2014–15 Wrap Up

PREVIEW
OF UNITED STATES SUPREME COURT CASES

Contributors to This Issue:

Civil Rights Cases
Presented by Rachel K. Paulose, partner at DLA Piper.

First Amendment Cases
Recapped by David Hudson Jr., who teaches First Amendment classes at Vanderbilt Law School and the Nashville School of Law.

The People’s Term
and
The Separation of Powers Cases
Analyzed by Steven D. Schwinn, an associate professor of law at The John Marshall Law School.

On the Docket: What’s to Come in 2015
Previewed by Mark A. Cohen.
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The 2014–2015 Term has been a difficult one to categorize. In its last week alone, the Court issued blockbuster rulings on same-sex marriage, the Affordable Care Act, housing discrimination, and the death penalty. The rest of the Court’s docket failed to attract the same level of media attention. This, of course, isn’t to say that the Court failed to issue any major decisions in other areas, such as the First Amendment and criminal law. These cases just seemed to be more overshadowed than in past Terms.

Court watchers also found it difficult to categorize the Term as conservative, liberal, or somewhere in between. On the one hand, this was a Term that saw the Supreme Court go out of its way to uphold one of President Obama’s key legislative initiatives, health care, the same week it granted same-sex couples the right to marry in the face of state laws to the contrary. And on the other, the 2014–2015 Term saw state legislative decisions regarding the death penalty receive favorable review and a refusal to recognize an individual cause of action challenging violations of federal Medicaid laws.

In short, it was a fascinating session with lots to dissect and discuss. Our wrap-up issue features some of our frequent PREVIEW authors providing insightful analysis for the bigger trends and development from this Term, including the Court’s treatment of individual liberties and the shifting balance of power within our structure of government. We hope you enjoy this issue and, if you are not already, will become a regular PREVIEW subscriber!

Sincerely,
Catherine Hawke
Editor, ABA PREVIEW of United States Supreme Court Cases
Experts Agree: Supreme Court Won’t “Take a Pause” in 2016
The Docket for Next Term Is Already “Dotted with Controversial Issues”
by Mark A. Cohen

After an undeniably historic year of landmark cases, the U.S. Supreme Court has no plans to back off from tackling some of the most contentious issues of the day in its upcoming Term.

The Court has already accepted review of cases with potentially far-reaching implications for affirmative action, public employee unions, and voting rights. And, with about three dozen cases accepted for review so far, the Court’s docket for the upcoming Term is only about half full if recent averages hold true.

“Important, controversial issues are already dotting the docket and more may be on their way,” observed Stephen Wermiel, a constitutional law professor at American University Washington College of Law. “The justices have waded back into the debate over the constitutional role for affirmative action in higher education, and there is at least the potential for them to cut back on the use of race in admissions policies.”

The justices also face “important new tests of the meaning of the 50-year-old fundamental concept of ‘one person, one vote,’” he continued. “And a recurring item is back on their docket, the extent to which compelled payment of union dues for government workers violates the free speech rights of workers who object to union policies or practices.”

This all-star lineup of potential blockbusters is coming on the heels of a session that saw the recognition of same-sex marriage as a constitutional right, the rejection of a potentially devastating challenge to the Patient Protection and Affordable Care Act, and an affirmation of the use of the current method of lethal injection for death-penalty cases.

“The Supreme Court often takes a pause after a Term as controversial and fractious as this past one to resolve more routine cases in order to salve institutional wounds. But, the early grants in the public teacher union and affirmative action cases in particular suggest that the justices are prioritizing their ability to make a mark on history over institutional healing,” said ITT-Chicago Kent College of Law Dean J. Harold Krent.

Krent also noted that the Court is taking on some less riveting, but conceptually tough, cases that may result in unusual alignments of the justices. These cases include opportunities to:

• delineate the boundaries among state, Indian, and federal courts;

• rule on several key class-action issues; and

• decide whether federal courts have jurisdiction over certain state-based securities claims.

Wermiel predicted that the number of high-profile, controversial cases will continue to multiply as the Court looks to round out its 2015–16 docket. “The justices will be under pressure to add one or more appeals involving state regulation of abortion, certain to be a volatile and divisive issue,” he said. “So at least for the year ahead, the Supreme Court looks more like it will face storm after the storm, not calm.”

Affirmative Action and Unions
Of the cases currently slated for argument in the 2015–16 Term, two of the most closely watched will be Fisher v. University of Texas at Austin (14-981) (a challenge to the university’s affirmative action policy for admissions) and Friedrichs v. California Teachers Association (14-915) (a challenge to a requirement that teachers pay union fees).

The Fisher case began in 2008, when Abigail Fisher, a white female applicant denied admission to the University of Texas at Austin, filed a discrimination claim alleging that she had been wrongfully denied admission because of the school’s race-preference policy.

Texas high school seniors who graduate in the top 10 percent of their class are automatically admitted to the university. In addition to this “Top Ten Percent” program, the school considers race and other factors for admission. Since Fisher did not finish in the top 10 percent of her class, she applied with other non-Top 10 applicants, some of whom received racial preferences. Fisher contends that but for these racial preferences, she would have been accepted and that her rejection constituted illegal race discrimination.

If the Fisher case sounds familiar, that’s probably because it came before the Supreme Court once before—during the 2012–13 Term. At that time, the Court ruled that the lower court had applied the incorrect standard in upholding the university’s affirmative action policy. (The Supreme Court concluded that “strict scrutiny” applies to the race-preference policy and that the university was required to demonstrate that the policy was “narrowly tailored.”) On remand, the district court, this time utilizing a strict-scrutiny analysis, again found for the university, and the Fifth U.S. Circuit Court of Appeals affirmed.

Many then believed that the Supreme Court was kicking the can when it remanded Fisher in 2013, and that the Court would
eventually take up the case’s underlying issue—i.e., the continuing viability of affirmative action policies utilizing racial preferences. That day appears to have arrived. Potentially at stake in Fisher II are two of the Court’s landmark rulings that allowed the use of racial preferences in admissions, Grutter v. Bollinger, 539 U.S. 306 (2003) and Regents of the University of California v. Bakke, 438 U.S. 265 (1978).

“This up-and-down case is now back at the Supreme Court, probably because the Court is dissatisfied with lower courts’ application of the strict-scrutiny test that applies to race-based affirmative action in college admissions programs,” said John Marshall Law School Professor Steven D. Schwinn. “The Court’s decision to hear the case yet again—especially with all its standing problems, [and] only getting more and more obvious as the plaintiff, Abigail Fisher, gets further and further away from what her case really should be about, her admission to UT—almost certainly says that the Court is prepared to make a major move on affirmative action in higher education. This could mean raising the bar for affirmative action even higher, or even striking race-based affirmative action altogether.”

With most of the justices likely to rule along their traditional “conservative” and “liberal” bloc lines on affirmative action, Schwinn said that Justice Anthony Kennedy “is the one to watch in this case.”

Meanwhile, in Friedrichs, public school teachers who opt out of union membership argue that they cannot be constitutionally compelled to pay union fees. The Court’s precedent allows public employees to be assessed mandatory union fees for bargaining done on their behalf. (These arrangements are sometimes referred to as “fair-share” requirements.) The teachers challenging the mandatory union fees argue that requiring payment of the fees as a condition of employment violates their free-speech and free-association rights.

The Court’s increasing scrutiny of union activities has caused alarm throughout the labor movement, according to Rachel K. Paulose, an attorney with DLA Piper in Minneapolis.

“Friedrichs directly challenges the ‘agency shop’ rules under which all workers pay union fees to support a union’s collective bargaining activities, a principle endorsed by the Court in 1977 in Abood v. Detroit Board of Education,” Paulose said. 431 U.S. 209. “If the Court uses Friedrichs as a vehicle to reverse Abood under a First Amendment theory of allowing greater worker choice in subsidizing union activities, it will dramatically continue to reverse the progressive revolution the Court first reluctantly embraced in the 1930s during the era of the New Deal,” she added.

The Supreme Court has been “taking swipes” at public sector union fair-share requirements in minor cases for a couple of Terms now, according to Schwinn.

“If the Court’s rulings in the past few Terms are any indication, the Court will use Friedrichs to strike fair-share requirements and overturn Abood by a narrow majority,” he said. “If so, this could mark the beginning of the end of public sector unions. Here’s why: Without fair-share requirements, no individual public sector employee in a union shop would have an incentive to pay union dues and join the union. Instead, every individual employee would seek to ride free on the union’s work. This free-rider problem is one of the reasons why the Abood Court upheld fair-share requirements in the first place. If every individual employee acts this way, support for public sector unions will soon erode from the inside out.”

Class-Action Cases
The Supreme Court has accepted review of two cases that could have a major impact on class-action suits brought over the violation of statutory rights. Both cases revolve around the issue of whether and to what extent plaintiffs may bring a class-action suit when it cannot be demonstrated that every member of the putative class has suffered a concrete harm.

In Spokeo v. Robins (13-1339), the plaintiff alleges that the defendant company has false data about him in its publicly searchable database, which draws data—including addresses, marital status, education level, and age—from public records and makes that data available to customers. Alleging that the incorrect results harmed his job prospects, the plaintiff filed a class action on behalf of himself and others in the defendant’s database for violating the Fair Credit Reporting Act. Since there are millions of people in the Spokeo database, and Congress provided for damages of up to $1,000 per violation of the Fair Credit Reporting Act, the potential damages run into the billions.

A federal district court judge dismissed the suit, finding that the alleged damages from the incorrect data were too speculative to satisfy the U.S. Constitution’s requirement that federal courts hear only “cases and controversies.” The Supreme Court has been asked to resolve whether Congress can constitutionally confer standing on an individual or class of individuals who cannot demonstrate concrete harm notwithstanding the “cases and controversies” requirement.

Spokeo has the potential to be a watershed case in determining the viability of multimillion-dollar class-action lawsuits brought for violations of federal laws that provide for statutory damages. If the Supreme Court accepts Spokeo’s position, class actions over incorrect credit reporting and data breaches will be a lot more difficult to maintain.

The second case, Tyson Foods, Inc. v. Bouaphakeo (14-1146), involves a class action brought by meat-processing plant employees alleging that, in violation of the Fair Labor Standards Act, Tyson undercompensated them for the amount of time it takes them to don and doff necessary safety equipment. The amount of time it takes each employee to suit up varies substantially, depending upon such factors as job function, individual preference for the equipment used, and location of the employee’s workstation. The plaintiffs alleged that they could demonstrate through the results of a statistical sampling that, on average, employees were not being adequately compensated.

“[F]or the year ahead, the Supreme Court looks more like it will face storm after the storm, not calm.”
— Professor Stephen Wermiel, American University Washington College of Law
The district court allowed the lawsuit to proceed as a class action, and during a nine-day trial, allowed the plaintiffs to present expert testimony utilizing statistical sampling to demonstrate that the “average” worker was undercompensated. The jury found for the employees, awarding $5 million in damages. The Eighth U.S. Circuit Court of Appeals upheld the verdict, concluding that the plaintiffs could use statistical inference to prove liability and damages, and that individualized damages did not preclude class certification. The Supreme Court will determine whether the Eighth Circuit was correct, or if the lack of uniformity in damages and failure to demonstrate that each plaintiff in the putative class had suffered an injury is fatal to a class-action claim.

According to University of Texas-Austin Law School Professor Linda Mullenix, these cases will focus the Court on two important, pressing issues in current class action jurisprudence: (1) the problem of the so-called “no injury” class, and (2) the problem of class-wide damage models and so-called “trial by formula.”

“The Court has not yet addressed the first issue, but a slim conservative majority has manifested antipathy towards trial-by-formula in its [2011] Walmart v. Dukes decision,” she said. “These appeals afford the Court’s conservative wing with fresh opportunities to further restrict class action litigation and impel the Court’s liberal contingent to continue its rearguard battle to preserve Rule 23 as the primary means for collective redress.”

A third class-action case on the Court’s docket—Campbell-Ewald Company v. Gomez (14-857)—presents an interesting jurisdictional question: Does a case becomes moot, while the Court is in session. As always, PREVIEW will be providing comprehensive coverage of every case slated for argument.

**In a major case for unions, the Supreme Court has agreed to hear a case that presents a direct challenge to a key component of ‘agency shop’ rules.”

— Minneapolis attorney Rachel Paulose

Evenwel v. Abbott (14-940), a case arising out of Texas, presents the issue of whether the one-person, one-vote principle under the Equal Protection Clause allows states to use total population, or requires states to use voter population, when apportioning state legislative districts. Challengers to the current Texas system, which utilizes total voter population, argue that it violates “one person, one vote” by providing overrepresentation to districts that include large numbers of noncitizens, children, felons, and others ineligible to vote. Partisan interests are lining up predictably in the conservative-backed challenge.

In a redistricting case decided last Term, Arizona State Legislature v. Arizona Independent Redistricting Commission, 576 U. S. (2015), the Court rebuffed a conservative-led challenge to a voter-approved independent redistricting commission. Challengers in the Arizona case had argued that the Constitution left apportionment decisions to state legislatures, not directly voters. The 5-4 decision sparked a vigorous dissent from the Court’s four most conservative justices, with Justice Anthony Kennedy playing his treasured role as “swing justice” by joining with the liberal justices to form a majority.

Conventional wisdom is that, regardless of what happens with the Evenwel case, voters will be treated to frequent references to the U.S. Supreme Court during the upcoming election cycle. In fact, declared and likely presidential candidates are already lining up behind or against the Court’s recent rulings on same-sex marriage and the Affordable Care Act, as well as debating the role of the Supreme Court in resolving pressing societal issues.

**Death Penalty Issues Persist**

The Court has already added several death-penalty cases to its docket. None has the potential legal heft that last Term’s lethal-injunction decision did; however, the fact that these matters currently make up more than 10 percent of the Court’s 2015–16 docket shows that numerous capital-punishment issues remain to be resolved, notwithstanding last Term’s highly significant ruling.

Stay tuned to see what else the Court’s 2015–16 Term will bring. Some of the most controversial cases have been added to the docket while the Court is in session. As always, PREVIEW will be providing comprehensive coverage of every case slated for argument.

**Voting Districts**

The fact that 2016 is a presidential election year provides extra poignancy to the fact that the Court has added an election-law case to its 2015–16 repertoire.
The October 2014 Term was a significant one for First Amendment jurisprudence even though the Court did not decide many First Amendment decisions. In spite of the limited First Amendment docket, several of the cases could have long-term ramifications. Through these decisions, the Court reiterated the importance of and clarified the application of the content-discrimination principle in Reed v. Town of Gilbert, expanded the government speech doctrine in Walker v. Texas Division, Sons of Confederate Veterans, arguably changed the strict scrutiny standard in Williams-Yulee v. The Florida Bar, and addressed the complex area of true threats in Elonis v. United States.

Reed v. Town of Gilbert (13-502)
The town of Gilbert’s sign ordinance treated different types of signs quite disparately. For example, the ordinance imposed fewer restrictions on “ideological” signs, more restrictions on “political signs” and the most onerous restrictions on “temporary directional signs related to a qualifying event.” Ideological signs could be up to 20 square feet in area and had no durational limits. Political signs could be 16 square feet on residential property and up to 32 square feet on nonresidential property. However, political signs faced durational limits, as they could be displayed between 60 days before an election and up to 15 days after. Temporary directional signs could be only six square feet in area and could be displayed during a short window of 12 hours before the event to one hour after.

Pastor Clyde Reed and the Good News Community Church posted signs identifying the places where the church would meet on Sundays. The church ran afoul of the ordinance because it exceeded the durational limits. After failing to reach a compromise with city officials, Reed and the church sued in federal court, alleging a violation of the First Amendment.

Both the federal district court and the Ninth U.S. Circuit Court of Appeals ruled in favor of the town, finding that the sign ordinance was a content-neutral way of addressing the city’s interests in aesthetics and traffic safety. The Ninth Circuit reasoned the ordinance was content neutral because city officials had no legitimate purpose to suppress speech.

However, the U.S. Supreme Court disagreed, viewing the ordinance as content based because on its face it treated signs differently based on their category. In First Amendment jurisprudence, content-based laws must pass strict scrutiny, while content-neutral laws are assessed under a lower level of review known as intermediate scrutiny. In writing for the majority, Justice Clarence Thomas emphasized that a law is content based if it treats categories of speech differently on its face. He explained that a law is content based even if there were no insidious purposes to censor certain types of speech. Justice Thomas noted that there remains a difference between a law that is content based and a law that is viewpoint based.

Justice Thomas further explained that a “speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter.” In other words, a law can be viewpoint neutral but still content based. Viewpoint discrimination is an egregious form of content discrimination, according to Justice Thomas.

Because the town’s ordinance was content based on its face, the Court applied strict scrutiny, requiring the town to show that its ordinance advanced a compelling governmental interest in a very narrowly tailored way. Justice Thomas assumed that the town’s interests were compelling, but found that the ordinance was not narrowly tailored. Instead, Justice Thomas wrote that the law was “hopelessly underinclusive” because other types of signs had the same impact on aesthetics and traffic safety as the church’s signs. There was no evidence that temporary directional signs posed more of an aesthetics or traffic problem than other types of signs.

Justice Samuel Alito wrote a concurring opinion, explaining that the Court’s decision did not sound the death knell for sign ordinances across the country. He noted that sign ordinances can still regulate the size of signs, control the location of signs, distinguish between signs with fixed and changing messages, treat signs on public and private property differently, regulate off-premise and on-premise signs differently, distinguish between signs on residential and commercial property, and limit the overall number of signs.

Justices Elena Kagan and Stephen Breyer wrote separate concurring opinions in which they questioned the Court’s application of strict scrutiny to ordinances without a nefarious purpose to censor speech. Justice Kagan argued that strict scrutiny should be reserved for those laws where there is a purpose to treat speech differently. “We can administer our content-regulation doctrine with a dose of common sense, so as to leave standing laws that in no way implicate its intended function,” she wrote. Justice Kagan concluded that “the Court may soon find itself a veritable Board of Sign Review.” Justice Breyer wrote that the content-based rule should be used as a rule of thumb rather than the “determinative legal tool.”
Reed is significant because the Court reiterated the importance of the content-discrimination principle, emphasized the difference between content based and viewpoint based, and perhaps opened up the door to more challenges of sign ordinances across the country.

Walker v. Texas Division, Sons of Confederate Veterans (14-144)
The state of Texas approved of hundreds of specialty license plates for a variety of different groups. However, state officials balked when they received an application from the Sons of Confederate Veterans, whose license plate design featured the Confederate battle flag, a symbol of hate and racism to some, and a symbol of heritage to others.

Thus, state officials denied the application because many people found the Confederate flag offensive. Ordinarily, this would constitute viewpoint discrimination—the government discriminating against speakers or speech because of its offensive viewpoint. However, Texas argued that a specialty license plate is a form of government speech. Under the government speech doctrine, the government may utter certain speech or support certain messages and not others free from First Amendment review; consequently, Texas argued it could control the speech it expresses on license plates. The Sons of Confederate Veterans sued, claiming its First Amendment rights were being violated.

On appeal, the U.S. Supreme Court reversed by a 5-4 vote. The majority determined that specialty license plates are a form of government speech. Justice Stephen Breyer, in writing for the majority, explained that the plates qualified as government speech for several reasons. The plates often convey messages or ideas from the government, the plates are closely associated with the government in people’s minds, the state controls the messages on the specialty plates, and with such plates, car owners seek to say that the state has endorsed that particular message.

Justice Breyer rejected the idea that the specialty license plate program was akin to a public forum for different forms of private speech. “But forum analysis is misplaced here,” he wrote. “With respect to specialty license plate designs, Texas is not simply managing government property, but instead is engaging in expressive conduct.”

Justice Alito dissented. He disagreed with the majority that specialty license plates were government speech. Instead, Justice Alito reasoned that the plates were private speech. “What Texas has done by selling space on its license plates is to create what we have called a limited public forum,” explained Justice Alito.

Justice Alito also argued that specialty license plates represent private speech under a common-sense approach. A reasonable observer viewing the plate on a vehicle would associate the plate more with the viewpoint of the owner/driver of the vehicle than with the state. “As you sat there watching these plates speed by, would you really think that the sentiments reflected in these specialty plates are the views of the State of Texas and not those of the owners of the cars?” Justice Alito asked.

He also warned that the Court’s opinion represented a dangerous expansion of the government speech doctrine. According to Justice Alito, after the Walker decision, government officials may be able to censor a much broader range of private speech simply by claiming some level of governmental involvement.

Walker gives significant leeway to states to issue or deny specialty plates as they see fit. Walker gives significant leeway to states to issue or deny specialty plates as they see fit. It remains to be seen exactly how much the Court expanded the government-speech doctrine. A federal district court already has relied on the Walker decision to declare that the government’s trademark registration program was a form of government speech exempt from First Amendment scrutiny. See Pro Football, Inc. v. Blackhorse, Case No. 1:14-cv-01043-GBL-IDD, (E.D. Va.) (7/8/15).

Williams-Yulee v. The Florida Bar (13-1499)
Lanell Williams-Yulee (Yulee), a Florida attorney since 1991, decided to run for a seat on the county court in Hillsborough County. She drafted a letter announcing her candidacy, asking for contributions, mailed it to local voters and posted it on her website. Yulee lost the primary to the incumbent judge. The Florida Bar then filed a complaint against her for violating the following bar rule:

A candidate, including an incumbent judge, for a judicial office that is filled by public election between competing candidates shall not personally solicit campaign funds, or solicit attorneys for publicly stated support, but may establish committees. …”

Yulee contended that the First Amendment protected her right to solicit financial support. The Florida Supreme Court appointed a referee who ruled against Yulee. Florida’s high court adopted the referee’s findings.

The U.S. Supreme Court affirmed by a narrow 5-4 vote. Chief Justice John G. Roberts Jr. contended that the Florida regulation was a content-based restriction on speech that should be subject to strict scrutiny.

However, Chief Justice Roberts determined that the law “advances the State’s compelling interest in preserving public confidence in the integrity of the judiciary” and it does so in a narrowly tailored way. The Chief Justice explained that “[s]tates may regulate judicial elections differently than they regulate political elections, because the role of judges differs from the role of politicians.”

Chief Justice Roberts determined that “the solicitation ban aims squarely at the conduct most likely to undermine public confidence in the integrity of the judiciary; personal requests for money by judges and judicial candidates.” He also emphasized that the law need only be narrowly tailored, not “perfectly tailored.”

Justice Ruth Bader Ginsburg concurred but wrote separately to emphasize that she would not apply exacting or strict scrutiny in this area. According to Justice Ginsburg, states should have “substantial latitude” to enact campaign finance-related rules.
Three of the four dissenting justices wrote separate opinions: Justices Antonin Scalia, Anthony Kennedy, and Samuel Alito. Justice Scalia accused the majority of not applying strict scrutiny but instead engaging in judicial sleight of hand and “twistifications.” According to Justice Scalia, the Florida Bar failed to identify “the slightest evidence that banning requests for contributions will substantially improve public trust in judges.” Further, Florida’s rule “bans candidates from asking for contributions even in messages that do not target any listener in particular—mass-mailed letters, flyers posted on telephone poles, speeches to large gatherings, and Web sites addressed to the general public.” In typical Justice Scalia fashion, he concluded with a barb: “The First Amendment is not reserved for the Brotherhood of the Robe.”

Justice Kennedy in his separate dissent noted the irony of restricting speech during elections—what he termed “a paradigmatic forum for speech.” He explained that the First Amendment protects not only a candidate’s right to express herself but also the public’s right to receive information in an “open and robust debate.”

Justice Kennedy invoked the counter-speech doctrine, noting that the preferable response to speech we don’t like or oppose is to respond with “more speech, not enforced silence”—a doctrine articulated most cogently by Justice Louis Brandeis in his concurring opinion in Whitney v. California, 274 U.S. 357 (1927). Justice Kennedy warned that the Court had damaged First Amendment jurisprudence by “eviscerating” the strict scrutiny standard.

Justice Alito, in his own dissent, also questioned the Court’s application of strict scrutiny, particularly the narrowly tailored prong. “[I]ndeed, this rule is about as narrowly tailored as a burlap bag,” he wrote. “If this rule can be characterized as narrowly tailored, then narrow tailoring has no meaning, and strict scrutiny, which is essential to the protection of free speech, is seriously impaired.”

The interesting question will be whether the Court’s application of strict scrutiny will have an impact on other areas of free speech or remain confined to judicial campaign finance. Chief Justice Roberts acknowledged that it is “the rare case” in which content-based restrictions on speech will be upheld, but theoretically, the Court’s application of strict scrutiny could be used in many other contexts outside of campaign finance to uphold myriad content-based restrictions on speech.

Elonis v. United States (13-983)
This Term, the Court also addressed the true-threat doctrine in the case of Anthony Elonis, who posted on Facebook derogatory, degrading, and disturbing material in 2010 about his estranged wife. Elonis posted the messages on Facebook as “Tone Dougie”—his rap persona. Some of these messages were violent-themed and directed at not only his ex-wife but also to some coworkers. The posts led law enforcement officials to charge Elonis with violating the federal anti-threat law that prohibits “any communication containing any threat … to injure the person of another.”

The case went to trial. Elonis requested jury instruction that the government must prove that he intended to communicate a true threat. The court denied the request. The jury instructions instead read: “A statement is a true threat when a defendant intentionally makes a statement in a context … wherein a reasonable person would foresee that the statement would be interpreted … as a serious expression of an intention to inflict bodily harm.”

Elonis was convicted of violating a federal law by making threats across the Internet, and served 44 months in prison.

The Supreme Court held that the jury instructions in the initial trial failed to focus on Elonis’s mental state, and required only that Elonis have made a statement in a context that a reasonable person would interpret as threatening. In his majority opinion, Chief Justice Roberts reasoned that this was a mere negligence standard, disrespectful of the cardinal criminal law principle that “wrongdoing must be conscious to be criminal.”

The Court declined to decide whether recklessness would be sufficient under the statute. This omission drew the ire of Justice Alito in his partial concursing and partial dissenting opinion. “The Court’s disposition of this case is certain to cause confusion and serious problems,” he wrote. “Would recklessness suffice? The Court declines to say. Attorneys and judges are left to guess.” Justice Alito warned that the majority opinion was “certain to cause confusion and serious problems.”

Justice Thomas offered a similar criticism in his dissenting opinion: “Given the majority’s ostensible concern for protecting innocent actors, one would have expected it to announce a clear rule—any clear rule.”

The Court also declined to address any First Amendment issues: “Given our disposition, it is not necessary to consider any First Amendment issues,” wrote the Chief Justice.

The Court’s concern about protecting those who do not intend statements to be threatening is laudable. However, the Court’s failure to address the First Amendment arguments and identify more precisely the mental state required for threat convictions is troubling and likely will lead to some confusion in the lower courts.

Conclusion
At first glance, the Court’s October 2014 Term doesn’t qualify as a blockbuster. However, the Court addressed several core concepts in First Amendment law. The Court’s decisions regarding the content-discrimination principle (Reed) and the government-speech doctrine (Walker) likely will have a significant impact on the development of free-speech jurisprudence.

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In our system of government, power is divided two ways: between the legislative, executive, and judicial branches; and between the national government and the states. We sometimes call the former division “horizontal separation of powers,” and we sometimes call the latter division “vertical separation of powers,” or federalism. Whatever we call them, these separations exist not for their own sakes, but in order to protect individual liberty. Thus the Supreme Court guards against intrusions by one branch into the authority of another, and against intrusions by the federal or state governments into the authority of the other, all in the name of protecting our rights.

But with all this separation of powers, we sometimes forget that ultimate sovereign authority in our system comes from the people. The U.S. Constitution reminds us of this in the first three words of the Preamble, “We the People”; state constitutions similarly tell us that state sovereignty, too, resides ultimately with the people. This means that government power comes from the people (and not the other way around), and that the people vest or delegate authority in the government. This also means that the people serve as the ultimate check on government abuses of authority, whether that check comes in the form of direct democracy and state voter initiatives, or from federal judicial review under the U.S. Constitution itself (which, after all, was ratified by the people as supreme over the states).

Still, there’s a lot of talk these days about state sovereignty, states’ rights, and the importance and virtue of states in our system of federalism. It’s true: states play an important role in our system. But we have to remember that states derive their sovereign authority from the people, and that states’ rights (whatever they are) can never outweigh a federal constitutional right.

The Supreme Court reminded us of these truths in a string of important cases this Term. Indeed, this Term is marked by cases that put the people and their rights distinctly above claims of federalism and states’ rights, in several different ways. For example, the Court in Arizona State Legislature v. Arizona Independent Redistricting Commission (13-1314) upheld an independent redistricting commission, created by voter initiative, against the state legislature’s claim that the legislature (and the legislature only) has redistricting power under the Elections Clause. Similarly, in Alabama Legislative Black Caucus v. Alabama (13-895) the Court clarified the test for a state legislative racial gerrymander and restricted the way a state legislature can use race in drawing electoral districts—a core sovereign function of the states. In the biggest cases of the Term, Obergefell v. Hodges (14-556) and King v. Burwell (14-114), the Court held, respectively, that same-sex couples have a right to marry and that individual purchasers of health insurance on a federally facilitated exchange can receive federal tax subsidies. In Obergefell, the Court rejected an argument that states, not the Court, should determine the definition of marriage; in King, the Court rejected an argument that the Affordable Care Act was designed with certain federalism principles in mind.

In all these cases, the Court ruled in favor of the people and their rights as against the interests of federalism and states’ rights.

But while many of the cases this Term, including the two biggest, fell into this pattern, at least two important cases did not. In Armstrong v. Exceptional Child Center, Inc. (14-15), the Court ruled that plaintiffs did not have a federal right or a federal cause of action against a state for violation of the federal Medicaid Act. A federal cause of action would have helped protect individual rights as against state interests in this cooperative federalism program. In Glossip v. Gross (14-7955), the Court upheld a state’s lethal injection protocol—a protocol the state developed when it could no longer obtain the previous drugs that it used. The Court in Glossip found it significant that anti-death-penalty advocates impaired the state’s ability to administer its duly enacted death penalty, thus infringing on the state’s prerogative to enforce its own law. Both of these cases also pit individual rights against significant claims of federalism and states’ rights, but the Court in these cases favored the states.

Still, on the whole, this was a Term for the people and their rights, as against countervailing federalism and states’ rights considerations.

Arizona State Legislature and Alabama Legislative Black Caucus

The two voting cases this Term perhaps best illustrate why this was the people’s Term. In both cases, Arizona State Legislature v. Arizona Independent Redistricting Commission and Alabama Legislative Black Caucus v. Alabama, the Court considered the interests and rights of the people as against significant federalism and state interests. And in both cases, the people won.

In Arizona State Legislature v. Arizona Independent Redistricting Commission, the Court held that the people of Arizona could create, by voter initiative, an independent redistricting commission in order to address the problem of political gerrymandering by the state legislature. The case involved Proposition 106, which amended the

[On the whole, this was a Term for the people and their rights, as against countervailing federalism and states’ rights considerations.]
state constitution to add and empower the Arizona Independent Redistricting Commission (AIRC). The AIRC was designed to protect against political gerrymandering by taking redistricting authority away from the state legislature and giving it to a politically independent body. But this power grab by the people of Arizona did not sit well with the state legislature. So when the AIRC adopted redistricting maps for congressional and state legislative districts after the 2010 census, the state legislature sued.

The legislature argued that the AIRC violated the U.S. Constitution’s Elections Clause. That clause says that “The Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations.” In other words, the clause gives “the Legislature” the authority to set the terms of federal elections, including establishing congressional districts in the state. The Arizona state legislature claimed that the AIRC was not “the Legislature” and therefore intruded into the role reserved to the legislature under the Elections Clause.

The Court rejected this argument. It said that states can fashion the structure of their own governments, within certain boundaries, and even provide for governance by direct voter initiative, if they like. Moreover, the Court said that states can determine for themselves how to allocate government power within the state. The Court held that neither federal law nor the Elections Clause restricted these powers in the context of redistricting, and that Arizona voters were only exercising these powers when they created the AIRC and vested it with redistricting authority. In short, the Court said that “the Legislature” in the Elections Clause really means the state lawmaking authority, and that the state can make its own laws any way it likes.

As to the ultimate state lawmaking authority, the Court made no bones about placing this squarely with the people. Indeed, the majority opinion is rife with references to the ultimate power of the people, even reminding us that “the animating principle of our Constitution [is] that the people themselves are the originating source of all the powers of government.” The ultimate power of the people is especially important in the area of election regulation, because an elected body (like the state legislature) can be counted on to act to preserve its own power (sometimes against the interests of the people). Direct democracy can be an important check:

“"The very prospect of lawmaking by the people may influence the legislature when it considers (or fails to consider) election-related measures.""
to a racial gerrymander in violation of the Equal Protection Clause. The district court upheld the redistricting plan, however, saying that the legislature’s map did not amount to an illegal racial gerrymander of the state as a whole, and that the legislature’s use of race in drawing particular districts did not predominate, because the legislature was mostly motivated by race-neutral criteria (such as drawing districts of roughly equal population).

The Supreme Court reversed. The Court, without getting to the merits, ruled that the district court erred in analyzing these claims. In particular, the Court said that the lower court improperly analyzed the plaintiffs’ claim with respect to the state “as a whole,” rather than district by district. The Court said that the courts should analyze racial gerrymandering claims not by looking at the state redistricting plan as a whole, but instead by examining the challenged districts. Moreover, the Court held that the district court erred in evaluating whether race predominated as a factor in redistricting. The Court said that the lower court improperly considered the legislature’s race-neutral goal of achieving roughly equal populations among districts as part of the balance in determining whether the legislature’s consideration of race predominated. The Court held that the goal of achieving roughly equal populations is a background condition, “taken as given,” and not a race-neutral factor that can counterbalance the legislature’s use of race in determining whether race predominated.

The Court also ruled that the district court erred in other important ways. The Court said that the district court improperly dismissed the case for lack of standing before it gave one of the plaintiff-organizations, the Alabama Democratic Conference, a chance to show that it had members in the challenged legislative districts. The Court also held that the district court erred in holding that even if the legislature used race in drawing the districts, the legislature’s use of race satisfied strict scrutiny, because the legislature used race to maintain a particular minority percentage in majority-minority districts under the Voting Rights Act. The Court said that the Voting Rights Act did not require the state to maintain a particular numerical minority percentage; instead, it required the state to maintain a racial minority’s ability to elect a preferred candidate of choice (a different question entirely). The Court remanded the case for reconsideration consistent with its opinion.

Just as the Court’s ruling in Arizona State Legislature moved power away from the state legislature to the people, so too here. The Court’s ruling, while not a final decision on the underlying merits, represents a heavy thumb on the scale against the state legislature. For one, the ruling means that the state legislature cannot rely on race-neutrality in some districts to shield its plan from a claim of racial gerrymandering in other districts. This favors the plaintiffs because it allows them to prove illegal racial gerrymandering in a particular district even if the state used predominantly race-neutral criteria in other districts. For another, the ruling means that the legislature’s use of race weighs relatively more heavily in determining whether the legislature’s use of race predominated. In all, the ruling means that a state legislature will have a harder time using the Voting Rights Act to manipulate and ultimately reduce minority voting strength. In this way, the ruling is a direct strike at a core state sovereign function, redistricting legislative boundaries. This ruling represents a power shift away from state legislatures and to the people.

In both voting cases this Term, the Court put the people and their rights ahead of the interests of federalism and states’ rights. While the voting cases put this pattern into its sharpest focus, other cases follow this pattern as well.

Obergefell and King

We see victories for the people over the state legislatures in other cases, too. Indeed, the Term’s two centerpiece cases follow this pattern. Thus, in Obergefell v. Hodges, the Court struck state bans on same-sex marriages, including same-sex marriages validly performed in other states. These bans, some enacted pursuant to voter initiatives and others enacted by state legislatures, defined marriage as only between one man and one woman, ruling out the possibility of a same-sex marriage. The Court held that these bans on same-sex marriage violated due process and equal protection—that is, that marriage is a well-established fundamental right that cannot be categorically denied to a class of individuals.

Significantly, the Court in Obergefell rejected the federalism and states’ rights interests in the case. In particular, the Court rejected the leave-it-to-the-states approach of Chief Justice Roberts’s principal dissent and the federalism and states’ rights arguments by the parties and amici in the case. Chief Justice Roberts argued that the Court’s ruling “comes at the expense of the people” to make change through ordinary democratic processes—processes that had occurred largely at and through the states. The parties and some amici went a step further and argued that a “recognition right” would conflict with the Constitution’s “federalist design.” Fifty-seven members of Congress argued that federalism principles, including “deference to the states as sovereign in the field of domestic relations,” counseled in favor of leaving it to the states.

The Court acknowledged that useful debates occurred in the states, among other forums. But rather than leaving the issue to the states, the Court said that these debates sharpened the issues for constitutional review. The Court thus took a rights-based approach to the issue, hardly even mentioning the role of the states. Obergefell is a clear victory for the people’s rights, as against claims of federalism and states’ rights.

So, too, King. In King v. Burwell, the Court upheld an IRS rule that extended tax subsidies to individuals who purchased health insurance on a federally facilitated exchange. The case involved language in the Affordable Care Act (ACA) that authorized these subsidies only for purchasers on an “Exchange established by the State.” Plaintiffs and several states that declined to establish their own health-insurance exchanges (and thus relied on a federally facilitated exchange) argued that the IRS exceeded its authority
under the ACA by extending tax subsidies to individuals who purchased health insurance on a federally facilitated exchange (and not only to those who purchased on an “Exchange established by the State”).

The Court rejected this argument. In an opinion by Chief Justice Roberts, and joined by Justices Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan, the Court said that the ACA, read broadly, meant that tax subsidies extended to individuals who purchased health insurance on a federally facilitated exchange as well as individuals who purchased on a state exchange. The Court looked to the text of the ACA to determine that the phrase “an Exchange established by the State” was ambiguous; and it looked to the structure of the ACA to determine that tax subsidies extended to purchasers on a federally facilitated exchange. (The Court deemed the question too important to apply deference to the IRS interpretation of the ACA under Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc. That aspect of the ruling is discussed in a companion piece on separation of powers.) The Court wrote that this reading was the only way to make sense of the ACA’s goal to provide affordable health insurance to all Americans. It said that the petitioners’ reading would destabilize insurance markets and lead to the familiar “death spiral” that Congress sought to avoid:

The combination of no tax credits and an ineffective coverage requirement could well push a State’s individual insurance market into a death spiral. One study predicts that premiums would increase by 47 percent and enrollment would decrease by 70 percent. Another study predicts that premiums would increase by 35 percent and enrollment would decrease by 69 percent. And those effects would not be limited to individuals who purchase insurance on the Exchanges. Because the Act requires insurers to treat the entire individual market as a single risk pool, premiums outside the Exchange would rise along with those inside the Exchange.

The Court said that “[i]t was implausible that Congress meant the Act to operate in this manner” and upheld the IRS rule.

In doing so, the Court ensured the continued availability of health insurance for all Americans under the ACA. The Court ensured the availability of affordable health insurance for those individuals who purchased health insurance on a federally facilitated exchange (with the help of their tax subsidy), and thus ensured the continued availability of affordable health insurance for all individuals in the risk pool, that is, everyone. While health insurance is not a fundamental constitutional right, it is nevertheless an important individual interest. The Court protected that interest as against the countervailing federalism concerns.

Those concerns came in two forms. The first form was legal: the petitioners argued that a particular kind of federalism was baked-in to the ACA. In particular, the petitioners argued that Congress designed the ACA’s tax subsidies to encourage states to create health insurance exchanges, on the assumption that states would like to provide this benefit to their citizens. By the petitioners’ reckoning, states could not provide this benefit if they declined to establish their own exchanges (and instead relied on the federally facilitated exchange), so their federalism theory squared with their reading that the ACA did not extend subsidies to purchasers on a federally facilitated exchange. But the Court rejected this approach, and wrote that the overall structure of the ACA did not include this version of federalism; instead, it included a guarantee that all individuals could receive affordable health insurance, which required that tax subsidies extend to federally facilitated exchanges.

The second form was part policy, part political. Several states declined to establish exchanges as part of their overall strategy to undermine the ACA. They thought that if they relied on the federally facilitated exchange, and if tax subsidies were unavailable on the federally facilitated exchange, they could force the ACA into the “death spiral” described by the Court. In other words, some states exercised their state sovereign prerogative to rely on the federally facilitated exchange, with the political benefit (as they saw it) to dismantle the ACA. (Oddly, this benefit came at the expense of a state’s own citizens, who, by the plaintiffs’ reckoning, would not qualify for tax subsidies as a result of this decision.) After King, the states still have a state sovereign prerogative either to establish their own exchange or to rely on the federally facilitated exchange. But the choice no longer matters for the purpose of dismantling the ACA, because tax credits extend to both kinds of exchange. Thus the Court, in upholding the IRS rule extending tax subsidies to purchasers on a federally facilitated exchange, undermined state efforts (or, as some seemed to see it, states’ rights) to derail the entire Act.

Obergefell and King in many ways are the most important victories of the people over the states (even if Arizona State Legislature and Alabama Legislative Black Caucus put the people’s Term in sharpest focus). That’s because of the direct and personal issues at stake in those cases. The Court’s ruling in Obergefell means that untold numbers of same-sex couples can now marry, and enjoy all the benefits of marriage, even against their states’ prior opposition. The Court’s ruling in King means that untold numbers of individuals can afford to purchase health insurance, even though their states declined to create a state-run health-insurance exchange, often out of bald and naked opposition to the ACA itself or its goal to provide affordable health insurance to all Americans.

Armstrong and Glossip

Even as the redistricting cases and Obergefell and King establish a trend of the people and their rights over federalism and states’ rights, two important cases cut the other direction. In one, Armstrong v. Exceptional Child Care Center, Inc., the Court rejected an individual cause of action against a state agency for alleged violation of provisions of the federal Medicaid Act. In the other, Glossip v. Gross, the Court upheld Oklahoma’s three-drug cocktail for lethal injection. Both cases involve individual rights against federalism interests, and in both cases the states won.

In Armstrong v. Exceptional Child Center, Inc., the Court ruled that the plaintiffs could not obtain injunctive relief against the Idaho Department of Health and Welfare for paying them too little under the federal Medicaid Act. The plaintiffs, providers of habilitation services, sued the Idaho Department, which administers the state Medicaid plan, arguing that the Department did not “assure that payments are consistent with efficiency, economy, and quality of care” while “safeguard[ing] against unnecessary utilization of … care and services,” in violation of the Medicaid Act. The plaintiffs claimed that the Idaho Department of Health and Welfare
reimbursed them at rates lower than the Medicaid Act allowed and sought to enjoin the Department to increase its rates.

The Court rejected the plaintiffs’ claims. The Court ruled that while the Supremacy Clause meant that the Idaho Department of Health and Welfare had to comply with the requirements of the Medicaid Act, the Supremacy Clause did not create a federal right or a federal cause of action for the plaintiffs to enforce those requirements. The Court said that Congress designed the Medicaid Act to be enforced by the Secretary of Health and Human Services, by withholding state Medicaid funds when a state violates the requirements of the Act. The plaintiffs could petition the Secretary to withhold funds, but, absent congressional authorization, they could not sue in federal court.

The ruling represents a defeat for individual rights as against state interests. The Court rejected an individual cause of action against the state in a cooperative federalism program, Medicaid, where the state plays a key role, especially in setting compensation for services. While the Court did not couch its ruling in federalism terms, the Court’s decision nevertheless protects state interests as against the plaintiffs’ interests in fair compensation for Medicaid services. In this way, Armstrong bucks the trend in the election cases and Obergefell and King that the people and their rights prevail over federalism and state interests.

The Court’s ruling in Glossip v. Gross bucks the trend, too. In that case, the Court held that Oklahoma’s three-drug protocol for lethal injection did not violate the Eighth Amendment. The Glossip plaintiffs challenged Oklahoma’s use of a sedative, midazolam, as the first drug, arguing that it would not produce the deep, coma-like unconsciousness that was necessary to render them insensate to the extreme pain of the second and third drugs. Oklahoma substituted midazolam for the barbiturates that it previously used (one of which was part of the three-drug protocol upheld in Baze v. Rees, 553 U.S. 35 (2008)) after it was unable to obtain those drugs. (Suppliers of these barbiturates, partially in response to the efforts of anti-death-penalty advocates, refused to provide them to states for use in administration of the death penalty. So several states, like Oklahoma, scrambled to find an alternative. They found it in midazolam.) But Oklahoma and other states that used midazolam engaged in several botched executions, where condemned prisoners called out in pain, struggled, and writhed for as long as two hours. The plaintiffs argued that these experiences showed that midazolam did not render a person sufficiently insensate to the extreme pain of the second and third drugs.

The Court rejected the plaintiffs’ arguments. The Court said that the plaintiffs failed to show that Oklahoma’s protocol would result in extreme pain, and that they failed to identify an alternative protocol that would be constitutionally sound. The Court said that the district court properly relied on the state’s expert’s testimony that midazolam could render a condemned person insensate to the pain of the second and third drugs (even though Oklahoma itself later disavowed key parts of this testimony), and that the plaintiffs failed to show that the district court’s ruling amounted to clear error. The Court said that unless and until the plaintiffs could show the protocol would produce an unconstitutional level of pain, and until they could come forward with an alternative protocol that produced less pain, Oklahoma’s use of midazolam did not violate the Eighth Amendment.

Just like Armstrong, Glossip represents a defeat for individual rights as against federalism and state interests. In Glossip, the individual right is the right against a cruel and unusual punishment under the Eighth Amendment. But this right runs up against a state interest in administering a duly enacted death penalty. More specifically, the Court said that prevailing constitutional law (upholding the death penalty against an Eighth Amendment challenge) implies that there must be a constitutional way for states to administer the death penalty. This, in turn, means that the plaintiff must show that any particular method of execution would result in unconstitutional pain, and that there is a viable, less painful alternative available to the state, in order to establish an Eighth Amendment claim. In other words, prevailing constitutional law says that a state has a right to administer the death penalty, so much so that the plaintiff is straddled with a near impossible burden to establish an Eighth Amendment violation. (It also didn’t escape the Court’s attention that the dearth of drugs resulted from the dogged and determined work of opponents of the death penalty. The Court seemed to see this as an infringement on the states’ prerogative to administer the death penalty. Indeed, the Court seemed to elevate the states’ prerogative because of the effective work to take these drugs off the market.) Glossip thus represents a distinct defeat for individual rights as against federalism and state interests.

Taken together, Armstrong and Glossip are two cases that buck the larger trend in favor of the people and their rights over federalism and state interests. But even with these two cases (important though they are), the overall trend in the most significant cases this Term is clear: the people and their rights prevail against federalism and state interests.

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The Court ruled on three significant separation of powers cases this Term, handing the Obama administration victories in two of them and a defeat in one. In the first, Zivotofsky v. Kerry (13-628), the Court ruled that long-running executive practice of not listing “Israel” on the passport of a U.S. citizen born in Jerusalem trumped a congressional act that required such listing in certain circumstances. The Court said that the President had the sole power to recognize foreign sovereigns, and the included power to designate foreign sovereignty on official documents such as U.S. passports. In the next, King v. Burwell (14-114), a far more publicized case, the Court ruled that IRS tax subsidies for individuals who purchased health insurance on a federally facilitated exchange were valid, even though the Affordable Care Act authorized these subsidies on an “Exchange established by the State.” The ruling was an important win for President Obama: it represented the last significant legal challenge to the Affordable Care Act, and saved the Act from implosion.

But in the third case, Michigan v. EPA (14-46), the Court ruled that the EPA failed to consider costs in determining whether to regulate emissions from fossil-fuel-fired power plants, in violation of the Clean Air Act. The Court said that the EPA should have considered costs as part of its determination whether regulation was “appropriate and necessary.” Because it didn’t, the Court struck the Agency’s determination and sent the issue back to the EPA.

At first glance, the separation of powers cases this Term seem to represent a net win for the presidency. But like so many of these cases throughout history, these three turn out to be much more complicated and nuanced. For example, in Zivotofsky, while the Court held that the President has the sole power of recognition of foreign sovereignty (a significant power, to be sure, that extends far beyond a dispute over passports), it also emphasized that its ruling was limited to the power of recognition, and that Congress has significant foreign policy powers of its own. Moreover, the Court sharply limited language in one of its own prior rulings, United States v. Curtiss-Wright, 299 U.S. 304 (1936), that presidents have used time and again to argue for expansive and unilateral executive authority in areas related to foreign affairs. While the Court’s holding in Zivotofsky is a clear victory for the President on a relatively narrow (even if important) point, the case overall represents a significant check on executive authority in foreign affairs.

Similarly, while the Court in King held that the IRS could issue tax subsidies to purchasers of health insurance on a federally facilitated exchange, it also declined to apply its ordinary deference to executive agency decision making. The Court said that the decision whether to extend tax subsidies was too important for Congress to leave to the IRS without explicitly saying so, and in turn, the Court declined to defer to the IRS as it ordinarily would in reviewing administrative decisions. While King is an important legal and political victory for President Obama, it also sets a precedent for the Court to rigorously review agency decision making, without deferring to the executive branch. This may, over the long term, come back to bite the presidency.

Finally, even in the separation of powers case that went against the President, Michigan v. EPA, the Court’s ruling was mixed. While the Court held that the EPA failed to consider costs in determining whether to regulate power plants, the ruling simply puts the ball back in the EPA’s court and allows the Agency to engage in cost-considering decision making. Indeed, the EPA already considered costs along with its decision to regulate (even if it didn’t formally include them in its decision making), so reconsideration should not be hard and, unless the cost-benefit calculation changes (as it might, for example, with a change in data, or even a change in administrations), will almost certainly lead to the same result.

In short, like so many separation of powers cases throughout history, the three significant cases this Term are complicated and nuanced. They represent two clear victories and a defeat for the executive, but they also contain plenty of fodder that restricts or checks their plain holdings. Like so many of these cases, their full significance (or insignificance) may not be apparent for months, years, or even decades, as policies and politics unfold.

Zivotofsky

For such an important case, Zivotofsky grew out of a surprisingly ordinary problem. In 2002, Menachem Binyamin Zivotofsky was born to U.S.-citizen parents in Jerusalem. Soon after his birth, Zivotofsky’s mother visited the U.S. Embassy in Tel Aviv to get him a passport and a consular report of birth abroad. Zivotofsky’s mother asked the State Department to designate his place of birth as “Jerusalem, Israel.” The Embassy clerks declined, however, and explained that pursuant to long-running State Department policy, Zivotofsky’s passport would list his place of birth as only “Jerusalem.”

The State Department policy was, indeed, long running. Ever since 1948, the year President Truman formally recognized Israel in a signed statement of “recognition,” every administration has declined to recognize Israeli sovereignty over Jerusalem. The executive branch has maintained this consistent policy because of the importance of the status of Jerusalem in Middle East peace negotiations. (Israelis and Palestinians both claim sovereignty over the city. A formal U.S. position on the status of Jerusalem would likely dismantle any success in negotiations and destroy the possibility of future talks.) Warren Christopher, Secretary of State in the Clinton Administration, wrote to Congress that “[t]here is no issue related to the Arab-Israeli negotiations that is more sensitive than Jerusalem,” and that “any effort … to bring it to the forefront” could be “very damaging to the success of the peace process.”
The executive’s position was reflected in State Department policies, including State Department passport policies. Thus, the State Department’s Foreign Affairs Manual (FAM) instructs employees to list the place of birth for U.S. citizens born in Jerusalem as “Jerusalem” (and not “Jerusalem, Israel,” or “Israel”). (In general, the FAM instructs employees to list the place of birth as the “country [having] present sovereignty over the actual area of birth,” unless the citizen objects, in which case he or she may list the city or town of birth rather than the country. The FAM, however, does not permit a citizen to list a sovereign that conflicts with executive branch policy.)

This did not sit well with the Zivotofskys, and so they sued. As the basis of their suit, the Zivotofskys cited the Foreign Relations Authorization Act, Fiscal Year 2003. Section 214 of that Act, titled “United States Policy with Respect to Jerusalem as the Capital of Israel,” permits a U.S. citizen born in Jerusalem to designate his or her place of birth on a passport as “Israel.” The provision says, “[f]or the purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary shall, upon the request of the citizen or the citizen’s legal guardian, record the place of birth as Israel.”

President George W. Bush signed the Act into law, but he also issued a signing statement saying that Section 214 was unconstitutional. The statement said that Section 214 would, “if construed as mandatory rather than advisory, impermissibly interfere with the President’s constitutional authority to formulate the position of the United States, speak for the Nation in international affairs, and determine the terms on which recognition is given to foreign states.” President Bush also wrote that “U.S. policy regarding Jerusalem has not changed.”

The Zivotofsky’s suit thus pitted long-running executive policy against U.S. law, albeit law that the signing President deemed unconstitutional. In the first round of litigation at the Supreme Court, the Court reversed the lower court and held that the case was justiciable. (The lower court ruled that it raised a nonjusticiable political question.) On remand, the United States Court of Appeals for the D.C. Circuit held the statute unconstitutional. The Supreme Court agreed.

Justice Kennedy wrote the opinion of the Court, joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan. Justice Kennedy started by framing the issue against Justice Jackson’s familiar three-part structure for separation of powers problems in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). According to that framework, the President’s power is at its maximum when Congress delegates authority to the President; the President’s power is in a “zone of twilight” when Congress is silent, where “congressional inertia, indifference or quiescence may” invite the exercise of executive power; and the President’s power is at its “lowest ebb” when “the President takes measures incompatible with the expressed or implied will of Congress.”

Justice Kennedy wrote that the President’s power in this case was at its lowest ebb, because it was at odds with specific congressional action. Still, he wrote that the President had authority to designate the place of birth on the passport as only “Jerusalem,” notwithstanding congressional action to the contrary. That’s because a U.S. passport operates as an official diplomatic statement of U.S. foreign policy with regard to recognition. It’s also because the Constitution grants the President the sole power of recognition of foreign sovereignty—a power that Congress is powerless to alter. In arriving at this conclusion, Justice Kennedy looked to the text of the Constitution (and, in particular, the Reception Clause, which says that the President “shall receive Ambassadors and other public Ministers”); the original understanding of the Reception Clause; executive practice; and Supreme Court precedent. Drawing on all these sources, Justice Kennedy reiterated that recognition is an area in which the nation must “speak with one voice,” that the unity in the executive allows the President to exercise “[d]ecision, activity, secrecy, and dispatch,” and that the President is uniquely capable of “engaging in the delicate and often secret diplomatic contacts that may lead to a decision on recognition,” and “better positioned to take the decisive, unequivocal action necessary to recognize other states at international law.”

But even with this ruling, the Court did not go as far as the President would like. In fact, the Court curtailed executive authority in an important way. In particular, the Court “declined to acknowledge” the broadest claims of executive power under the far-reaching and infamous case, Curtiss-Wright Export Corp. In that case, the Court described the President as “the sole organ of the federal government in the field of international relations.”

As a result, Curtiss-Wright is commonly cited in support of expansive and unilateral executive powers in any area related to foreign relations. Indeed, the executive branch cited Curtiss-Wright in this case to argue that the President has “exclusive authority to conduct diplomatic relations,” along with “the bulk of foreign-affairs powers.”

The Court rejected this sweeping claim. It said that Curtiss-Wright does not give the President these kinds of broad, unilateral powers. Justice Kennedy wrote that the description of executive power in Curtiss-Wright was not necessary to the holding … which, after all, dealt with congressionally authorized action, not a unilateral Presidential determination. Indeed, Curtiss-Wright did not hold that the President is free from Congress’ lawmakership power in the field of international relations. The President does have a unique role in communicating with foreign governments . . . . But whether the realm is foreign or domestic, it is still the Legislative Branch that makes the law.

Moreover, the Court specifically recognized Congress’s powers over foreign affairs—powers that might restrain the President in certain ways. But even so, the Court said that it did not have to resolve the full scope of executive power, or the full scope of power-sharing between the President and Congress in all areas of foreign affairs: it was enough to say that the President had the narrow power at issue—the sole power of recognition.
So while *Zivotofsky* is a clear victory for the President on the power of recognition (and the included power of place-of-birth designation on passports), the case also contains language that may later significantly restrict the President in the area of foreign affairs.

**King**

*King v. Burwell* grew out of a quirk in a key piece of the Affordable Care Act (ACA). The Act was designed to provide affordable health insurance to all Americans. It sought to achieve this goal through three integrated components: a requirement that insurers cover all individuals, without regard to preexisting medical conditions; a requirement that insurers set rates at affordable levels; and a requirement that all Americans obtain health insurance. In order to facilitate this last requirement, the ACA also required every state to create an “exchange,” an online marketplace where otherwise-uninsured state residents could shop for and purchase health insurance. If a state declined to establish its own exchange, the ACA provided that state residents could shop for and purchase health insurance on a federally facilitated exchange. In order to ensure that all individuals could afford health insurance, the ACA authorized federal tax subsidies to certain individuals whose incomes were relatively low, but still too high to qualify for Medicaid.

The quirk was a provision in the ACA authorizing federal tax subsidies for purchasers on an “Exchange established by the State.” The plain language of this one provision suggested that tax subsidies would extend only to purchasers on a state-created exchange, and not the federally facilitated exchange, even though low-income purchasers on the federally facilitated exchange needed the tax subsidy every bit as much as purchasers on a state-created exchange in order to afford health insurance. If this reading were correct, it would mean that the ACA did not authorize tax subsidies for qualified individuals in states that declined to establish their own exchanges. And if so, a substantial number of individuals could not afford health insurance and would go uninsured, undermining the ACA’s goal of universal coverage and (because universal coverage is essential to keep rates affordable) likely undermining the entire ACA itself. This would have allowed states that declined to establish a state exchange (for policy reasons, or out of mere political opposition to the ACA) to unilaterally undo the Act.

Because of the problems reading the provision this way, and because so much of the rest of the ACA suggested that this reading was wrong, the IRS issued a rule that extended federal tax credits to qualified individuals on both a state-created and federally facilitated exchange. Plaintiffs—individuals who qualified for the tax credit in a state with a federally facilitated exchange, but who did not want the tax credit—sued, arguing that the IRS rule violated the plain text of the ACA.

The Court rejected this argument. In an opinion by Chief Justice Roberts, and joined by Justices Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan, the Court said that the ACA, read broadly, meant that tax subsidies extended to individuals who purchased health insurance on a federally facilitated exchange as well as individuals who purchased on a state exchange. The Court looked to the text of the ACA to determine that the phrase “an Exchange established by the State” was ambiguous; and it looked to the structure of the ACA to determine that tax subsidies extended to purchasers on a federally facilitated exchange. The Court wrote that this reading was the only way to make sense of the ACA’s goal to provide affordable health insurance to all Americans. It said that the petitioners’ reading would destabilize insurance markets and lead to the familiar “death spiral” that Congress sought to avoid: substantially declined enrollment, which would lead to higher premiums for everyone, which would lead to less enrollment, and so on.

The Court said that “[i]t was implausible that Congress meant the Act to operate in this manner” and upheld the IRS rule.

In doing so, the Court handed President Obama a critical political and legal victory. In the short term, the ruling ensured the continued availability of health insurance for all Americans under the ACA. In the longer term, the ruling prevented the ACA from imploding and thus preserved the ACA itself. Moreover, because this case was the last significant legal challenge to the ACA (that is, the last remaining serious challenge that would threaten the existence of the entire Act), the Court effectively protected the ACA, unless and until Congress changes it.

But in handing this victory to President Obama, the Court also set and followed a precedent limiting executive enforcement of the law. In particular, the Court declined to apply its traditional deference to an agency interpretation of a statute under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The Court explained,

> The tax credits are among the Act’s key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people. Whether those credits are available on Federal Exchanges is thus a question of deep “economic and political significance” that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly. It is especially unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting health insurance policy of this sort. This is not a case for the IRS.

In short, the Court deemed the question too important to apply *Chevron* deference. But the Court did not explain in any detail why not. The case thus sets new precedent for the Court to rigorously review agency rulemaking in certain policy areas, without specifically delineating those areas (other than to say that they include questions of deep “economic and political significance”).

In the long run, this could represent a shift of power away from the executive and in favor of the courts on agency action.

Thus, while the holding in *King* is a clear and unequivocal victory for President Obama, the case also represents a potential restriction on executive enforcement of the law in future cases. Only time will tell whether this restriction is significant.
**EPA**

*Michigan v. EPA* involved the EPA’s finding that it could regulate emissions of fossil-fuel-fired power plants under the Clean Air Act. The 1990 amendments to the Act directed the EPA to “perform a study of the hazards to public health reasonably anticipated to occur as a result of emissions by [power plants] of [hazardous pollutants] after imposition of the requirements of this chapter.” If the EPA “finds . . . regulation is appropriate and necessary after considering the results of this study,” it “shall regulate” the power plants consistent with the existing regulatory framework for stationary sources.

The EPA completed its study in 1998 and two years later concluded that regulation of fossil-fuel-fired power plants was “appropriate and necessary.”The EPA reaffirmed this conclusion in 2012. The EPA found regulation “appropriate” because the power plants’ emissions of hazardous air pollutants posed risks to human health and the environment and because controls were available to limit those emissions. It found the regulation “necessary” because the Act’s other requirements did not eliminate those risks. Based on the Agency’s conclusions, and pursuant to the Act’s regulatory framework for stationary sources, the EPA divided power plants into subcategories and promulgated “floor standards” that limited emissions from power plants.

At the same time, the EPA issued a “Regulatory Impact Analysis” that estimated costs and benefits of regulation. The EPA estimated that regulation would cost power plants $9.6 billion per year, and produce benefits in the amount of $37 to $90 billion per year (which included $4 to $6 million per year of quantifiable benefits plus other, less quantifiable benefits, like as many as 11,000 fewer premature deaths each year and a far greater number of avoided illnesses). But the EPA conceded that its Regulatory Impact Analysis “played no role” in its conclusion that regulation was “appropriate” and “necessary.”

The plaintiffs, including 23 states, sued, arguing that the EPA failed to consider costs in determining whether regulation was “appropriate” and “necessary” under the Clean Air Act. The United States Court of Appeals for the D.C. Circuit ruled in favor of the EPA, but the Supreme Court reversed.

Justice Scalia wrote the opinion for the Court, joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito. Justice Scalia wrote that even applying ordinary deference to the EPA’s decision under *Chevron U.S.A.*, the EPA should have considered the costs of regulation as part of its appropriate-and-necessary conclusion. In a relatively short and simple opinion, the Court said that the plain language of the Clean Air Act (“appropriate and necessary”) required the EPA to consider costs, as did the broader statutory context of the Act.

But while the holding in *Michigan v. EPA* goes against the Agency, the ruling only sends the issue back to the EPA for explicit consideration of costs as part of its appropriate-and-necessary determination. This represents only a minor road-bump for the EPA, as the Agency already considered costs alongside (even if not as an explicit part of) its decision to regulate. If the cost-benefit analysis remains the same as in the Regulatory Impact Analysis, and if nothing else changes that might impact the EPA’s decision making, then we might reasonably expect the EPA to re-arrive at exactly the same decision to regulate in a relatively short period of time.

Although the holding in *Michigan v. EPA* quite clearly goes against the Agency, the broader significance of the case is probably very limited. The case likely only represents a temporary diversion for the Agency in arriving at exactly the same decision.

**Conclusion**

In all, while the separation of powers cases this Term give a net (2 to 1) victory to the President, the cases actually are much more complicated and nuanced. The two cases that favor the President, *Zivotofsky* and *King*, each contain important restrictions on executive authority for future cases, while the one case that went against the President, *Michigan v. EPA*, probably represents only a minor road-bump and diversion on the Agency’s way to reissuing exactly the same conclusion. As a result, and as with so many separation of powers cases, we probably won’t know the full significance of these cases for months, years, and even decades to come.

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The United States Supreme Court embraced a more expansive vision of civil rights during its 2014–2015 Term, with equal rights advocates and civil libertarians winning nearly every major decision on the docket. From declaring a right to same-sex marriage to expanding the ability of litigants to bring disparate impact claims, the Court continued to break new ground in its civil rights and liberties jurisprudence.

When the 1954 Warren Court declared in Brown v. Board of Education, 347 U.S. 483 (1954), that separate was inherently unequal, the Court was ahead of its time. The Court’s courage in finally completing the victory of the Civil War helped bring about equality in education over the violent opposition of a still recalcitrant South and the complicit silence of the North. By contrast today, influential governmental and private institutions lead the charge in attempting to transform society. To a large extent, those thought leaders have helped transform popular opinion, paving the way for acceptance of the Court’s more progressive decisions. Thus in 2015, the Court issued its civil rights and liberties decisions to the widespread applause of a rapidly changing American culture. The Court is no longer well ahead of the times, but is not behind them either.

Same-Sex Marriage

This term long will be remembered for the Court’s landmark decision declaring same-sex marriage a constitutional right. The Court’s decision in Obergefell et al. v. Hodges, Director, Ohio Department of Health, et al. (14-556), largely ends a 50-state on-the-ground political battle as gay and lesbian citizens now enjoy a right to marriage which no legislature may diminish.

Continuing his role as the Court’s author of opinions deciding hotly contested social issues, Justice Kennedy wrote the opinion for a 5-4 divided Court. The majority held that the Fourteenth Amendment’s Due Process Clause required the states to authorize marriages between two people of the same gender and to recognize such marriages validly performed in another state. As with many of his most culturally popular opinions, Justice Kennedy framed the issue as one of personal liberty, this time tied to the freedom to fully express what Justice Kennedy termed an immutable characteristic.

The decision came as a result of a consolidated appeal of cases from Michigan, Kentucky, Ohio, and Tennessee, all of which had defined marriage as a union between one man and one woman. Petitioners successfully brought suit in federal district courts for the right to marry or have their out-of-state marriages legally recognized. Respondents, state officials responsible for enforcing state laws, appealed to the United States Court of Appeals for the Sixth Circuit. The appellate court consolidated the cases, reversed the district court judgments, and held that the Constitution did not recognize a right to same-sex marriage.

Justice Kennedy began with a lengthy soliloquy on the personal significance of marriage. Citing no case law, Justice Kennedy opined that the history of marriage rose from an innate human need. Acknowledging that marriage had historically been understood as a “gender-differentiated union of man and woman,” the Court described it as a timeless institution that binds together strangers, families, and societies. In the Court’s view, the very centrality of marriage underscores petitioners’ need for this “profound commitment,” with all its “privileges and responsibilities.”

Nevertheless, the Court recounted the ways in which the institution of marriage has changed over time. Arranged marriages, contracts, and coverture have largely gone to the wayside in this country because of what the Court called “new insights.”

Further, homosexuality, once defined as a mental illness, is now understood to be an immutable characteristic. The Court itself had previously struck down statutes discriminating against homosexuals in Romer v. Evans, 517 U.S. 620 (1996) and Lawrence v. Texas, 539 U.S. 558 (2003), which respectively prohibited the states from discriminating against gays and criminalizing sodomy. But Justice Kennedy described the present understanding of homosexuality as more evolved:

The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a character protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution’s central protections and a received legal stricture, a claim to liberty must be addressed.

The Court asserted that the fundamental right to marry has long been recognized by the Constitution. Loving v. Virginia, 388 U.S. 1 (1967), overturned restrictions on interracial marriage. Zablocki v. Redhail, 434 U.S. 374 (1978), overturned denials of the right to marry by fathers delinquent on child support payments. Turner v. Safley, 482 U.S. 78 (1987), lifted prohibitions on inmates’ right to marry. The Court described the right to same-sex marriage as a step in the progression of a deepening understanding of liberty.

The Court identified four principles demonstrating that same-sex couples held a right to marriage. The basis of these rights is not simply “ancient sources” but “a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era.”

First, the Court held that the Due Process Clause protects individual autonomy, including the right to personally choose one’s spouse. The Court characterized its decision as the natural evolution of its
Second, the Court held the right to intimacy recognizes a two-person union that the Court said is unlike any other in its importance. Marriage is a right possibly older than the Bill of Rights, wrote the Court. While “outlaw to outcast may be a step forward, . . . it does not achieve the full promise of liberty.”

Third, the Court held that extending the right to marriage to gay couples would deepen protections for children and families in those unions. Moreover, since the Constitution protects the right of a married couple who do not wish to procreate, the right to marry cannot be based on a couple’s biological ability to procreate.

Fourth, the Court held that marriage is a keystone of the social order upon which a whole host of other rights depend. Marriage confers benefits involving property rights, taxation, medical access, health insurance, child custody, and inheritance, among many other advantages. Gay and lesbian couples may no longer be locked out of those benefits, wrote the Court.

The Court asserted the right to gay marriage also derives from the Fourteenth Amendment’s Equal Protection Clause. The prohibitions against same-sex marriage disrespect and demean same-sex couples, according to the Court.

Finally, the Court deemed these rights significant enough to avoid waiting for further legislative action. Overruling its prior precedent, the Court ordered same-sex marriage to be recognized throughout the nation.

These considerations lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them. Baker v. Nelson must be and now is overruled, and the State laws challenged by Petitioners in these cases are now held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.

Chief Justice Roberts dissented in an opinion joined by Justices Scalia and Thomas. The chief justice asserted that the Court’s opinion usurped the legislative function, declared law unmoored from the Constitution, and demonstrated arrogance in the extreme. While the chief justice acknowledged the strong social and policy reasons to be sympathetic to gay marriage, he insisted the Constitution has nothing to say about the matter. Therefore, he asserted, it is a question best left to the people of the states to decide. Chief Justice Roberts largely tracked the reasoning of the appellate court below, which the chief justice would have affirmed.

In a passage crystallizing the chief justice’s concerns, he wrote of the institutional damage he believed the majority had wreaked:

The majority’s decision is an act of will, not legal judgment. The right it announces has no basis in the Constitution or this Court’s precedent. The majority expressly disclaims judicial ‘caution’ and omits even a pretense of humility, openly relying on its desire to remake society according to its own ‘new insight’ into the ‘nature of injustice.’ As a result, the Court invalidates the marriage laws of more than half the States and orders the transformation of a social institution that has formed the basis of human society for millennia, for the Kalahari Bushmen and the Han Chinese, the Carthaginians and the Aztecs. Just who do we think we are?

The chief justice went on to note that the use of the Due Process Clause to declare what the law should be has a tortured history in Supreme Court jurisprudence. Disturbingly, the Court used the notion of substantive due process to strike down the Missouri Compromise on the purported grounds that legislation restricting the institution of slavery violated the rights of slaveholders in Dred Scott v. Sandford, 19 How. 393 (1857). Chief Justice Roberts detailed how the Court used its interpretation of the Fourteenth Amendment to strike down a state statute in its soon-to-be discredited opinion in Lochner v. New York, 198 U.S. 45 (1905). Likewise, asserted the chief justice, the Court’s Obergefell decision simply “convert[ed] personal preferences into constitutional mandates.” Finally, the chief justice warned that the majority’s opinion might be used to trample the First Amendment rights of people of faith who might object to the recognition of gay marriage. The chief justice noted the Court made a passing reference to the rights of conscience of people of faith. By contrast, wrote the chief justice, “The First Amendment guarantees . . . the freedom to ‘exercise’ religion. Ominously, that is not a word the majority used.”

Justice Scalia dissented in an opinion joined by Justice Thomas. Justice Scalia first clarified that he contested not the substantive issue before the Court: “The law can recognize as marriage whatever sexual attachments and living arrangements it wishes, and can accord them favorable civil consequences, from tax treatment to rights of inheritance.” The question of how to define marriage was not of “special importance,” to Justice Scalia. However, he declared it was of “overwhelming importance” who exercises ultimate authority in a constitutional democracy. In Justice Scalia’s telling, the Court had ensconced itself as the “Ruler of 320 million Americans coast-to-coast.” Like the chief justice, Justice Scalia’s chief concern was that the Court’s decision took away the people’s right to decide the question for themselves in an area he said had traditionally been governed by the states.

Justice Thomas dissented in an opinion joined by Justice Scalia. Justice Thomas likewise expressed concern that the Court arrogated to itself the power to declare what marriage should be. Justice Thomas wrote, “Since well before 1787, liberty has been understood as freedom from government action, not entitlement to government benefits.” Moreover, he described as a “fiction” the concept of “treating the Due Process Clause as a font of substantive rights.”

The Court asserted that the fundamental right to marry has long been recognized by the Constitution. The Court described the right to same-sex marriage as a step in the progression of a deepening understanding of liberty.
Justice Alito dissented in an opinion joined by Justices Scalia and Thomas. Echoing the chief sentiment expressed by his fellow dissenters, Justice Alito insisted that the Constitution left the definition of marriage to the states, but five “unelected Justices” had imposed their own agenda upon the American people. Moreover, Justice Alito worried that the decision would “be used to vilify Americans who are unwilling to assent to the new orthodoxy.”

The Court’s multiplicity of opinions in this case is in many ways a reflection of the deep divisions in the country regarding the issue of same-sex marriage. While the Court’s decision ends the raging legal and political battle, the ripple effects of this decision, including its impact on people and institutions of faith who may not subscribe to its tenets, remain to be seen.

Fair Housing
Texas Department of Housing & Community Affairs v. Inclusive Communities Projects (13-1371) marks the first time the Court has endorsed disparate impact claims as a means of showing discrimination where intentional discrimination can be difficult to prove in housing cases.

The states distribute federally provided tax credits to developers to build low-income housing. Respondent, the Inclusive Communities Project, Inc., a Texas nonprofit advocacy group for low-income families seeking affordable housing, sued a state agency that it claimed unfairly distributed tax credits. Specifically, respondent asserted that the state agency allocated too few credits in white suburban neighborhoods and too many credits in black inner-city neighborhoods. This action exacerbated segregated housing patterns and, respondent argued, violated the Fair Housing Act’s (FHA) prohibitions against disparate impact discrimination. Respondent sought to create more affordable housing in traditionally Anglo areas and relied on a disparate impact theory to successfully persuade the Court to recognize their cause of action under the FHA.

Respondent chiefly relied on statistical evidence showing that the state agency had approved nearly half of units proposed in majority minority areas, but only approved 38 percent of units proposed in majority white areas. Second, respondent showed that 92 percent of the proposed units were ultimately built in neighborhoods with majority minority populations. The district court ruled respondent had thus established a prima facie case of discrimination. After the state failed to meet its burden of proving that there were no less discriminatory methods to advance its interests, respondent prevailed in federal district court.

The state appealed to the federal appellate court. While the appeal was pending, the Department of Housing and Urban Development (HUD), issued a regulation interpreting the FHA to establish liability for disparate impact discrimination.

The United States Court of Appeals for the Fifth Circuit agreed that the FHA prohibits disparate impact discrimination but found that respondent had not proven such discrimination. Accordingly, the appellate court overturned the judgment of the district court. The Supreme Court affirmed the decision of the appellate court and remanded for further proceedings.

The Court prefaced its analysis by laying out the history of housing discrimination in the United States. While de jure housing discrimination was outlawed in 1917, de facto housing remains a fact of life. White flight, rapid urbanization, and lack of choice left minorities populated in large cities. Congress enacted the Fair Housing Act in the wake of Dr. Martin Luther King’s tragic assassination and the Kerner Commission Report which found, in an oft-cited conclusion, “Our Nation is moving toward two societies, one black, one white—separate and unequal.”

First, the Court determined that two cases, Griggs v. Duke Power Co., 401 U.S. 424 (1971) and Smith v. City of Jackson, 544 U.S. 228 (2005), provided the proper framework for interpreting the FHA. These cases interpreted Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967 (ADEA), respectively, the statutes the Court described as most analogous to the FHA.

In Griggs, the Court determined that imposing disparate impact liability was entirely consistent with the purpose of the statute. The defendant-employer in Griggs required manual laborers to hold high school diplomas and to pass two “intelligence tests.” The employer’s requirements most dramatically impacted minorities. The Court held Congress “proscribed not only overt discrimination but also practices that are fair in form, but discriminatory in operation.” Because high school diplomas and intelligence tests are not directly correlated to job duties of manual laborers, the Court held the employer liable for violating Title VII under a disparate impact theory of liability.

In Smith, older employees sued their employer for granting more significant pay raises to employees with less than five years of experience. Applying the same reasoning it adopted in Griggs, the Court ruled that the texts of the relevant antidiscrimination statutes “focus[ ] on the effects of the action on the employee rather than the motivation for the action of the employer.” Under a disparate impact theory, the Court found the employer in Smith liable for violating the ADEA.

The Court explained the relevant subsections of the FHA are analogous to the texts of Title VII and the ADEA.

Section 804(a) of the FHA states that it is illegal:

To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

Section 805(a) states:

It shall be unlawful for any person or other entity whose business includes engaging in real-estate-related transaction to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin.

Given the parallel statutory language, the Court held that disparate claims are cognizable under the FHA. The Court found that the
term “otherwise adversely affect” found in Title VII and the ADEA mirrors the FHA's use of the term “otherwise make unavailable.” “Congress’ use of the phrase ‘otherwise make unavailable’ refers to the consequences of an action rather than the actor's intent. … This results-oriented language counsels in favor of recognizing disparate-impact liability.” The text of the language, the structure of the statute, and the proximity in time, all counsel in favor of interpreting the FHA under the framework of Title VII and the ADEA, wrote the Court. Finally, imposing disparate impact liability is consistent with the purpose of the FHA, which was enacted to eradicate discriminatory housing practices.

The Court cautioned, however, that disparate impact claims must be limited to avoid other grave constitutional violations. Imposing liability on the sole basis of statistical disparity, for example, would fail to give government officials necessary discretion to fashion valid policies that further legitimate interests. Market factors, subjective and objective, are legitimate criteria to consider in housing cases, explained the Court. Moreover, the Court’s ruling did not mandate the construction of affordable housing in any or every particular neighborhood. Under any circumstances, the Court discouraged the use of racial quotas to achieve certain results, cautioning that remedy would itself likely violate the Constitution. With these general guidelines, the Court remanded the case for further proceedings consistent with its ruling.

Justice Thomas dissented to critique Griggs, a “foundation … made of sand.” Fundamentally, Justice Thomas disagreed that the Civil Rights Act of 1964 expressly prohibits disparate impact discrimination. Justice Thomas generally described the theory of disparate impact liability as the monster child of the EEOC. He described the EEOC’s actions in this and other cases as suspect for reasons he detailed in footnote four, including the possible manipulation of the Court’s docket by a federal agency that entered into a “secret deal” with St. Paul, Minnesota, officials to dismiss Magnier v. Gallagher (10-1032), another disparate impact case, after the Court had already granted certiorari for its 2014 Term.

Justice Alito dissented in an opinion joined by the chief justice and Justices Scalia and Thomas. Justice Alito and his fellow dissenters rejected the Court’s premise that the FHA authorized disparate treatment claims. “Intent makes all the difference,” wrote Justice Alito. Beginning where Justice Thomas’s dissent left off in footnote four, Justice Alito wrote that Magnier illustrated precisely why disparate impact liability in housing cases condemns a city’s poorest residents “to live in a rat’s nest.” The Court’s decision in the case at hand, wrote Justice Alito, embraced the same theory that drove the Magnier decision. But “something has gone badly awry when a city can’t even make slumlords kill rats without fear of a lawsuit.”

The use of disparate impact theory in housing cases is likely to lead to continued battles and in some ways may reflect the next generation of civil rights advocacy to eliminate de facto segregation. Courts will be called upon to consider the legal and social implications of using government subsidies to create diversity across a wider range of American neighborhoods.

Women's Rights

Title VII prohibits discrimination on the basis of sex. In 1978, Congress amended Title VII by enacting the Pregnancy Discrimination Act. The first clause of the Pregnancy Discrimination Act prohibits discrimination “because of or on the bases of pregnancy, childbirth, or related medical conditions.” The second clause states:

Women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes … as other persons not so affected but similar in their ability or inability to work.

Peggy Young worked for United Parcel Service, Inc. (UPS) as a part-time driver. When she became pregnant in 2006 after enduring several miscarriages, her doctor advised her to avoid lifting more than 20 pounds during the first 20 weeks of her pregnancy or more than 10 pounds thereafter. However, UPS required its drivers to lift packages weighing up to 70 pounds without assistance and 150 pounds with assistance. Young conveyed this to an unsympathetic UPS. UPS told Young she could not work while under a lifting restriction, notwithstanding that her coworkers offered to help her with heavy packages.

UPS acknowledged it had indeed accommodated other workers under lifting restrictions, but asserted that those workers had become disabled on the job, had lost their Department of Transportation (DOT) certifications, or had experienced a disability under the definition of the Americans with Disabilities Act of 1990 (ADA). UPS would not accommodate Young because her pregnancy was not protected under one of those aforementioned categories. Without further recourse, Young took an unpaid leave of absence from UPS for most of her pregnancy.

Young filed a pregnancy discrimination charge with the Equal Employment Opportunity Commission (EEOC) in July of 2007. The agency provided Young with a right-to-sue letter in September of 2008, after which Young brought suit in federal district court. Concluding that Young could not prove intentional discrimination through direct evidence, the district court granted UPS summary judgment. The United States Court of Appeals for the Fourth Circuit affirmed. The Supreme Court vacated the judgment of the lower court.

After laying out the interpretations urged on it by the parties, the Court rejected all litigants’ readings and crafted its own. Young’s interpretation, which the Court suggested would grant pregnant women a “most-favored-nation status,” proved too much. The EEOC’s interpretation, seeking to treat pregnancy as any other temporary medical condition, came in the wake of guidelines it issued only after the Court had granted Young’s petition for certiorari. The Court noted the EEOC’s interpretation also contradicted the government’s long-held position. Consequently, the EEOC, too, left the Court unpersuaded. UPS asked the Court to define sex discrimination to simply include pregnancy discrimination, an interpretation the Court rejected as redundant.

The Court fashioned its own independent analysis using the classic framework of McDonnell Douglas. The Court held:

An individual pregnant worker who seeks to show disparate treatment through indirect evidence may do so through application of the McDonnell Douglas framework. That framework requires a plaintiff to make out a prima
facial difference. But it is not intended to be an inflexible rule.” Rather, an individual may establish a prima facie case by showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were based on a discriminatory criterion illegal under Title VII.

In other words, a potential plaintiff must show she was a member of a protected class, she sought an accommodation, the employer refused her an accommodation, but the employer accommodated others similarly situated in their ability to work or lack thereof. Further, an employer may defend itself by showing it acted based on “legitimate, non-discriminatory reasons.” The plaintiff could then rebut that showing by proving that the employer’s alleged bases were in fact pretextual.

Using this framework, the Court reversed the judgment of the Fourth Circuit, which mistakenly granted UPS summary judgment. The Court ruled that Young created a genuine issue of material fact as to whether UPS offered more favorable treatment to other workers whose inability to work rendered them similarly situated to Young. The Court remanded the case for the Fourth Circuit to determine whether UPS’s proffered bases for treating Young were pretextual, among other factual conflicts.

Justice Alito concurred in the judgment. In his view, an employer should be held liable for discrimination “only if the employer’s intent is to discriminate because of or on the basis of pregnancy.” In a line rippling throughout his civil rights cases this Term, Justice Alito emphasized “all that matters is the employer’s actual intent.” Here, Justice Alito agreed with the majority that Young had presented enough evidence to defeat UPS’s motion for summary judgment and to remand the case to the court of appeals for further consideration.

Justice Scalia dissented in an opinion joined by Justices Kennedy and Thomas. In Justice Scalia’s judgment, Young simply did not establish pregnancy discrimination. Justice Scalia agreed with Justice Alito’s conclusion that Young should be required to show she was treated differently because of her pregnancy. He also agreed with the Court’s conclusion that pregnancy did not create a “most favored employee” status. The focus, Justice Scalia suggested, should be on the employer’s intent:

All things considered, then, the right reading of the same-treatment clause prohibits practices that discriminate against pregnant women relative to workers of similar ability or inability. It does not prohibit denying pregnant women accommodations, or any other benefit for that matter, on the basis of an evenhanded policy.

Instead, in Justice Scalia’s opinion, the Court muddled the line between disparate impact and disparate treatment, merging the theories.

Justice Kennedy dissent to express his concern that the majority opinion conflated disparate impact with disparate treatment for the reasons described in Justice Scalia’s dissent. However, he wrote separately to express his concerns about the challenges faced by pregnant women in the workplace, challenges to which he wished to express that he was fully sympathetic.

Young comes at a time when the American workplace is divided nearly equally between men and women. As more women of childbearing age seek to work through pregnancy and return to their place of employment following childbirth, issues of how employers ought to treat pregnancy-related restrictions will increasingly come to the fore. While the Court’s esoteric decision in this case will not dramatically increase the power of pregnant women in the workplace, it does represent a limited victory for women’s rights advocates.

Religious Freedom
In an 8-1 decision vindicating religious liberties, the Court in Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores, Inc., (14-86) ruled that an applicant or employee could prevail in a disparate treatment claim under Title VII of the Civil Rights Act of 1964 by showing the employer factored in the applicant’s need for an accommodation in refusing to hire the applicant or promote the employee. Moreover, the applicant need not show the employer had actual knowledge of her need for an accommodation and need not show that she affirmatively raised such a need. In other words, Title VII prohibits certain motives, regardless of actual knowledge, where the employer may accommodate the applicant or employee without undue hardship.

Samantha Elauf, a practicing Muslim who wears a hijab, applied for a job at Abercrombie & Fitch Stores, Inc. (Abercrombie). Abercrombie & Fitch Stores maintains a “Look Policy” that prohibits, among other things, “caps.” Elauf never mentioned her religion or reason for wearing a hijab, and Abercrombie employees did not specifically ask. Assistant Manager Heather Cooke deemed Elauf qualified for the job and documented her recommendation that Abercrombie hire Elauf. Concerned, however, that Elauf’s headscarf would violate Abercrombie’s Look Policy, Cooke consulted with her store manager as well as her district manager, Randall Johnson. Cooke told Johnson she believed that Elauf wore her headscarf as a reflection of her faith. Johnson told Cooke any headwear, whatever the basis, violated the Look Policy. Johnson directed Cooke to decline to hire Elauf.

Acting on Elauf’s behalf, the EEOC sued Abercrombie. The EEOC asserted that Abercrombie violated Title VII and sought summary judgment. The district court granted the EEOC’s motion on the issue of liability and awarded Elauf $20,000 on the issue of damages after trial.

Over Judge Ebel’s vigorous dissent, a divided panel of the Tenth Circuit reversed the district court. The Tenth Circuit ruled that an employer could not be held liable under Title VII unless the employer possessed actual knowledge of the employee’s need for an accommodation based on notice from the employee.

Writing for the Court, Justice Scalia first clarified that Title VII prohibits both disparate treatment (intentional discrimination) and disparate impact. Abercrombie argued an employee could not prevail in a disparate treatment case unless she gave notice of her need for an accommodation, and an employer possessed actual knowledge of the employee’s need for an accommodation. The Court rejected Abercrombie’s attempt to graft an actual notice and knowledge requirement onto the text of the statute. The Court ruled that “an employer may not make an applicant’s religious practice, confirmed or otherwise, a factor in employment decisions.”
The Court easily dispensed with Abercrombie's remaining arguments. Abercrombie asserted that all failure to accommodate claims must be categorized as disparate impact claims, rather than disparate treatment claims. However, the Court held that Title VII's protections extend to religious belief as well as religious practice.

Abercrombie finally asserted its conduct fell short of intentional discrimination because it treated Elauf's headscarf no differently than a headscarf worn for secular reasons. The Court rejoined:

Title VII does not demand mere neutrality with regard to religious practices—that they be treated no worse than other practices. Rather, it gives them favored treatment, affirmatively obligating employers not 'to fail or refuse to hire or discharge any individual because of such individual’s' 'religious observance or practice.' . . . Title VII requires otherwise-neutral policies to give way to the need for an accommodation.

The Court remanded the case to the Tenth Circuit.

Justice Alito concurred in the judgment. First, Justice Alito clarified that he would "hold that an employer cannot be held liable for taking an adverse action because of an employee’s religious practice unless the employer knows that the employee engages in the practice for a religious reason.” He thought it questionable to impose employer liability in the absence of knowledge of a religious practice or belief, whatever the source of that knowledge. Here, Justice Alito wrote that the evidence in the record below was sufficient to show Abercrombie knew Elauf was a Muslim and wore a headscarf for religious reasons.

Justice Thomas dissented. In Justice Thomas’s view, “Mere application of a neutral policy cannot constitute 'intentional discrimination.'” Essentially, Justice Thomas accepted Abercrombie’s argument that it simply applied its policy banning caps to Elauf, without regard to any religious significance of headwear. Justice Thomas claimed the Court’s reading of the statute unfairly punished employers who had no discriminatory motive. Moreover, Justice Thomas disagreed with the Court’s conclusion that religion must be treated differently and accommodated where doing so would not constitute an undue burden.

When announcing the Court’s decision, Justice Scalia prefaced the opinion reading by saying, “This is easy.” Indeed, for at least eight members of the Court who read this as a case of intentional discrimination. The Court ruled that Title VII requires otherwise-neutral policies to give way to the need for an accommodation.

Civil Liberties
In City of Los Angeles, California v. Patel et al., the Court struck down a City of Los Angeles (City) municipal ordinance requiring motel and hotel operators to log guest information and make their records available for inspection to law enforcement for 90 days. The Court held the statute unconstitutional under the Fourth Amendment.

The City's statute forced hotel and motel operators to obtain and turn over personal information from every guest. Specifically, Los Angeles Municipal Code § 41.49 required lodging operators to record each guest's name, address, room number, time of arrival, and scheduled departure; number of parties accompanying the guest; identifying characteristics of the guest's vehicle; rate charged; and manner of payment. The City further required hotel operators to maintain this information in the guest reception area for three months. The City ordered compliance even in the absence of consent or a warrant. The City decreed noncompliance a criminal misdemeanor punishable by a jail term of up to six months and a $1,000 fine.

Respondents, a group of affected businesspeople including motel operators and a lodging association, sued in federal district court. Respondents brought a facial challenge under the Fourth Amendment, asserting they had been forced to comply with nonconsensual records inspections. Respondents sought declaratory judgment and injunctive relief.

The district court ruled that respondents lacked any reasonable expectation of privacy in their hotel records, a holding upheld by the appellate court. However, the Ninth Circuit sitting en banc reversed, ruling the inspections were unreasonable searches under the Fourth Amendment because respondents were given no opportunity for precompliance review. The Supreme Court affirmed the judgment of the Ninth Circuit.

Writing for the majority, Justice Sotomayor first rejected the City’s argument that facial challenges to the Fourth Amendment are disfavored or even barred. The Court noted that facial challenges, which involve a claim that a statute or regulation is unconstitutional regardless of the manner of application, are difficult to justify, but viable nonetheless. The Court also described successful facial challenges it had upheld vindicating the First, Second, and Fourteenth Amendments.

Under a Fourth Amendment framework, the Court ruled the statute constituted an administrative search. Such searches require consent. Absent consent, subjects must be permitted to obtain precompliance review before an objective decision maker. By contrast here, the City neither requested consent nor provided the opportunity for precompliance review. Indeed, respondents’ failure to comply could subject them to immediate arrest. This caused an intolerable situation for respondents and created the specter of pretextual harassment:

Absent an opportunity for precompliance review, the statute creates an intolerable risk that searches authorized by it will exceed statutory limits, or be used as a pretext to harass hotel operators and their guests. Even if a hotel has been searched 10 times a day, every day, for three months, without any violation being found, the operators can only refuse to comply with an officer’s demand to turn over the registry at his or her own peril.

The Court’s observation may have been a discreet reference to the record below, which suggested that law enforcement subjected Indian American motel owners to particular scrutiny. The Court further noted that the opportunity for precompliance review, even if never actually exercised, created a different power dynamic between law enforcement and respondents. In a post-Patel world, the Court expected its decision would decrease the possibility that law enforcement would leverage administrative searches as a means of harassing legitimate business owners. This was particularly important where respondents did not operate in an industry traditionally subject to increased government scrutiny covering
more inherently dangerous commerce, e.g., alcohol, firearms, mining, and automobile junkyards. Hotel operators, the Court ruled, did not inherently threaten the public welfare. Thus, absent any opportunity for precompliance review, the Court struck down the statute as a facial violation of the Fourth Amendment.

Justice Scalia dissented in an opinion joined by the chief justice and Justice Thomas. While the majority opinion focused on the privacy interests of motel owners, Justice Scalia concentrated on what he described as law enforcement’s need for the ordinance. Indeed, Justice Scalia pointed out that a plethora of other municipalities had similar statutes on the books. He noted that the purpose of the statute was to “deter criminal conduct,” and motels attracted certain types of crime, from prostitution to human trafficking. Justice Scalia opined that the limited search at issue was reasonable under the circumstances. Justice Scalia also detailed the lengthy history of government regulation of motels and inns going back centuries.

Justice Alito also dissented in an opinion joined by Justice Thomas. Justice Alito disagreed with the Court’s holding that a facial challenge was appropriate in this case. He gave five hypothetical examples involving ongoing or imminent criminal conduct in which he thought the statute could be held constitutional. More generally, Justice Alito questioned whether the fact-bound inquiries inherent in a Fourth Amendment challenge ever could justify a successful facial challenge.

Given the choice between law enforcement’s assertion of the need to regulate an industry allegedly prone to attracting seedy elements and the civil liberties rights of independent motel owners, the Court in this case protected the rights of individuals against undue intrusion by the state. In practice, law enforcement still has work-arounds to search any business it believes harbors criminals or fosters criminal activity, including by utilizing other means of search or obtaining consent.

Together, these cases paint a picture of a Court particularly concerned about the rights and liberties of minorities of every type. Indeed, even when the justices did not agree on the means, individual justices took care to express their sympathies for the ends of a more just society.

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A Strong Year for Defendants:
Criminal Procedure and the 2014–2015 Supreme Court Term
by Catherine Hawke

Compared to some of the more recent Terms, the 2014–2015 Supreme Court Term at first seems to be light on the criminal procedure front. Recent Terms have included some major criminal procedure blockbusters, such as *Riley v. California*, 134 S. Ct. 2473 (2014), limiting the ability of law enforcement to search cell phones without a warrant; *Florida v. Jardines*, 133 S. Ct. 1409 (2013), holding that a dog sniff at a suspect’s front door also constitutes a “search”; and *United States v. Jones*, 132 S. Ct. 945 (2012), when the Court determined that attaching a GPS device to someone’s vehicle counts as a “search.”

However, in spite of its not including such obvious blockbuster cases, the 2014–2015 criminal docket has its own, somewhat surprising, headline: A Strong Year for Criminal Defendants. Or, at least that seems to be true given the majority of the criminal law cases this Term. Generally, the justices seemed to favor limiting the application of criminal statutes and protecting the rights for criminal suspects and defendants, a development that goes against the belief that the current Court is more conservative.

For example, early in the Court’s criminal docket was a somewhat odd case, *Yates v. United States* (13-7451), referred to by Court-watchers as “the fish case.” *Yates* is one in a long string of cases before the Court to define, limit, and round out the Sarbanes-Oxley Act, the federal statute passed in the shadow of the Enron and Worldcom scandals to protect shareholders and the general public. The Act criminalizes the destruction of a “tangible object” with the intent to impede a federal investigation. *Yates* asked the Court to determine how far the application of “tangible object” extended. Specifically, John Yates destroyed undersized red grouper fish that were to be collected as evidence of his having harvested undersized fish. According to the Court, the criminalization of such an act was a step too far; for the purposes of the Sarbanes-Oxley Act, the term “tangible object” is limited to objects used to record or preserve information. Justice Ginsburg termed the use of the Act to criminalize such behavior as “an aggressive interpretation.”

Continuing to limit the application of federal criminal statutes, later in the Term, the justices ruled that an entire portion of the Armed Career Criminal Act (ACCA) was unconstitutional. *Johnson v. United States* (13-7120) asked the justices to consider whether possession of a short-barreled shotgun qualified as a violent felony under the ACCA. In an 8-1 vote, the Court went one step beyond what it was asked to do and ruled that the ACCA residual clause (which was a catchall provision for violent felonies that were not enumerated in other parts of the statute) was unconstitutionally vague. In writing for the majority, Justice Scalia concluded that “the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates.” For the immediate defendant, Samuel Johnson, this holding meant that his possession of a short-barreled shotgun would not qualify for a sentence-enhancement under the ACCA. For future defendants, the holding means that unless their crime aligns with one of the felonies specifically enumerated by the ACCA, they too are not subject to enhanced sentences as career criminals.

In a similar vein, the Court established a higher burden for the government in trying to convict individuals for threatening to injure another person. In *Elonis v. United States* (13-983), the justices again ruled in favor of a criminal defendant, this time finding that, in order to be convicted for threatening another person, prosecutors must show that a defendant was aware of how his or her words would be understood; according to the Court, a mere negligence standard is not enough to hold someone criminally liable for perceived threats. Anthony Elonis had posted a series of writings on his Facebook account that seemed to threaten his estranged wife, law enforcement officials, and his employer. Elonis claimed that his postings were not intended to threaten anyone and were merely poetic musings. Prosecutors argued that, regardless of what Elonis intended, he could be convicted if a reasonable person would interpret his words as a threat. According to the Court, prosecutors didn’t do enough; they had to show that Elonis was aware that his words would have been viewed as threats in order for the conviction to stand. Although the holding in *Elonis* did not include a sweeping pronouncement regarding the First Amendment’s reach into the online environment as some court-watchers had expected, it did continue to shore up the rights of individual criminal defendants and make the burden on prosecutors a little more onerous.

Finally, in *Henderson v. United States* (13-1487), the Court affirmed the rights of criminal defendants outside of the scope of their trials and sentencing. After being charged with a felony for distribution of marijuana, Tony Henderson turned over his lawfully owned firearms. Once he was convicted, Henderson asked the FBI to transfer his firearms to either a third-party purchaser or his wife. The government claimed that this was prohibited under the felon-in-possession statute. A unanimous Supreme Court disagreed. In writing for the Court, Justice Kagan argued that the government “wrongly conflates the right to possess a gun with another incident of ownership.” According to the Court, the inability to possess firearms does not mean that felons cannot exercise other aspects of ownership, including the ability to sell or transfer them.
Policing the Police
The criminal procedure docket also tackled some important policing practices, with the Court continuing the trend of ruling in favor of criminal suspects and defendants. In Rodriguez v. United States (13-9972), the Court ruled that, without reasonable suspicion, police cannot extend a traffic stop in order to conduct a dog drug sniff of the car. And although not seemingly aimed at protecting the rights of criminal defendants, the Court’s holding in Los Angeles v. Patel (13-1175) limits the investigative ability of law enforcement. Patel challenged a Los Angeles ordinance that required hotel and motel operators to maintain guest registers and turn them over to police upon request. In a two-part holding, the Court first ruled that Fourth Amendment cases can go forward as facial challenges, meaning that a petitioner can argue that the mere existence of a law violates the Fourth Amendment, thereby preventing the petitioner from having to show that the Fourth Amendment was violated by a particular application of the law. Second, Patel held that the L.A. ordinance violated the Fourth Amendment by failing to provide hotel operators with an opportunity for precompliance review. The undercurrent to Patel is that hotels are frequently the location of criminal activity and police wish to use these registers in criminal investigations. In his dissent, Justice Scalia noted: “Motels not only provide housing to vulnerable transient populations, they are also a particularly attractive site for criminal activity ranging from drug dealing and prostitution to human trafficking. Offering privacy and anonymity on the cheap, they have been employed as prisons for migrants smuggled across the border and held for ransom … and rendezvous sites where child sex workers meet their clients on threat of violence from their procurers.”

Not All Criminal Defendants Win
However, the Court’s 2014–2015 criminal docket wasn’t completely in favor of criminal defendants. Indeed, there were a few very important restraints on the swing to the left. Although the Court seemed to limit the application of many criminal statutes through 2015, in Whitfield v. United States (13-9026), the Court expanded the application of the federal kidnapping statute. Whitfield involved a botched robbery; in fleeing the scene, Larry Whitfield entered Mary Parnell’s home to hide and Parnell subsequently had a fatal heart attack during the events. While in Parnell’s home, Whitfield had Parnell move between rooms. Whitfield was eventually convicted of, among other things, forcing another person to accompany him during the robbery. Whitfield argued that Parnell’s movement was not enough to justify the charges. The Supreme Court disagreed; according to a unanimous ruling, the statute applies anytime a robber forces another person to go somewhere with him, even if that is within the same building or over a short distance.

The Court also issued two important rulings in the arena of criminal procedure that seemingly puts a thumb on the scale in favor of the government in certain trials. First, in Heien v. North Carolina (13-604), the Court held that reasonable suspicion to justify a traffic stop could exist even in spite of an officer’s mistake of law, so long as that mistake was reasonable. Second was the Court’s ruling in Ohio v. Clark (13-1352), that latest case since Crawford v. Washington, 541 U.S. 36 (2004), to examine what is “testimonial” hearsay for purposes of the Confrontation Clause. In Ohio v. Clark, the Court considered how that exception applies to a child’s out-of-court statements made to a teacher regarding potential child abuse. The Supreme Court held that such statements do not violate the Confrontation Clause. Although all the justices agreed with the outcome, they very much disagreed on how to get there. In writing for the majority, Chief Justice Roberts succinctly concluded “And considering all the relevant circumstances here, L.P.’s [the child’s] statements clearly were not made with the primary purpose of creating evidence for Clark’s prosecution. Thus, their introduction at trial did not violate the Confrontation Clause.” In a concurring opinion, Justice Scalia, advocating for the constitutional right of criminal defendants to confront their accusers, wrote separately “to protest the Court’s shoveling of fresh dirt upon the Sixth Amendment right of confrontation so recently rescued from the grave in Crawford[].”

In the capital punishment area, there was one very large exception to the prodefendant trend in the Court’s 2014–2015 docket. In Glossip v. Gross (14-7955), the Court upheld the use of the three-drug cocktail method of lethal injection currently being used. In this 5-4 ruling, the justices voted in line with their perceived conservative and liberal alignments. Notably, however, two of the liberal justices (Justices Breyer, joined by Justice Ginsburg) implied they might be willing to strike down the death penalty altogether.

However, in spite of these rulings that seem to be more in line with the Court’s assumed conservative preference for law-and-order policing, the 2014–2015 Term will, on balance, likely be seen by history as favoring criminal defendants and suspects. And given that the 2015–2016 Term already includes at least one set of cases dealing with the jury instructions for death penalty cases and another addressing racial basis in jury selection for death penalty cases, criminal defendant rights will be center stage before the justices once again.
This chart shows the breakdown of majority opinion authorship by justice.
**Administrative Law**  
*Perez v. Mortgage Bankers Association*  
**Docket No. 13-1041**  
**Reversed: The District of Columbia Circuit**

Argued: December 1, 2014  
Decided: March 9, 2015  
Analysis: See ABA PREVIEW 99 Issue 3

**Overview:** The Department of Labor issued an interpretation of one of its administrative regulations saying that employers of mortgage loan officers are exempt from the federal requirement that employers pay employees overtime wages for work over 40 hours a week. The Department subsequently reversed course and issued another interpretation that said the opposite. The Department did not submit either interpretation for public notice-and-comment rulemaking.

**Issue:** Did the circuit court err when it held that the Administrative Procedure Act (APA) requires an agency to use notice-and-comment procedures when issuing new regulatory interpretations that deviate significantly from one the agency has previously adopted?

**Yes.** The District of Columbia’s Circuit Court’s line of decisions interpreting the APA to require an agency to use notice-and-comment procedures when issuing new regulations significantly different from previous interpretations was a misreading of the APA; such a rule is contrary to the clear text of the APA’s rulemaking provisions and improperly imposes obligations on agencies.

From the opinion by Justice Sotomayor  
(joined by Chief Justice Roberts and Justices Kennedy, Ginsburg, Breyer, and Kagan, and joined by Justice Alito as to Part III-B): So, the D. C. Circuit correctly read § 1 of the APA to mandate that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance. See FCC v. Fox Television Stations, Inc., 556 U. S. 502 (2009) (the APA “make[s] no distinction … between initial agency action and subsequent agency action undoing or revising that action”). Where

the court went wrong was in failing to apply that accurate understanding of § 1 to the exemption for interpretive rules contained in § 4: Because an agency is not required to use notice-and-comment procedures to issue an initial interpretive rule, it is also not required to use those procedures when it amends or repeals that interpretive rule.

**Concurring in part and in judgment:** Justice Alito  
**Concurring in judgment:** Justice Scalia  
**Concurring in judgment:** Justice Thomas

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**Administrative Law**  
*T-Mobile South, LLC v. Roswell*  
**Docket No. 13-975**  
**Reversed and Remanded: The Eleventh Circuit**

Argued: November 10, 2014  
Decided: January 14, 2015  
Analysis: See ABA PREVIEW 40 Issue 2

**Overview:** The Federal Telecommunications Act requires that a personal wireless service facility siting decision be “in writing” and supported by a “written record.” The statutory scheme places some limitations on local control of land uses so as to allow the deployment of “personal wireless service facilities,” including nondiscrimination among carriers, prohibition of denial of such facilities based on alleged environmental effects of radio frequency emissions when the facility meets federal frequency emission standards, and the standards applied in this case. The Eleventh Circuit agreed with the respondent-city that the notification of the denial action and reference to the city’s minutes and a transcript met this statute, but petitioner T-Mobile argued for a more formal process by which the reasons for denial based on the record would be required.

**Issue:** Can a document from a state or local government stating that an application has been denied, but providing no reasons whatsoever for the denial, satisfy the Federal Telecommunications Act “in writing” requirement?

**No.** Localities must provide reasons when they deny applications for cell phone tower siting applications. We stress, however, that these reasons need not be elaborate or even sophisticated, but rather, as discussed below, simply clear enough to enable judicial review.

**Concurring:** Justice Alito  
**Dissenting:** Chief Justice Roberts (joined by Justice Ginsburg and Justice Thomas joined as to Part I)  
**Dissenting:** Justice Thomas

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**Antitrust Law**  
*North Carolina State Bd. of Dental Examiners v. FTC*  
**Docket No. 13-534**  
**Affirmed: The Fourth Circuit**

Argued: October 14, 2014  
Decided: February 25, 2015  
Analysis: See ABA PREVIEW 25 Issue 1

**Overview:** The Federal Trade Commission (FTC) filed a complaint against the North Carolina State Board of Dental Examiners (Board) to prevent the Board from excluding nondentists from the teeth whitening services market. After a trial, the administrative law judge ordered the Board to cease and desist from its practices preventing and discouraging nondentists from entering the market. After the Board appealed, the FTC issued an order finding the Board had indeed violated Section 5 of the FTC Act. The Fourth Circuit Court of Appeals affirmed the ruling of the FTC.

**Issue:** Is a state regulatory board exempt from federal antitrust law pursuant to the state-action exemption, where a majority of the board’s members are private actor market participants?

**Yes.** When a controlling number of a state regulatory board’s decision makers are active market participants in the regulated
occupation, the board can invoke state-action antitrust immunity if it was subject to active state supervision; in this particular case, the requirement for state supervision was not met.

From the opinion by Justice Kennedy (joined by Chief Justice Roberts and Justices Ginsburg, Breyer, Sotomayor, and Kagan): In this case the Board argues its members were invested by North Carolina with the power of the State and that, as a result, the Board’s actions are cloaked with Parker immunity. This argument fails, however. A nonsovereign actor controlled by active market participants—such as the Board—enjoys Parker [Parker v. Brown, 317 U. S. 341 (1943)] immunity only if it satisfies two requirements: “first that ‘the challenged restraint … be one clearly articulated and affirmatively expressed as state policy,’ and second that ‘the policy … be actively supervised by the State.’” FTC v. Phoebe Putney Health System, Inc., 568 U. S. ___ (2013). The parties have assumed that the clear articulation requirement is satisfied, and we do the same. While North Carolina prohibits the unauthorized practice of dentistry, however, its Act is silent on whether that broad prohibition covers teeth whitening. Here, the Board did not receive active supervision by the State when it interpreted the Act as addressing teeth whitening and when it enforced that policy by issuing cease-and-desist letters to nondentist teeth whiteners.

Dissenting: Justice Alito (joined by Justices Scalia and Thomas)

Appellate Procedure

Gelboim v. Bank of America Corp.

Docket No. 13-1174

Reversed and Remanded:

The Second Circuit

Argued: December 9, 2014
Decided: January 21, 2015
Analysis: See ABA PREVIEW 80 Issue 3

Overview: Federal appellate courts have jurisdiction to review final decisions of the district courts, under 28 U.S.C. § 1291. This case involved the meaning of “finality,” where numerous similar district court cases are consolidated and just one is dismissed. Petitioners’ antitrust lawsuit was consolidated for pretrial purposes in multidistrict litigation (MDL) involving over 60 cases. The district court found the antitrust claims legally insufficient, and dismissed petitioners’ entire case. Petitioners appealed, but the Second Circuit dismissed the appeal for lack of jurisdiction because the other consolidated cases, with other types of claims, remained pending.

Issue: Do cases that are consolidated for pretrial purposes in multidistrict litigation, under 28 U.S.C. § 1407(a), retain their independent character for purposes of appellate jurisdiction?

Yes. When an ordering completely removes petitioners from a consolidated proceeding, those petitioners have a right to appeal under 28 U.S.C. § 1291.

From the unanimous opinion by Justice Ginsburg: The sensible solution is evident: When the transferee court overseeing pretrial proceedings in multidistrict litigation grants a defendant’s dispositive motion “on all issues in some transferred cases, [those cases] become immediately appealable … while cases where other issues remain would not be appealable at that time.”

Bankruptcy

Baker Botts v. ASARCO

Docket No. 14-103

Affirmed: The Fifth Circuit

Argued: February 25, 2015
Decided: June 15, 2015
Analysis: See ABA PREVIEW 191 Issue 5

Overview: The Bankruptcy Code authorizes the retention of lawyers and other professionals to provide necessary services to the trustee or debtor in possession. The lawyers and other professionals must submit fee applications itemizing their work for approval by the bankruptcy court, and those applications can be challenged by creditors and other parties in interest. This case asked whether a bankruptcy court had the authority to award fees to a law firm to cover its work in defending against challenges brought to its fee applications.

Issue: Does Section 330(a) of the Bankruptcy Code, which authorizes the court to award “reasonable compensation for actual, necessary services rendered” by professionals retained by the debtor with the court’s approval, give the court discretion to award compensation to debtor’s counsel for work performed in defending its fee application?

No. Section 330(a) of the Bankruptcy Code does not permit a court to award compensation to debtor’s counsel for work performed in defending its fee application.

From the opinion by Justice Thomas (joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Alito, and joined by Justice Sotomayor as to all but Part III-B-2): This legislative decision to limit “compensation” to “services rendered” is particularly telling given that other provisions of the Bankruptcy Code expressly transfer the costs of litigation from one adversarial party to the other. Section 110(i), for instance, provides that “[i]f a bankruptcy petition preparer … commits any act that the court finds to be fraudulent, unfair, or deceptive, on the motion of the debtor, trustee, United States trustee (or the bankruptcy administrator, if any),” the bankruptcy court must “order the bankruptcy petition preparer to pay the debtor … reasonable attorneys’ fees and costs in moving for damages under this subsection.” § 110(i)(1)(C). Had Congress wished to shift the burdens of fee-defense litigation under § 330(a)(1) in a similar manner, it easily could have done so. We accordingly refuse to “invade the legislature’s province by redistributing litigation costs” here.

Concurring in part and concurring in judgment: Justice Sotomayor
Dissenting: Justice Breyer (joined by Justices Ginsburg and Kagan)

Bankruptcy

Bank of America, N.A. v. Caulkett and Bank of America, N.A. v. Toledo-Cardona

Docket Nos. 13-1421 and 14-163

Reversed and Remanded:

The Eleventh Circuit

Argued: March 24, 2015
Decided: June 1, 2015
Analysis: See ABA PREVIEW 214 Issue 6

Overview: The debtors in two separate Chapter 7 liquidation bankruptcy cases asked the bankruptcy court to void the
second mortgages on their homes in light of the fact that no property value stood behind these mortgages. The first mortgages fully encumbered and exceeded the value of the homes, and the Bankruptcy Code might be read to say that a lien (e.g., a mortgage) not backed up by actual property value is void. The bankruptcy court agreed with the debtors and voided, or “stripped off,” the second mortgages. Following Eleventh Circuit precedent, the district court and court of appeals summarily affirmed, despite a Supreme Court case, Dewsnup v. Timm, 502 U.S. 410 (1992), that many other courts had interpreted as prohibiting this form of “lien stripping” in Chapter 7 bankruptcy. The Eleventh Circuit distinguished the Dewsnup precedent on the basis that it prohibited only “stripping down” a partially value-backed mortgage; it did not expressly prohibit “stripping off” a mortgage backed by no value at all. At the request of the holder of the second mortgages, the Supreme Court granted certiorari in these cases to resolve a split among the lower courts concerning the scope of its earlier Dewsnup decision.

**Issue:** Does the Bankruptcy Code allow the bankruptcy court in a Chapter 7 liquidation case to “strip off” a mortgage (or other lien) that is not backed by any available property value?

No. A debtor in a Chapter 7 bankruptcy proceeding may not void a junior mortgage when the debt owed on the senior mortgage exceeds the current value of the collateral if the claim is both secured by a lien and allowed by the Bankruptcy Code.

From the opinion by Justice Thomas (joined by Chief Justice Roberts and Justices Scalia, Ginsburg, Alito, and Kagan, and joined by Justices Kennedy, Breyer, and Sotomayor except as to the footnote): Dewsnup’s construction of “secured claim” resolves the question presented here. Dewsnup construed the term “secured claim” in § 506(d) to include any claim “secured by a lien and … fully allowed pursuant to § 502.” Because the Bank’s claims here are both secured by liens and allowed under § 502, they cannot be voided under the definition given to the term “allowed secured claim” by Dewsnup.

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**Bankruptcy**  
**Bullard v. Blue Hills Bank**  
**Docket No. 14-116**  
**Affirmed: The First Circuit**

**Argued:** April 1, 2015  
**Decided:** May 4, 2015  
**Analysis:** See ABA PREVIEW 235 Issue 6  
**Overview:** Petitioner Louis Bullard owned a two-family residence in Randolph, Massachusetts. At the time of his filing for bankruptcy under Chapter 13, Bullard’s property was deeply underwater, valued at $245,000 by him and $285,000 by the respondent mortgagee. Respondent claimed it had a $346,006.54 interest in the mortgage. The bankruptcy court denied petitioner’s plan to divide respondent’s claim into secured and unsecured parts, known as a hybrid plan. The Bankruptcy Appellate Panel (BAP) affirmed. Petitioner noticed an appeal to the First Circuit and also requested certification of an interlocutory appeal. The BAP refused to certify the appeal and the First Circuit dismissed the appeal for lack of jurisdiction. It said that the denial of plan confirmation was not final because petitioner could propose an amended plan.

**Issue:** Is an order denying confirmation of a bankruptcy plan final and appealable as of right?

No. A bankruptcy court’s order denying confirmation of a debtor’s proposed repayment plan is not a final order that the debtor can immediately appeal.

From the unanimous opinion by Chief Justice Roberts: In Bullard’s view the debtor can appeal the denial of the first plan he submits to the bankruptcy court. If the court of appeals affirms the denial, the debtor can then revise the plan. If the new plan is also denied confirmation, another appeal can ensue. And so on. As Bullard’s case shows, each climb up the appellate ladder and slide down the chute can take more than a year. Avoiding such delays and inefficiencies is precisely the reason for a rule of finality. It does not make much sense to define the pertinent proceeding so narrowly that the requirement of finality would do little work as a meaningful constraint on the availability of appellate review.

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**Bankruptcy**  
**Harris v. Viegelnahn**  
**Docket No. 14-400**  
**Reversed and Remanded: The Fifth Circuit**

**Argued:** April 1, 2015  
**Decided:** May 18, 2015  
**Analysis:** See ABA PREVIEW 221 Issue 6  
**Overview:** Behind on mortgage payments and trying to save his home, Charles Harris, the petitioner, filed a Chapter 13 bankruptcy plan to repay his creditors. Under the plan, he would pay all his income except that needed for basic living expenses for 60 months to the bankruptcy trustee to repay secured creditors in full and then pay unsecured creditors. As so often happens, petitioner was unable to keep up with the plan and after losing his home in foreclosure, converted his bankruptcy to a Chapter 7. When the conversion was filed, the trustee had $5,519 in plan payments on hand, which she distributed to creditors. Petitioner’s attorney was paid $1,200. Petitioner wants $4,319 refunded to him, and the lower courts agreed. The Fifth U.S. Circuit Court of Appeals reversed. Its position was contrary to the Third Circuit’s.

**Issue:** Does a bankruptcy estate include wages earned by a debtor after the Chapter 13 petition was filed, meaning that those wages should be distributed to creditors if the matter is converted to a Chapter 7?

No. A debtor who converts a Chapter 7 is entitled to return of any postpetition wages not yet distributed by the Chapter 13 trustee.

From the unanimous opinion by Justice Ginsburg: By excluding postpetition wages from the converted Chapter 7 estate, § 348(f)(1)(A) removes those earnings from the pool of assets that may be liquidated and distributed to creditors. Allowing a terminated Chapter 13 trustee to disburse the very same earnings to the very same creditors is incompatible with that statutory design. We resist attributing to Congress, after explicitly exempting from Chapter 7’s liquidation-and-distribution process a debtor’s postpetition wages, a plan to place those wages in creditors’ hands another way.
Concurring in part and concurring in judgment: Justice Alito

Dissenting: Chief Justice Roberts (joined by Justice Scalia and Justice Thomas as to Part I)
Dissenting: Justice Thomas

Civil Procedure
Carroll v. Carman

Docket No. 14-212
Reversed and Remanded:
The Third Circuit

Argued: N/A
Decided: November 10, 2014
Analysis: N/A

Overview: Police arrived at the Carman home after receiving a report that a suspect was there. Due to parking limitations, the officers parked toward the rear of the house and entered the property through the backyard and onto a deck. The officers saw a glass door, assumed it was a “customary entryway” and knocked. The officers were eventually given consent to search the home. The Carmans later sued under § 1983, claiming that the officers unlawfully entered the Carmans’ property without a warrant in violation of the Fourth Amendment.

Issue: Did the Third Circuit err when it ruled that an officer was not entitled to qualified immunity from a suit alleging that the officer violated the respondents’ Fourth Amendment rights after going into their backyard and onto their deck without a warrant?

Yes. There is no clearly established law that the “knock and talk” exception to the warrant requirement only applies to a home’s obvious front door.

From the per curiam opinion: In the court’s view, that statement clearly established that a “knock and talk” must begin at the front door. But that conclusion does not follow. Estate of Smith v. Marasco, 318 F. 3d 497 (CA3 2003), held that an unsuccessful “knock and talk” at the front door does not automatically allow officers to go onto other parts of the property. It did not hold, however, that knocking on the front door is required before officers go onto other parts of the property that are open to visitors. Thus, Marasco simply did not answer the question whether a “knock and talk” must begin at the front door when visitors may also go to the back door.

Civil Procedure
Johnson v. Shelby

Docket No. 13-1318
Reversed and Remanded:
The Fifth Circuit

Argued: N/A
Decided: November 10, 2014
Analysis: N/A

Overview: Petitioners, police officers, sued the city of Shelby, Mississippi, alleging that they were fired for bringing to light criminal activities of an alderman. The lower court dismissed their case for failure to invoke § 1983 in their complaint.

Issue: Do Federal Rules of Civil Procedure require plaintiffs to specifically cite § 1983 in bringing suit against a city?

No. The Federal Rules of Civil Procedure and Supreme Court precedent do not require plaintiffs to specifically cite § 1983 in bringing suit against a city; plaintiffs must plead facts specifically to show their claims seem substantially plausible.

From the per curiam opinion: The requirement serves a notice function, the Fifth Circuit said, because “[c]ertain consequences flow from claims under § 1983, such as the unavailability of respondent superior liability, which bears on the qualified immunity analysis.” This statement displays some confusion in the Fifth Circuit’s perception of petitioners’ suit. No “qualified immunity analysis” is implicated here, as petitioners asserted a constitutional claim against the city only, not against any municipal officer.
Civil Rights
Kingsley v. Hendrickson
Docket No. 14-6368
Vacated and Remanded: The Seventh Circuit

Argued: April 27, 2015
Decided: June 22, 2015
Analysis: See ABA PREVIEW 272 Issue 7

Overview: Petitioner, a pretrial detainee, alleges that jail officers used excessive force in violation of the Fourteenth Amendment by restraining and tasering him. The Seventh Circuit approved jury instructions that required finding that the defendants’ use of force was both subjectively reckless and objectively unreasonable. The Supreme Court was asked to resolve a circuit split regarding whether excessive force in this context is a purely objective inquiry or whether it also requires a finding as to the officer’s subjective intent.

Issue: Are the requirements of a 42 U.S.C. § 1983 excessive force claim brought by a plaintiff who was a pretrial detainee at the time of the incident satisfied by a showing that the state actor deliberately used force against the pretrial detainee and the use of force was objectively unreasonable?

Yes. For a 42 U.S.C § 1983 excessive force claim, a pretrial detainee must only show that the force used against him was purposely or knowingly used against him and was objectively unreasonable.

From the opinion by Justice Breyer (joined by Justices Kennedy, Ginsburg, Sotomayor, and Kagan): Consider the series of physical events that take place in the world—a series of events that might consist, for example, of the swing of a fist that hits a face, a push that leads to a fall, or the shot of a Taser that leads to the stunning of its recipient. No one here denies, and we must assume, that, as to the series of events that have taken place in the world, the defendant must possess a purposeful, a knowing, or possibly a reckless state of mind. That is because, as we have stated, “liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process.” County of Sacramento v. Lewis, 523 U. S. 833 (1998) (emphasis added) . . . . Thus, if an officer’s Taser goes off by accident or if an officer unintentionally trips and falls on a detainee, causing him harm, the pretrial detainee cannot prevail on an excessive force claim. But if the use of force is deliberate—i.e., purposeful or knowingly—the pretrial detainee’s claim may proceed. In the context of a police pursuit of a suspect the Court noted, though without so holding, that recklessness in some cases might suffice as a standard for imposing liability . . . . Whether that standard might suffice for liability in the case of an alleged mistreatment of a pretrial detainee need not be decided here; for the officers do not dispute that they acted purposefully or knowingly with respect to the force they used against Kingsley.

Dissenting: Justice Scalia (joined by Chief Justice Roberts and Justice Thomas)
Dissenting: Justice Alito

Civil Rights
Docket No. 14-86
Reversed and Remanded: The Tenth Circuit

Argued: February 25, 2015
Decided: June 1, 2015
Analysis: See ABA PREVIEW 179 Issue 5

Overview: The Equal Employment Opportunity Commission (EEOC) filed a complaint against Abercrombie & Fitch Stores, Inc. (Abercrombie), alleging Abercrombie violated Title VII of the Civil Rights Act of 1964 when it failed to hire Samantha Elauf, a Muslim who wears a hijab as a symbol of her faith. The United States District Court for the Northern District of Oklahoma granted partial summary judgment to the EEOC as to liability. After a jury trial limited to the question of damages, the jury granted $20,000 to Elauf in compensatory damages. The Tenth Circuit Court of Appeals reversed the district court and granted summary judgment to Abercrombie, with Judge Ebel dissenting in part. The government filed a successful petition for certiorari. There was a circuit split on the question between the Tenth Circuit and the Seventh, Eighth, Ninth, and Eleventh Circuits.

Issue: Under Title VII of the Civil Rights Act of 1964, should an employer be held liable for discrimination based on a religious observance and practice if the employer fails to hire an applicant or terminates an employee only if the applicant or employee provides direct and explicit notice to the employer of the need for a religious accommodation?

No. To prevail in a disparate-treatment claim, an applicant need only show his need for an accommodation was a motivating factor, not that the employer had knowledge of his need.

From the opinion by Justice Scalia (joined by Chief Justice Roberts and Justices Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan): [T]he intentional discrimination provision prohibits certain motives, regardless of the state of the actor’s knowledge. Motive and knowledge are separate concepts. An employer who has actual knowledge of the need for an accommodation does not violate Title VII by refusing to hire an applicant if avoiding that accommodation is not his motive. Conversely, an employer who acts with the motive of avoiding accommodation may violate Title VII even if he has no more than an unsubstantiated suspicion that accommodation would be needed. Thus, the rule for disparate-treatment claims based on a failure to accommodate a religious practice is straightforward: An employer may not make an applicant’s religious practice, confirmed or otherwise, a factor in employment decisions.

Concurring in judgment: Justice Alito
Concurring in part and dissenting in part: Justice Thomas

Constitutional Law
Department of Transportation v. Association of American Railroads
Docket No. 13-1080
Vacated and Remanded: The District of Columbia Circuit

Argued: December 8, 2014
Decided: March 9, 2015
Analysis: See ABA PREVIEW 86 Issue 3

Overview: Section 207 of the Passenger Rail Investment and Improvement Act of 2008 (PRIIA) required the Federal Railroad
Administration (FRA) and Amtrak to jointly develop metrics and standards to improve Amtrak’s performance. Respondent Association of American Railroads claims that the law violates the constitutional nondelegation doctrine and the separation of powers principle by placing legislative and rulemaking authority in the hands of a private entity. The district court granted summary judgment to petitioners and the court of appeals reversed, holding that Amtrak could not be granted regulatory powers.

**Issue:** Does Section 207 of the Passenger Rail Investment and Improvement Act of 2008 violate the nondelegation principle?

**No.** For the purposes of determining metrics and standards, Amtrak is a governmental agency and the PRIIA’s grant of regulatory powers to Amtrak does not violate the nondelegation principle.

**From the opinion by Justice Kennedy**

(joined by Chief Justice Roberts and Justices Scalia, Ginsburg, Breyer, Alito, Sotomayor, and Kagan): Given the combination of these unique features and its significant ties to the Government, Amtrak is not an autonomous private enterprise. Among other important considerations, its priorities, operations, and decisions are extensively supervised and substantially funded by the political branches. A majority of its Board is appointed by the President and confirmed by the Senate and is understood by the Executive to be removable by the President at will. Amtrak was created by the Government, is controlled by the Government, and operates for the Government’s benefit. Thus, in its joint issuance of the metrics and standards with the FRA, Amtrak acted as a governmental entity for purposes of the Constitution’s separation of powers provisions. And that exercise of governmental power must be consistent with the design and requirements of the Constitution, including those provisions relating to the separation of powers.

**Concurring:** Justice Alito

**Concurring in judgment:** Justice Thomas

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**Criminal Law**

**McFadden v. United States**

**Docket No. 14-378**

Vacated and Remanded:
The Fourth Circuit

**Argued:** April 21, 2015  
**Decided:** June 18, 2015  
**Analysis:** See ABA PREVIEW 244 Issue 7

**Overview:** Stephen D. McFadden was convicted in a jury trial of distributing synthetic stimulants commonly known as “bath salts” in violation of the Controlled Substance Analogue Enforcement Act of 1986. The trial court rejected McFadden’s proposed jury instruction that the government had to prove he knew that the substances constituted an analogue under the statute. The United States Court of Appeals for the Fourth Circuit affirmed, following its precedent. The Supreme Court was asked to determine whether mens rea is required for a conviction under the Analogue Act.

**Issue:** Does a conviction for distributing a controlled substance analogue require the government to prove that the defendant knew he was selling a controlled substance analogue?

**Yes.** When dealing with a controlled substance analogue, the government must establish that the defendant knew the substance was regulated under the Controlled Substances Act or Analogue Act.

**From the opinion by Justice Thomas**

(joined by Justices Scalia, Kennedy, Ginsburg, Breyer, Alito, Sotomayor, and Kagan): McFadden also invokes the canon of constitutional avoidance, arguing that we must adopt his interpretation of the statute lest it be rendered unconstitutionally vague. But that argument fails on two grounds. Under our precedents, this canon “is a tool for choosing between competing plausible interpretations of a provision.” Shauer v. Shauer, 574 U. S. ___, ___. (2014). It “has no application” in the interpretation of an unambiguous statute such as this one. … Even if this statute were ambiguous, McFadden’s argument would falter. Under our precedents, a scienter requirement in a statute “alleviate[s] vagueness concerns,” “narrow[s] the scope of the [its] prohibition[,]” and limit[s] prosecutorial discretion.” Gonzales v. Carhart, 550 U. S. 124 (2007). The scienter requirement in this statute does not, as McFadden suggests, render the statute vague. Moreover, to the extent McFadden suggests that the substantial similarity test for defining analogues is itself indeterminate, his proposed alternative scienter requirement would do nothing to cure that infirmity.

**Concurring in part and concurring in judgment:** Chief Justice Roberts

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**Criminal Procedure**

**Johnson v. United States**

**Docket No. 13-7120**

Reversed and Remanded:
The Eighth Circuit

**Argued:** April 20, 2015  
**Decided:** June 26, 2015  
**Analysis:** See ABA PREVIEW 257 Issue 7

**Overview:** Petitioner Samuel Johnson pled guilty to being a felon in possession of a firearm. As part of the sentencing process, the Probation Department prepared a presentence investigation. Included in the report were three prior felony convictions the government contended were violent felonies, thereby establishing his eligibility to be sentenced as an armed career offender. Although petitioner conceded that two of his prior convictions, robbery and attempted robbery, constituted violent felonies for purposes of the Armed Career Criminal Act (ACCA), he argued that his prior conviction for possession of a short-barreled shotgun was not a violent felony. Therefore, petitioner asserted he was ineligible to be sentenced as an armed career offender. The district court determined possession of a short-barreled shotgun was a violent felony for purposes of the ACCA and sentenced Johnson to a 180-month prison term. Petitioner appealed to the Eighth Circuit Court of Appeals. The Eighth Circuit ruled that possession of a short-barreled shotgun constituted a violent felony and affirmed petitioner’s conviction. The Supreme Court granted certiorari and was asked to decide whether mere possession of a short-barreled shotgun constitutes a violent felony for purposes of enhancing a sentence under the Armed Career Criminal Act.
**Issue:** Is it constitutionally permissible to sentence a defendant as a violent felon under the Armed Career Criminal Act for possession of a short-barreled shotgun?

No. Imposing a sentence under the ACCA's residual clause, including one for possession of a short-barreled shotgun, is a violation of due process.

**From the opinion by Justice Scalia** (joined by Chief Justice Roberts and Justices Ginsburg, Breyer, Sotomayor, and Kagan): At the same time, the residual clause leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony. It is one thing to apply an imprecise “serious potential risk” standard to real-world facts; it is quite another to apply it to a judge-imagined abstraction. By asking whether the crime “otherwise involves conduct that presents a serious potential risk,” moreover, the residual clause forces courts to interpret “serious potential risk” in light of the four enumerated crimes—burglary, arson, extortion, and crimes involving the use of explosives. These offenses are “far from clear in respect to the degree of risk each poses.”… Does the ordinary burglar invade an occupied home by night or an unoccupied home by day? Does the typical extortionist threaten his victim in person with the use of force, or does he threaten his victim by mail with the revelation of embarrassing personal information? By combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates.

**Concurring in judgment:** Justice Kennedy

**Concurring in judgment:** Justice Thomas

**Dissenting:** Justice Alito

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**Death Penalty**  
**Davis v. Ayala**  
**Docket No. 13-1428**  
**Reversed and Remanded:** The Ninth Circuit

Argued: March 3, 2015  
Decided: June 18, 2015  
Analysis: See ABA PREVIEW 164 Issue 5

**Overview:** During voir dire of Hector Ayala’s capital trial, defense counsel raised three separate race-based challenges to the prosecution’s use of peremptory strikes; each time, the judge permitted the prosecutor to respond on an ex parte basis. Ayala was convicted and sentenced to die. On appeal, Ayala claimed error in this ex parte process, and that his ability to develop his voir dire claim was compounded by the trial judge’s loss of most of the detailed juror questionnaires. The California Supreme Court found harmless error under state law but issued a potentially confusing ruling as to federal error. The Ninth Circuit held that no deference was due to this state court ruling, and granted relief.

**Issue:** Did the Ninth Circuit err in holding that the defendant’s alleged *Batson v. Kentucky* violation, if it did exist, was not harmless under *Brecht v. Abrahamson*?

Yes. Any federal constitutional error that may have occurred when the defendant’s attorney was excluded from part of a *Batson* hearing was harmless.

**From the opinion by Justice Alito** (joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas): Because Ayala seeks federal habeas corpus relief, he must meet the *Brecht* standard, but that does not mean, as the Ninth Circuit thought, that a state court’s harmlessness determination has no significance under *Brecht*. In *Fry v. Piter*, 551 U. S. 112 (2007), we held that the *Brecht* standard “subsumes” the requirements that § 2254(d) imposes when a federal habeas petitioner contests a state court’s determination that a constitutional error was harmless under *Chapman*. The *Fry* Court did not hold—and would have had no possible basis for holding—that *Brecht* somehow abrogates the limitation on federal habeas relief that § 2254(d) plainly sets out. While a federal habeas court need not “formal[ly]” apply both *Brecht* and “AEDPA/Chapman,” AEDPA nevertheless “sets forth a precondition to the grant of habeas relief.”

**Concurring:** Justice Kennedy  
**Concurring:** Justice Thomas  
**Dissenting:** Justice Sotomayor (joined by Justices Ginsburg, Breyer, and Kennedy)

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**Death Penalty**  
**Glossip v. Gross**  
**Docket No. 14-7955**  
**Affirmed:** The Tenth Circuit

Argued: April 29, 2015  
Decided: June 29, 2015  
Analysis: See ABA PREVIEW 268 Issue 7

**Overview:** Oklahoma allows for a three-drug protocol for lethal injections in administering its death penalty. The first drug, however, does not relieve pain or reliably produce a deep, coma-like unconsciousness, raising a substantial risk of pain and suffering from the administration of the second and third drugs. The petitioners, prisoners condemned to death, challenged the protocol under the Eighth Amendment; challenged the standard that courts must apply in considering a stay of execution; and challenged the lower court’s requirement that the petitioners establish the availability of an alternative drug formula.

**Issue:** Was the district court correct in denying the death-row inmates’ motion for preliminary injunction on the basis that the use of midazolam during executions violated the Eighth Amendment?

Yes. Petitioners have failed to establish a likelihood of success on their claim that the use of midazolam violates the Eighth Amendment; petitioners failed to establish a substantial risk of harm compared to any known and available alternative method of execution and the district court did not commit clear error when it found that midazolam was effective.

**From the opinion by Justice Alito** (joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas): Our decisions in this area have been animated in part by the recognition that because it is settled that capital punishment is constitutional, “[i]t necessarily follows that there must be a [constitutional] means of carrying it...”
out.” … And because some risk of pain is inherent in any method of execution, we have held that the Constitution does not require the avoidance of all risk of pain … After all, while most humans wish to die a painless death, many do not have that good fortune. Holding that the Eighth Amendment demands the elimination of essentially all risk of pain would effectively outlaw the death penalty altogether.

**Concurring:** Justice Scalia (joined by Justice Thomas)

**Concurring:** Justice Thomas (joined by Justice Scalia)

**Dissenting:** Justice Breyer (joined by Justice Ginsburg)

**Dissenting:** Justice Sotomayor (joined by Justices Ginsburg, Breyer, and Kagan)

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**Disability Rights**

**City and County of San Francisco v. Sheehan**

**Docket No. 13-1412**

**Certiorari Dismissed in Part; Reversed in Part and Remanded:**

**The Ninth Circuit**

**Argued:** March 23, 2015

**Decided:** May 18, 2015

**Analysis:** See ABA PREVIEW 224 Issue 6

**Overview:** Teresa Sheehan lived in a group home for persons with mental illness. After she threatened a social worker, police officers entered her room to take her into custody for psychiatric assessment and treatment. Sheehan threatened the officers with a knife, forcing them out of her room, and closed her door. The officers then reentered Sheehan’s room. Sheehan again threatened the officers with a knife, and the officers shot her. The Court was asked to consider whether the Americans with Disabilities Act or the Fourth Amendment requires officers to take into consideration an armed and violent suspect’s mental illness and foreseeable resistance to arrest.

**Issue:** Did the law clearly establish that officers’ entry into a residence may be unreasonable under the Fourth Amendment, even if an exception to the warrant requirement applied?

**No.** The officers did not clearly violate the Fourth Amendment when they first entered Sheehan’s room, when they engaged in the use of reasonable force, nor when they reopened the door rather than accommodating Sheehan’s disability; consequently, the officers are entitled to qualified immunity.

**From the opinion by Justice Alito**

(joined by Chief Justice Roberts and Justices Kennedy, Thomas, Ginsburg, and Sotomayor): The real question, then, is whether, despite these dangerous circumstances, the officers violated the Fourth Amendment when they decided to reopen Sheehan’s door rather than attempting to accommodate her disability. Here we come to another problem. San Francisco, whose attorneys represent Reynolds and Holder, devotes scant briefing to this question. Instead, San Francisco argues almost exclusively that even if it is assumed that there was a Fourth Amendment violation, the right was not clearly established. This Court, of course, could decide the constitutional question anyway. See Pearson v. Callahan, 555 U. S. 223 (2009) (recognizing discretion). But because this question has not been adequately briefed, we decline to do so. Rather, we simply decide whether the officers’ failure to accommodate Sheehan’s illness violated clearly established law. It did not.

**Concurring in part and dissenting in part:** Justice Scalia (joined by Justice Kagan)

**Taking no part:** Justice Breyer

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**Dormant Commerce Clause**

**Comptroller of Treasury of MD v. Wynne**

**Docket No. 13-485**

**Affirmed:** The Maryland Court of Appeals

**Argued:** November 12, 2014

**Decided:** May 18, 2015

**Analysis:** See ABA PREVIEW 62 Issue 2

**Overview:** Maryland imposes a tax on the income of its residents, wherever earned. In particular, the state imposes a state income tax and a county income tax. The state provides a credit for income tax paid to another state. But the credit applies only against the state income tax, not the county income tax. Respondent paid income tax in the several states where his company operated, including Maryland. Maryland provided Wynne a credit against his state income tax for his income tax paid to other states, but it did not provide him a credit against his county income tax. Wynne sued, arguing that the Maryland income tax scheme discriminates against interstate commerce in violation of the dormant Commerce Clause.

**Issue:** May a state provide a credit for income tax paid to other states against a resident’s state income tax without also providing a credit against that resident’s county income tax?

**No.** Maryland’s personal income tax scheme violates the dormant Commerce Clause; a state may not provide a credit for income tax paid to other states against a resident’s state income tax without also providing a credit against that resident’s county income tax.

**From the opinion by Justice Alito**

(joined by Chief Justice Roberts and Justices Kennedy, Breyer, and Sotomayor): We have long held that States cannot subject corporate income to tax schemes similar to Maryland’s, and we see no reason why income earned by individuals should be treated less favorably. Maryland admits that its law has the same economic effect as a state tariff, the quintessential evil targeted by the dormant Commerce Clause. We therefore affirm the decision of Maryland’s highest court and hold that this feature of the State’s tax scheme violates the Federal Constitution.

**From the dissenting opinion by Justice Scalia**

(joined by Justice Thomas as to Parts I and II): The fundamental problem with our negative Commerce Clause cases is that the Constitution does not contain a negative Commerce Clause. It contains only a Commerce Clause. Unlike the negative Commerce Clause adopted by the judges, the real Commerce Clause adopted by the People merely empowers Congress to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” Art. I, § 8, cl. 3. The Clause says nothing about prohibiting state laws that burden commerce. Much less does it say anything about authorizing judges to set aside state laws they believe burden commerce. The clearest sign that the negative Commerce Clause is a judicial
fraud is the utterly illogical holding that congressional consent enables States to enact laws that would otherwise constitute impermissible burdens upon interstate commerce.

**Dissenting:** Justice Thomas (joined by Justice Scalia except as to the first paragraph)

**Dissenting:** Justice Ginsburg (joined by Justices Scalia and Kagan)

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**Election Law**  
*Alabama Legislative Black Caucus v. Alabama and Alabama Democratic Conference v. Alabama*

**Docket Nos. 13-895 and 13-1138**  
**Vacated and Remanded:**  
**The District Court for the Middle District of Alabama**

**Argued:** November 12, 2014  
**Decided:** March 25, 2015  
**Analysis:** See ABA **PREVIEW** 74 Issue 2

**Overview:** The Alabama Legislative Black Caucus and Alabama Democratic Conference challenged the Alabama 2012 state legislative districting plans on the ground that they impermissibly classified voters on the basis of race in violation of the Equal Protection Clause. Plaintiffs relied on the line of racial gerrymandering beginning with *Shaw v. Reno*, 509 U.S. 630 (1993), under which strict scrutiny applies if race is the “predominant factor” motivating placement of voters in a district. Alabama contended that its redistricting plans were designed to comply with Section 5 of the Voting Rights Act and to achieve race-neutral goals, including population equality among districts.

**Issue:** Did the district court err when it held that Alabama impermissibly classified voters on the basis of race, in violation of the Equal Protection Clause, by packing African American voters into supermajority black districts pursuant to a policy of maintaining at least the same percentages of African Americans in those districts as under the previous redistricting plans?

**Yes.** The district court erred when, in its analysis for the gerrymandering claim, it considered the state “as a whole” rather than on a district-by-district basis.

**From the opinion by Justice Breyer**  
(joined by Justices Kennedy, Ginsburg, Sotomayor, and Kagan): We recognize that the plaintiffs relied heavily upon statewide evidence to prove that race predominated in the drawing of individual district lines … And they also sought to prove that the use of race to draw the boundaries of the majority-minority districts affected the boundaries of other districts as well … Such evidence is perfectly relevant. We have said that the plaintiff’s burden in a racial gerrymandering case is “to show, either through circumstantial evidence of a district’s shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature’s decision to place a significant number of voters within or without a particular district.” … That Alabama expressly adopted and applied a policy of prioritizing mechanical racial targets above all other districting criteria (save one-person, one-vote) provides evidence that race motivated the drawing of particular lines in multiple districts in the State. And neither the use of statewide evidence nor the effort to show widespread effect can transform a racial gerrymandering claim about a set of individual districts into a separate, general claim that the legislature racially gerrymandered the State “as” an undifferentiated “whole.”

**Dissenting:** Justice Scalia (joined by Chief Justice Roberts and Justices Thomas and Alito)

**Dissenting:** Justice Thomas

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**Election Law**  
*Arizona State Legislature v. Arizona Independent Redistricting Commission*

**Docket No. 13-1314**  
**Affirmed: The District of Arizona**

**Argued:** March 2, 2015  
**Decided:** June 29, 2015  
**Analysis:** See ABA **PREVIEW** 171 Issue 5

**Overview:** Arizona voters amended the state constitution to move congressional redistricting authority from the state legislature to a new and independent commission. After the 2010 census, the commission approved a final congressional map for all congressional elections until the next census. This did not sit well with members of the Arizona state legislature, so the legislature sued, claiming that the commission and its congressional map violated the U.S. Constitution.

**Issue:** Does the Arizona state legislature have standing to challenge the commission?

**Yes.** The Arizona legislature has standing to bring this challenge to the commission.

**Issue:** Do the Elections Clause and federal law allow Arizona to use an independent commission, not the state legislature, to adopt congressional districts?

**Yes.** The Elections Clause and federal law allow Arizona to use an independent commission to adopt congressional districts.

**From the opinion by Justice Ginsburg**  
(joined by Justices Kennedy, Breyer, Sotomayor, and Kagan): In accord with the District Court … we hold that the Elections Clause permits the people of Arizona to provide for redistricting by independent commission. To restate the key question in this case, the issue centrally debated by the parties: Absent congressional authorization, does the Elections Clause preclude the people of Arizona from creating a commission operating independently of the state legislature to establish congressional districts? The history and purpose of the Clause weigh heavily against such preclusion, as does the animating principle of our Constitution that the people themselves are the originating source of all the powers of government.
Employment Discrimination

Young v. United Parcel Service, Inc.

Docket No. 12-1226
Vacated and Remanded: The Fourth Circuit

Argued: December 3, 2014
Decided: March 25, 2015
Analysis: See ABA PREVIEW 89 Issue 3

Overview: A former employee at United Parcel Service (UPS) requested a light-duty work accommodation once she became pregnant. UPS denied the accommodation, though it provided similar accommodations to workers who suffered on-the-job injuries. The employer contended that its policy was pregnancy-blind and legal. The employee alleged that this policy violated the Pregnancy Discrimination Act (PDA) by treating pregnant employees worse than other employees who have the same ability or inability. This case gave the Court a chance to explain the meaning and reach of the PDA.

Issue: Did the Fourth Circuit err when it ruled that an employee cannot bring a claim under the Pregnancy Discrimination Act alleging that an employer must make accommodations for pregnant workers similar to those it would make for nonpregnant workers with like limitations resulting from on-the-job injuries?

Yes. The Fourth Circuit erred when it held that an employee could not bring a claim under the Pregnancy Discrimination Act alleging that an employer accommodates nonpregnant workers while failing to accommodate pregnant workers.

From the opinion by Justice Breyer
(joined by Chief Justice Roberts and Justices Ginsburg, Sotomayor, and Kagan): The plaintiff can create a genuine issue of material fact as to whether a significant burden exists by providing evidence that the employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers. Here, for example, if the facts are as Young says they are, she can show that UPS accommodates most nonpregnant employees with lifting limitations while categorically failing to accommodate pregnant employees with lifting limitations. Young might also add that the fact that UPS has multiple policies that accommodate nonpregnant employees with lifting restrictions suggests that its reasons for failing to accommodate pregnant employees with lifting restrictions are not sufficiently strong—to the point that a jury could find that its reasons for failing to accommodate pregnant employees give rise to an inference of intentional discrimination.

Concurring in judgment: Justice Alito
Dissenting: Justice Scalia (joined by Justices Kennedy and Thomas)
Dissenting: Justice Kennedy

Employment Law

M&G Polymers USA v. Tackett

Docket No. 13-1010
Vacated and Remanded: The Sixth Circuit

Argued: November 10, 2014
Decided: January 26, 2015
Analysis: See ABA PREVIEW 42 Issue 2

Overview: Petitioner purchased a manufacturing plant, and in doing so, entered into collective bargaining agreements with respondent union. Following the expiration of those agreements, petitioner announced that it would enforce a limit on both current and future retirees’ health care benefits. Respondents sued, arguing the limit did not apply to retirees whose benefits had vested under the previous collective bargaining agreement. The Sixth Circuit held courts presume that silence concerning the duration of retiree health care benefits means the parties intended those benefits to vest (and therefore continue indefinitely).

Issue: Was the Sixth Circuit correct to presume that silence concerning the duration of retiree health care benefits means the parties intended those benefits to vest (and therefore continue indefinitely)?

No. Collective bargaining agreements should be interpreted in accordance with ordinary principles of contract law; as such, ambiguity in collective bargaining agreements should be ascertained in accordance with its plainly expressed intent.

From the unanimous opinion by Justice Thomas: In this case, the Court of Appeals applied the International Union, United Auto, Aerospace, & Agricultural Implement Workers of Am. v. Yard-Man, Inc., 716 F.2d 1476 (1983) inferences to conclude that, in the absence of extrinsic evidence to the contrary, the provisions of the contract indicated an intent to vest retirees with lifetime benefits. As we now explain, those inferences conflict with ordinary principles of contract law.

Concurring: Justice Ginsburg (joined by Justices Breyer, Sotomayor, and Kagan)

Employment Law

Mach Mining v. EEOC

Docket No. 13-1019
Vacated and Remanded: The Seventh Circuit

Argued: January 13, 2015
Decided: April 29, 2015
Analysis: See ABA PREVIEW 127 Issue 4

Overview: Title VII of the Civil Rights Act of 1964 directs the Equal Employment Opportunity Commission (EEOC) to use informal conciliation methods before filing lawsuits against employers. This case asked the Court to determine when, if ever, a court may dismiss an EEOC lawsuit due to the EEOC’s failure to engage in sufficient conciliation efforts prior to filing suit.

Issue: Did the Circuit Court err when it determined that the EEOC’s determination that it had met its statutory obligation to engage in conciliation was unreviewable?

Yes. Courts have the narrow authority to review whether the EEOC has fulfilled its Title VII duty to engage in conciliation.

From the unanimous opinion by Justice Kagan: [I]n thus denying that Title VII creates a “reviewable prerequisite to suit,” the Government takes its observation about discretion too far … Yes, the statute provides the EEOC with wide latitude over the conciliation process, and that feature becomes significant when we turn to defining the proper scope of judicial review.
But no, Congress has not left everything to the Commission. Consider if the EEOC declined to make any attempt to conciliate a claim—if, after finding reasonable cause to support a charge, the EEOC took the employer straight to court. In such a case, Title VII would offer a perfectly serviceable standard for judicial review: Without any “endeavor” at all, the EEOC would have failed to satisfy a necessary condition of litigation.

Environmental Law

**Michigan v. EPA, Utility Air Regulatory Group v. EPA, and National Mining Association v. EPA**

Docket Nos. 14-46, 14-47, and 14-49

Reversed and Remanded: The District of Columbia Circuit

Argued: March 25, 2015
Decided: June 29, 2015
Analysis: See ABA PREVIEW 218 Issue 6

Overview: The Clean Air Act directs the EPA to regulate hazardous air pollutants from power plants when doing so is “appropriate and necessary.” In 2012, after making that finding, the EPA adopted a final rule setting mercury and other emission standards for power plants. In doing so, the EPA explained that it had made the “appropriate and necessary” finding without considering costs. The EPA had considered costs in setting the proper level of regulation; it did not, however, consider them in making the threshold determination whether to regulate. Various industry groups and states challenged the rule based on the EPA’s decision not to consider costs. The D.C. Circuit upheld the EPA’s interpretation of the statute as reasonable.

**Issue:** Does the EPA unreasonably refuse to consider costs in determining whether it is appropriate to regulate hazardous air pollutants emitted by electric utilities (power plants)?

Yes. The EPA unreasonably interpreted the Clean Air Act when it deemed cost irrelevant to the decision to regulate hazardous air pollutants emitted by power plants.

**From the opinion by Justice Scalia (joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito):** Read naturally in the present context, the phrase “appropriate and necessary” requires at least some attention to cost. One would not say that it is even rational, never mind “appropriate,” to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits. In addition, “cost” includes more than the expense of complying with regulations; any disadvantage could be termed a cost. EPA’s interpretation precludes the Agency from considering any type of cost—including, for instance, harms that regulation might do to human health or the environment. The Government concedes that if the Agency were to find that emissions from power plants do damage to human health, but that the technologies needed to eliminate these emissions do even more damage to human health, it would still deem regulation appropriate … No regulation is “appropriate” if it does significantly more harm than good.

**Concurring:** Justice Thomas

**Dissenting:** Justice Kagan (joined by Justices Ginsburg, Breyer, and Sotomayor)

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**ERISA**

**Tibble v. Edison International**

Docket No. 13-550
Vacated and Remanded: The Ninth Circuit

Argued: February 24, 2015
Decided: May 18, 2015
Analysis: See ABA PREVIEW 199 Issue 5

Overview: Plaintiff, a participant in the Edison 401(k) Savings Plan, filed suit alleging that the plan’s fiduciaries breached their duties under ERISA by failing to remove imprudent investment options. The Ninth Circuit held that the statute of limitations commenced when the initial investment decision was made. The court barred claims challenging a 1999 decision to include retail mutual funds in the plan’s investment menu, but allowed claims based on a 2006 decision. Participants argued that the limitation period commenced each time the fiduciaries met to review investments and failed to replace the retail funds with identical lower-cost institutional funds. Plaintiffs sought damages for the six years preceding the date the complaint was filed.

**Issue:** Does ERISA Section 413(1) bar a claim filed more than six years after plan fiduciaries offered higher-cost retail-class mutual funds to participants even though identical lower-cost institutional-class mutual funds were available?

No. So long as a plaintiff’s claim alleging breach of the continuing duty of prudence occurred within six years of suit, the claim is timely.

**From the unanimous opinion by Justice Breyer:** We believe the Ninth Circuit erred by applying a statutory bar to a claim of a “breach or violation” of a fiduciary duty without considering the nature of the fiduciary duty. The Ninth Circuit did not recognize that under trust law a fiduciary is required to conduct a regular review of its investment with the nature and timing of the review contingent on the circumstances. Of course, after the Ninth Circuit considers trust-law principles, it is possible that it will conclude that respondents did indeed conduct the sort of review that a prudent fiduciary would have conducted absent a significant change in circumstances.

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**Evidentiary Law**

**Warger v. Shauers**

Docket No. 13-517
Affirmed: The Eighth Circuit

Argued: December 8, 2014
Decided: December 9, 2014
Analysis: See ABA PREVIEW 18 Issue 1

Overview: Randy Shauers collided with Gregory Warger during a motor vehicle accident, resulting in Warger’s serious bodily injury. After an initial trial ended in mistrial, Shauers prevailed during a second jury trial. After the trial, one juror submitted an affidavit to Warger’s counsel challenging the motives of the jury foreperson and alleging dishonesty by the jury foreperson during voir dire. Warger used the affidavit as a basis for a motion for a new trial. The district court denied Warger’s motion. The Eighth Circuit affirmed, holding the verdict was sacramental under Federal Rule of Evidence 606(b) but for limited exceptions not applicable in the case at hand.

**Issue:** Does Federal Rule of Evidence 606(b) permit a party moving for a new trial to introduce evidence of alleged juror...
Fair Housing Act
Texas Department of Housing and
Community Affairs v. Inclusive Communities Project

Docket No. 13-1371
Affirmed and Remanded: The Fifth Circuit

Argued: January 21, 2015
Decided: June 25, 2015
Analysis: See ABA PREVIEW 148 Issue 4

Overview: The Fair Housing Act (FHA) makes it illegal to refuse to sell or rent or to “otherwise make unlawful or deny” housing to a person because of a protected characteristic, including race. See 42 U.S.C. § 3604(a). This case asked the Court to determine whether the FHA covers disparate impact claims, where a plaintiff alleges discrimination based on the disparate impact that a defendant’s facially neutral practice has on members of a group who share a protected characteristic.

Issue: Are disparate impact claims cognizable under the Fair Housing Act?

Yes. Disparate impact claims are cognizable under the Fair Housing Act.

From the opinion by Justice Kennedy (joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan): Recognition of disparate impact liability under the FHA also plays a role in uncovering discriminatory intent: It permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment. In this way disparate-impact liability may prevent segregated housing patterns that might otherwise result from covert and illicit stereotyping.

Dissenting: Justice Thomas

Dissenting: Justice Alito (joined by Chief Justice Roberts and Justices Scalia and Thomas)

False Claims Act
Kellogg Brown & Root v. Carter

Docket No. 12-1497
Reversed in Part, Affirmed in Part, and Remanded: The Fourth Circuit

Argued: January 13, 2015
Decided: May 26, 2015
Analysis: See ABA PREVIEW 133 Issue 4

Overview: Respondent Benjamin Carter sued Kellogg Brown & Root Services, Inc., and other petitioners (collectively KBR) for fraudulently billing the United States under a military contract. Carter’s suit rested on the False Claims Act (FCA), which authorizes private, “qui tam” suits on behalf of the federal government. KBR argued that Carter’s suit was untimely and barred by prior, similar suits. Those arguments required the Court to interpret the Wartime Suspension of Limitations Act and the FCA’s “first-to-file” provision.

Issue: Does the Wartime Suspension of Limitations Act suspend the statute of limitations for a qui tam suit under the False Claims Act (FCA)?

No. The Wartime Suspension of Limitations Act only applies to criminal offenses, not civil ones like those brought under the False Claims Act.

Issue: Does the FCA’s “first-to-file” provision bar a qui tam suit that is filed after an earlier-filed, similar suit has ended?

No. The FCA’s first-to-file bar keeps new claims out of court only while related claims are still alive, not in perpetuity.

From the unanimous opinion by Justice Alito: The WSLA’s history provides what is perhaps the strongest support for the conclusion that it applies only to criminal charges. The parties do not dispute that the term “offenses” in the 1921 and 1942 suspension statutes applied only to crimes . . . and after 1942, the WSLA continued to use that same term. The retention of the same term in the later laws suggests that no fundamental alteration was intended.

Federal Criminal Law
Whitfield v. United States

Docket No. 13-9026
Affirmed: The Fourth Circuit

Argued: December 2, 2014
Decided: January 13, 2015
Analysis: See ABA PREVIEW 92 Issue 3

Overview: In fleeing a botched robbery, petitioner entered Mary Parnell’s home; Parnell had a heart attack during the events resulting in her death. While in Parnell’s home, petitioner had Parnell move between rooms. He was eventually convicted of, among other things, forcing another person to accompany him during the robbery.

Petitioner challenged whether 18 U.S.C. § 2113(e) requires more than de minimis movement of a victim.

Issue: Does 18 U.S.C. § 2113(e), which provides a minimum sentence of ten years in prison and a maximum sentence of life imprisonment for a bank robber who forces another person “to accompany him” during the robbery or while in flight, require proof of more than a de minimis movement of the victim?

No. A bank robber forces another person to accompany him for purposes of 18 U.S.C. § 2113(e) when he forces the person to go somewhere with him, even if that is within the same building or over a short distance.

From the unanimous opinion by Justice Scalia: It is true enough that accompaniment does not embrace minimal movement—for example, the movement of a bank teller’s feet when the robber grabs her arm. It must constitute movement that would normally be described as from one place to another, even if only from one spot within a room or outdoors to a different one. Here, Whitfield forced Parnell to accompany
Dissenting: Justice Scalia (joined by Justices Kennedy and Kagan and Justice Thomas as to all but the final sentence)

Dissenting: Justice Thomas

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**Federal Jurisdiction**

**Dart Cherokee Basin Operating v. Owens**

**Docket No. 13-719**

Vacated and Remanded: The Tenth Circuit

**Federal Jurisdiction**

**Direct Marketing Association v. Brohl**

**Docket No. 13-1032**

Reversed and Remanded: The Tenth Circuit

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**Federal Preemption**

**Oneok, Inc. v. Learjet, Inc.**

**Docket No. 13-271**

Affirmed: The Ninth Circuit

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**Overview:**

Brandon Owens filed a putative class action in Kansas state court seeking royalty payments under oil and gas leases. He asked for damages that he and the class suffered up to the time of trial. Petitioners Dart Cherokee Basin Operating Company and Cherokee Basin Pipeline removed the case to federal court via a “short and plain statement of the grounds for removal” which they said would satisfy the Federal Rules of Civil Procedure Rule 8 pleading standards. The district court remanded, saying that the petitioners failed to offer any evidence that the amount in controversy exceeded $5 million as the Class Action Fairness Act (CAFA), 28 U.S.C. § 1332(d) requires. The court refused to look outside of the petition and the notice of removal to determine the amount in controversy.

**Issue:**

May a removing party provide only a statement of the grounds for removal?

**Yes.** Under Federal Rule of Civil Procedure, a notice of removal need only include a plausible allegation that the amount in controversy exceeds the threshold and need not contain supporting evidence.

**From the opinion by Justice Ginsburg** (joined by Chief Justice Roberts and Justices Breyer, Alito, and Sotomayor):

When a plaintiff invokes federal-court jurisdiction, the plaintiff’s amount-in-controversy allegation is accepted if made in good faith. Similarly, when a defendant seeks federal-court adjudication, the defendant’s amount-in-controversy allegation should be accepted when not contested by the plaintiff or questioned by the court. Indeed, the Tenth Circuit, although not disturbing prior decisions demanding proof together with the removal notice, recognized that it was anomalous to treat commencing plaintiffs and removing defendants differently with regard to the amount in controversy.

**Dissenting:** Justice Scalia (joined by Justices Kennedy and Kagan and Justice Thomas as to all but the final sentence)

**Dissenting:** Justice Thomas

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**Overview:**

Direct Marketing Association (DMA) filed suit in the federal district court for Colorado challenging provisions of a Colorado statute that imposes informational notice and reporting requirements on out-of-state retailers in order to facilitate the collection of the state’s sales and use taxes. After the district court entered a permanent injunction based on DMA’s Commerce Clause challenge, the Tenth Circuit reversed, holding that the Tax Injunction Act precluded the district court’s exercise of jurisdiction.

**Issue:**

Did the district court injunction barring enforcement of the Colorado Act “enjoin, suspend, or restrain” the “assessment, levy, or collection” of the Colorado sales or use tax so as to violate the Tax Injunction Act?

**No.** The Tax Injunction Act does not bar the suit as the relief sought does not “enjoin, suspend, or restrain” the “assessment, levy, or collection” of the Colorado sales or use tax.

**From the unanimous opinion by Justice Thomas**:

The District Court enjoined state officials from enforcing the notice and reporting requirements. Because an injunction is clearly a form of equitable relief barred by the TIA, the question becomes whether the enforcement of the notice and reporting requirements is an act of “assessment, levy or collection.” We need not comprehensively define these terms to conclude that they do not encompass enforcement of the notice and reporting requirements at issue.

**Concurring:** Justice Kennedy

**Concurring:** Justice Ginsburg (joined by Justice Breyer and joined in part by Justice Sotomayor)

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Oneok, Inc. v. Learjet, Inc.

**Docket No. 13-271**

Affirmed: The Ninth Circuit

**Overview:**

Retail natural gas purchasers filed a series of class-action lawsuits against natural gas companies for conspiring to manipulate retail gas prices. The manipulation contributed to the Western energy crisis of 2000–2002. The companies moved to dismiss the cases, however, arguing that the suits were preempted by the federal Natural Gas Act.

**Issue:**

Does the federal Natural Gas Act preempt state-law antitrust claims against natural gas companies for conspiring to manipulate retail gas prices?

**No.** Respondents’ state-law antitrust claims are not within the field of matters preempted by the Natural Gas Act.

**From the opinion by Justice Breyer** (joined by Justices Kennedy, Ginsburg, Alito Sotomayor, and Kagan, and joined by Justice Thomas as to all but Part I-A): Antitrust laws, like blue sky laws, are not aimed at natural-gas companies in particular, but rather all businesses in the marketplace. … They are far broader in their application than, for example, the regulations at issue in Northern Natural, which applied only to entities buying gas from fields within the State…. This broad applicability of state antitrust law supports a finding of no pre-emption here.

**Concurring in part and concurring in judgment:** Justice Thomas

**Dissenting:** Justice Scalia (joined by Chief Justice Roberts)
Federal Tort Claims Act
United States v. Wong and United States v. June
Docket Nos. 13-1074 and 13-1075
Affirmed and Remanded: The Ninth Circuit

Argued: December 10, 2014
Decided: April 22, 2015
Analysis: See ABA PREVIEW 111 Issue 3

Overview: These two cases examined whether the six-month and two-year time limits established in the Federal Tort Claims Act, 28 U.S.C. § 2401(b), are subject to equitable tolling, particularly in cases where plaintiffs have diligently pursued their claims, but have encountered extenuating circumstances beyond their control.

Issue: Are the time limits in Section 2401(b) of the Federal Tort Claims Act, which state that a claim for administrative review must be presented within two years after the claim accrues, subject to equitable tolling?

Yes. Section 2401(b) is not jurisdictional and therefore its time limits are subject to equitable tolling.

From the opinion by Justice Kagan (joined by Justices Kennedy, Ginsburg, Breyer, and Sotomayor): Congress must do something special, beyond setting an exception-free deadline, to tag a statute of limitations as jurisdictional and so prohibit a court from tolling it. In enacting the FTCA, Congress did nothing of that kind. It provided no clear statement indicating that § 2401(b) is the rare statute of limitations that can deprive a court of jurisdiction. Neither the text nor the context nor the legislative history indicates (much less does so plainly) that Congress meant to enact something other than a standard time bar.

Dissenting: Justice Alito (joined by Chief Justice Roberts and Justices Scalia and Thomas)

First Amendment
Elonis v. United States
Docket No. 13-983
Reversed and Remanded: The Third Circuit

Argued: December 1, 2014
Decided: June 1, 2015
Analysis: See ABA PREVIEW 106 Issue 3

Overview: Anthony Elonis posted a series of writings on Facebook that seemingly threatened his estranged wife, law enforcement officials, and even a local school with violence. Elonis claimed that he never intended to threaten anyone; instead, he said, his writings were therapeutic, to help him get over his grief after his wife left him. Still, Elonis was charged with and convicted of violating a federal law criminalizing a threat to injure another person.

Issue: Does the federal statute criminalizing threats, 18 U.S.C. § 875(c), as a matter of statutory interpretation, require proof of the speaker’s subjective intent to threaten?

Yes. The Third Circuit’s instructions requiring only negligence with respect to the communication of a threat, is not sufficient to support a conviction under Section 875(c).

From the opinion by Chief Justice Roberts (joined by Justices Scalia, Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan): Section 875(c), as noted, requires proof that a communication was transmitted and that it contained a threat. The “presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct.” … The parties agree that a defendant under Section 875(c) must know that he is transmitting a communication. But communicating something is not what makes the conduct “wrongful.” Here “the crucial element separating legal innocence from wrongful conduct” is the threatening nature of the communication … The mental state requirement must therefore apply to the fact that the communication contains a threat.

Concurring in part and dissenting in part: Justice Alito
Dissenting: Justice Thomas

First Amendment
Reed v. Town of Gilbert, AZ
Docket No. 13-502
Reversed and Remanded: The Ninth Circuit

Argued: January 12, 2015
Decided: June 18, 2015
Analysis: See ABA PREVIEW 124 Issue 4

Overview: A central principle in First Amendment jurisprudence is the content discrimination doctrine. Under this principle, content-based laws are subject to strict scrutiny, while content-neutral laws are subject only to intermediate scrutiny. An Arizona town had a sign ordinance that treated qualifying event signs differently than political signs or ideological signs. A local church and its pastor contended that the sign ordinance was an unconstitutional content-based regulation of speech. The town and its code compliance manager countered that the law is content-neutral because they had no discriminatory intent or purpose. Further, the town and compliance manager argued that they didn’t regulate the church’s signs because of any disagreement with the church’s ideas or viewpoints.

Issue: Is a law content-based because it facially treats speech differently?

Yes. The Sign Code, that treats speech differently, is a content-based regulation of speech that does not survive strict scrutiny.

From the opinion by Justice Thomas (joined by Chief Justice Roberts and Justices Scalia, Kennedy, Alito, and Sotomayor): The restrictions in the Sign Code that apply to any given sign thus depend entirely on the communicative content of the sign. If a sign informs its reader of the time and place a book club will discuss John Locke’s Two Treatises of Government, that sign will be treated differently from a sign expressing the view that one should vote for one of Locke’s followers in an upcoming election, and both signs will be treated differently from a sign expressing an ideological view rooted in
Locke’s theory of government. More to the point, the Church’s signs inviting people to attend its worship services are treated differently from signs conveying other types of ideas. On its face, the Sign Code is a content-based regulation of speech. We thus have no need to consider the government’s justifications or purposes for enacting the Code to determine whether it is subject to strict scrutiny.

**Concurring:** Justice Alito (joined by Justices Kennedy and Sotomayor)

**Concurring in judgment:** Justice Breyer

**Concurring in judgment:** Justice Kagan (joined by Justices Ginsburg and Breyer)

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**First Amendment**

**Walker v. Texas Division, Sons of Confederate Veterans, Inc.**

**Docket No. 14-144**

**Reversed: The Fifth Circuit**

Argued: March 23, 2015

Decided: June 18, 2015

Analysis: See ABA PREVIEW 208 Issue 6

**Overview:** In 2009, the Texas Division, Sons of Confederate Veterans (SCV), Inc., applied to the Texas Department of Motor Vehicles Board for a specialty license plate bearing the Confederate battle flag. After the Board denied the application on the grounds that many members of the community considered the design offensive, SCV sued to require the plate to be issued, alleging that the Board’s action violated its First Amendment right to free speech. The district court upheld the Board’s actions, but the United States Court of Appeals for the Fifth Circuit reversed.

**Issue:** Do the messages and images that appear on state-issued specialty license plates qualify as government speech immune from any requirement of viewpoint neutrality?

Yes. Specialty license plate designs constitute government speech, and as such, states are entitled to refuse to issue plates featuring certain designs.

**From the opinion by Justice Breyer** (joined by Justices Thomas, Ginsburg, Sotomayor, and Kagan): Texas license plate designs “are often closely identified in the public mind with the [State].” *Pleasant Grove v. Summum*, 555 U. S. 460 (2009).

Each Texas license plate is a government article serving the governmental purposes of vehicle registration and identification. The governmental nature of the plates is clear from their faces: The State places the name “TEXAS” in large letters at the top of every plate. Moreover, the State requires Texas vehicle owners to display license plates, and every Texas license plate is issued by the State. See § 504.943. Texas also owns the designs on its license plates, including the designs that Texas adopts on the basis of proposals made by private individuals and organizations. See § 504.002(3). And Texas dictates the manner in which drivers may dispose of unused plates. See § 504.901(c). See also § 504.008(g).

From the dissenting opinion by Justice Alito (joined by Chief Justice Roberts and Justices Scalia and Kennedy): As you sat there watching these plates speed by, would you really think that the sentiments reflected in these specialty plates are the views of the State of Texas and not those of the owners of the cars? If a car with a plate that says “Rather Be Golfing” passed by at 8:30 am on a Monday morning, would you think: “This is the official policy of the State—better to golf than to work?” If you did your viewing at the start of the college football season and you saw Texas plates with the names of the University of Texas’s out-of-state competitors in upcoming games—Notre Dame, Oklahoma State, the University of Oklahoma, Kansas State, Iowa State—would you assume that the State of Texas was officially (and perhaps treasonously) rooting for the Longhorns’ opponents? And when a car zipped by with a plate that reads “NASCAR – 24 Jeff Gordon,” would you think that Gordon (born in California, raised in Indiana, resides in North Carolina) is the official favorite of the State government? The Court says that all of these messages are government speech.

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**First Amendment**

**Williams-Yulee v. Florida Bar**

**Docket No. 13-1499**

**Affirmed: The Supreme Court of Florida**

Argued: January 20, 2015

Decided: April 29, 2015

Analysis: See ABA PREVIEW 130 Issue 4

**Overview:** Under the First Amendment, content-based restrictions on speech are ordinarily subject to strict judicial scrutiny. This means that laws and regulations that limit speech based on its content (like the regulation at issue here) must be narrowly tailored to meet a compelling government interest. This is a very difficult test to meet; indeed, it is the most stringent test known to constitutional law. This case presented the Court with the issue of whether a state rule of judicial conduct that prohibits candidates for judicial office from personally soliciting campaign funds violates free speech.

**Issue:** Does a state code of judicial conduct that prohibits direct solicitation of campaign contributions by candidates for judicial office violate free speech?

No. The First Amendment permits a state judicial rule that bans personal solicitation of campaign funds by judicial candidates.

**From the opinion by Chief Justice Roberts** (joined in full by Justices Breyer, Sotomayor, and Kagan, and joined except as to Part II by Justice Ginsburg): The Florida Bar faces a demanding task in defending Canon 7C(1) against Yulee’s First Amendment challenge. We have emphasized that “it is the rare case” in which a State demonstrates that a speech restriction is narrowly tailored to serve a compelling interest … . Here, Canon 7C(1) advances the State’s compelling interest in preserving public confidence in the integrity of the judiciary, and it does so through means narrowly tailored to avoid unnecessarily abridging speech. This is therefore one of the rare cases in which a speech restriction withstands strict scrutiny.

**Concurring:** Justice Breyer

**Concurring in part and concurring in judgment:** Justice Ginsburg (joined by
Justice Breyer as to Part II
Dissenting: Justice Scalia (joined by Justice Thomas)
Dissenting: Justice Kennedy
Dissenting: Justice Alito

Forfeiture Law
Henderson v. United States

Docket No. 13-1487
Vacated and Remanded: The Eleventh Circuit

Argued: February 24, 2015
Decided: May 18, 2015
Analysis: See ABA PREVIEW 184 Issue 5

Overview: Petitioner, a United States Border Patrol Agent, surrendered his firearms to the FBI as a condition of bond while unrelated marijuana charges were pending against him. He pleaded guilty to one count of distributing marijuana, a felony. The FBI refused to return the firearms, transfer them to a third party who would purchase them, or transfer them to petitioner’s wife. The district court and the Eleventh Circuit agreed. The Court of Appeals said that allowing petitioner to transfer his nonpossessor interests would be tantamount to giving him constructive possession of the weapons contrary to law. It also agreed that petitioner had unclean hands and should not be allowed to request his property back, even though the firearms had nothing to do with his offense. The circuits were split on the question of transferring confiscated property for the benefit of the defendant. The Third, Sixth, Eighth, and Eleventh Circuits did not allow such transfers or sale, but the Second, Fifth, and Seventh Circuits did.

Issue: Does the felon-in-possession statute make it unlawful for a felon to transfer his interest in firearms that the felon owned prior to his conviction and which were not used to commit a crime?

No. The felon-in-possession statute does not prohibit a court order transferring a felon’s lawfully owned firearms from government custody to a third party so long as the court is satisfied that the recipient will not give the felon control over the firearms.

From the unanimous opinion by Justice Kagan: [T]he Government’s theory wrongly conflates the right to possess a gun with another incident of ownership, which § 922(g) does not affect: the right merely to sell or otherwise dispose of that item. … Consider the scenario that the Government claims would violate § 922(g). The felon has nothing to do with his guns before, during, or after the transaction in question, except to nominate their recipient. Prior to the transfer, the guns sit in an evidence vault, under the sole custody of law enforcement officers. Assuming the court approves the proposed recipient, FBI agents handle the firearms’ physical conveyance, without the felon’s participation. Afterward, the purchaser or other custodian denies the felon any access to or influence over the guns; the recipient alone decides where to store them, when to loan them out, how to use them, and so on. In short, the arrangement serves only to divest the felon of his firearms—and even that much depends on a court approving the designee’s fitness and ordering the transfer to go forward. Such a felon exercises not a possessory interest (whether directly or through another), but instead a naked right of alienation—the capacity to sell or transfer his guns, unaccompanied by any control over them.

Yes. A satellite-based monitoring system that tracks an individual’s movements is a Fourth Amendment search.

From the per curiam opinion: The State’s program is plainly designed to obtain information. And since it does so by physically intruding on a subject’s body, it effects a Fourth Amendment search. That conclusion, however, does not decide the ultimate question of the program’s constitutionality. The Fourth Amendment prohibits only unreasonable searches. The reasonableness of a search depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations. See, e.g., Samson v. California, 547 U. S. 843 (2006) (suspectionless search of parolee was reasonable); Vernonia School Dist. 47J v. Acton, 515 U. S. 646 (1995) (random drug testing of student athletes was reasonable).

The North Carolina courts did not examine whether the State’s monitoring program is reasonable—when properly viewed as a search—and we will not do so in the first instance.

Fourth Amendment
Grady v. North Carolina

Docket No. 14-593
Vacated and Remanded: The Supreme Court of North Carolina

Argued: N/A
Decided: March 30, 2015
Analysis: N/A

Overview: Petitioner Torrey Dale Grady was convicted of various sexual assault crimes in 1997 and then again in 2006. Under North Carolina law, he was considered a recidivist sex offender and ordered to submit to satellite-based monitoring, which required him to wear a tracking device at all times. Grady challenged the monitoring as a violation of his Fourth Amendment rights.

Issue: Can nonconsensual satellite-based monitoring be considered a “search” for the purposes of Fourth Amendment challenges?
**Issue:** Does the Fourth Amendment allow an officer to stop a car based on a mistaken interpretation of the law?

**Yes.** If an officer's mistake of law is reasonable, there may be a reasonable suspicion to justify a stop under the Fourth Amendment.

**From the opinion by Chief Justice Roberts** (joined by Justices Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, and Kagan): But reasonable men make mistakes of law, too, and such mistakes are no less compatible with the concept of reasonable suspicion. Reasonable suspicion arises from the combination of an officer's understanding of the facts and his understanding of the relevant law. The officer may be reasonably mistaken on either ground. Whether the facts turn out to be not what was thought, or the law turns out to be not what was thought, the result is the same: the facts are outside the scope of the law. There is no reason, under the text of the Fourth Amendment or our precedents, why this same result should be acceptable when reached by way of a reasonable mistake of fact, but not when reached by way of a similarly reasonable mistake of law.

**Concurring:** Justice Kagan (joined by Justice Ginsburg)

**Dissenting:** Justice Sotomayor

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**Fourth Amendment Los Angeles v. Patel**

**Docket No. 13-1175**

**Affirmed:** The Ninth Circuit

Argued: March 3, 2015
Decided: June 22, 2015
Analysis: See ABA PREVIEW 168 Issue 5

**Overview:** A Los Angeles city ordinance required hotel owners to compile and record guest information in a registry. It also required that hotel owners provide this information to police officers upon demand. Officers do not need a warrant and hotel owners have no mechanism to obtain precompliance court review of such requests. In other words, they have to turn over the information upon demand. The hotel owners argued that this provision is unconstitutional on its face—what is termed in constitutional law as a facial challenge—under the Fourth Amendment. The ordinance allowed the police to search the hotel records without a warrant. Generally, warrantless searches are unreasonable and violate the Fourth Amendment. However, there is an exception for pervasively regulated industries.

**Issue:** Are facial challenges to ordinances and statutes permitted under the Fourth Amendment?

**Yes.** Facial challenges are not categorically barred under the Fourth Amendment.

**From the opinion by Justice Sotomayor** (joined by Justices Kennedy, Ginsburg, Breyer, and Kagan): Petitioner principally contends that facial challenges to statutes authorizing warrantless searches must fail because such searches will never be unconstitutional in all applications … In particular, the City points to situations where police are responding to an emergency, where the subject of the search consents to the intrusion, and where police are acting under a court-ordered warrant … While petitioner frames this argument as an objection to respondents’ challenge in this case, its logic would preclude facial relief in every Fourth Amendment challenge to a statute authorizing warrantless searches. For this reason alone, the City’s argument must fail: The Court’s precedents demonstrate not only that facial challenges to statutes authorizing warrantless searches can be brought, but also that they can succeed.

**Dissenting:** Justice Scalia (joined by Chief Justice Roberts and Justice Thomas)

**Dissenting:** Justice Alito (joined by Justice Thomas)

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**Fourth Amendment Rodriguez v. United States**

**Docket No. 13-9972**

**Vacated and Remanded:** The Eighth Circuit

Argued: January 21, 2015
Decided: April 21, 2015
Analysis: See ABA PREVIEW 145 Issue 4

**Overview:** Officer Morgan Struble pulled Dennys Rodriguez over for driving briefly on the shoulder. After issuing Rodriguez a warning ticket for the violation, Officer Struble detained Rodriguez for seven or eight minutes to call for backup and to conduct a dog sniff of Rodriguez’s vehicle. The dog alerted, and the officers found methamphetamines in Rodriguez’s car. Rodriguez was charged with possession with intent to distribute 50 grams or more of methamphetamine in violation of federal law.

**Issue:** Does the Fourth Amendment permit an officer to detain a person for a short period after the justification for the stop expired in order to conduct a dog sniff?

**No.** Absent reasonable suspicion, police extension of a traffic stop in order to conduct a dog sniff violates the Fourth Amendment.

**From the opinion by Justice Ginsburg** (joined by Chief Justice Roberts and Justices Scalia, Breyer, Sotomayor, and Kagan): Beyond determining whether to issue a traffic ticket, an officer’s mission includes “ordinary inquiries incident to [the traffic] stop.” … Typically such inquiries involve checking the driver’s license, determining whether there are outstanding warrants against the driver, and inspecting the automobile’s registration and proof of insurance. See Delaware v. Prouse, 440 U. S. 648 (1979) … These checks serve the same objective as enforcement of the traffic code: ensuring that vehicles on the road are operated safely and responsibly … A dog sniff, by contrast, is a measure aimed at “detect[ing] evidence of ordinary criminal wrongdoing.” Indianapolis v. Edmond, 531 U. S. 32 (2000).

**Dissenting:** Justice Kennedy

**Dissenting:** Justice Thomas (joined by
Justice Alito and joined by Justice Kennedy as to all but Part III)  
Dissenting: Justice Alito

Habeas Corpus  
Brumfield v. Cain  
Docket No. 13-1433  
Vacated and Remanded:  
The Fifth Circuit

Argued: March 30, 2015  
Decided: June 18, 2015  
Analysis: See ABA PREVIEW 231 Issue 6

Overview: Kevan Brumfield was convicted of first-degree murder and sentenced to death. After exhausting his direct appeals, Brumfield filed a postconviction petition in state court. As that petition was pending, the Supreme Court ruled that the Eighth Amendment prohibited the execution of an intellectually disabled person. Brumfield then amended his petition to claim that he was intellectually disabled, requested an opportunity to offer additional evidence that he was intellectually disabled, and asked for funds to help him establish that he was intellectually disabled. The state court denied Brumfield’s petition and requests, and Brumfield filed a petition for a writ of habeas corpus in federal court.

Issue: Is a state postconviction court’s decision “based on an unreasonable determination of the facts” when the court relied only on evidence that the petitioner submitted at his sentencing hearing (and refused to allow the petitioner to submit additional evidence of his intellectual disability)?

Yes. The petitioner showed that the lower court’s decision meet the requirements of 28 U.S.C § 2254(d)(2), that the decision was “based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding”; petitioner is therefore entitled to a hearing to present his evidence in light of the recent Supreme Court ruling in Atkins v. Virginia, 536 U.S. 304 (2002).

From the opinion by Justice Sotomayor (joined by Justices Kennedy, Ginsburg, Breyer, and Kagan): In Atkins v. Virginia, this Court recognized that the execution of the intellectually disabled contravenes the Eighth Amendment’s prohibition on cruel and unusual punishment. After Atkins was decided, petitioner, a Louisiana death-row inmate, requested an opportunity to prove he was intellectually disabled in state court. Without affording him an evidentiary hearing or granting him time or funding to secure expert evidence, the state court rejected petitioner’s claim. That decision, we hold, was “based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U. S. C. § 2254(d)(2).

Petitioner was therefore entitled to have his Atkins claim considered on the merits in federal court.

Dissenting: Justice Thomas (joined in all but Part I-C by Chief Justice Roberts and Justices Scalia and Alito)

Habeas Corpus  
Glebe v. Frost  
Docket No. 14-95  
Reversed and Remanded:  
The Ninth Circuit

Argued: N/A  
Decided: November 17, 2014  
Analysis: N/A

Overview: The respondent was charged with robbery and related offenses for a series of robberies for which he was alleged to be an accomplice. At closing, defense counsel sought to contend both that the state had failed to prove that respondent was an accomplice during the robberies and that if he was an accomplice, he was acting under duress. The judge ordered defense counsel to select one theory after claiming that the dueling closing arguments were prohibited under state law; defense counsel then focused on the duress defense. Respondent was convicted. The appellate court, after finding that the trial judge’s order was in violation of Due Process, upheld the conviction after finding that such an error was harmless in light of the other evidence presented at trial. The Ninth Circuit reversed.

Issue: Did the Ninth Circuit err when it held that a state supreme court unreasonably applied clearly established federal law by classifying the trial court’s error as harmless rather than structural?

Yes. There is no clearly established constitutional principal that the mistake in this case, the trial judge ordering defense counsel to select one of two possible
theories for closing argument, constituted a structural error.

From the per curiam opinion: Only the rare type of error—in general, one that “infect[s] the entire trial process” and “necessarily render[s] [it] fundamentally unfair”—requires automatic reversal. None of our cases clearly requires placing improper restriction of closing argument in this narrow category.

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**Habeas Corpus**

**Jennings v. Stephens**

Docket No. 13-7211
Reversed and Remanded: The Fifth Circuit

Argued: October 15, 2014
Decided: January 14, 2015
Analysis: See ABA PREVIEW 7 Issue 1

**Overview:** The inmate/petitioner, Robert Jennings, sought a new trial on three theories of ineffective assistance of counsel. The district court granted a new sentencing hearing, finding ineffective assistance in two of the claims; but the court found the third claim was a plausible defense strategy. Petitioner defended all three theories on appeal; the appellate court said it lacked jurisdiction over the third theory because the petitioner failed to obtain a Certificate of Appealability or file a cross-appeal.

**Issue:** Was petitioner required to file a cross-appeal or a Certificate of Appealability (COA)?

No. A petitioner who is successful in raising two of three claims of ineffective assistance of counsel is not required to file a cross-appeal or Certificate of Appealability to use the third claim as part of his argument during appellate proceedings.

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**Habeas Corpus**

**Lopez v. Smith**

Docket No. 13-946
Reversed and Remanded: The Ninth Circuit

Argued: N/A
Decided: October 6, 2014
Analysis: N/A

**Overview:** Respondent was convicted of murdering his wife. At trial, the state argued both that respondent could have killed his wife, but also argued that he could be found guilty of murder on a theory of aiding and abetting; the state introduced the aiding-and-abetting theory at closing arguments. The jury verdict did not indicate a specific theory of guilt. On appeal, respondent argued that he had adequate notice of the aiding-and-abetting theory. The Ninth Circuit held that the initial charge of first degree murder was enough to put respondent on notice that he could be convicted as a principal or aider and abettor, but since the theory was not introduced until closing, respondent’s Sixth Amendment and due process rights were violated. The Ninth Circuit did not cite any precedent finding notice inadequate.

**Issue:** Did the Ninth Circuit err in relying on its own precedent to determine that a particular constitutional provision is “clearly established?”

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**Habeas Corpus**

**Taylor v. Barkes**

Docket No. 14-939
Reversed: The Third Circuit

Argued: N/A
Decided: June 1, 2015
Analysis: N/A

**Overview:** Christopher Barkes was arrested for a probation violation; the intake process at the correctional institution included a mental health evaluation. Barkes indicated he had previously attempted suicide and was receiving psychiatric treatment. The intake nurse did not initiate any suicide prevention measures. Barkes committed suicide in his cell the next day. Barkes’s family brought a Section 1983 claim alleging the correctional institution and its officials failed to prevent his suicide. The Commissioner of the Department of Corrections and the
institution’s warden, who had no contact with Barkes, claimed they had qualified immunity for the suit. The district court and Third Circuit disagreed.

**Issue:** Is it clearly established federal law that the Eighth Amendment gives prisoners the right to the proper implementation of adequate suicide prevention measures?

**No.** There is no clearly established federal law that the Eighth Amendment gives prisoners the right to the proper implementation of adequate suicide prevention measures.

From the per curiam opinion: In short, even if the Institution’s suicide screening and prevention measures contained the shortcomings that respondents allege, no precedent on the books in November 2004 would have made clear to petitioners that they were overseeing a system that violated the Constitution. Because, at the very least, petitioners were not contravening clearly established law, they are entitled to qualified immunity.

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**Habeas Corpus**

**Woods v. Donald**

**Docket No. 14-618**

**Reversed and Remanded:**

The Sixth Circuit

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**Health Care**

**King v. Burwell**

**Docket No. 14-114**

**Affirmed:** The Fourth Circuit

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**Issue:** Does the Affordable Care Act provide tax credits to individuals who purchase health insurance on a federally facilitated exchange?

Yes. ACA tax credits are available to individuals in states that have a federal exchange.

From the opinion by Justice Chief Justice Roberts (joined by Justices Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan): In a democracy, the power to make the law rests with those chosen by the people. Our role is more confined—to say what the law is.” Marbury v. Madison, 1 Cranch 137 (1803). That is easier in some cases than in others. But in every case we must respect the role of the Legislature, and take care not to undo what it has done. A fair reading of legislation demands a fair understanding of the legislative plan. Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter. Section 36B can fairly be read consistent with what we see as Congress’s plan, and that is the reading we adopt.

From the dissenting opinion by Justice Scalia (joined by Justices Thomas and Alito): Words no longer have meaning if an Exchange that is not established by a State is “established by the State.” It is hard to come up with a clearer way to limit tax credits to state Exchanges than to use the words “established by the State.” And it is hard to come up with a reason to include the words “by the State” other than the purpose of limiting credits to state Exchanges. “[T]he plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover.” Lynch v. Alworth-Stephens Co., 267 U. S. 364 (1925) (internal quotation marks omitted). Under all the usual rules of interpretation, in short, the Government should lose this case. But normal rules of interpretation seem always to yield to the overriding principle of the present Court: The Affordable Care Act must be saved.
Immigration Law
Kerry v. Din
Docket No. 13-1402
Vacated and Remanded: The Ninth Circuit

Argued: February 23, 2015
Decided: June 15, 2015
Analysis: See ABA PREVIEW 195 Issue 5

Overview: In general, a consular officer’s refusal to issue a visa is not reviewable in court. That’s because an alien has no constitutional right to entry into the United States. But some courts entertain challenges to denials of a visa application when the denial implicates the constitutional rights of a U.S. citizen. Kanisha Berashk, a citizen and resident of Afghanistan, filed a visa application with the U.S. Embassy in Islamabad, Pakistan, based on his marriage to Fauzia Din, a U.S. citizen. The government denied Berashk’s application. The government declined to provide an explanation, except to say that Berashk’s application was denied because of “terrorist activities.”

Issue: Does a consular officer’s refusal of a visa to a U.S. citizen’s alien spouse impinge upon a constitutionally protected interest of the citizen?

No. According to three justices, the government did not deprive the citizen of any constitutional right; according to two justices, even if the citizen had a protected liberty interest in the visa application of her alien spouse. The Court need not decide that issue, for this Court’s precedents instruct that, even assuming she has such an interest, the Government satisfied due process when it notified Din’s husband that his visa was denied under the immigration statute’s terrorism bar, § 1182(a)(3)(B).

Dissenting: Justice Breyer (joined by Justices Ginsburg, Sotomayor, and Kagan)

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Immigration Law
Mata v. Lynch
Docket No. 14-185
Reversed and Remanded: The Fifth Circuit

Argued: April 29, 2015
Decided: June 15, 2015
Analysis: See ABA PREVIEW 254 Issue 7

Overview: After being ordered removed from the United States, petitioner filed a motion to reopen removal proceedings. The Board of Immigration Appeals (BIA) denied the motion based on petitioner’s untimely filing and declined to apply equitable tolling for ineffective assistance of prior counsel. Petitioner appealed to the U.S. Court of Appeals for the Fifth Circuit, arguing that the BIA should have tolled the filing period. The Fifth Circuit held that it did not have jurisdiction to review the BIA’s decision regarding tolling.

Issue: Did the Fifth Circuit err in holding that it did not have jurisdiction to review the BIA’s decision denying a request for equitable tolling of the 90-day statutory period for filing a motion to reopen removal proceedings as a result of ineffective assistance of counsel?

Yes. The Fifth Circuit erred in declining jurisdiction over petitioner’s appeal; a court of appeals has jurisdiction to review a BIA’s decision to reject a petitioner’s motion to reopen removal proceedings.

From the opinion by Justice Kagan (joined by Chief Justice Roberts and Justices Scalia, Kennedy, Breyer, Alito, and Sotomayor): Indeed, as we explained in Kucana v. Holder, courts have reviewed those decisions for nearly a hundred years; and even as Congress curtailed other aspects of courts’ jurisdiction over BIA rulings, it left that authority in place. Nothing changes when the Board denies a motion to reopen because it is untimely—or when, in doing so, the Board rejects a request for equitable tolling. Under the INA, as under our century-old practice, the reason for the BIA’s denial makes no difference to the jurisdictional issue. Whether the BIA rejects the alien’s motion to reopen because it comes too late or because it falls short in some other respect, the courts have jurisdiction to review that decision.

Dissenting: Justice Thomas

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Immigration Law
Mellouli v. Lynch
Docket No. 13-1034
Reversed: The Eighth Circuit

Argued: January 14, 2015
Decided: June 1, 2015
Analysis: See ABA PREVIEW 137 Issue 4

Overview: In 2010, lawful permanent resident Moones Mellouli pled guilty under a Kansas statute that prohibits the possession of drug paraphernalia to “store, contain, conceal, inject, ingest, inhale or otherwise introduce a controlled substance into the human body.” He served no jail time for this misdemeanor, but for this offense, he was later charged as deportable under 8 U.S.C. § 1227(a)(2)(B)(i). He argued that his conviction did not involve “a controlled substance (as defined in section 802 of Title 21)” and he was not deportable under that provision. The government argued that he was deportable because the Kansas statute under which he was convicted was “related” to the federal drug law cited in the removal provision.

Issue: Under 8 U.S.C. § 1227(a)(2)(B)(i), the government may remove a noncitizen convicted of violating “any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21). . . .”
For a state drug paraphernalia conviction to support deportation of a noncitizen under this statute, must the government prove that the conviction related to a substance included in 21 U.S.C. § 802’s definition of “controlled substance”?

Yes. A state conviction for concealing unnamed pills in a sock is not enough to trigger removal under Section 1227(a)(2)(B)(i).

From the opinion by Justice Ginsburg (joined by Chief Justice Roberts and Justices Scalia, Kennedy, Breyer, Sotomayor, and Kagan): The Kansas statute made it unlawful “to use or possess with intent to use any drug paraphernalia to … store [or] conceal … a controlled substance.” But it was immaterial under that law whether the substance was defined in 21 U.S.C. § 802. Nor did the State charge, or seek to prove, that Mellouli possessed a substance on the § 802 schedules. Federal law (§ 1227(a)(2)(B)(i)), therefore, did not authorize Mellouli’s removal.

Dissenting: Justice Thomas (joined by Justice Alito)

LinkedIn

Marriage Equality


Docket Nos. 14-556, 14-562, 14-571, 14-574
Reversed: The Sixth Circuit

Argued: April 28, 2015
Decided: June 26, 2015
Analysis: See ABA PREVIEW 261 Issue 7

Overview: Petitioners challenged laws in four states that define marriage only as between one man and one woman, thus prohibiting same-sex marriages within the states and refusing to recognize valid same-sex marriages from outside the state.

Issue: Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex?

Yes. The Fourteenth Amendment requires a state to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state.

From the opinion by Justice Kennedy (joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan): No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, value it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization’s oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.

From the dissenting opinion by Chief Justice Roberts (joined by Justices Scalia and Thomas): If you are among the many Americans—of whatever sexual orientation—who favor expanding same-sex marriage, by all means celebrate today’s decision. Celebrate the achievement of a desired goal. Celebrate the opportunity for a new expression of commitment to a partner. Celebrate the availability of new benefits. But do not celebrate the Constitution. It had nothing to do with it.

From the dissenting opinion by Justice Scalia (joined by Justice Thomas): Until the courts put a stop to it, public debate over same-sex marriage displayed American democracy at its best. Individuals on both sides of the issue passionately, but respectfully, attempted to persuade their fellow citizens to accept their views. Americans considered the arguments and put the question to a vote. The electorates of 11 States, either directly or through their representatives, chose to expand the traditional definition of marriage. Many more decided not to. Win or lose, advocates for both sides continued pressing their cases, secure in the knowledge that an electoral loss can be negated by a later electoral win. That is exactly how our system of government is supposed to work.

Dissenting: Justice Thomas (joined by Justice Scalia)

From the dissenting opinion by Justice Alito (joined by Justices Scalia and Thomas): Until the federal courts intervened, the American people were engaged in a debate about whether their States should recognize same-sex marriage. The question in these cases, however, is not what States should do about same-sex marriage but whether the Constitution
answers that question for them. It does not. The Constitution leaves that question to be decided by the people of each State.

Patent Law
Commil USA, LLC v. Cisco Systems, Inc.

Docket No. 13-896
Vacated and Remanded:
The Federal Circuit

Argued: March 31, 2015
Decided: May 26, 2015
Analysis: See ABA PREVIEW 228 Issue 6

Overview: Under 35 U.S.C. § 271(b) of the Patent Act of 1952 (Patent Act), a party can be held liable as an infringer of a patent if that person or entity “actively induces” another’s direct “infringement of a patent.” Recently, in Global-Tech Appliances, Inc. v. SEB S.A., 131 S. Ct. 2060 (2011), the Supreme Court held that “induced infringement under § 271(b) requires knowledge that the induced acts constitute patent infringement.” Proof of knowledge may include proof that the infringer actually acted with knowledge of the patentee’s exclusive rights in the patent or acted with willful blindness as to those rights. This case addressed the appropriate standard to establish “knowledge” under § 271(b) of the Patent Act. The Supreme Court was asked to assess whether a potential infringer’s good faith belief that a patent is invalid should serve as a defense to liability for one party’s active inducement of third parties to commit infringement as to disputed patent.

Issue: Is a good-faith belief that a patent is invalid a defense to liability under 35 U.S.C. § 271(b) for inducing infringement of the patent?

No. A defendant’s belief regarding patent validity is not a defense to an induced infringement claim.

From the opinion by Justice Kennedy (joined by Justices Ginsburg, Alito, Sotomayor, and Kagan, and joined by Justice Thomas as to Parts II-B and III): The question the Court confronts today concerns whether a defendant’s belief regarding patent validity is a defense to a claim of induced infringement. It is not. The scienter element for induced infringement concerns infringement; that is a different issue than validity. Section 271(b) requires that the defendant “actively induce[d] infringement.” That language requires intent to “bring about the desired result,” which is infringement … And because infringement and validity are separate issues under the Act, belief regarding validity cannot negate the scienter required under § 271(b).

Dissenting: Justice Scalia (joined by Chief Justice Roberts)
Taking no part: Justice Breyer

Patent Law
Kimble v. Marvel Enterprises, LLC

Docket No. 13-720
Affirmed: The Ninth Circuit

Argued: March 31, 2015
Decided: June 22, 2015
Analysis: See ABA PREVIEW 238 Issue 6

Overview: Supreme Court precedent from 1964 holds that a patent licensing agreement requiring royalty payments based on use of the patented technology after the patent has expired is unenforceable as an unlawful attempt to extend the patent beyond its statutorily prescribed term. The circuit courts have criticized that ruling since it was issued. The Supreme Court was presented with the opportunity to revisit its earlier decision and determine whether to overturn it.

Issue: Should the Court overrule Brulotte v. Thys Co., 379 U.S. 29 (1964), which held that patent license provisions requiring the payment of royalties based on postexpiration use are unlawful per se?

No. Stare decisis requires the Court to adhere to Brulotte.

From the opinion by Justice Kagan (joined by Justices Scalia, Kennedy, Ginsburg, Breyer, and Sotomayor): What we can decide, we can decide. But stare decisis teaches that we should exercise that authority sparingly. Cf. S. Lee and S. Ditko, Amazing Fantasy No. 15: “SpiderMan,” p. 13 (1962) (“[I]n this world, with great power there must also come—great responsibility”). Finding many reasons for staying the stare decisis course and no “special justification” for departing from it, we decline Kimble’s invitation to overrule Brulotte.

Dissenting: Justice Alito (joined by Chief Justice Roberts and Justice Thomas)

Patent Law
Teva Pharmaceuticals USA, Inc. v. Sandoz, Inc.

Docket No. 13-854
Vacated and Remanded:
The Federal Circuit

Argued: October 15, 2014
Decided: January 20, 2015
Analysis: See ABA PREVIEW 14 Issue 1

Overview: Teva Pharmaceuticals asked the Court to decide whether the Federal Circuit’s application of the de novo standard to findings of fact related to patent interpretation is contrary to Rule 52(a) and to the Court’s decisions interpreting Rule 52. Teva argued that the Federal Circuit’s practice of reviewing patent interpretation de novo makes patent litigation “longer, more expensive, and less predictable” because the Federal Circuit does not pay deference to the scientific evidence and fact-based findings the district court hears and rules upon. The Sandoz, Inc., and Mylan Pharmaceuticals respondents, however, argued that the “facts” that Teva mentions are Teva’s litigation expert’s “interpretation of the patent documents themselves” and “a reviewing court in a patent case should read the legal documents in the patent record for itself and disregard extrinsic evidence contrary to that record.”

Issue: Should a district court’s factual findings in support of its construction of a patent claim term be reviewed de novo, as is the current standard?

No. When reviewing a district court’s matters involving the construction of a patent claim, the Federal Circuit should apply a “clear error” standard.

From the opinion by Justice Breyer (joined by Chief Justice Roberts and Justices Scalia, Kennedy, Ginsburg, Sotomayor, and Kagan): [P]ractical considerations favor clear error review. We have previously pointed out that clear error review is “particularly” important where patent law is at issue because patent law is “a field where so much depends upon familiarity with specific scientific problems and principles not usually contained in
the general storehouse of knowledge and experience.” Graver Tank & Mfg. Co. v. Linde Air Products Co., 339 U. S. 605 (1950). A district court judge who has presided over, and listened to, the entirety of a proceeding has a comparatively greater opportunity to gain that familiarity than an appeals court judge who must read a written transcript or perhaps just those portions to which the parties have referred.

Dissenting: Justice Thomas (joined by Justice Alito)

Prison Litigation Reform Act
Coleman v. Tollefson

Docket No. 13-1333
Affirmed: The Sixth Circuit

Argued: February 23, 2015
Decided: May 18, 2015
Analysis: See ABA PREVIEW 187 Issue 5

Overview: The Prison Litigation Reform Act of 1996 amended the federal in forma pauperis statute to include, among other provisions, what has become known as the “three strikes provision.” Under this provision, prisoners who have accumulated three strikes—three dismissals of cases that were frivolous, malicious, or failed to state a claim—are no longer permitted to proceed in forma pauperis unless they can show immediate danger of serious physical injury.

Issue: Under the “three strikes” provision of the Prison Litigation Reform Act, 28 U.S.C. § 1915(G), does a district court’s dismissal of a lawsuit count as a strike while it is still pending on appeal?

Yes. Under the “three strikes” provision of the Prison Litigation Reform Act, a prior dismissal of a lawsuit counts as a strike, even if the dismissal is the subject of an ongoing appeal.

From the unanimous opinion by Justice Breyer: Linguistically speaking, we see nothing about the phrase “prior occasions” that would transform a dismissal into a dismissal-plus-appellate review. An “occasion” is “a particular occurrence,” a “happening,” or an “incident.” Webster’s Third New International Dictionary 1560 (3d ed. 1993). And the statute provides the content of that occurrence, happening, or incident: It is an instance in which a “prisoner has … brought an action or appeal in a court of the United States that was dismissed on” statutorily enumerated grounds. § 1915(G). Under the plain language of the statute, when Coleman filed the suits at issue here, he had already experienced three such “prior occasions.”

Railroad Revitalization and Regulatory Reform Act
Alabama Department of Revenue v. CSX Transportation

Docket No. 13-553
Reversed and Remanded: The Eleventh Circuit

Argued: December 9, 2014
Decided: March 4, 2015
Analysis: See ABA PREVIEW 96 Issue 3

Overview: Alabama imposes a sales and use tax on the purchase of diesel fuel by commercial and industrial businesses, including railroads. The state exempts motor carriers and water carriers from the sales and use tax, but imposes a different tax on the purchase of diesel fuel by motor carriers. CSX Transportation, Inc., an interstate rail carrier, sued the state, arguing that this tax scheme discriminated against it in violation of the Railroad Revitalization and Regulatory Reform Act.

Issue: Did the Eleventh Circuit err when it concluded that CSX’s competitors were an appropriate comparison class?

No. For a claim brought under the Railroad Revitalization and Regulation Reform Act of 1976, the petitioner’s competitors are an appropriate comparison class.

Issue: Did the Eleventh Circuit err when it refused to consider whether Alabama could justify its decision to exempt motor carriers from its sales and use taxes?

Yes. The Eleventh Circuit erred when it refused to consider whether Alabama could justify its decision; the Eleventh Circuit should have allowed Alabama to show whether its fuel-excise tax is the rough equivalent of its sales tax as applied to diesel fuel.

From the opinion by Justice Scalia (joined by Chief Justice Roberts and Justices Kennedy, Breyer, Alito, Sotomayor, and Kagan): Nothing in the ordinary meaning of the word “discrimination” suggests that it occurs only when the victim is singled out relative to the population at large. If, for example, a State offers free college education to all returning combat veterans, but arbitrarily excepts those who served in the Marines, we would say that Marines have experienced discrimination. That would remain the case even though the Marines are treated the same way as members of the general public, who have to pay for their education.

Dissenting: Justice Thomas (joined by Justice Ginsburg)

Religious Freedom
Holt v. Hobbs

Docket No. 13-6827
Reversed and Remanded: The Eighth Circuit

Argued: October 7, 2014
Decided: January 20, 2015
Analysis: See ABA PREVIEW 29 Issue 1

Overview: The Religious Land Use and Institutionalized Persons Act (RLUIPA) prohibits prisons and local governments from imposing a substantial burden on the religious exercise of persons living in an institution, including a prison. This limitation exists even if the burden results from a rule of general applicability, unless the government can show that the burden is the least restrictive means of furthering a compelling governmental interest. In this case, a Department of Corrections rule prohibited an inmate from growing a beard in accordance with his religious beliefs. The prisoner claimed such a limitation violates RLUIPA.

Issue: Does a prison rule that prohibits an inmate from growing a beard in accordance with his religious beliefs violate the Religious Land Use and Institutionalized Persons Act?

Yes. A prison rule preventing a prisoner from growing a 1/2-inch beard in accordance with his religious beliefs violates the Religious Land Use and Institutionalized Persons Act.

From the unanimous opinion by Justice Alito: We readily agree that the Department has a compelling interest in stanching
the flow of contraband into and within its facilities, but the argument that this interest would be seriously compromised by allowing an inmate to grow a 1/2-inch beard is hard to take seriously. As noted, the Magistrate Judge observed that it was "almost preposterous to think that [petitioner] could hide contraband" in the short beard he had grown at the time of the evidentiary hearing. An item of contraband would have to be very small indeed to be concealed by a 1/2-inch beard, and a prisoner seeking to hide an item in such a short beard would have to find a way to prevent the item from falling out. Since the Department does not demand that inmates have shaved heads or short crew cuts, it is hard to see why an inmate would seek to hide contraband in a 1/2-inch beard rather than in the longer hair on his head.

**Concurring:** Justice Ginsburg (joined by Justice Sotomayor)
**Concurring:** Justice Sotomayor

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**Sarbanes-Oxley Act**  
**Yates v. United States**  
**Docket No. 13-7451**  
**Reversed and Remanded:**  
**The Eleventh Circuit**

**Argued:** November 5, 2014  
**Decided:** February 25, 2015  
**Analysis:** See ABA *PREVIEW* 70 Issue 2  
**Overview:** Petitioner John Yates was convicted in federal court of destroying a "tangible object" with the intent to impede a federal investigation in violation of the Sarbanes-Oxley Act. The tangible object was fish—72 undersized red grouper fish that Yates allegedly tossed into the sea to prevent the Department from discovering that he harvested undersized fish. Yates argued that "tangible object" in the Sarbanes-Oxley Act does not encompass fish and instead is limited to objects that preserve information, such as a computer, server, or similar storage device.

**Issue:** Does "tangible object" in the Sarbanes-Oxley Act include fish that were destroyed to impede a federal investigation, or instead is that act limited to objects that preserve information, such as a computer, server, or similar storage device?

**No.** A tangible object for the purpose of Section 1519 of the Sarbanes-Oxley Act is one used to record or preserve information.

From the opinion by Justice Ginsburg (joined by Chief Justice Roberts and Justices Breyer and Sotomayor): Having used traditional tools of statutory interpretation to examine markers of congressional intent within the Sarbanes-Oxley Act and § 1519 itself, we are persuaded that an aggressive interpretation of "tangible object" must be rejected. It is highly improbable that Congress would have buried a general spoliation statute covering objects of any and every kind in a provision targeting fraud in financial record-keeping.

**Concurring:** Justice Alito  
**Dissenting:** Justice Kagan (joined by Justices Scalia, Kennedy, and Thomas)

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**Securities Law**  
**Omnicare, Inc. v. Laborers Dist. Council**  
**Docket No. 13-435**  
**Vacated and Remanded:**  
**The Sixth Circuit**

**Argued:** November 3, 2014  
**Decided:** March 24, 2015  
**Analysis:** See ABA *PREVIEW* 54 Issue 2  
**Overview:** Omnicare was accused of accepting and paying kickbacks to drug companies and other entities, as eventually revealed in various private and governmental lawsuits. Omnicare paid hundreds of millions to settle related claims. While that was occurring, Omnicare issued a registration statement saying "We believe that our contracts with pharmaceutical manufacturers are legally and economically valid arrangements that bring value to the healthcare system." In a lawsuit by investors, the matter before the Court concerned whether those statements violated Section 11 of the Securities Act of 1933 only if subjectively disbelieved by the issuer.

**Issue:** Did the Sixth Circuit err when it ruled that no showing of subject disbelief was required to bring a claim under Section 11 of the Securities Act?

**Yes.** A statement of opinion does not constitute an "untrue statement of fact" simply because the opinion is later proven incorrect; a registration statement that omits material facts about the issuer’s inquiry into a statement of opinion and, if those facts conflict with what a reasonable investor would take from the statement, then Section 11 of the Securities Act creates liability.

From the opinion by Justice Kagan (joined by Chief Justice Roberts and Justices Kennedy, Ginsburg, Breyer, Alito, and Sotomayor): When reading such a document [a registration statement], the investor thus distinguishes between the sentences "we believe X is true" and "X is true." And because she does so, the omission of a fact that merely rebuts the latter statement fails to render the former misleading. In other words, a statement of opinion is not misleading just because external facts show the opinion to be incorrect. Reasonable investors do not understand such statements as guarantees, and § 11’s omissions clause therefore does not treat them that way.

**Concurring in part and concurring in judgment:** Justice Scalia  
**Concurring in judgment:** Justice Thomas

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**Separation of Powers**  
**Zivotofsky v. Kerry**  
**Docket No. 13-628**  
**Affirmed:**  
**The District of Columbia Circuit**

**Argued:** November 3, 2014  
**Decided:** June 8, 2015  
**Analysis:** See ABA *PREVIEW* 58 Issue 2  
**Overview:** Since President Truman, presidents have consistently maintained a policy of strict neutrality with regard to sovereignty over Jerusalem. This policy is reflected in State Department regulations, which, among other things, specify that a passport of a U.S. citizen born in Jerusalem designate only "Jerusalem" as the place of birth (and not "Jerusalem, Israel" or "Israel"). But in 2002, Congress enacted legislation that requires the Secretary of State to designate "Israel" as the country of birth on a passport of any U.S. citizen born in Jerusalem, upon the request of the passport applicant. Menachem Zivotofsky is a U.S. citizen born in Jerusalem in 2002.
Sixth Amendment

Ohio v. Clark

Docket No. 13-1352

Reversed and Remanded:
The Supreme Court of Ohio

Argued: March 2, 2015
Decided: June 18, 2015
Analysis: See ABA PREVIEW 175 Issue 5

Overview: This case was the latest since Crawford v. Washington, 541 U.S. 36 (2004), to examine what is “testimonial” hearsay for purposes of the Confrontation Clause. At least four other cases, including Crawford, clearly involved some sort of in-person police questioning. Here, two school teachers with a mandatory statutory duty to report suspected child abuse questioned a young child in their care about his injuries. Whether the questioners’ identity and/or their statutory duty makes any difference regarding “testimonial” hearsay for Confrontation Clause purposes were among the central issues here.

Issue: Do a child’s out-of-court statements to a teacher in response to the teacher’s concerns about potential child abuse violate the Confrontation Clause?

No. A child’s out-of-court statements to a teacher in response to the teacher’s concerns about potential child abuse does not violate the Confrontation Clause.

From the opinion by Justice Kennedy (joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan): If the power over recognition is to mean anything, it must mean that the President not only makes the initial, formal recognition determination but also that he may maintain that determination in his and his agent’s statements. This conclusion is a matter of both common sense and necessity. If Congress could command the President to state a recognition position inconsistent with his own, Congress could override the President’s recognition determination. Under international law, recognition may be effected by “written or oral declaration of the recognizing state.” In addition an act of recognition must “leave no doubt as to the intention to grant it.” Thus, if Congress could alter the President’s statements on matters of recognition or force him to contradict them, Congress in effect would exercise the recognition power.

Concurring: Justice Breyer
Concurring in judgment in part and dissenting in part: Justice Thomas
Dissenting: Chief Justice Roberts (joined by Justice Alito)
Dissenting: Justice Scalia (joined by Chief Justice Roberts and Justice Alito)

Clark’s prosecution. Thus, their introduction at trial did not violate the Confrontation Clause.

From the concurring opinion by Justice Scalia (joined by Justice Ginsburg): I write separately, however, to protest the Court’s shoveling of fresh dirt upon the Sixth Amendment right of confrontation so recently rescued from the grave in Crawford v. Washington. For several decades before that case, we had been allowing hearsay statements to be admitted against a criminal defendant if they bore “‘indicia of reliability.’” Ohio v. Roberts, 448 U. S. 56 (1980). Prosecutors, past and present, love that flabby test. Crawford sought to bring our application of the Confrontation Clause back to its original meaning, which was to exclude unconflicted statements made by witnesses—i.e., statements that were testimonial. We defined testimony as a “‘solemn declaration or affirmation made for the purpose of establishing or proving some fact,’” ibid.—in the context of the Confrontation Clause, a fact “potentially relevant to later criminal prosecution,” Davis v. Washington, 547 U. S. 813 (2006). Crawford remains the law. But when else has the categorical overruling, the thorough repudiation, of an earlier line of cases been described as nothing more than “‘adopt[ing] a different approach,’” … as though Crawford is only a matter of twiddle-dum twiddle-dee preference, and the old, pre-Crawford “approach” remains available? The author unabashedly displays his hostility to Crawford and its progeny, perhaps aggravated by inability to muster the votes to overrule them.

Concurring in judgment: Justice Thomas

Supremacy Clause

Armstrong v. Exceptional Child Center

Docket No. 14-15

Reversed: The Ninth Circuit

Argued: January 20, 2015
Decided: March 31, 2015
Analysis: See ABA PREVIEW 153 Issue 4

Overview: This case presented the Court with whether and how Medicaid providers may challenge state reimbursement rates. Private entities—Medicaid providers—
sought to enforce the supremacy of federal law against a state government agency. The entities bringing suit provide residential services for people with significant developmental disabilities. Their suit was brought against Richard Armstrong, Director of the State of Idaho Department of Health and Welfare, and his Medicaid deputy director. In the case below, the Medicaid providers brought suit to challenge Idaho’s Medicaid reimbursement rates for supported care facilities. At the time of the lawsuit, these rates had not been increased since 2006, despite studies by Idaho Medicaid required by Idaho law, Idaho Code § 56-118 (2014), recommending increases and requests to the Idaho legislature to appropriate the $4 million necessary to implement the increases.

**Issue:** Does the Supremacy Clause give Medicaid providers a private right of action to enforce § 1396a(a)(30)(A) against a state where Congress chose not to create enforceable rights under that statute?

No. The Supremacy Clause does not create a private right of action; in this case, the Medicaid providers cannot sue to enforce compliance under § 1396a(a)(30)(A).

From the opinion by Justice Scalia as to Parts I, II, and III (joined by Chief Justice Roberts and Justices Thomas, Breyer, and Alito, and an opinion with respect to Part IV in which Chief Justice Roberts and Justice Thomas and Alito joined): It is unlikely that the Constitution gave Congress such broad discretion with regard to the enactment of laws, while simultaneously limiting Congress’s power over the manner of their implementation, making it impossible to leave the enforcement of federal law to federal actors. If the Supremacy Clause includes a private right of action, then the Constitution requires Congress to permit the enforcement of its laws by private actors, significantly curtailing its ability to guide the implementation of federal law. It would be strange indeed to give a clause that makes federal law supreme a reading that limits Congress’s power to enforce that law, by imposing mandatory private enforcement—a limitation unheard-of with regard to state legislatures.

Concurring in part and concurring in judgment: Justice Breyer

Dissenting: Justice Sotomayor (joined by Justices Kennedy, Ginsburg, and Kagan)

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**Takings Clause**

**Horne v. Dept. of Agriculture**

**Docket No. 14-275**

**Reversed: The Ninth Circuit**

Argued: April 22, 2015
Decided: June 22, 2015
Analysis: See ABA PREVIEW 250 Issue 7

**Overview:** The Hornes produced raisins and were found to have violated a U.S. Department of Agriculture order requiring them to reserve a certain amount of their crop for marketing. They claimed a physical taking of their property, but the Ninth Circuit disagreed, applying the nexus and rough proportionality standards of Nollan v. California Coastal Commission and Dolan v. City of Tigard. The Hornes sought certiorari, asserting a categorical duty to just compensation for a physical taking, which was not defeated by the fact that the withheld raisins could yield a return, if market conditions allow.

**Issue:** Did the Ninth Circuit err in holding that the government may avoid the categorical duty to pay just compensation for a physical taking of personal property when the government reserves to the property owner a contingent interest in a portion of the value of the property, set at the government’s discretion?

Yes. The Fifth Amendment requires the government to pay just compensation when it takes personal property, just as when it takes real property; any proceeds the property owners may reserve from the eventual sale of the property goes to the amount of compensation they should receive.

From the opinion by Chief Justice Roberts (joined by Justices Scalia, Kennedy, Thomas, and Alito, and joined by Justices Ginsburg, Breyer, and Kagan as to Parts I and II): The Government thinks it “strange” and the dissent “baffling” that the Hornes object to the reserve requirement, when they nonetheless concede that “the government may prohibit the sale of raisins without effecting a per se taking.” … But that distinction flows naturally from the settled difference in our takings jurisprudence between appropriation and regulation. A physical taking of raisins and a regulatory limit on production may have the same economic impact on a grower. The Constitution, however, is concerned with means as well as ends. The Government has broad powers, but the means it uses to achieve its ends must be “consistent with the letter and spirit of the constitution.” McCulloch v. Maryland, 4 Wheat. 316 (1819). As Justice Holmes noted, “a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way.” Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

Concurring: Justice Thomas
Concurring in part and dissenting in part: Justice Breyer (joined by Justices Ginsburg and Kagan)

Dissenting: Justice Sotomayor

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**Trademark Law**

**B&B Hardware, Inc. v. Hargis Industries, Inc.**

**Docket No. 13-352**

**Reversed and Remanded: The Eighth Circuit**

Argued: December 2, 2014
Decided: March 24, 2015
Analysis: See ABA PREVIEW 117 Issue 3

**Overview:** B&B Hardware registered its trademark for “Sealtight,” a fastener used in the aerospace industry, in 1993. When Hargis Industries later attempted to register the name “Sealtite” for a fastener used in the building construction industry, B&B successfully opposed registration before the Trademark Trial and Appeal Board (TTAB). The TTAB concluded that the similarity of the names was likely to cause confusion. B&B argues that the favorable TTAB ruling precludes a relitigation of the likelihood-of-confusion issue in its federal court trademark infringement action against Hargis.

**Issue:** Does a decision of the Trademark Trial and Appeal Board (TTAB) as to the appropriateness of patent registration preclude a party from subsequently raising the issue of patent infringement before a district court?

No. Assuming the TTAB decision meets the ordinary elements of issue preclusion and the issues before the TTAB are materially
the same as those before the district court, issue preclusion should apply.

From the opinion by Justice Alito (joined by Chief Justice Roberts and Justices Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan): The real question, therefore, is whether likelihood of confusion for purposes of registration is the same standard as likelihood of confusion for purposes of infringement. We conclude it is, for at least three reasons. First, the operative language is essentially the same; the fact that the registration provision separates “likely” from “to cause confusion, or to cause mistake, or to deceive” does not change that reality … Second, the likelihood-of-confusion language that Congress used in these Lanham Act provisions has been central to trademark registration since at least 1881 … That could hardly have been by accident. And third, district courts can cancel registrations during infringement litigation, just as they can adjudicate infringement in suits seeking judicial review of registration decisions … There is no reason to think that the same district judge in the same case should apply two separate standards of likelihood of confusion.

Concurring: Justice Ginsburg
Dissenting: Justice Thomas (joined by Justice Scalia)

Trademark Law
Hana Financial, Inc. v. Hana Bank

Docket No. 13-1211
Affirmed: The Ninth Circuit

Argued: December 3, 2014
Decided: January 21, 2015
Analysis: See ABA PREVIEW 83 Issue 3

Overview: The Supreme Court was asked to consider whether a judge or jury should resolve a dispute over the doctrine of tacking in trademark law. A circuit split existed between the Ninth Circuit, which asserted that the judge is in the best position to determine if the “tacked” marks would make the same commercial impression to consumers in the relevant marketplace, and the Federal Circuit, which asserted that a judge is in the best position to determine if the “tacked” marks share a visual resemblance and thus make the same commercial impression in the relevant marketplace.

Issue: Can a judge resolve whether a trademark owner can “tack” the use of an older mark onto a newer, modified mark?

No. Assessing whether two trademarks may be tacked for purposes of determining priority is a question for the jury.

From the unanimous opinion by Justice Sotomayor: Application of a test that relies upon an ordinary consumer’s understanding of the impression that a mark conveys falls comfortably within the ken of a jury. Indeed, we have long recognized across a variety of doctrinal contexts that, when the relevant question is how an ordinary person or community would make an assessment, the jury is generally the decisionmaker that ought to provide the fact-intensive answer.

Truth in Lending Act
Jesinoski v. Countrywide Home Loans, Inc.

Docket No. 13-684
Reversed and Remanded: The Eighth Circuit

Argued: November 4, 2014
Decided: January 13, 2015
Analysis: See ABA PREVIEW 66 Issue 2

Overview: The Truth in Lending Act permits a borrower to rescind a loan secured by a mortgage on the borrower’s principal residence by notifying the lender within the first three days after the loan is made, or within three days of receiving loan disclosure forms if those forms are not provided at closing. This right expires three years after the loan is originated. In this case, the Court was called on to decide whether that three-year limit refers to notifying the lender of the decision to rescind, or to filing an actual suit for rescission.

Issue: May a borrower rescind a mortgage loan for violation of the Truth in Lending Act by sending a notice of rescission within the three-year window provided by section 1635(f) and bringing suit thereafter if the creditor objects?

Yes. Borrowers exercising their rights to rescind mortgages based on violations of the Truth in Lending Act need only provide written notice to the lender within the three-year window and need not file suit within that period.

From the unanimous opinion by Justice Scalia: The language leaves no doubt that rescission is effected when the borrower notifies the creditor of his intention to rescind. It follows that, so long as the borrower notifies within three years after the transaction is consummated, his rescission is timely. The statute does not also require him to sue within three years.

Water Law
Kansas v. Nebraska et al.

Docket No. 126, Orig.
Exceptions to Special Master’s Report Overruled; Master’s Recommendations Adopted

Argued: October 14, 2014
Decided: February 24, 2015
Analysis: See ABA PREVIEW 10 Issue 1

Overview: The Republican River Compact of 1943 allocates the beneficial use of the river’s waters among the three basin states: Kansas (40 percent), Nebraska (49 percent), and Colorado (11 percent). In this litigation commenced in 1999, Kansas, the most downstream state, sued Nebraska, claiming groundwater pumping in Nebraska resulted in under-delivery of water to Kansas in violation of the compact. Kansas prevailed and a model to measure the groundwater depletions was developed and agreed to by the parties. This facet of the litigation addressed the damages to be paid by Nebraska for past violations, whether the model should be revised, and whether additional measures are needed to ensure future compliance by Nebraska.

Issue: Should Kansas, as the Special Master recommends, be awarded $1.8 million over and above Kansas’s actual damages, which the Master’s Report stated is an “additional amount [which] represents a disgorgement of a portion of the amount by which Nebraska’s gain exceeds Kansas’ loss”?

Yes. Disgorgement is appropriate where one state has recklessly gambled with another state’s rights to a scarce natural resource.

Issue: Should the Supreme Court reject the Master’s invitation to exclude, based on the
doctrine of mutual mistake, imported water from the accounting procedures contained in the Final Settlement Stipulation (FSS) agreement of the states, an agreement that the Court approved in its 2003 Decree?

No. The remedy is necessary to prevent serious inaccuracies from destroying the states’ intended apportionment of interstate waters and is also necessary to avert an outright breach of the compact in violation of federal law.

Issue: Should Nebraska’s violation of the compact be termed a “knowing violation,” and if so, does that entitle Kansas (a) to an injunction to compel future compliance with the compact and the FSS and (b) a larger award of disgorgement of benefits damages than that recommended by the Special Master to deter future violations?

Yes. Nebraska knowingly exposed Kansas to a substantial risk of receiving less water than it was entitled to under the compact.

From the opinion by Justice Kagan (joined by Justices Kennedy, Ginsburg, Breyer, and Sotomayor, and joined by Chief Justice Roberts as to Parts I and III): Nebraska contends, contrary to the Master’s finding, that it could not have anticipated breaching the Compact in those years … But that argument does not hold water: Rather, as the Special Master found, Nebraska failed to put in place adequate mechanisms for staying within its allotment in the face of known substantial risk that it would otherwise violate Kansas’s rights.

Concurring in part and dissenting in part: Chief Justice Roberts
Concurring in part and dissenting in part: Justice Scalia
Concurring in part and dissenting in part: Justice Thomas (joined by Justices Scalia and Alito, and joined by Chief Justice Roberts as to Part III)

Whistleblower Protection Act
Department of Homeland Security v. MacLean

Docket No. 13-894
Affirmed: The Federal Circuit

Argued: November 4, 2014
Decided: January 21, 2015
Analysis: See ABA PREVIEW 46 Issue 2

Overview: Respondent Robert MacLean worked for the Transportation Security Administration (TSA) as an air marshal. MacLean learned that TSA planned temporarily not to assign air marshals to certain commercial flights. MacLean disclosed TSA’s plan to a reporter and was fired for violating a TSA regulation prohibiting such disclosures. MacLean argued his firing violated the Whistleblower Protection Act (WPA). TSA’s parent agency, the Department of Homeland Security (DHS), argued that MacLean’s disclosure falls into the WPAs exception for disclosures “specifically prohibited by law.”

Issue: Can a federal employee claim protection under the Whistleblower Protection Act—which withholds protection for employees who make disclosures “specifically prohibited by law”—when the employee makes a disclosure that violates a TSA rule barring disclosure of “sensitive security information”?

Yes. The employee’s disclosure, although violating agency rules, was not “specifically prohibited by law” and therefore the employee was eligible for protection under the Whistleblower Protection Act.

From the opinion by Chief Justice Roberts (joined by Justices Scalia, Thomas, Ginsburg, Breyer, Alito, and Kagan): Congress did not use the phrase “law, rule, or regulation” in the statutory language at issue here; it used the word “law” standing alone. That is significant because Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another. Russello v. United States, 464 U. S. 16 (1983). Thus, Congress’s choice to say “specifically prohibited by law” rather than “specifically prohibited by law, rule, or regulation” suggests that Congress meant to exclude rules and regulations.

Dissenting: Justice Sotomayor (joined by Justice Kennedy)
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**On the Docket: What’s to Come in 2015**
Previewed by Mark A. Cohen.

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