pepper* | 17-204 | 11/26/18 | 5/13/19 | *Whether consumers may sue anyone who delivers goods to them for antitrust damages, even when they seek damages based on prices set by third parties who would be the immediate victims of the alleged offense.*<br>**Held: Respondents, who purchased apps for their iPhones though Apple's App Store, were direct purchasers from Apple under *Illinois Brick Co. v. Illinois*, 431 U.S. 720, and may sue Apple for allegedly monopolizing the retail market for the sale of iPhone apps.** | Antitrust & Trade Law |

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|---|---|---|---|---|---|
| *Azar v. Allina Health Services* | 17-1484 | 1/15/19 | 6/3/19 | *Whether 42 U.S.C. § 1395hh(a)(2) or § 1395hh(a)(4) required the Department of Health and Human Services to conduct notice-and-comment rulemaking before providing the challenged instructions to a Medicare administrative contractor making initial determinations of payments due under Medicare.*<br>**Held: Because the Department of Health and Human Services neglected its statutory notice-and-comment obligations when it revealed a new policy that dramatically—and retroactively—reduced Medicare payments to hospitals serving low-income patients, its policy must be vacated.** | Administrative Law<br>Public Health & Welfare Law |
| *Biestek v. Berryhill* | 17-1184 | 12/4/18 | 4/1/19 | *Whether a vocational expert's testimony can constitute substantial evidence of "other work," 20 C.F.R. § 404.1520(a)(4)(v), available to an applicant for social security benefits on the basis of a disability, when the expert fails upon the applicant's request to provide the underlying data on which that testimony is premised.*<br>**Held: A vocational expert's refusal to provide private market-survey data during a Social Security disability benefits hearing upon the applicant's request does not categorically preclude the testimony from counting as "substantial evidence" in federal court under 42 U.S.C. § 405(g).** | Workers' Compensation & SSDI |
| *BNSF Railway Company v. Loos* | 17-1042 | 11/6/18 | 3/4/19 | *Whether a railroad's payment to an employee for time lost from work is subject to employment taxes under the Railroad Retirement Tax Act.*<br>**Held: A railroad's payment to an employee for working time lost due to an on-the-job injury is taxable "compensation" under the Railroad Retirement Tax Act.** | Tax Law |

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|---|---|---|---|---|---|
| *Bucklew v. Precythe* | 17-8151 | 11/6/18 | 4/1/19 | *(1) Whether a court evaluating an as-applied challenge to a state's method of execution based on an inmate's rare and severe medical condition should assume that medical personnel are competent to manage his condition and that procedure will go as intended; (2) whether evidence comparing a state's method of execution with an alternative proposed by an inmate must be offered via a single witness, or whether a court at summary judgment must look to the record as a whole to determine whether a factfinder could conclude that the two methods significantly differ in the risks they pose to the inmate; (3) whether the Eighth Amendment requires an inmate to prove an adequate alternative method of execution when raising an as-applied challenge to the state's proposed method of execution based on his rare and severe medical condition; and (4) whether petitioner Russell Bucklew met his burden under* Glossip v. Gross *to prove what procedures would be used to administer his proposed alternative method of execution, the severity and duration of pain likely to be produced, and how they compare to the state's method of execution.*<br>**Held: *Baze v. Rees*, 553 U.S. 35, and *Glossip v. Gross*, 576 U.S. ___, govern all Eighth Amendment challenges alleging that a method of execution inflicts unconstitutionally cruel pain; petitioner's as-applied challenge to Missouri's single-drug execution protocol—that it would cause him severe pain because of his particular medical condition—fails to satisfy the *Baze-Glossip* test.** | Constitutional Law<br>Criminal Law & Procedure |
| *Cochise Consultancy Inc. v. U.S.,* ex rel. *Hunt* | 18-315 | 3/19/19 | 5/13/19 | *Whether a relator in a False Claims Act qui tam action may rely on the statute of limitations in 31 U.S.C. § 3731(b)(2) in a suit in which the United States has declined to intervene and, if so, whether the relator constitutes an "official of the United States" for purposes of Section 3731(b)(2).*<br>**Held: The limitations period in 31 U.S.C. § 3731(b)(2)—which provides that a False Claims Act action must be brought within years after the "the official of the United States charged with responsibility to act in the circumstances" knew or should have known the relevant facts, but not more than 10 years after the violation—applies in a qui tam suit in which the Federal Government has declined to intervene; the relator in a nonintervened suit is not "the official of the United States" whose knowledge triggers § 3731(b)(2)'s limitations period.** | Civil Procedure<br>Governments |

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|---|---|---|---|---|---|
| *Culbertson v. Berryhill* | 17-773 | 11/7/18 | 1/8/19 | *Whether fees subject to 42 U.S.C. § 406(b)'s 25-percent cap related to the representation of individuals claiming Social Security benefits include, as the U.S. Courts of Appeals for the 6th, 9th, and 10th Circuits hold, only fees for representation in court or, as the U.S. Courts of Appeals for the 4th, 5th, and 11th Circuits hold, also fees for representation before the agency.*<br>**Held: The Social Security Act's fee cap of 25% of past-due benefits imposed on attorneys who successfully represent Title II benefit claimants in court proceedings applies only to fees for court representation and not to aggregate fees for both court and agency representation.** | Workers' Compensation & SSDI |
| *Dawson v. Steager* | 17-419 | 12/3/18 | 2/20/19 | *Whether the doctrine of intergovernmental tax immunity, as codified in 4 U.S.C. § 111, prohibits the state of West Virginia from exempting the retirement benefits of certain former state law-enforcement officers from state taxation without providing the same exemption for the retirement benefits of former employees of the United States Marshals Service.*<br>**Held: By taxing the federal pension benefits of U.S. Marshals Service retiree Dawson, while exempting from taxation the pension benefits of certain state and local law enforcement officers, West Virginia unlawfully discriminates against Mr. Dawson as 4 U.S.C. § 111 forbids.** | Tax Law |
| *Department of Commerce v. New York* | 18-966 | 4/23/19 | 6/27/19 | *(1) Whether the district court erred in enjoining the secretary of the Department of Commerce from reinstating a question about citizenship to the 2020 decennial census on the ground that the secretary's decision violated the Administrative Procedure Act; (2) whether, in an action seeking to set aside agency action under the Administrative Procedure Act, a district court may order discovery outside the administrative record to probe the mental processes of the agency decisionmaker; (3) whether the Secretary of Commerce's decision to add a citizenship question to the Decennial Census violated the Enumeration Clause of the U.S. Constitution.*<br>**Held: The Secretary did not violate the Enumeration Clause or the Census Act in deciding to reinstate a citizenship question on the 2020 census questionnaire, but the District Court was warranted in remanding the case back to the agency where the evidence tells a story that does not match the Secretary's explanation for his decision.** | Administrative Law<br>Constitutional Law<br>Immigration |

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|---|---|---|---|---|---|
| *Dutra Group v. Batterton* | 18-266 | 3/25/18 | 6/24/19 | *Whether punitive damages may be awarded to a Jones Act seaman in a personal-injury suit alleging a breach of the general maritime duty to provide a seaworthy vessel.*<br>**Held: A plaintiff may not recover punitive damages on a maritime claim of unseaworthiness.** | Admiralty & Maritime Law<br>Workers' Compensation & SSDI |
| *Flowers v. Mississippi* | 17-9572 | 3/20/19 | 6/21/19 | *Whether the Mississippi Supreme Court erred in how it applied* Batson v. Kentucky *in this case.*<br>**Held: The trial court at Flowers' sixth murder trial committed clear error in concluding that the state's peremptory strike of a particular black prospective juror was not motivated in substantial part by discriminatory intent.** | Constitutional Law<br>Criminal Law & Procedure |
| *Food Marketing Institute v. Argus Leader Media* | 18-481 | 4/22/19 | 6/24/19 | *(1) Whether the statutory term "confidential" in the Freedom of Information Act's Exemption 4 requires the government to withhold all "commercial or financial information" that is confidentially held and not publicly disseminated; and (2) whether, in the alternative, if the Supreme Court retains the substantial-competitive-harm test, that test is satisfied when the requested information could be potentially useful to a competitor, as the U.S. Courts of Appeals for the 1st and 10th Circuits have held, or whether the party opposing disclosure must establish with near certainty a defined competitive harm like lost market share, as the U.S. Courts of Appeals for the 9th and District of Columbia Circuits have held, and as the U.S. Court of Appeals for the 8th Circuit required here.*<br>**Held: Where commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy, the information is "confidential" within the meaning of 5 U.S.C. § 552(b)(4), the Freedom of Information Act's Exemption 4.** | Administrative Law<br>Governments |
| *Fort Bend County, Texas v. Davis* | 18-525 | 4/22/19 | 6/3/19 | *Whether Title VII's administrative-exhaustion requirement is a jurisdictional prerequisite to suit, as three circuits have held, or a waivable claim-processing rule, as eight circuits have held.*<br>**Held: The charge-filing precondition to suit set out in Title VII of the Civil Rights Act of 1964 is not a jurisdictional requirement.** | Civil Rights Law |

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|---|---|---|---|---|---|
| *Fourth Estate Public Benefit Corp. v. Wall-Street.com* | 17-571 | 1/8/19 | 3/4/19 | *Whether the "registration of [a] copyright claim has been made" within the meaning of 17 U.S.C. § 411(a) when the copyright holder delivers the required application, deposit, and fee to the Copyright Office, as the U.S. Courts of Appeals for the 5th and 9th Circuits have held, or only once the Copyright Office acts on that application, as the U.S. Courts of Appeals for the 10th and, in the decision below, the 11th Circuits have held.*<br>**Held: Registration occurs, and a copyright claimant may commence an infringement suit, when the Copyright Office registers a copyright.** | Copyright Law |
| *Franchise Tax Board of California v. Hyatt* | 17-1299 | 1/9/19 | 5/13/19 | *Whether* Nevada v. Hall, *which permits a sovereign state to be haled into another state's courts without its consent, should be overruled.*<br>**Held: *Nevada v. Hall*, 440 U.S. 410, is overruled; States retain their sovereign immunity from private suits brought in courts of other States.** | Civil Procedure<br>Constitutional Law |
| *Frank v. Gaos* | 17-961 | 10/31/18 | 3/20/19 | *Whether, or in what circumstances, a cy pres award of class action proceeds that provides no direct relief to class members supports class certification and comports with the requirement that a settlement binding class members must be "fair, reasonable, and adequate."*<br>**Held: This class action settlement case is remanded for the courts below to address the plaintiffs' standing in light of *Spokeo, Inc. v. Robins*, 578 U. S. ___.** | Civil Procedure |
| *Gamble v. United States* | 17-646 | 12/6/18 | 6/17/19 | *Whether the Supreme Court should overrule the "separate sovereigns" exception to the Double Jeopardy Clause.*<br>**Held: The dual sovereignty doctrine—under which two offenses are not the "same offence" for double jeopardy purposes if prosecuted by separate sovereigns—is upheld.** | Constitutional Law<br>Criminal Law & Procedure |
| *Garza v. Idaho* | 17-1026 | 10/30/18 | 2/27/19 | *Whether the "presumption of prejudice" recognized in* Roe v. Flores-Ortega *applies when a criminal defendant instructs his trial counsel to file a notice of appeal but trial counsel decides not to do so because the defendant's plea agreement included an appeal waiver.*<br>**Held: The presumption of prejudice for Sixth Amendment purposes recognized in *Roe v. Flores-Ortega*, 528 U.S. 470, applies regardless of whether a defendant has signed an appeal waiver.** | Constitutional Law<br>Criminal Law & Procedure |

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|---|---|---|---|---|---|
| *Gundy v. United States* | 17-6086 | 10/2/18 | 6/20/19 | *Whether the federal Sex Offender Registration and Notification Act's delegation of authority to the Attorney General to issue regulations under 42 U.S.C. § 16913 violates the nondelegation doctrine.*<br>**Held: The Second Circuit's judgment that 34 U.S.C. § 20913(d)—which requires the Attorney General to apply the Sex Offender Registration and Notification Act's registration requirements as soon as feasible to offenders convicted before the statute's enactment—is not an unconstitutional delegation of legislative authority is affirmed.** | Constitutional Law<br>Criminal Law & Procedure |
| *Helsinn Healthcare S.A. v. Teva Pharmaceuticals USA Inc.* | 17-1229 | 12/4/18 | 1/22/19 | *Whether, under the Leahy-Smith America Invents Act, an inventor's sale of an invention to a third party that is obligated to keep the invention confidential qualifies as prior art for purposes of determining the patentability of the invention.*<br>**Held: The sale of an invention to a third party who is obligated to keep the invention confidential may place the invention "on sale" for purposes of the Leahy-Smith America Invents Act, which bars a person from receiving a patent on an invention that was "in public use, on sale, or otherwise available to the public before the effective filing date of the claimed invention," 35 U.S.C. §102(a)(1).** | Patent Law |
| *Henry Schein Inc. v. Archer and White Sales Inc.* | 17-1272 | 10/29/18 | 1/8/19 | *Whether the Federal Arbitration Act permits a court to decline to enforce an agreement delegating questions of arbitrability to an arbitrator if the court concludes the claim of arbitrability is "wholly groundless."*<br>**Held: The "wholly groundless" exception to the general rule that courts must enforce contracts that delegate threshold arbitrability questions to an arbitrator, not a court, is inconsistent with the Federal Arbitration Act and this Court's precedent.** | Civil Procedure<br>Contracts Law |
| *Herrera v. Wyoming* | 17-532 | 1/8/19 | 5/20/19 | *Whether Wyoming's admission to the Union or the establishment of the Bighorn National Forest abrogated the Crow Tribe of Indians' 1868 federal treaty right to hunt on the "unoccupied lands of the United States," thereby permitting the present-day criminal conviction of a Crow member who engaged in subsistence hunting for his family.*<br>**Held: Wyoming's statehood did not abrogate the Crow Tribe's 1868 federal treaty right to hunt on the "unoccupied lands of the United States"; the lands of the Bighorn National Forest did not become categorically "occupied" when the forest was created.** | Indian Law |

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|---|---|---|---|---|---|
| *Home Depot U.S.A. Inc. v. Jackson* | 17-1471 | 1/15/19 | 5/28/19 | *(1) Whether, under the Class Action Fairness Act—which permits "any defendant" in a state-court class action to remove the action to federal court if it satisfies certain jurisdictional requirements—an original defendant to a class-action claim that was originally asserted as a counterclaim against a co-defendant can remove the class action to federal court if it otherwise satisfies the jurisdictional requirements of the Class Action Fairness Act; and (2) whether the Supreme Court's holding in* Shamrock Oil & Gas Co. v. Sheets*—that an original plaintiff may not remove a counterclaim against it—extends to third-party counterclaim defendants.*<br>**Held: Neither the general removal provision, 28 U.S.C. § 1441(a), nor the removal provision in the Class Action Fairness Act of 2005, § 1453(b), permit a third-party counterclaim defendant to remove a class-action claim from state to federal court.** | Civil Procedure |
| *Iancu v. Brunetti* | 18-302 | 4/15/19 | 6/24/19 | *Whether Section 2(a) of the Lanham Act's prohibition on the federal registration of "immoral" or "scandalous" marks is facially invalid under the free speech clause of the First Amendment.*<br>**Held: The Lanham Act prohibition on the registration of "immoral" or "scandalous" trademarks infringes the First Amendment.** | Constitutional Law<br>Trademark Law |
| *Jam v. International Finance Corp.* | 17-1011 | 10/31/18 | 2/27/19 | *Whether the International Organizations Immunities Act—which affords international organizations the "same immunity" from suit that foreign governments have, 22 U.S.C. § 288a(b)—confers the same immunity on such organizations as foreign governments have under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-11.*<br>**Held: The International Organizations Immunities Act of 1945 affords international organizations the same immunity from suit that foreign governments enjoy today under the Foreign Sovereign Immunities Act of 1976.** | International Law |
| *Kisor v. Wilkie* | 18-15 | 3/27/19 | 6/26/19 | *Whether the Supreme Court should overrule* Auer v. Robbins *and* Bowles v. Seminole Rock & Sand Co.*, which direct courts to defer to an agency's reasonable interpretation of its own ambiguous regulation.*<br>**Held: *Auer v. Robbins*, 519 U.S. 452, and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410—under which deference is given to an agency's reasonable reading of its own genuinely ambiguous regulations—are not overruled.** | Administrative Law |

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|---|---|---|---|---|---|
| *Knick v. Township of Scott, Pennsylvania* | 17-647 | 1/16/19 | 6/21/19 | *(1) Whether the Supreme Court should reconsider the portion of* Williamson County Regional Planning Commission v. Hamilton Bank *that requires property owners to exhaust state court remedies to ripen federal takings claims; and (2) whether* Williamson County's *ripeness doctrine bars review of takings claims that assert that a law causes an unconstitutional taking on its face, as the U.S. Courts of Appeals for the 3rd, 6th, 9th and 10th Circuits hold, or whether facial claims are exempt from Williamson County, as the U.S. Courts of Appeals for the 1st, 4th and 7th Circuits hold.*<br>**Held: A government violates the Takings Clause when it takes property without compensation, and a property owner may bring a Fifth Amendment claim under 42 U.S.C. § 1983 at that time; the state-litigation requirement of *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, is overruled.** | Constitutional Law<br>Real Property Law |
| *Lamone v. Benisek* | 18-726 | 3/26/19 | 6/27/19 | *In case in which the plaintiffs allege that a Maryland congressional district was gerrymandered to retaliate against them for their political views: (1) whether the various legal claims articulated by the three-judge district court are unmanageable; (2) whether the three-judge district court erred in resolving the factual record in granting plaintiffs' motion for summary judgment; and (3) whether the three-judge district court abused its discretion in entering an injunction.*<br>**Held: Partisan gerrymandering claims present political questions beyond the reach of the federal courts.** | Constitutional Law |
| *Lamps Plus Inc. v. Varela* | 17-988 | 10/29/18 | 4/24/19 | *Whether the Federal Arbitration Act forecloses a state-law interpretation of an arbitration agreement that would authorize class arbitration based solely on general language commonly used in arbitration agreements.*<br>**Held: Under the Federal Arbitration Act, an ambiguous agreement cannot provide the necessary contractual basis for concluding that the parties agreed to submit to class arbitration.** | Civil Procedure<br>Contracts Law |

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|---|---|---|---|---|---|
| *Lorenzo v. Securities and Exchange Commission* | 17-1077 | 12/3/18 | 3/27/19 | *Whether a misstatement claim that does not meet the elements set forth in* Janus Capital Group, Inc. v. First Derivative Traders *can be pursued as a fraudulent-scheme claim.*<br>**Held: Dissemination of false or misleading statements with intent to defraud can fall within the scope of SEC Rules 10b–5(a) and (c), as well as the relevant statutory provisions, even if the disseminator cannot be held liable under Rule 10b–5(b).** | Securities Law |
| *Madison v. Alabama* | 17-7505 | 10/2/18 | 2/27/19 | *(1) Whether, consistent with the Eighth Amendment, and the Supreme Court's decisions in* Ford v. Wainwright *and* Panetti v. Quarterman*, a state may execute a prisoner whose mental disability leaves him with no memory of his commission of the capital offense; and*<br>*(2) whether evolving standards of decency and the Eighth Amendment's prohibition of cruel and unusual punishment bar the execution of a prisoner whose competency has been compromised by vascular dementia and multiple strokes causing severe cognitive dysfunction and a degenerative medical condition that prevents him from remembering the crime for which he was convicted or understanding the circumstances of his scheduled execution.*<br>**Held: The Eighth Amendment may permit executing a prisoner even if he cannot remember committing his crime but it may prohibit executing a prisoner who suffers from dementia or another disorder rather than psychotic delusions.** | Constitutional Law<br>Criminal Law & Procedure |
| *Manhattan Community Access Corp. v. Halleck* | 17-1702 | 2/25/19 | 6/17/19 | *(1) Whether the U.S. Court of Appeals for the 2nd Circuit erred in rejecting the Supreme Court's state actor tests and instead creating a per se rule that private operators of public access channels are state actors subject to constitutional liability; and (2) whether the U.S. Court of Appeals for the 2nd Circuit erred in holding—contrary to the U.S. Courts of Appeals for the 6th and District of Columbia Circuits—that private entities operating public access television stations are state actors for constitutional purposes where the state has no control over the private entity's board or operations.*<br>**Held: Petitioner, a private nonprofit corporation designated by New York City to operate the public access channels on the Manhattan cable system owned by Time Warner (now Charter), is not a state actor subject to the First Amendment.** | Constitutional Law |

| Name of Case | Case Number | Date of Oral Argument | Date of Opinion | *Question(s) Presented* (as Quoted from SCOTUSBlog.com)<br>**Opinion's Central Holding** (as Quoted from Supreme Court Syllabus with Minor Alterations) | **Area(s) of Law** |
|---|---|---|---|---|---|
| *McDonough v. Smith* | 18-485 | 4/17/19 | 6/20/19 | *Whether the statute of limitations for a Section 1983 claim based on fabrication of evidence in criminal proceedings begins to run when those proceedings terminate in the defendant's favor, as the majority of circuits have held, or whether it begins to run when the defendant becomes aware of the tainted evidence and its improper use, as the U.S. Court of Appeals for the 2nd Circuit held below.*<br>**Held: The statute of limitations for McDonough's 42 U.S.C. § 1983 fabricated-evidence claim against his prosecutor began to run when the criminal proceedings against him terminated in his favor—that is, when he was acquitted at the end of his second trial.** | Civil Rights Law<br>Criminal Law & Procedure |
| *Merck Sharp & Dohme Corp. v. Albrecht* | 17-290 | 1/7/19 | 5/20/19 | *Whether a state-law failure-to-warn claim is pre-empted when the Food and Drug Administration rejected the drug manufacturer's proposal to warn about the risk after being provided with the relevant scientific data, or whether such a case must go to a jury for conjecture as to why the FDA rejected the proposed warning.*<br>**Held: "Clear evidence" that the FDA would not have approved a change to a drug's label—thus preempting a state-law failure-to-warn claim—is evidence showing that the drug manufacturer fully informed the FDA of the justifications for the warning required by state law and that the FDA, in turn, informed the drug manufacturer that the FDA would not approve a change to the drug's label to include that warning; the question of agency disapproval is primarily one of law for a judge to decide.** | Life Sciences/Pharmaceutical<br>Tort Law |
| *Mission Product Holdings Inc. v. Tempnology, LLC* | 17-1657 | 2/20/19 | 5/20/19 | *Whether, under Section 365 of the Bankruptcy Code, a debtor-licensor's "rejection" of a license agreement—which "constitutes a breach of such contract," 11 U.S.C. § 365(g)—terminates rights of the licensee that would survive the licensor's breach under applicable non-bankruptcy law.*<br>**Held: A bankruptcy debtor's rejection of an executory contract under 11 U.S.C. § 365 has the same effect as a breach of that contract outside bankruptcy; such an act thus cannot rescind rights that the contract previously granted.** | Bankruptcy Law |

| Name of Case | Case Number | Date of Oral Argument | Date of Opinion | *Question(s) Presented* (as Quoted from SCOTUSBlog.com)<br>**Opinion's Central Holding** (as Quoted from Supreme Court Syllabus with Minor Alterations) | Area(s) of Law |
|---|---|---|---|---|---|
| *Mitchell v. Wisconsin* | 18-6210 | 4/23/19 | 6/27/19 | *Whether a statute authorizing a blood draw from an unconscious motorist provides an exception to the Fourth Amendment warrant requirement.*<br>**Held: The Wisconsin Supreme Court's judgment—affirming the drunk-driving convictions of petitioner Mitchell, who was administered a warrantless blood test while he was unconscious—is vacated, and the case is remanded.** | Constitutional Law<br>Criminal Law & Procedure |
| *Mont v. United States* | 17-8995 | 2/26/19 | 6/3/19 | *Whether a period of supervised release for one offense is tolled under 18 U.S.C. § 3624(e) during a period of pretrial confinement that upon conviction is credited toward a defendant's term of imprisonment for another offense.*<br>**Held: Pretrial detention later credited as time served for a new conviction tolls a supervised-release term under 18 U.S.C. § 3624(e), even if the court must make the tolling calculation after learning whether the time will be credited.** | Criminal Law & Procedure |
| *Mount Lemmon Fire District v. Guido* | 17-587 | 10/1/18 | 11/6/18 | *Whether, under the Age Discrimination in Employment Act, the same 20-employee minimum that applies to private employers also applies to political subdivisions of a state, as the U.S. Courts of Appeals for the 6th, 7th, 8th and 10th Circuits have held, or whether the ADEA applies instead to all state political subdivisions of any size, as the U.S. Court of Appeals for the 9th Circuit held in this case.*<br>**Held: State and local governments are covered employers under the Age Discrimination in Employment Act of 1967 regardless of the number of employees they have.** | Civil Rights Law<br>Labor & Employment Law |
| *New Prime Inc. v. Oliveira* | 17-340 | 10/3/18 | 1/15/19 | *(1) Whether a dispute over applicability of the Federal Arbitration Act's Section 1 exemption is an arbitrability issue that must be resolved in arbitration pursuant to a valid delegation clause; and (2) whether the FAA's Section 1 exemption, which applies on its face only to "contracts of employment," is inapplicable to independent contractor agreements.*<br>**Held: A court should determine whether the Federal Arbitration Act's § 1 exclusion for disputes involving the "contracts of employment" of certain transportation workers applies before ordering arbitration; here, truck driver Oliveira's independent contractor operating agreement with New Prime falls within that exception.** | Civil Procedure<br>Labor & Employment Law |

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|---|---|---|---|---|---|
| *Nielsen v. Preap* | 16-1363 | 10/10/18 | 3/19/19 | *Whether a criminal alien becomes exempt from mandatory detention under 8 U.S.C. § 1226(c) if, after the alien is released from criminal custody, the Department of Homeland Security does not take him into immigration custody immediately.*<br>**Held: The Ninth Circuit's judgments—that respondents, who are deportable for certain specified crimes, are not subject to 8 U.S.C. § 1226(c)(2)'s mandatory-detention requirement because they were not arrested by immigration officials as soon as they were released from jail—are reversed, and the cases are remanded.** | Immigration |
| *Nieves v. Bartlett* | 17-1174 | 11/26/18 | 5/28/19 | *Whether probable cause defeats a First Amendment retaliatory-arrest claim under 42 U.S.C. § 1983.*<br>**Held: Because police officers had probable cause to arrest Bartlett, his First Amendment retaliatory arrest claim fails as a matter of law.** | Civil Rights Law<br>Constitutional Law |
| *North Carolina Department of Revenue v. The Kimberley Rice Kaestner 1992 Family Trust* | 18-457 | 4/16/19 | 6/21/19 | *Whether the Due Process Clause prohibits states from taxing trusts based on trust beneficiaries' in-state residency.*<br>**Held: The presence of in-state beneficiaries alone does not empower a state to tax trust income that has not been distributed to the beneficiaries where the beneficiaries have no right to demand that income and are uncertain to receive it.** | Constitutional Law<br>Tax Law |
| *Nutraceutical Corp. v. Lambert* | 17-1094 | 11/27/18 | 2/26/19 | *Whether the U.S. Court of Appeals for the 9th Circuit erred when it held that equitable exceptions apply to mandatory claim-processing rules—such as Federal Rule of Civil Procedure 23(f), which establishes a 14-day deadline to file a petition for permission to appeal an order granting or denying class-action certification—and can excuse a party's failure to file timely within the deadline specified by Federal Rule of Civil Procedure 23(f), in conflict with the decisions of the U.S. Courts of Appeals for the 2nd, 3rd, 4th, 5th, 7th, 10th and 11th Circuits.*<br>**Held: Federal Rule of Civil Procedure 23(f), which establishes a 14-day deadline to seek permission to appeal an order granting or denying class certification, is not subject to equitable tolling.** | Civil Procedure |

| Name of Case | Case Number | Date of Oral Argument | Date of Opinion | *Question(s) Presented* (as Quoted from SCOTUSBlog.com)<br>**Opinion's Central Holding** (as Quoted from Supreme Court Syllabus with Minor Alterations) | Area(s) of Law |
|---|---|---|---|---|---|
| *Obduskey v. McCarthy & Holthus LLP* | 17-1307 | 1/7/19 | 3/20/19 | *Whether the Fair Debt Collection Practices Act applies to non-judicial foreclosure proceedings.*<br>**Held: A business engaged in no more than nonjudicial foreclosure proceedings is not a "debt collector" under the Fair Debt Collection Practices Act, except for the limited purpose of enforcing security interests under 15 U.S.C. § 1692f(6).** | Business & Corporate Law |
| *Parker Drilling Management Services, Ltd. v. Newton* | 18-389 | 4/16/19 | 6/10/19 | *Whether, under the Outer Continental Shelf Lands Act, state law is borrowed as the applicable federal law only when there is a gap in the coverage of federal law, as the U.S. Court of Appeals for the 5th Circuit has held, or whenever state law pertains to the subject matter of a lawsuit and is not pre-empted by inconsistent federal law, as the U.S. Court of Appeals for the 9th Circuit has held.*<br>**Held: Under the Outer Continental Shelf Lands Act, where federal law addresses the relevant issue, state law is not adopted as surrogate federal law on the Outer Continental Shelf.** | Admiralty & Maritime Law<br>Energy & Utilities Law |
| *PDR Network, LLC v. Carlton & Harris Chiropractic Inc.* | 17-1705 | 3/25/19 | 6/20/19 | *Whether the Hobbs Act required the district court in this case to accept the Federal Communication Commission's legal interpretation of the Telephone Consumer Protection Act.*<br>**Held: The extent to which a 2006 FCC Order interpreting the term "unsolicited advertisement" binds lower courts may depend on the resolution of two preliminary questions that the Fourth Circuit should address in the first instance: (1) whether the Order is the equivalent of a legislative rule, which has the force and effect of law, or an interpretative rule, which does not; and (2) whether petitioners had a "prior" and "adequate" opportunity to seek judicial review of the Order.** | Administrative Law<br>Communications Law |

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|---|---|---|---|---|---|
| *Quarles v. United States* | 17-778 | 4/24/19 | 6/10/19 | *Whether* Taylor v. United States' *definition of generic burglary requires proof that intent to commit a crime was present at the time of unlawful entry or first unlawful remaining, as two circuits hold; or whether it is enough that the defendant formed the intent to commit a crime at any time while "remaining in" the building or structure, as the court below and three other circuits hold.*<br>**Held: Michigan's third-degree home-invasion statute substantially corresponds to or is narrower than generic burglary for purposes of qualifying for enhanced sentencing under the Armed Career Criminal Act.** | Criminal Law & Procedure |
| *Rehaif v. United States* | 17-9560 | 4/23/19 | 6/21/19 | *Whether the "knowingly" provision of 18 U.S.C. § 924(a)(2) applies to both the possession and status elements of a § 922(g) crime, or whether it applies only to the possession element.*<br>**Held: In a prosecution under 18 U.S.C. § 922(g) and § 924(a)(2), the Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm.** | Criminal Law & Procedure |
| *Republic of Sudan v. Harrison* | 16-1094 | 11/7/18 | 3/26/19 | *Whether the U.S. Court of Appeals for the 2nd Circuit erred by holding—in direct conflict with the U.S. Courts of Appeals for the District of Columbia, 5th and 7th Circuits and in the face of an amicus brief from the United States—that plaintiffs suing a foreign state under the Foreign Sovereign Immunities Act may serve the foreign state under 28 U.S.C. § 1608(a)(3) by mail addressed and dispatched to the head of the foreign state's ministry of foreign affairs "via" or in "care of" the foreign state's diplomatic mission in the United States, despite U.S. obligations under the Vienna Convention on Diplomatic Relations to preserve mission inviolability.*<br>**Held: When civil process is served on a foreign state under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1608(a)(3) requires a mailing to be sent directly to the foreign minister's office in the foreign state.** | International Law |

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|---|---|---|---|---|---|
| *Return Mail Inc. v. U.S. Postal Service* | 17-1594 | 2/19/19 | 6/10/19 | *Whether the government is a "person" who may petition to institute review proceedings under the Leahy-Smith America Invents Act.*<br>**Held: The Federal Government is not a "person" capable of petitioning the Patent Trial and Appeal Board to institute patent review proceedings under the Leahy-Smith America Invents Act.** | Patent Law |
| *Rimini Street Inc. v. Oracle USA Inc.* | 17-1625 | 1/14/19 | 3/4/19 | *Whether the Copyright Act's allowance of "full costs," 17 U.S.C. § 505, to a prevailing party is limited to taxable costs under 28 U.S.C. §§ 1920 and 1821, as the U.S. Courts of Appeals for the 8th and 11th Circuits have held, or whether the act also authorizes non-taxable costs, as the U.S. Court of Appeals for the 9th Circuit held.*<br>**Held: A federal district court's discretion to award "full costs" to a party in copyright litigation pursuant to 17 U.S.C. § 505 is limited to the six categories specified in the general costs statute codified at 28 U.S.C. §§ 1821 and 1920.** | Copyright Law |
| *Rucho v. Common Cause* | 18-422 | 3/26/19 | 6/27/19 | *(1) Whether plaintiffs have standing to press their partisan gerrymandering claims; (2) whether plaintiffs' partisan gerrymandering claims are justiciable; and (3) whether North Carolina's 2016 congressional map is, in fact, an unconstitutional partisan gerrymander.*<br>**Held: Partisan gerrymandering claims present political questions beyond the reach of the federal courts.** | Constitutional Law |
| *Smith v. Berryhill* | 17-1606 | 3/18/19 | 5/28/19 | *Whether the decision of the Appeals Council—the administrative body that hears a claimant's appeal of an adverse decision of an administrative law judge regarding a disability benefit claim—to reject a disability claim on the ground that the claimant's appeal was untimely is a "final decision" subject to judicial review under Section 405(g) of the Social Security Act, 42 U.S.C. § 405(g).*<br>**Held: A Social Security Administration Appeals Council dismissal on timeliness grounds of a request for review after a claimant has had an administrative law judge hearing on the merits qualifies as a "final decision . . . made after a hearing" for purposes of allowing judicial review under 42 U.S.C. § 405(g).** | Administrative Law<br>Workers' Compensation & SSDI |

| Name of Case | Case Number | Date of Oral Argument | Date of Opinion | *Question(s) Presented* (as Quoted from SCOTUSBlog.com)<br>**Opinion's Central Holding** (as Quoted from Supreme Court Syllabus with Minor Alterations) | Area(s) of Law |
|---|---|---|---|---|---|
| *Stokeling v. United States* | 17-5554 | 10/9/18 | 1/15/19 | *Whether a state robbery offense that includes "as an element" the common law requirement of overcoming "victim resistance" is categorically a "violent felony" under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(i), when the offense has been specifically interpreted by state appellate courts to require only slight force to overcome resistance.*<br>**Held: The Armed Career Criminal Act's elements clause encompasses a robbery offense that, like Florida's law, requires the criminal to overcome the victim's resistance.** | Criminal Law & Procedure |
| *Sturgeon v. Frost* | 17-949 | 11/5/18 | 3/26/19 | *Whether the Alaska National Interest Lands Conservation Act prohibits the National Park Service from exercising regulatory control over state, native corporation and private land physically located within the boundaries of the national park system in Alaska.*<br>**Held: Alaska's Nation River is not public land; and like all non-public lands and navigable waters within Alaska's national parks, it is exempt under the Alaska National Interest Lands Conservation Act from the National Park Service's ordinary regulatory authority.** | Environmental Law |
| *Taggart v. Lorenzen* | 18-489 | 4/24/19 | 6/3/19 | *Whether, under the Bankruptcy Code, a creditor's good-faith belief that the discharge injunction does not apply precludes a finding of civil contempt.*<br>**Held: A creditor may be held in civil contempt for violating a bankruptcy court's discharge order if there is no fair ground of doubt as to whether the order barred the creditor's conduct.** | Bankruptcy Law |
| *Tennessee Wine & Spirits Retailers Association v. Blair* | 18-96 | 1/16/19 | 6/26/19 | *Whether the 21st Amendment empowers states, consistent with the dormant Commerce Clause, to regulate liquor sales by granting retail or wholesale licenses only to individuals or entities that have resided in-state for a specified time.*<br>**Held: Tennessee's 2-year durational-residency requirement applicable to retail liquor store license applicants violates the Commerce Clause and is not saved by the Twenty-first Amendment.** | Constitutional Law |

| Name of Case | Case Number | Date of Oral Argument | Date of Opinion | *Question(s) Presented* (as Quoted from SCOTUSBlog.com)<br>**Opinion's Central Holding** (as Quoted from Supreme Court Syllabus with Minor Alterations) | Area(s) of Law |
|---|---|---|---|---|---|
| *Thacker v. Tennessee Valley Authority* | 17-1201 | 1/14/19 | 4/29/19 | *Whether the U.S. Court of Appeals for the 11th Circuit erred by using a "discretionary-function exception" derived from the Federal Tort Claims Act, instead of the test set forth in* Federal Housing Authority v. Burr *when testing the immunity of governmental "sue and be sued" entities (like the Tennessee Valley Authority), to immunize the Tennessee Valley Authority from the plaintiffs' claims.*<br>**Held: Title 16 U.S.C. § 831c(b), which serves to waive the Tennessee Valley Authority's sovereign immunity from suit, is not subject to a discretionary function exception of the kind in the Federal Tort Claims Act.** | Tort Law |
| *Timbs v. Indiana* | 17-1091 | 11/28/18 | 2/20/19 | *Whether the Eighth Amendment's excessive fines clause is incorporated against the states under the Fourteenth Amendment.*<br>**Held: The Eighth Amendment's Excessive Fines Clause is an incorporated protection applicable to the states under the Fourteenth Amendment's Due Process Clause.** | Constitutional Law<br>Criminal Law & Procedure |
| *United States v. Davis* | 18-431 | 4/17/19 | 6/24/19 | *Whether the subsection-specific definition of "crime of violence" in 18 U.S.C. § 924(c)(3)(B), which applies only in the limited context of a federal criminal prosecution for possessing, using or carrying a firearm in connection with acts comprising such a crime, is unconstitutionally vague.*<br>**Held: Title 18 U.S.C. § 924(c)(3)(B), which provides enhanced penalties for using a firearm during a "crime of violence," is unconstitutionally vague.** | Constitutional Law<br>Criminal Law & Procedure |
| *United States v. Haymond* | 17-1672 | 2/26/19 | 6/26/19 | *Whether the U.S. Court of Appeals for the 10th Circuit erred in holding "unconstitutional and unenforceable" the portions of 18 U.S.C. § 3583(k) that required the district court to revoke the respondent's 10-year term of supervised release, and to impose five years of reimprisonment, following its finding by a preponderance of the evidence that the respondent violated the conditions of his release by knowingly possessing child pornography.*<br>**Held: The Tenth Circuit's judgment—that 18 U.S.C. § 3583(k)'s last two sentences are unconstitutional and unenforceable—is vacated, and the case is remanded.** | Constitutional Law<br>Criminal Law & Procedure |

| Name of Case | Case Number | Date of Oral Argument | Date of Opinion | *Question(s) Presented* (as Quoted from SCOTUSBlog.com)<br>**Opinion's Central Holding** (as Quoted from Supreme Court Syllabus with Minor Alterations) | Area(s) of Law |
|---|---|---|---|---|---|
| *United States v. Stitt; United States v. Simms*[b] | 17-765; 17-766 | 10/9/18 | 12/10/18 | *Whether burglary of a nonpermanent or mobile structure that is adapted or used for overnight accommodation can qualify as "burglary" under the Armed Career Criminal Act of 1984, 18 U.S.C. § 924(e)(2)(B)(ii).*<br>**Held: The term "burglary" in the Armed Career Criminal Act includes burglary of a structure or vehicle that has been adapted or is customarily used for overnight accommodation.** | Criminal Law & Procedure |
| *Virginia House of Delegates v. Bethune-Hill* | 18-281 | 3/18/19 | 6/17/19 | *(1) Whether the district court conducted a proper "holistic" analysis of the majority-minority Virginia House of Delegates districts under the prior decision in this case,* Bethune-Hill v. Virginia State Board of Elections*; (2) whether the* Bethune-Hill *"predominance" test is satisfied by a description of Voting Rights Act compliance measures; (3) whether the district court erred in relying on certain expert analysis; (4) whether the district court committed clear error in its evaluation of the evidence; (5) whether Virginia's choice to draw 11 "safe" majority-minority districts of around or above 55 percent black voting-age population ("BVAP") was narrowly tailored; (6) whether the district court erred in its evaluation of the district-specific evidence before the house; and (7) whether appellants have standing to bring this appeal.*<br>**Held: The House of Delegates lacks standing to appeal the invalidation of Virginia's redistricting plan.** | Civil Rights Law<br>Constitutional Law |
| *Virginia Uranium v. Warren* | 16-1275 | 11/5/18 | 6/17/19 | *Whether the Atomic Energy Act pre-empts a state law that on its face regulates an activity within its jurisdiction (here, uranium mining), but has the purpose and effect of regulating the radiological safety hazards of activities entrusted to the Nuclear Regulatory Commission (here, the milling of uranium and the management of the resulting tailings).*<br>**Held: The Fourth Circuit's judgment that the Atomic Energy Act does not preempt Virginia's prohibition on uranium mining in the Commonwealth is affirmed.** | Energy & Utilities Law |
| *Washington State Department of Licensing v. Cougar Den Inc.* | 16-1498 | 10/30/18 | 3/19/19 | *Whether the Yakama Treaty of 1855 creates a right for tribal members to avoid state taxes on off-reservation commercial activities that make use of public highways.*<br>**Held: The Supreme Court of Washington's judgment—that the "right to travel" provision of the 1855 Treaty Between the United States and the Yakama Nation of Indians pre-empts the State's fuel tax as applied to Cougar Den's importation of fuel by public highway for sale within the reservation—is affirmed.** | Indian Law<br>Tax Law |

| Name of Case | Case Number | Date of Oral Argument | Date of Opinion | *Question(s) Presented* (as Quoted from SCOTUSBlog.com)<br>**Opinion's Central Holding** (as Quoted from Supreme Court Syllabus with Minor Alterations) | Area(s) of Law |
|---|---|---|---|---|---|
| *Weyerhaeuser Company v. U.S. Fish and Wildlife Service* | 17-71 | 10/1/18 | 11/27/18 | *(1) Whether the Endangered Species Act prohibits designation of private land as unoccupied critical habitat that is neither habitat nor essential to species conservation; and (2) whether an agency decision not to exclude an area from critical habitat because of the economic impact of designation is subject to judicial review.*<br>**Held: An area is eligible for designation as "critical habitat" under the Endangered Species Act of 1973 only if it is habitat for the listed species; and the Secretary of the Interior's decision not to exclude an area from critical habitat under 16 U.S.C. § 1533(b)(2) is subject to judicial review.** | Administrative Law<br>Environmental Law |

**Source:** Created by CRS.

**Notes:** List includes cases granted via a writ of certiorari or cases in which the Court has otherwise opted to have a merits hearing.

a. Based on LEXIS-NEXIS Practice Area or Industry Headings.

b. Consolidated Cases.

**Table 2. Per Curiam Opinions Issued During the Supreme Court's 2018 Term**

Per Curiam Opinions Issued by the Court without Oral Argument as of June 26, 2019

| Name of Case | Case Number | Date of Opinion | Opinion's Central Holding (as Quoted from Supreme Court Syllabus) | Area(s) of Law[a] |
|---|---|---|---|---|
| *City of Escondido v. Emmons* | 17-1660 | 1/7/19 | **The Ninth Circuit failed to conduct the analysis required by this Court's precedents in determining whether two Escondido police officers were entitled to qualified immunity.** | Civil Rights Law<br>Criminal Law & Procedure |
| *Moore v. Texas* | 18-443 | 2/19/19 | **The Texas Court of Criminal Appeals' redetermination that Moore does not have an intellectual disability and is thus eligible for the death penalty is inconsistent with *Moore v. Texas*, 581 U. S. ___.** | Constitutional Law<br>Criminal Law & Procedure |
| *Shoop v. Hill* | 18-56 | 1/7/19 | **Because Hill's intellectual disability claim must be evaluated based solely on holdings of this Court that were clearly established at the time the state-court decisions were rendered, see 28 U. S. C. § 2254(d)(1), the Sixth Circuit's reliance on *Moore v. Texas*, 581 U. S. ___—which was handed down much later—was plainly improper.** | Constitutional Law<br>Criminal Law & Procedure |
| *Yovino v. Rizo* | 18-272 | 2/25/19 | **The Ninth Circuit erred when it counted as a member of the majority a judge who died before the court's opinion in this case was filed.** | Civil Procedure |
| *Box v. Planned Parenthood of Indiana and Kentucky, Inc.* | 18-483 | 5/28/19 | **Indiana's law relating to the disposition of fetal remains by abortion providers passes rational basis review; certiorari is denied on the question whether the State may bar the knowing provision of sex-, race-, or disability-selective abortions by abortion providers, as only the Seventh Circuit has addressed this kind of law.** | Constitutional Law |

**Source:** Created by CRS.

a. Based on LEXIS-NEXIS Practice Area or Industry Headings.

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