PREVIEW
OF UNITED STATES SUPREME COURT CASES

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The 2015–2016 Term will be one that stays in our memories for years to come. While there were some headline-making rulings on abortion and affirmative action, the sudden and unexpected death of Justice Antonin Scalia will likely be the touchstone for the Term. The impact of Justice Scalia’s passing and the vacancy it created will provide fodder for Supreme Court commentators for years in the future. One obvious consequence was the 4-4 split along ideological lines in some of the major cases decided in the latter half of the Term, including decisions that will have serious implications for union rights and immigration. The vacancy is shaping the upcoming docket, both in terms of possible rulings and also in terms of the cases the Court is willing (or not) to hear. The far-reaching impact of the Court losing a leading conservative voice with a distinct jurisprudential style will continue to play out for quite some time.

Much of the conversation on the cases that resulted in holdings this Term has focused on the major “wins” for the progressive justices. This is a Term that saw the Court protect a woman’s right to access abortion procedures and affirm a program used by the University of Texas at Austin to promote a racially diverse student body. However, the details of this Term show that it was a bit more complicated than this simple rights-based analysis would have you believe. The Court once again took on an issue that impacts most Americans in their daily lives, even if they don’t realize it: class action lawsuits. Although the Term was generally a win for the plaintiffs’ bar, there were important developments surrounding the interpretation of arbitration clauses. In other, more high-profile arenas, the narrative that the “liberal” agenda won out most certainly does not hold water, particularly in the areas of immigration and the Fourth Amendment. In splitting equally on President Obama’s immigration plan, the Court’s lack of a decision effectively overruled the president’s order to halt deportations for certain immigrants (at least for the time being). And in a 5-3 split, the Court further chipped away at the exclusionary rule it had previously developed to encourage law enforcement officers to follow both the letter and spirit of the Fourth Amendment.

Our wrap-up issue features some of our frequent PREVIEW contributors providing their insightful expert analysis on these and other trends and developments from this Term, including the Court’s treatment of class action suits, individual rights and liberties during criminal investigations, and the impact of politics in voting law decisions. 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
## Circuit Scorecard—Federal and State Courts

<table>
<thead>
<tr>
<th>Court</th>
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* The consolidated cases referred to as *Zubick v. Burwell* are noted separately.
* The three separate cases consolidated together as *Birchfield v. North Dakota*, *Bernard v. Minnesota*, and *Beylund v. Levi* are noted individually here.
Supreme Court watchers predicted many things for the last Supreme Court Term, but the sudden death of Justice Antonin Scalia was so unexpected that the crystal balls pretty much shattered.

With pressing questions of labor relations, affirmative action, and reproductive rights lingering on the docket, the loss of the longtime conservative stalwart halfway into the Term threw all of the conventional thinking into disarray. Prior to Justice Scalia’s death, the conservative justices had enjoyed a majority, giving them a 5-4 advantage on cases decided along ideological lines. With the Court’s liberal and conservative blocs now even at four justices apiece, the prospect of gridlock and increased rancor loomed.

As it turns out, a Court divided was able to stand, navigating the choppy waters more adeptly than many initially thought possible.

“The Supreme Court managed to make some relative order out of potential chaos,” observed Stephen Wermiel, professor of practice at American University Washington College of Law. “Operating for more than four months without a ninth justice, the Supreme Court kept the number of 4-4 tie votes down and avoided having to reargue cases next term.”

While acknowledging there were tie votes in several significant cases, Wermiel said that “the justices clearly worked hard to try to come to resolution of most cases, defying predictions after the death of Justice Scalia in February that the Term would dissolve in ideological divisions and leave much unresolved.”

Nonetheless, the loss of the formidable Justice Scalia cast a large shadow on the second half of the Term.

“The fact that the Court has been down to eight justices for the last few months meant that several cases which were expected to yield ‘big ticket’ decisions going in a ‘conservative’ direction turned out differently,” observed Professor Richard Gannett of Notre Dame Law School. “I’m thinking specifically of the free speech case involving teacher-union dues, the Texas case involving the president’s immigration policy, and the RFRA [i.e., Religious Freedom Restoration Act] challenge to the contraception-coverage mandate. In each of these cases, Justice Scalia’s absence probably resulted in the absence of a significant win for judicial conservatives.”

The Splits

The impact of Justice Scalia’s death on the Supreme Court Term is apparent in a pair of expected 5-4 landmark conservative victories that weren’t.

_Friedrichs v. California Teachers Association_ (14-915) involved a free-speech challenge to public-sector unions’ ability to collect fees from workers who opt not to join and do not want to pay for the unions’ collective bargaining activities. Union supporters argued that a ruling against the fees would be devastating to organized labor.

A little more than a month after Justice Scalia’s death, the Court issued its ruling in the closely watched case—a 4-4 split with the justices evenly divided along ideological lines. The split decision left standing a lower court ruling in favor of the union, which, though lacking precedential power, was effectively a major victory for organized labor. Had Justice Scalia been there to cast his vote along with his fellow conservatives, the Court would likely have overturned a four-decades-old precedent allowing payments of union fees to be mandatory for public employees.

In _United States v. Texas_ (15-674), the justices split 4-4 in deciding the fate of one of President Obama’s signature immigration initiatives, deferred action. Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) alone shielded five million undocumented immigrants from deportation and allowed them to hold jobs legally in the United States.

President Obama set up the deferred-action program through executive order, an action challenged by Texas and 25 other states. A federal judge stayed implementation, and a Fifth U.S. Circuit Court of Appeals panel upheld that order.

As it did in _Friedrichs_, the eight-justice Court dispatched of the case with a simple nine-word statement: “The judgment is affirmed by an equally divided Court.” The split leaves in place the federal judge’s injunction, effectively putting an end to President Obama’s deferred action program.

Had Justice Scalia voted with his fellow conservatives, as he was expected to do, the resulting decision could have set a major precedent circumscribing presidential authority in making wide-scale decisions on enforcement of immigration laws. However, because the 4-4 split lacks any precedential power, the issue may crop up again in a future presidential administration.

The Split That Could Have Been

_In Fisher v. University of Texas_ (14-981), supporters of affirmative action eked out a major victory that almost certainly would not have come in a nine-justice Court. In a 4-3 ruling, the Court upheld the University of Texas’s race-conscious admissions plan. (Justice Elena
Kagan recused herself because she had worked on the case while serving as solicitor general.)

Justice Anthony Kennedy, reasserting his role as swing justice, tipped the balance toward the Court’s liberal bloc. Had Justice Scalia been there to join with the other three conservative justices, the Court would have split. A tie would have left in place a lower court ruling upholding the university’s affirmative-action plan, so the end result would not have been different if Justice Scalia had participated in the decision. However, a split would have had no precedential value, thereby denying affirmative-action advocates a key affirmation of race-sensitive admissions policies.

As it stands, the case is a reaffirmation of Grutter v. Bollinger, a 2003 Supreme Court ruling allowing race to be considered as a factor in the college admission process. Prior to Fisher (known as Fisher II because it was the second time the case made the journey to the Supreme Court), the continuing vitality of Grutter was uncertain.

The Punt

At first blush, Zubik v. Burwell (14-1418), seemed to have it all. It was a challenge to the Affordable Care Act (ACA) (a/k/a Obamacare) in a presidential election year; it was a reproductive rights case involving the ACA’s contraceptive mandate; and it was brought under the Religious Freedom Restoration Act (RFRA), a red-hot area in recent Supreme Court jurisprudence.

Religious organizations challenged a Department of Human Services regulation requiring them to notify the government of their objections to the ACA’s contraceptive mandate so that arrangements could be made for their employees to receive free contraceptive coverage from a third-party insurer. The organizations argued the act of providing the notice itself violated their religious beliefs by making them complicit in the obtaining and use of contraception, thereby violating their religious-freedom rights under the RFRA.

When the Court accepted review of the case, experts expected a 5-4 ruling with the Court’s conservative bloc finding in favor of the religious organizations. Such a ruling would be the most significant RFRA and ACA decision since the Supreme Court’s 2014 ruling in Burwell v. Hobby Lobby Stores, Inc. (holding that the contraceptive mandate—without providing any accommodation for religious organizations—violated the RFRA).

Justice Scalia’s death changed the calculus, and suddenly it looked as if the justices might split 4-4. However, the Court did something completely unexpected. In a unanimous 8-0 decision, the justices sent the case back to the lower courts with instructions to consider a solution proposed by the Court itself. The Court’s suggested fix would allow workers to get third-party contraception coverage without religious organizations having to provide the notice letter that they deemed objectionable.

This kick-the-can approach effectively preserves the underlying issues for another day, presumably for a time when the composition of the Court is such that a deadlock is less likely.

An Unchanged Result

Whole Woman’s Health v. Hellerstedt (15-274) provides an important reminder that not every controversial or politically charged case last Term rose and fell with Justice Scalia’s death.

This case involved a challenge to two provisions in a Texas law—one requiring physicians who perform abortions to have admitting privileges at a nearby hospital and another requiring abortion clinics in the state to have facilities comparable to an ambulatory surgical center. Combined, these laws threatened to close three-quarters of the state’s abortion clinics.

In a landmark 5-3 ruling, the Supreme Court struck down the restrictions as an undue burden on women’s abortion access. Legal experts believe the decision could lead to invalidation of restrictive abortion laws in 25 other states.

As with the affirmative-action case, Justice Kennedy demonstrated that, despite the new math, he still plays the role of swing justice. While Justice Scalia may have penned one of his trademark stinging dissents in this case, his presence as the ninth justice would not have been enough to change the result.

Looking into the Magic Eight Ball

With the nomination of Merrick Garland indefinitely stalled and a presidential election cycle in progress, it is possible that the Supreme Court will continue to be staffed with just eight justices for most or all of its 2016–2017 session. As a result, it will be difficult for the Court to tackle some of the more controversial issues of the day without deadlockng.

Perhaps for this reason, the cases the Court has so far accepted for review in the upcoming sessions tend to be more about technical points of law and procedure rather than ones with potential to make sweeping changes on politically controversial issues.

“It seems very likely that uncertainty among the justices about Justice Scalia’s replacement—and, perhaps, about President Obama’s—caused them to be somewhat more tentative and ‘risk averse’ when voting to grant certiorari,” Professor Garnett said.

Another consideration is that a grant certiorari requires four justices to agree to review a case. Being down a justice makes it that much harder to reach this threshold.

So, after a raft of blockbuster sessions, the 2016–2017 Term may turn out to be something of a snoozer. But never fear, dedicated Court watchers will likely get more than their share of excitement by tuning in to C-SPAN for the no-holds-barred confirmation hearing that will surely result whenever a Supreme Court nominee makes it that far.
Class Actions: A Court Divided

by Linda S. Mullenix

During the 2015–2016 Term, the Court continued its recent, robust interest in class action litigation, granting review in four class action appeals. On balance, it was a relatively good year for the plaintiffs’ trial bar, which scored some significant victories in the class action arena. However, a divided Court continued to fight over the enforceability of class action waivers in arbitration clauses. Notably, the Court averted definitive resolution of the problem of the “no injury” class, deferring this issue for ultimate resolution in some future case. And finally, it is worth noting that Justice Scalia’s vote would not have changed the outcome of any of the Court’s class action decisions this Term. Nonetheless, with the end of the Scalia jurisprudential era, class counsel may now perhaps look to an even rosier future for class action litigation if a liberal justice is added to the Court’s bench.

Proving Classwide Liability by Statistics

One of the most closely watched appeals concerned the controversial use of statistical methodology to prove up classwide liability and damages. In its first post-Scalia decision relating to class litigation, the Court in Tyson Foods, Inc. v. Bouaphakeo handed plaintiffs a victory for the use of such methodology (slip op. March 22, 2016).

In a 6-2 decision, the Court endorsed the carefully crafted use of statistical methodologies in class litigation, indicating that this holding was entirely consistent with the Court’s prior holdings in Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011). Significantly, Justice Scalia’s vote would not have changed the outcome. Tyson Foods also represents the beginning of retrenchment from broad anticlass rulings based on the Court’s controversial Wal-Mart decision.

In Tyson Foods, the Court addressed two issues: (1) whether a trial court could certify and try a Rule 23 class action and Fair Labor Standards Act (FLSA) collective action through representative proof to determine a defendant’s liability and damages, presuming all class members to be identical to the sample average, and (2) whether courts may certify actions where some class members allegedly sustained no injuries and have no right to damages. The Court answered the first issue affirmatively but demurred answering the second, leaving the problem of so-called no injury class for another day. The Court further deflected resolution of the problem of so-called no injury class for another day. The Court further deflected resolution of the problem of the “no injury” class, deferring this issue for ultimate resolution in some future case. And finally, it is worth noting that Justice Scalia’s vote would not have changed the outcome of any of the Court’s class action decisions this Term. Nonetheless, with the end of the Scalia jurisprudential era, class counsel may now perhaps look to an even rosier future for class action litigation if a liberal justice is added to the Court’s bench.

Tyson objected that this purported methodology amounted to a “trial by formula” that the Court expressly rejected in Wal-Mart. Tyson argued that any employee’s entitlement to overtime pay could only be determined on an individualized basis, not on the statistical averaging and assumptions of the Mericle and Fox reports. The district court rejected Tyson’s analogy to Wal-Mart and denied Tyson’s decertification motion. The case went to trial.

At trial, because Tyson had kept no actual records, the plaintiffs relied on Mericle’s and Fox’s expert testimony to establish the time workers spent donning and doffing. Testifying as to damages, Fox calculated damages, assuming that all class members spent the average time reported by Mericle’s study.

While the Tyson action was pending, the Court decided Spokeo v. Robins. Tyson then moved to decertify the class, contending that neither liability nor damages “were capable of classwide resolution in one stroke.” The plaintiffs opposed decertification and offered two expert witness reports proposing to calculate classwide overtime compensation and damages. A time study by Dr. Mericle showed the average amount of time Tyson employees spent in donning and doffing their safety equipment. An expert report by Dr. Fox calculated damages, assuming that all class members spent the average time reported by Mericle’s study.

Several class members testified that each was required to wear different equipment and that it took varying amounts of time to don, doff, wash this equipment, or walk to work stations. Mericle conceded that his time measurements included employees who performed different jobs and donned and doffed different equipment. He also conceded that he made no attempt to ensure that his study was based on a random sample or statistically representative sample of class members.

The jury found for the plaintiffs, awarding $2.9 million in unpaid wages to the class. The district court denied Tyson’s request for a judgment as a matter of law. A divided Eighth Circuit panel affirmed. The court upheld the plaintiffs’ reliance on an inference from
average donning and doffing activities to calculate uncompensated work time, relying on Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946). The court held that because Tyson failed in its record-keeping duties under the FLSA, the plaintiffs could rely on representative, inferential proof under Mt. Clemens. The majority reasoned that, unlike Wal-Mart, Tyson had a specific company policy governing compensable time and that class members worked at the same plant and used similar equipment. The court disagreed that an inappropriate “trial by formula” had occurred. The court did not address Tyson’s argument that a class could contain uninjured class members.

The Supreme Court affirmed the Eighth Circuit’s decision in virtually all respects. The Court first noted that the parties did not dispute there were common classwide questions, including whether the donning and doffing was compensable work under the FLSA. Instead, the central dispute was whether it was possible for the jury, based on Mericle’s study, to infer that each employee donned and doffed for the same average time as Mericle’s sample.

Addressing the central issue of statistical methodologies to prove up classwide liability and damages, the Court very carefully declined to announce a broad rule regarding the use of such studies. Writing for the majority, Justice Kennedy held: “It follows the Court would reach too far were it to establish general rules governing the use of statistical evidence, or so-called representative evidence, in all class action cases.” The permissible use of statistical studies did not depend on the form of the proceeding—either an individual case or a class action—but rather whether such evidence was reliable in proving or disproving the elements of a cause of action.

In carefully crafting its pronouncement, the Court indicated that whether a statistical sample might be used to establish classwide liability would depend on the purpose for which the sample was introduced and the underlying cause of action. Citing Mt. Clemens, the Court indicated that inferring employee hours from a statistical study had long been permitted in FLSA actions, provided the study was otherwise admissible under evidentiary rules. However, the Court issued a cautionary note, limiting the sweep of its decision: “The fairness and utility of statistical methods in contexts other than those presented here will depend on facts and circumstances particular to those cases.”

The Court further ruled that plaintiffs permissively could use a statistical sample to prove classwide liability if that sample could be used to prove liability in an individual case. As an initial matter, the Court noted that Tyson had failed to raise a Daubert challenge to the plaintiffs’ offer of its expert testimony. The Court concluded that the plaintiffs’ use of statistical sampling in this context was therefore appropriate and distinguished this use of statistical sample from the proffer of a statistical sampling in Wal-Mart.

The Court further noted that in many cases, a representative sample was the only practicable means to present data to establish a defendant’s liability. The Court found that Mt. Clemens illustrated and supported the permissible use of a statistical sample. In both cases, the plaintiffs used a representative sample to fill an evidentiary gap created by the employer’s failure to keep adequate records. Moreover, the Court rejected Tyson’s argument that reliance on the Mericle study deprived Tyson of its ability to litigate individual defenses. Instead, the majority concluded that the defendant had the opportunity to challenge Mericle’s study as unrepresentative or inaccurate, a defense common to all class members.

In a further blow to defendants, the Court indicated that Tyson’s reliance on Wal-Mart was misplaced. In a surprising retreat from that decision, Justice Kennedy announced: “Wal-Mart does not stand for the broad proposition that a representative sample is an impermissible means of establishing classwide liability.” Instead, the Court held that its decision accorded with Wal-Mart. Comparing the two cases, the majority noted that the Wal-Mart employees’ experiences bore little relationship to one another, while the Tyson employees all worked in the same facility, did similar work, and were paid under the same policy. Under these circumstances, the experiences of a subset of Tyson employees could be probative of the experiences of all.

Finally, after canvassing the various arguments concerning class members who allegedly had suffered no injury and were not entitled to damages, the Court declined to rule on this issue. The Court indicated that whether some methodology would be successful in identifying uninjured class members was premature on the record before the Court.

The Court ordered a remand to the district court to establish a damage allocation method, suggesting that Tyson could challenge the district court’s allocation methodology when the jury award was disbursed to class members. Finally, the Court expressed a lack of sympathy for Tyson’s no-injury objection, indicating that this was a problem of the company’s own making. The plaintiffs had suggested bifurcating the trial of liability and damages, which would have offered the opportunity to remove uninjured individuals from the class. Instead, Tyson insisted on a unitary trial. Hence, the Court concluded that Tyson had argued against a bifurcated trial and “now seeks to profit from the difficulty it caused.”

Focusing on this issue, Chief Justice Roberts, joined by Justice Alito, concurred in the Court’s decision but wrote separately to express concern that on remand the district court might not be able to fashion a methodology for awarding damages only to class members who had suffered an injury. Chief Justice Roberts noted that it was undisputed that hundreds of class members had suffered no injury.

In particular, Chief Justice Roberts pointed out that the jury had returned an aggregate award for less than half the amount of Fox’s expert witness testimony on damages, suggesting that the jury found that Mericle’s and Fox’s averages were too high. Chief Justice Roberts decided that the most reasonable guess was that the jury did not find that employees in different departments donned and doffed for identical amounts of time. In a sweeping conclusion, Chief Justice Roberts suggested that, given this difficulty, it remained to be seen whether the jury verdict could survive. If there was no way to ensure that the jury’s award would go only to injured class members, the award could not stand.
In 2010, Gomez sued Campbell-Ewald in California federal court under the Telephone Consumer Protection Act (TCPA), 48 Stat. 1064, 47 U.S.C. § 227(b)(1)(A)(iii), which prohibits sending unsolicited cell phone text messages without prior consent of the telephone recipient. He sued individually and on behalf of a nationwide class of individuals who had received but not consented to the messages.

The TCPA provides claimants with statutory damages of $500 for each violation, which may be tripled if the defendant willfully or knowingly violated the act. Gomez sought treble statutory damages, costs, and attorney fees, as well as an injunction restraining Campbell-Ewald’s involvement in the unsolicited messaging.

Before Gomez filed his motion for class certification, the defendant proposed to settle Gomez’s individual claim and filed an “offer of judgment” pursuant to Fed. R. Civ. P. 68. Campbell-Ewald offered Gomez $1,503 for each message he received, which satisfied his personal treble-damage claim. Campbell-Ewald also approved a stipulated injunction agreeing not to send text messages in violation of the TCPA. Gomez did not accept the settlement offer and allowed it to lapse after the fourteen days specified in Rule 68 as the time limitation to accept an offer of settlement.

Campbell-Ewald then moved for a motion to dismiss for a lack of jurisdiction, claiming that Gomez’s case was moot. The district court denied this motion. Campbell-Ewald subsequently moved for summary judgment, contending that the defendant had sovereign immunity from suit as a Navy contractor. The district court granted the summary judgment.

The Ninth Circuit reversed the sovereign immunity ruling but also held that Gomez’s case remained a live dispute. The Ninth Circuit ruled that an unaccepted offer of judgment under Rule 68, for the full amount of the plaintiff’s individual claim that was made before a plaintiff files a motion for class certification, did not moot the class action.

The Supreme Court granted review to resolve the circuit court conflict. The Court held that a plaintiff’s failure to accept a defendant’s full settlement offer did not moot the plaintiff’s individual or class claims. In arriving at this conclusion, the Court distinguished its 2013 ruling in Genesis HealthCare. The majority suggested that decision had evaded ruling on the mootness issue because the plaintiff had not disputed that the settlement offer mooted her individual case. In dissent in that case, Justice Kagan argued that she would have addressed this threshold mootness issue, holding that an unaccepted offer of judgment cannot moot a case. In the aftermath of Genesis HealthCare, Justice Kagan’s dissent gained traction among lower federal courts faced with the same problem.

Writing for the majority, Justice Ginsburg announced: “We now adopt Justice Kagan’s analysis, as has every Court of Appeals’ ruling on the issue post–Genesis HealthCare.” Invoking basic principles of contract law, Justice Ginsburg held that once Gomez rejected Campbell-Ewald’s settlement bid and Rule 68 offer of judgment, the
The court was involved in determining class certification. As a policy matter, Justice Ginsburg noted that a contrary ruling (suggested by the dissenting justices) would effectively “place the defendant in the driver’s seat.” In other words, Justice Ginsburg eschewed a ruling that would permit defendants to strategically pick off plaintiffs through settlement offers, thereby mooting their individual claims and defeating class certification.

In a concurrence, Justice Thomas joined the Court’s majority in its judgment but would have resolved the issue based on the common-law history of tenders. Justice Thomas’s lengthy exegesis on the law of tenders, however, displeased some of his fellow conservatives.

The Court’s conservative wing—sans Justice Thomas—dissented from the majority’s holding. Joined by Justices Scalia and Alito, Chief Justice Roberts criticized the majority for mischaracterizing the framing issue. In the dissenters’ view, the mootness question was a problem of Article III jurisdiction that limited the authority of federal courts to adjudicate only real, live cases and controversies. “The question, however, is not whether there is a contract; it is whether there is a case or controversy under Article III.” Therefore, the majority erred in resolving the mootness question as a problem of simple contract law.

Invoking a familiar litany of Article III jurisprudential canons, Chief Justice Roberts pointed out that an Article III case or controversy exists when both the plaintiff and the defendant have a personal stake in the controversy. This personal stake must exist at every stage of a lawsuit. If a defendant makes a full offer of settlement and agrees to fully redress a plaintiff’s injuries, then there is no longer a case or controversy for Article III purposes, according to Chief Justice Roberts. The case has become moot. Moreover, Chief Justice Roberts indicated that various precedents reflected the important constitutional principle that a plaintiff’s agreement to a settlement offer was not required to moot a case.

Chief Justice Roberts determined that exactly what happened in this case. Campbell-Ewald agreed to fully satisfy Gomez’s claims. That made Gomez’s case moot, and Gomez was not entitled to a ruling on the merits of a moot case. Thus, “if a defendant is willing to give the plaintiff everything he asks for, there is no case or controversy to adjudicate, and the lawsuit is moot.”

**Class Action Waivers Survive, Again**

In DIRECTV, Inc. v. Imburgia, the Court revisited the problem of class action waivers included in arbitration clauses (slip op. December 14, 2015). In a 6-3 decision, the Court reaffirmed its 2011 decision in AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011), holding that the Federal Arbitration Act (FAA) preempted state law invalidating such waivers. In so doing, the majority handed a major victory to corporate America, while dealing a blow to consumer advocates fighting such restrictive clauses. Justices Ginsburg and Sotomayor strenuously dissented, arguing that the Court’s decision effectively denied ordinary folks access to justice and was blatantly anticonsumer.

The **DIRECTV** litigation arose from early termination fees imposed by **DIRECTV**, an issue familiar to millions of Americans. In 2008, Amy Imburgia and Kathy Greiner sued in California state court, alleging that the company’s early termination fees violated California consumer protection laws.

The **DIRECTV** subscriber contract contained a mandatory arbitration clause that required any dispute to be resolved only by binding arbitration. The contract also included a waiver of classwide arbitration, stating that neither the subscriber nor the company was entitled to join or consolidate claims in arbitration. Finally, the contract contained a provision stating that if “the law of your state” made the class action waiver unenforceable, then the entire arbitration clause was unenforceable. However, the contract also stated that the arbitration provision would be governed by the Federal Arbitration Act.

As the litigation progressed through state court and on review to the Supreme Court, the entire dispute focused on interpretation of the contract provision rendering the arbitration clauses unenforceable if the “law of your state” made the class action waiver unenforceable.

When Imburgia sued **DIRECTV** in 2008, class actions waivers were not enforceable in California under Discover Bank v. Superior Court, 36 Cal. 4th 148 (Cal. S. Ct. 2005). However, while Imburgia’s litigation was pending in 2011, the *Concepcion* Court invalidated the Discover Bank rule, holding that the Federal Arbitration Act preempted California state law.

Notwithstanding the Court’s *Concepcion* decision, the California Court of Appeals, in reliance on Discover Bank, concluded that the class action waiver in **DIRECTV**’s subscriber contract was unenforceable under California law. The appellate court interpreted the “law of your state” language to mean state law at the time. Imburgia filed her lawsuit, unmediated by the Supreme Court’s subsequent *Concepcion* decision.

In addition, the appellate court further invoked the contract canon that “a court should construe ambiguous language against the interest of the party that drafted it,” construing the clause against **DIRECTV** and holding the arbitration provision void. The California Supreme Court declined discretionary review and **DIRECTV** appealed to the U.S. Supreme Court.

In a 6-3 decision, the Court sided with **DIRECTV** and upheld enforceability of the arbitration clause, including its class action waiver. In an opinion by Justice Breyer, the majority reaffirmed its *Concepcion* decision, holding again that the Federal Arbitration Act was a law of the United States, and *Concepcion* was an
“authoritative interpretation of that Act.” Consequently, the majority ruled, “the judges of every state must follow it.”

Notwithstanding this clear ruling, the majority noted that Concepcion was a closely divided case, with four justices dissenting. However, the Court ruled that the California Court of Appeals’ interpretation of the arbitration clause was preempted by the Federal Arbitration Act, a conclusion that “fell well within the confines of present well-established law.”

The Court’s central task was to construe the contract language which conditioned DIRECTV’s arbitration provision on “the law of your state.” Justice Breyer offered multiple rationales for upholding the arbitration provision, centered on the basic principle that this language could not be construed to refer to invalid state law. Instead, Justice Breyer concluded that the contract language must presumptively take its ordinary meaning: valid state law.

Hence, because Concepcion had invalidated class action waivers and the Discover Bank rule, any preexisting California state law was invalid. Therefore invalid state law could not provide the rule of decision in Imburgia’s challenge to the arbitration clause. Justice Breyer further indicated that the California Court of Appeals had not explained why parties could intend the words “law of your state” to include invalid law of your state.

The majority also faulted the Court of Appeals’ conclusion that because the class action waiver was unenforceable under California law, the entire arbitration agreement was unenforceable. Justice Breyer commented that those statements did not describe California law. “The view that state law retains independent force even after it has been authoritatively invalidated by this Court is one courts are unlikely to accept as a general matter and to apply in other contexts.”

Finally, the majority rejected the conclusion that the ambiguous contract language should be construed against the drafter. As an initial matter, the Court did not find the contract language to be ambiguous. Additionally, the majority suggested that “the reach of the canon construing contract language against the drafter must have limits, no matter who the drafter was.”

Justice Thomas dissented, again reiterating his often-stated view that the FAA does not apply to state court proceedings.

Justices Ginsburg and Sotomayor also dissented, in an opinion replete with highly quotable anticorporate rhetoric. They critically noted the Court’s role in further disarming consumers “leaving them without effective access to justice.” Justice Ginsburg’s opening salvo set the tone: “It has become routine, in large part due to this Court’s decisions, for powerful economic enterprises to write into their form contracts with consumers and employees no-class-action arbitration clauses.”

Sounding an alarm, Justice Ginsburg suggested that the majority’s opinion took steps way beyond the Court’s holdings in Concepcion and American Express Co. v. Italian Colors Restaurant, 570 U.S. ___ (2013). “Today, the Court holds that consumers lack not only protection against unambiguous class-arbitration bans in adhesion contracts. They lack even the benefit of the doubt when anomalous terms in such contracts reasonably could be construed to protect their rights.”

For Justice Ginsburg, the California court’s interpretation of the “law of your state” language was not only reasonable, but entirely right. Thus, the dispositive question was not whether federal law preempted state law, but whether home state law meant law enacted by the California legislature. Justice Ginsburg indicated that was the better interpretation.

In addition, Justice Ginsburg argued that courts generally construed ambiguous contract terms against the drafter, reflecting the principle that a party should not be permitted to write an ambiguous term, lock another party into agreeing to that term, and then reap the benefit of the ambiguity once a dispute emerges.” Justice Ginsburg believed this canon of construction should apply to arbitration agreements with “hugely unequal bargaining power of the parties,” such as DIRECTV’s contract with its subscribers. Thus, Justice Ginsburg concluded that she would resolve the dispute in this case by employing traditional contract rules without any arbitration-favoring presumption.

Reflecting on judicial enforcement of arbitration provisions, Justice Ginsburg concluded: “These decisions have predictably resulted in the deprivation of consumers’ rights to seek redress for losses, and, turning the coin, they have insulated powerful economic interests for liability for violations of consumer protection laws.” And, reviewing the legislative history of the Federal Arbitration Act, Justice Ginsburg argued that Congress in 1925 could not have anticipated that the Court would apply the FAA to “render consumer adhesion contracts invulnerable to attack by parties who never meaningfully agreed to arbitration in the first place.” Finally, Justice Ginsburg pointed out that the United States was out of step with a European Union Directive that forborne binding consumers to unfair contractual terms.

Statutory Standing and No-Injury Classes: The Court Punts

In one of this Term’s most closely watched class action appeals, Spokeo v. Robins, the Court no doubt disappointed in deflecting resolution of the central issue of standing requirements for statutory class litigation. In a 6-2 decision, the Court set forth its understanding of Article III standing requirements, and concluded that the Ninth Circuit had failed to completely analyze standing in the underlying case. Consequently, the Court remanded the litigation to the Ninth Circuit to revisit the standing question in light of the Court’s pronouncements. In short, the Court punted Spokeo to the lower court. And, similar to the Tyson Foods decision, the absence of Justice Scalia’s vote would not have made a difference in the outcome.

Significantly, the Court made no sweeping rulings concerning whether plaintiffs who allegedly suffered no personal injury could pursue class litigation in statutory cases, based on simple violation of a relevant statute. In its conclusion, the Court took pains to note
that: “We take no position as to whether the Ninth Circuit’s ultimate conclusion—that Robins adequately alleged an injury in fact—was correct.”

The *Spokeo* litigation arose under an action brought pursuant to the Fair Credit Reporting Act of 1970 (FCRA). The FCRA regulates consumer reporting agencies and protects consumers where such information might be communicated and used by a third party. The statute provides for either actual damages or statutory damages ranging from $100 to $1000 per violation of the act. *Spokeo* is a web-based research site that provides information about individuals in response to inquiries from users conducting investigations. Robins alleged that he was subjected to such a search, and when he discovered that the website disseminated inaccurate information about him, he sued Spokeo on behalf of himself and a class of similarly situated individuals.

The district court dismissed Robins’s complaint, concluding that Robins had not properly pled an injury-in-fact; therefore, he lacked standing to pursue the action. A Ninth Circuit panel reversed, holding that Robins had adequately alleged injury-in-fact to satisfy Article III standing. The Ninth Circuit indicated that violation of a statutory right usually was sufficient to confer standing. Nonetheless, the Ninth Circuit further concluded that Robins had sufficiently alleged personal injury-in-fact, because he had alleged that Spokeo had violated his rights, and not just the statutory rights of others in the proposed class.

In a fairly brief majority decision, Justice Alito indicated that the Ninth Circuit’s analysis of standing was incomplete. After reviewing the constitutional basis for Article III standing, Justice Alito canvassed the three basic requirements of standing jurisprudence: (1) injury-in-fact, (2) traceability to the conduct of the defendant, and (3) redressability at law. Focusing solely on the injury-in-fact requirement, Justice Alito indicated that this requires a plaintiff to allege that an injury is both concrete and particularized. “To establish injury in fact, a plaintiff must allege that he or she suffered ‘an invasion of a legally protected interest’ that is ‘concrete and particularized,’ and ‘actual or imminent, not conjectural or hypothetical.’”

The Court ruled that particularity is necessary to establish injury in fact, but it alone is not sufficient. In addition, an injury in fact also must be “concrete.” Defining this concept, the Court indicated that an injury must be de facto, it must actually exist: it must be real, and not abstract. Consequently, Robins’s allegations could not satisfy Article III by alleging a mere procedural violation of the FCRA, because a violation of one of the FCRA’s procedures might result in no concrete harm.

The Court concluded that the Ninth Circuit had focused on the particularity requirement but failed to analyze the concreteness requirement. The Court found fault because the Ninth Circuit “did not address the question framed by our discussion, namely, whether the particular procedural violations alleged in this case entail a degree of risk sufficient to meet the concreteness requirement.” Consequently, the Court ordered the case remanded so that the Ninth Circuit could reexamine whether Robins’s allegations satisfied the concreteness requirement.

As he did in *Campbell-Ewald Co. v. Gomez*, Justice Thomas concurred in the judgment but wrote separately to discuss the injury-in-fact requirement as developed by common-law courts. In a similar and lengthy historical account of common-law courts, Justice Thomas expounded on his thesis regarding how the injury-in-fact requirement applies to different types of rights. After canvassing the development of standing principles, Justice Thomas concluded that Robins had no standing to sue Spokeo in his own name for violations of duties that Spokeo owed to the public collectively, in absence of Robins showing a concrete and particular harm.

In a dissenting opinion joined by Justice Sotomayor, Justice Ginsburg agreed with much of the Court’s opinion, including that Robins’s allegations satisfied the particularity requirement for Article III standing. She parted with majority, however, in rejecting the need to remand to determine whether Robins’s injury was concrete. Justice Ginsburg noted that the Court’s precedents did not discuss separate “offices” of the terms “concrete” and “particularized.” At any rate, she argued that Robins’s complaint did not seek redress for harm generally to the citizenry, but to Spokeo’s dissemination about misinformation specifically about him, which satisfied standing requirements.
The October 2015 Term featured three Fourth Amendment decisions and showcased a continuing divide among the justices on interpreting the constitutional provision designed to protect individual privacy from “unreasonable searches and seizures” by government officials.

Exclusionary Rule and the Attenuation Doctrine
The Court ruled in *Utah v. Strieff* (14-1373) that the exclusionary rule did not require suppression of illegal drugs obtained from an investigatory stop in which the police lacked reasonable suspicion. While that sounds questionable on its face, a six-member majority reasoned that because there was a valid arrest warrant on the defendant, the police could search him pursuant to a search incident to a lawful arrest. According to Justice Clarence Thomas, the initial unlawful stop was too attenuated from the valid search incident to a lawful arrest.

This case arose after a Utah police officer received an anonymous tip that there was narcotics trafficking at a particular residence. The officer conducted intermittent surveillance at the home and observed Edward Joseph Strieff Jr. leaving the residence. The officer followed Strieff in his vehicle to a convenience store and stopped him. The officer asked for Strieff’s identification and ran his information. Strieff had an outstanding arrest warrant for a traffic violation. The officer arrested Strieff and searched him, finding a baggie of methamphetamine and drug paraphernalia.

Strieff moved to suppress the evidence, contending that the police officer lacked reasonable suspicion to detain him initially. The state acknowledged the officer lacked reasonable suspicion but argued that the valid arrest warrant attenuated the connection between the initial unlawful stop and the discovery of the drugs.

After losing at trial and the intermediate appellate court levels, Strieff appealed to the Utah Supreme Court, which reversed. The state high court focused on the fact that the officer lacked reasonable suspicion to detain the defendant.

Utah petitioned the U.S. Supreme Court for review. In his majority opinion, Justice Thomas wrote that the question for the Court was whether the valid arrest warrant broke the chain of causation between the initial unlawful stop and the subsequent discovery of illegal drugs. Justice Thomas applied the three-factor test from *Brown v. Illinois*, 422 U. S. 590 (1975). The three factors are (1) temporal proximity between the unconstitutional conduct and the discovery of evidence; (2) presence of intervening factors; and (3) the flagrancy of the official misconduct.

Justice Thomas acknowledged that temporal proximity, or closeness in time, favored the defendant. However, he also reasoned that intervening factors and flagrancy of misconduct favored the state. With regard to intervening factors, Justice Thomas emphasized that the valid arrest warrant predated the unlawful stop and was “entirely unconnected with the stop.” With regard to flagrancy, Justice Thomas wrote that the officer was “at most negligent.”

Justice Thomas further noted that there was no evidence that the unlawful stop “was part of any systemic or recurrent police misconduct,” but characterized it as an “isolated instance of negligence.”

Justice Sonia Sotomayor warned that the majority’s opinion amounts to open season on all individuals who have warrants for unpaid parking tickets. She noted that the officer’s warrant check was not unrelated to the initial stop but instead was “part and parcel” of the stop.

Justice Sotomayor also questioned the majority’s characterization of the officer’s actions as “an isolated instance of negligence.” Instead, she noted that it was common practice for police departments to run warrant checks on all stopped drivers.

Her dissent attracted widespread media attention because she also emphasized the impact the majority’s decision will have on “people of color.” She quoted W.E.B. DuBois, Michelle Alexander, and Ta-Nehisi Coates for the principle that minorities are disproportionately scrutinized and stopped by the police.

Justice Elena Kagan authored her own dissent. She also disagreed with the Court’s conclusion that there were intervening factors between the unlawful stop and the subsequent discovery of illegal drugs. She reasoned that the discovery of the arrest warrant was an “eminently foreseeable consequence of stopping [the defendant].”

Justice Kagan warned that the Court’s decision will incentivize police officers to stop individuals even though they lack reasonable suspicion.

Warrantless Blood and Breath Tests
This Term the Court also addressed warrantless blood and Breathalyzer tests of drivers stopped on suspicion of drunk driving. The Court addressed this in three cases consolidated together: *Birchfield v. North Dakota* (14-1468), *Bernard v. Minnesota* (14-1470), and *Beylund v. Levi* (14-1507). Defendant Danny Birchfield refused to consent to a blood test; defendant Robert Bernard refused to consent to a breath test; and defendant Steve Michael Beylund allegedly consented to a blood test after being informed of his state’s implied consent laws.
Justice Samuel Alito split the difference in his majority opinion. He sanctioned the use of warrantless breath tests but not warrantless blood tests. According to Justice Alito, breath tests do not implicate significant privacy concerns in part because the physical intrusion is almost negligible. Unlike a blood test, there is no piercing of the skin. Justice Alito also reasoned that breath tests only reveal the amount of blood alcohol content (BAC) in the person, not other matters.

“Blood tests are a different matter,” Justice Alito wrote, noting that they require the piercing of skin and a significant physical intrusion. He also reasoned that blood samples give the police the opportunity to extract more information about an individual than the BAC.

Justice Alito then balanced the intrusions on individual privacy against the state’s need for BAC testing. Justice Alito described the state’s need for BAC testing as very significant given the heavy toll that drunk drivers take on human life. Justice Alito also determined that there was no less restrictive alternative to the breath tests that could assist the state in combatting drunk driving. He justified these warrantless tests under the rubric of the search incident to a lawful arrest doctrine.

However, Justice Alito also determined that breath tests were a less restrictive alternative to more intrusive blood tests. Calibrating these balances, Justice Alito concluded that warrantless breath tests are permissible but warrantless blood tests are not.

Applying these principles, the Court reversed Birchfield’s conviction for refusing to submit to a warrantless blood test, affirmed Bernard’s case to determine if he truly consented to the warrantless blood test.

There were partial dissenting opinions authored by Justices Sotomayor and Thomas. While on opposite ends of the ideological spectrum on this issue, both criticized Justice Alito’s different treatment of blood and breath tests. Justice Sotomayor reasoned that both warrantless breath and blood tests are unconstitutional.

Justice Thomas, on the other hand, believed that both warrantless breath and blood tests are unconstitutional. In his partial dissent, Justice Thomas adhered to his original position in his separate opinion in Missouri v. McNeely, 569 U. S. ___ (2013), that warrantless breath and blood tests are justified as exigent circumstances—another exception to the warrant requirement of the Fourth Amendment.

“The Court was wrong in McNeely, and today’s compromise is perhaps an inevitable consequence of that error,” he wrote. “Both searches contemplated by the state laws at issue in these cases would be constitutional under the exigent-circumstances exception to the warrant requirement.”

Qualified Immunity

The Court also addressed another Fourth Amendment case but did so on qualified immunity grounds. Qualified immunity is a defense that insulates government officials from liability for unconstitutional conduct unless they violate clearly established constitutional or statutory rights.

In Mullenix v. Luna (14-1183), the Court examined the qualified immunity defense raised in response to a Fourth Amendment excessive force claim where a police officer from Tulia, Texas, shot and killed a suspect. The shooting came at the end of an 18-minute car chase that covered 25 miles at speeds up to 110 miles per hour. Twice during the chase, the suspect called and claimed he had a weapon and would kill any officer he encountered if the chase was not abandoned. From an overpass, the officer shot the suspect four times.

The suspect’s mother later filed a civil rights lawsuit, alleging that the officer engaged in excessive force in firing and shooting her son. The officer moved for summary judgment based on qualified immunity, but the federal district court ruled there were material issues of fact as to whether the officer acted recklessly under the circumstances. The Fifth U.S. Circuit Court of Appeals affirmed, finding that it was clearly established law that an officer cannot fire on a fleeing felon.

On appeal, the U.S. Supreme Court reversed in a per curiam opinion. The per curiam opinion noted the “hazy legal background” surrounding the law in similar circumstances. The Court also noted that the suspect had threatened to kill the officers chasing him and, thus, this case was not similar to other car chase cases. Because the suspect posed a threat to officer safety, the Supreme Court determined that qualified immunity was applicable.

Justice Sotomayor dissented, writing that it was clearly established that the officer should not have fired the shots that killed the suspect. “By sanctioning a ‘shoot first, think later’ approach to policing, the Court renders the protections of the Fourth Amendment hollow.”
The Mixed Term
The Court’s decision in Strieff could be far-reaching, as countless individuals have warrants for minor violations such as traffic or parking tickets. The majority’s application of the attenuation doctrine could spell a significant loss of individual liberty for motorists.

However, the Birchfield holding shows that the Court appears sensitive to Fourth Amendment concerns at least when it comes to physical intrusions on a person. The Court’s differential treatment of breath and blood tests shows a Court struggling to calibrate the proper balance between law enforcement needs and privacy concerns.

On an individual justice level, the Court’s opinions in these Fourth Amendment cases demonstrate that Justice Sotomayor is most sensitive to individual privacy concerns. One commentator writes that she is “fast becoming the Court’s chief defender of the Fourth Amendment.” Damon Root, “Sonia Sotomayor Stands Up for the Fourth Amendment,” Reason.com, 7/1/16. She dissented in all three cases: she would have applied the exclusionary rule in Strieff, required warrants before both breath and blood testing of suspected drunk drivers, and not have granted qualified immunity to the officer who fired fatal shots at a fleeing felon.

On the other hand, Justice Thomas seems the justice most willing to defer to the government in Fourth Amendment cases. He was the only justice willing to sanction even warrantless blood tests under the rubric of exigent circumstances.

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Law over Politics in Voting Rights

by Steven D. Schwinn

When the Supreme Court struck a fatal blow to a key provision in the Voting Rights Act (VRA) a few Terms ago in Shelby County v. Holder, 570 U.S. ___ (2013), many read the ruling as the triumph of politics over law in the Court’s treatment of voting rights. In that case, recall, challengers argued that Congress violated the Constitution when it required certain states and jurisdictions to obtain “preclearance” from the U.S. Department of Justice or a federal court before adopting changes to their voting laws. The Court agreed, kind of. The Court left the preclearance requirement alone, but instead ruled that the coverage formula—the provision in the VRA that specified which jurisdictions must obtain preclearance—violated the Constitution. In particular, the Court said that the coverage formula was based on outdated information about the prevalence of racial discrimination in voting. The Court said that things have changed and gotten better since the time when Congress set the coverage formula, and that the coverage formula failed to keep up. The Court held that the coverage formula, in treating states differently (some covered, some not)—and in treating them differently for outdated reasons—violated federalism principles. The dramatic ruling effectively wiped out the preclearance requirement, the crown jewel of the civil rights movement, especially with a Congress that surely would not enact (and, indeed, has not enacted) a new coverage formula.

Those who read this ruling as a triumph of politics over law had good reasons. After all, the Court split sharply along conventional ideological lines, with the five conservatives voting to uphold the VRA, and the four progressives voting to overturn it. Moreover, the majority struck the coverage formula based in part on a new and novel application of a quite limited doctrine, the “fundamental principle” of equal state sovereignty. This doctrine had previously applied only to the conditions of admission of states to the Union—a very narrow circumstance, indeed. Yet the majority applied it to the coverage formula as if it were a bedrock principle that swept across all of constitutional law. Finally, the day after the Court struck the coverage formula and freed previously covered jurisdictions from preclearance, North Carolina and Texas, both previously covered jurisdictions, began to enforce voter ID laws that had been denied preclearance before Shelby County. The cynical moves underscored just how political these voting rights cases had become. As if to underscore the politics, the en banc Fifth Circuit held just last month that Texas’s voter ID law (the same one it enacted right after Shelby County came down) had a discriminatory effect in violation of yet a different provision of the VRA.

But if Shelby County marks a triumph of politics over law in the Court’s approach to voting rights cases, there is a quiet trio of cases this past Term that cuts the other way. In these three rulings, the Court decisively rebuffed attempts to get it to resolve raw political disputes related to the hotly contested issue of redistricting.

State redistricting is important, and politically charged, because it sets the legislative boundaries for districts in the state legislature and in Congress. States can manipulate the boundaries to create safe seats for Republicans or Democrats, and they can manipulate a legislative map in order to maximize representation by one party, and minimize representation by the other. Because states draw new boundaries only after each decennial census, a legislative map can easily lock in majorities for 10 years, or more. And a majority in the state legislature can reinforce or even strengthen itself in the next census (because that majority gets to redraw the legislative maps), creating a self-reinforcing cycle that a minority party could find nearly impossible to break.

The old preclearance requirement only added to the gamesmanship. (Remember that covered states drew their legislative maps based on the 2010 Census, before the Court struck the coverage formula in Shelby County.) Under the VRA, covered jurisdictions had to submit their redistricting plans to the U.S. Department of Justice (DOJ) or a federal court for preclearance. In determining whether a redistricting plan qualified for preclearance, the Department or the court looked to whether the plan preserved “opportunity districts” (also called “ability-to-elect” districts, or “majority-minority” districts), that is, legislative districts where a racial minority group could elect a candidate of their choice. (This requirement is also called “non-retrogression,” as in “non-retrogression of minority voting districts.”) This requirement meant that states had to take race into account when redistricting, at least to some extent, in order to preserve minority opportunity districts.

But it also meant that both parties could use racial redistricting under the VRA as a cover for enhancing their own political power. Thus, Republicans could “pack” racial minorities into opportunity districts in order to reduce minority influence in other, non-opportunity districts. This tactic, done in the name of compliance with the VRA (putatively to preserve opportunity districts), in reality only concentrated minority voting power in opportunity districts and created more and stronger non-opportunity Republican districts (because racial minorities often vote Democrat). Democrats, for their part, could use the non-retrogression requirement to maintain and strengthen opportunity districts (which often vote Democrat) or to disperse minority voters into non-opportunity districts, thus creating less safe Republican districts. (The Court set some guidelines for challenges to these kinds of practices last Term in Alabama Legislative Black Caucus v. Alabama, 135 S. Ct. 1257 (2015), discussed more below.) These are just two of the myriad ways that state legislatures can use race opportunistically, to improve political outcomes, and not necessarily to improve racial equality.

If Shelby County marks a triumph of politics over law, there is a quiet trio of cases this past Term that cuts the other way.
In order to reduce the influence of politics in redistricting, some states now reduce or eliminate the role of the state legislature and turn redistricting over to an independent redistricting commission. The Supreme Court validated this approach last Term in Arizona State Legislature v. Arizona Independent Redistricting Commission, 576 U.S. ___ (2015). But as the Arizona case itself illustrates, even “independent” redistricting often draws political complaints. (Indeed, as we are seeing now in Illinois, even a mere proposal to move to an independent redistricting model can be mired in politics.)

All this is to say that legislative redistricting is fraught with highly charged politics. And the cases involving redistricting thus threaten to draw the Court into raw political disputes—the same way that some say it was drawn into a political dispute in Shelby County. To its credit, however, the Court in three important, but under-emphasized, cases this Term has rebuffed attempts to draw it into these disputes. Two of these cases, Wittman v. Personhuballah (14-1504) and Harris v. Arizona Independent Redistricting Commission (14-232), involved challenges to redistricting plans that included VRA-compliance questions similar to those described above. The third case, Eocene v. Abbott (14-940), involved a challenge to the population basis for drawing districts. Each of these cases was highly political, and each had the potential to result in a sharply divided ruling from the Court that could have been seen as political. But the Court effectively ducked a political result, and rejected the invitation to use as a mere extension of ordinary politics.

Importantly, each of these three judgments was unanimous; and none involved the kind of split (in Shelby County, for example) that might suggest that the Court got drawn into a political dispute, or that the ruling was simply an extension of ordinary politics. Thus, if Shelby County seemed to mark a triumph of politics over the law in voting-rights cases at the Court, the three cases this Term cut exactly the other way. Indeed, in this Term’s three voting-rights cases, the Court flatly rebuffed any efforts to draw it into raw political disputes and to use the Court merely as an extension of politics.

Let’s take a look at these cases, one at a time.

**Wittman v. Personhuballah**

In Wittman, the unanimous Court ruled that certain members of the Virginia congressional delegation lacked standing to challenge the state’s congressional map based on alleged racial gerrymandering; and the Court dismissed the case. While not a ruling on the merits, Wittman is nevertheless an example of how the Court rebuffed a hotly political dispute. To see why this case was so political—and so fraught with the possibility of a political ruling from the Court—it helps to review the following complicated and lengthy facts.

Virginia redrew its congressional district map in order to account for population changes in the 2000 Census. The state, a covered jurisdiction under the preclearance requirement in the VRA, had only one opportunity district, Congressional District 3 (CD3), where racial minorities could elect a candidate of their choice. Before redistricting, CD3 had a black voting age population (BVAP) of 50.47 percent. But after redistricting, the BVAP increased to 53.1 percent. This was because the state shifted a number of black voters from CD4 into CD3 and CD5. DOJ precleared the plan.

After the 2010 Census, the state once again redrew its congressional districts. This time, CD3 was underpopulated by 63,976 citizens, so it needed additional citizens in order to reach the state’s benchmark population for compliance with the one-person, one-vote principle. (The one-person, one-vote principle says that districts have to include roughly equal populations, so that each person has roughly the same representation across districts.) Delegate Bill Janis introduced a plan that added population to CD3 and increased its BVAP from 53.1 percent to 56.3 percent.

Janis said that he based his plan on several criteria. These included complying with the one-person, one-vote principle, complying with the VRA rule against retrogression of minority voter influence, respecting the will of the Virginia electorate as reflected in the November 2010 elections, and maintaining current boundaries as much as possible. Throughout the floor debates on the plan, Janis repeatedly said that Section 5 of the VRA prohibited retrogression of minority voter influence, that compliance with Section 5 was “nonnegotiable,” and that compliance with the non-retrogression mandate was a “paramount concern” in drafting the plan.

The Virginia legislature failed to enact a plan in its 2011 special session. But Janis’s plan was reintroduced in the 2012 session (although Janis was no longer a member). At least two members of the legislature (Senators Locke and McEachin) protested that the plan packed black voters into CD3 and some surrounding districts, leaving them “essentially disenfranchised.” The House and Senate nevertheless passed the Janis plan, and the governor signed it. The plan maintained an 8-3 partisan division in favor of Republicans in the state and protected all incumbent members of Congress. DOJ precleared the plan in March 2012.

In October 2013, after Shelby County, Dawn Curry Page, Gloria Personhuballah, and James Farkas, three voters in CD3, sued, seeking to invalidate CD3 as a racial gerrymander. Republican members of Congress from districts surrounding CD3, including Representative Randy Forbes, Republican from CD4, intervened in the case to defend the plan.

The plaintiffs alleged that CD3 was designed to pack black voters in the district, which would dilute their influence in CD3 and in other districts. During trial, the plaintiffs called an expert, Dr. Michael McDonald, who testified that CD3 was drawn as a majority-black district for predominantly racial reasons. (McDonald based his conclusion in part on an Alternative Plan, produced by the plaintiffs, that resulted in a 50.1 percent BVAP in CD3. The parties disagreed over the meaning of the Alternative Plan and whether it supported McDonald’s conclusion.) The state called its own expert, John Morgan, who testified that CD3 was explainable by race-neutral factors of politics and incumbency protection.

Importantly, evidence suggested the General Assembly applied a 55 percent BVAP floor in drawing CD3. In particular, some evidence showed that at least some in the legislature thought that CD3 needed a 55 percent BVAP in order to pass DOJ preclearance under
the VRA. (Remember, the state created CD3 before the Court ruled in *Shelby County.*)

The district court, by a 2-1 vote, concluded that CD3 was an unconstitutional racial gerrymander and enjoined the state from conducting any further congressional elections under the 2012 plan. The intervenors appealed, and the Supreme Court vacated the district court’s judgment and remanded the case in light of *Alabama Legislative Black Caucus v. Alabama.* (Alabama Legislative Black Caucus involved the same kind of challenge to a similar plan, which also packed black voters into a district supposedly to comply with Section 5 of the VRA. The Court held that the lower court used an incorrect standard for judging this kind of case and provided guidance for applying the correct standard. As discussed below, a portion of this ruling is relevant here.)

On remand, the district court again ruled 2-1 that CD3 was an unconstitutional racial gerrymander. The court wrote that the “legislative record here is replete with statements indicating that race was the legislature’s paramount concern in enacting the 2012 Plan,” and that the legislature had impermissibly used “a 55% BVAP floor” in redrawing CD3. (Because race predominated in redrawing CD3, the court applied strict scrutiny. The court held that compliance with Section 5 was a compelling state interest, but that the state’s use of race to increase the BVAP from 53.1 percent to 56.3 percent was not narrowly tailored to avoid retrogression in CD3. That’s because Congressman Bobby Scott, “a Democrat supported by the majority of African-American voters,” had been repeatedly reelected under the prior BVAP by large margins, demonstrating that the state did not need an increased BVAP to maintain the district as an opportunity district.) The intervenors appealed again to the Supreme Court.

Meanwhile, the remedial phase of the litigation proceeded in the district court. The court invited the parties and any interested non-parties to propose plans and appointed Dr. Bernard Grofman as special master to review them. Grofman rejected the proposed plans and recommended his own. The court found that the Grofman plan cured the racial gerrymander by redrawing CD3 according to neutral districting criteria, and not race. The court also found that the plan complied with the VRA, despite the drop in CD3’s BVAP (to 45.3 percent), because the lower BVAP combined with significant white-crossover voting preserved “African-American voters’ ability to elect the representative of their choice.”

The court-ordered plan also changed CD4. The plan increased the BVAP in CD4 from 31.3 percent to 40.9 percent, creating a “realistic possibility,” according to Grofman, that black voters could elect a candidate of their choice. The plan also increased Democratic representation (as measured by the election results for the 2012 Presidential election) from 48.8 percent to 60.9 percent, turning a “safe seat for the Republican incumbent” into a “competitive” district, according to Grofman.

The intervenors again appealed to the Supreme Court. But by the time the case reached the Court, only three of the ten current and former members of Congress who intervened in the suit continued to maintain that they had standing: Representatives Randy Forbes, Robert Wittman, and David Brat. Republican Representative Forbes argued that unless the Enacted Plan were upheld, his district, District 4, would be “completely transform[ed] from a 48% Democratic district into a safe 60% Democratic district,” and that this change compelled him to run in a different district, District 2. (Representative Forbes’s attorney told the Court at oral argument that, if the Enacted Plan were reinstated, Representative Forbes would abandon his campaign in District 2 and run in his old district, District 4. But the attorney later wrote to the Court that Representative Forbes would continue to run in District 2, regardless of whether the Enacted Plan were reinstated.) Representatives Wittman and Brat each argued that unless the Enacted Plan were reinstated, “a portion of the [ir] ‘base electorate’” would be replaced with “unfavorable Democratic voters,” thus reducing their chances of reelection.

The case was thus loaded with politics. And it threatened to pull the Court into a highly charged political dispute, with the threat of a ruling that could be seen as an extension of these politics. But the Court avoided that result, by dismissing the case because the intervenors lacked standing. In particular, Justice Breyer, writing for a unanimous Court, wrote that Representative Forbes could not show that a favorable court ruling would redress his harm, because even if a court reinstated the Enacted Plan, Representative Forbes would continue to run in District 2. He wrote that Representatives Wittman and Brat failed to allege a harm, because they did not produce any evidence that an alternative to the Enacted Plan (including the Remedial Plan) would reduce their chances of reelection. (Justice Breyer noted that the briefs focused on Districts 3 and 4, but that those districts had nothing to do with Representatives Wittman’s and Brat’s chances of re-elections in their districts, Districts 1 and 7, respectively.) Without a cognizable and redressable harm, the intervenors lacked standing to sue. And without a plaintiff or intervenor who had standing to sue, the Court dismissed the case, effectively dodging the highly charged merits.

**Wittman threatened to pull the Court into a highly charged political dispute, with the threat of a ruling that could be seen as an extension of politics.**

**Evenwel v. Abbott**

In *Evenwel v. Abbott,* the Court rebuffed a claim that the state of Texas violated the one-person, one-vote principle when it used the total population of each district (and not the populations of eligible voters in each district) to draw legislative boundaries. Like *Wittman, Evenwel* was fraught with politics, barely veiled by a feeble constitutional claim that cut against nearly all precedent and practice. Again, the Court avoided being drawn into a political thicket, and avoided a ruling that could have been seen as merely an extension of ordinary politics.

The case arose when Sue Evenwel and Edward Pfenninger, voters in Texas Senate Districts 1 and 4, respectively, sued the state, arguing that Texas’s districting scheme violated the one-person, one-vote principle of the Equal Protection Clause. Texas, like all other states, draws its state legislative districts so that each district includes roughly the same size total population, based on U.S. Census data. (Texas Senate districts include a larger total population than Texas House districts. But all Senate districts are roughly equal, and all

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House districts are roughly equal. For more details on Texas Senate districts, including maps, check out the Texas Legislative Council website, at http://www.tlc.state.tx.us/redist/districts/senate.html. Similar information on Texas House districts is available at http://www.tlc.state.tx.us/redist/districts/house.html.

But Evenwel and Pfenninger argued that Texas’s apportionment of Senate districts based on total population diluted their votes in relation to voters in other Senate districts. They claimed that the state should instead draw districts based on eligible voter population. (Note that the plaintiffs only challenged the way Texas drew its state legislative districts, and not the way it drew its U.S. House of Representative districts. The Constitution itself prescribes the proper base for the apportionment of U.S. House seat among the states—Article I, Section 2, and the Fourteenth Amendment require apportionment based on total population—and Texas uses total population to draw U.S. House districts within the state. Texas’s districting of U.S. House seats was not at issue.)

Evenwel and Pfenninger’s claim was political, especially in a state like Texas, with significant numbers of non-citizens. Here’s why: Districting based on total population tends to benefit urban areas, where more non-citizens (and thus ineligible voters) live. And urban areas tend to lean Democratic. On the other hand, districting based on voter-eligible population would tend to benefit rural areas, where fewer non-citizens (and thus ineligible voters) live. Rural areas tend to lean Republican. A shift from districting based on total population to districting based on voter-eligible population would also shift power away from urban areas to rural areas, and away from Democrats to Republicans. In other words, Evenwel and Pfenninger weren’t just arguing about fairness in representation. They were also arguing about political power.

But a unanimous Supreme Court rejected their arguments and held that Texas could draw its legislative districts based on total population. Justice Ginsburg wrote for the Court that constitutional history, the constitutional text, the Court’s precedents, and the states’ practices all said that districting based on total population did not violate the one-person, one-vote principle of the Equal Protection Clause. The Court rejected the plaintiffs’ efforts to move away from this time-tested result merely to promote their raw political claims. (Justice Thomas concurred, arguing that the Court “has never provided a sound basis for the one-person, one-vote principle.” Justice Alito also concurred, arguing that the nature of representation is difficult and complex, and that there was no need for the Court to say whether a state could use some criterion other than total population as the basis to equalize districts. Still, despite the concurrences, the Court was unanimous on the central holding: A state may draw its districts based on total population.)

The Court thus again avoided being pulled into a hotly contested political dispute, and potentially issuing a ruling that could be seen as merely an extension of ordinary politics. **Harris v. Arizona Independent Redistricting Commission**

Finally, in **Harris v. Arizona Independent Redistricting Commission**, the Supreme Court rejected a claim that the Arizona Independent Redistricting Commission impermissibly used race and politics to draw legislative boundaries and thus violated the one-person, one-vote rule. Like **Wittman**, the case raised questions of race-based redistricting under the VRA. And like **Wittman** and **Evenwel**, the case was fraught with politics. But yet again, in **Harris**, the Court rebuffed an attempt to draw it into this political dispute, and avoided the possibility of a ruling that could be seen as political.

The case involved redistricting by the Arizona Independent Redistricting Commission. The Commission is an independent, bipartisan board charged with drawing legislative district boundaries within the state. It is comprised of five citizens—two Republicans, two Democrats, and one unaffiliated with either major party. (As mentioned above, the Court held last Term in **Arizona State Legislature v. Arizona Independent Redistricting Commission** that the state could use an independent commission [and not the state legislature] to draw legislative districts.)

After the 2010 Census, the Commission set out to reapportion state legislative districts. The Commission initially created two alternative districting maps, called “grid maps,” and then selected one of them to move forward. The selected grid map had a population deviation of 4.07 percent—that is, the total populations between districts deviated as much as 4.07 percent. (Arizona’s immediately preceding districts, based on the 2000 Census, had a deviation less than 2.5 percent, so this new deviation marked a significant increase.)

The Commission then adjusted the draft grid map in accordance with state constitutional requirements and, on advice of its counsel, to gain preclearance under the VRA. In particular, the Commission adjusted the map to create ten opportunity districts. These adjustments resulted in a greater population deviation between districts as compared to the initial draft grid map.

The Commission also adjusted the draft map for partisan reasons. In particular, the Commission increased the population in certain Republican districts, diluting voter strength in those districts relative to voter strength in other districts. Still, the map gave Republicans slightly more than their proportionate share of seats in the state legislature.

In January 2012, the Commission voted to approve the final adjusted map by a 3-2 vote, with both Republican Commissioners voting against. The final adjusted map included 12 under-populated districts and 18 over-populated districts, in relationship to the perfectly equal-population ideal. The maximum deviation between districts was 8.8 percent; the average deviation was 2.2 percent. In April 2012, the Attorney General precleared the plan under the VRA. The first election cycle using the map occurred later that year.

Arizona voters sued the Commission, arguing that the map violated the one-person, one-vote principle of the Equal Protection Clause. A three-judge district court rejected their arguments. The court noted initially that the population deviations in the final map fell under 10 percent, and that the plaintiffs therefore failed to make out a prima facie case of discrimination. The court then assumed without deciding that partisanship is not a legitimate reason to
deviate from population equality. But the court went on to say that the population deviations in the final map correlated with both (1) efforts to comply with the VRA and (2) party affiliation. Between the two explanations, the court wrote, “the population deviations were primarily a result of good-faith efforts to comply with the [VRA] … even though partisanship played some role.” While the court found that “some of the commissioners were motivated in part in some of the line-drawing decisions by a desire to improve Democratic prospects in the affected districts,” it concluded that “compliance with federal voting rights law was the predominant reason for the deviations.” As a result, the court rejected the plaintiffs’ claims and upheld the Commission’s map. The plaintiffs appealed directly to the Supreme Court.

The Court affirmed. Justice Breyer, writing for a unanimous Court, said that the deviation fell below the 10 percent threshold, and that the plaintiffs failed to demonstrate that illegitimate redistricting criteria predominated. He wrote that compliance with the VRA (in particular, achieving non-retrogression) was a legitimate redistricting criterion that could justify the deviation, and that the evidence supported the conclusion that compliance with the VRA was the predominant consideration. “[A]s a result, appellants have not shown that it is more probable than not that illegitimate considerations were the predominant motivation behind the plan’s deviations from mathematically equal district populations—deviations that were under 10%. Consequently, they have failed to show that the Commission’s plan violates the Equal Protection Clause ….” The Court rejected the plaintiffs’ argument that compliance with the VRA was an impermissible race-based redistricting criterion, that the Court should reject the 10 percent threshold for presumptively valid population deviations between districts, and that political considerations predominated in this case (although the Court was careful to hold off on saying that political considerations were necessarily impermissible).

The Court thus yet again avoided being drawn into a highly charged political dispute, this time by reaffirming long-standing principles of redistricting law (like the 10 percent threshold) and affirming that compliance with the VRA was a valid redistricting criterion that could justify minor deviations from perfect population equality between districts.

**Conclusion**

Voting rights cases are nearly always laden with political consideration. This is especially true for redistricting cases, where the stakes are quite high, where the implications are long-lasting and self-reinforcing, and where redistricting likely includes an important racial component, especially for covered jurisdictions after the 2010 Census, before *Shelby County*.

This means that cases challenging redistricting threaten to draw the Court into hotly contested political disputes, and raise the possibility that the Court’s rulings will be seen as merely an extension of ordinary politics. Some see *Shelby County* itself as a paradigmatic example of politics spilling into the Court’s jurisprudence—as an example of the triumph of politics over the law in voting rights cases at the Court.

But if this is true, the three redistricting cases this Term provide powerful counterexamples. In these three cases—unanimous all—the Court effectively rebuffed attempts to draw it into raw political disputes and to use it as a mere extension of ordinary politics. Instead, the Court’s careful legal reasoning says that in these redistricting cases, the law triumphs.

While three cases in a single Term do not necessarily set a trend, these cases should give some hope to anyone (on either side) who sees the Court as just another political institution that can be used to advance a particular political agenda.

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PREVIEW of United States Supreme Court Cases, pages 300–304. © 2016 American Bar Association.
At first glance, the Supreme Court seems to be set up for a quiet next Term. The justices have been somewhat slow in granting certiorari—there are currently only 31 cases slated for oral argument. And the numbers only tell half the story; a review of the docket shows the justices turning away from headline-grabbing issues such as affirmative action, abortion, and the death penalty, turning instead toward cases focusing on technical subjects and terms such as “laches” and “pleading standards.” However, a deeper review of the cases set for 2016 shows a surprising trend: many of the issues the Court tackled not long ago have bubbled back up again.

Redistricting Reheard
In recent years, the Court has frequently delved into the nitty-gritty of drawing and redrawing electoral districts, and the 2016 Term seems to be no different. In 2015, the Court disposed of three election law cases, each dealing with a slightly different nuance on how voting districts are defined or eligible voters counted. Two cases already before the Court for the next Term turn its attention back to the issue of electoral districts. McCrory v. Harris (15-1262) and Bethune-Hill v. Virginia State Board of Elections (15-680) both present the Court with the issue of the proper level of review for a lower court in deciding an allegation of racial gerrymandering in Virginia and North Carolina.

Fair Housing Act—Back in the Spotlight
At the end of the 2014–2015 Term, the Court issued a major win for fair housing advocates when it ruled that disparate impact claims were permissible under the Fair Housing Act (FHA). wheel. The ruling was a win for civil rights groups as it firmed up an important legal tool for fighting allegations of discrimination in housing. The Court itself acknowledged the Act’s “continuing role in moving the Nation toward a more integrated society[.]”

Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc., 576 U.S. ___. Commentators at the time noted that the holding was unexpected and “an unlikely conclusion to a years-long effort by opponents of the Civil Rights-Era law to reduce its effectiveness against housing policies and practices used by many builders, lenders and insurers.” Wolf, Richard. Supreme Court Upholds Housing Discrimination Law, www.usatoday.com, June 25, 2015. The ruling was a win for civil rights groups as it firmly up an important legal tool for fighting allegations of discrimination in housing. The Court itself acknowledged the Act’s “continuing role in moving the Nation toward a more integrated society[].”

The Jury Is Still Out
Last Term, the Court directly addressed the issue of racial discrimination in jury voir dire. In the case of Foster v. Chatman, 578 U.S. ___ (2016), the Court was presented with a fairly stark case of racially motivated jury selection when subsequent evidence revealed that the prosecutors had used a coded system in their voir dire notes. In writing for the majority, Chief Justice Roberts said that the evidence left the majority with the “firm conviction” that at least some of the perspective juror strikes were “motivated in substantial part by discriminatory intent.”

This year the docket includes a slightly different twist on racial discrimination as it applies to juries, this time, to an alleged bias during the deliberation process. Peña-Rodríguez v. Colorado (15-606) presents the Court with a unique question: can the traditional secrecy applied to jury deliberations be terminated due to an allegation of extreme racial bias? Specifically, Miguel Angel Peña-Rodríguez alleged that during the jury deliberations for his trial of sexual assault, one juror expressed a severe racial bias against individuals of Mexican heritage. After learning of these alleged comments, Peña-Rodríguez claimed his Sixth Amendment right to an impartial jury had been violated. The Court is now asked to answer a more foundational question: does the no-impeachment rule, which prevents jurors from testifying after a verdict about what happens during deliberations, bar the review of this evidence all together?

While the upcoming Term may lack some of the fireworks of recent blockbuster sessions, it will likely clear up a number of long-festering technical legal questions, the answer to which may impact key areas of the law.

Mix of Priorities Rounds Out the Docket
In addition to those cases that wade back into recently decided issues, the upcoming Term contains a variety of new topics, including:

- Class Actions: In Microsoft, Corp. v. Baker (15-457) the Court will answer whether a federal court of appeals has jurisdiction to review an order denying class certification after the named plaintiffs voluntarily dismiss their claims with prejudice.
- First Amendment: Trinity Lutheran Church of Columbia v. Pauley (15-577) presents the Court with the issue of whether the exclusion of churches from an otherwise neutral and secular aid program violates the Free Exercise and Equal Protection Clauses when the state has no valid Establishment Clause concern.
- Patent Law: Samsung Electronics Co. v. Apple (15-777) asks the Court to decide whether, when a design patent is applied to only a component of a product, an award of infringer’s profits should be limited to those profits attributable to the component.
This chart shows the breakdown of majority opinion authorship by justice.
Abortion Rights

*Whole Women’s Health v. Hellerstedt*

Docket No. 15-274
Reversed and Remanded: The Fifth Circuit

Argued: March 2, 2016
Decided: June 27, 2016
Analysis: ABA PREVIEW 194 Issue 5

**Overview:** Texas H.B. 2 required abortion doctors to have admitting privileges at a local hospital. It also required abortion clinics to meet the stringent standards of ambulatory surgical centers. The requirements, if upheld, could have forced 75 percent of the abortion clinics in Texas to close, leaving just nine clinics in metropolitan areas and creating an access problem for many Texas women. Texas claimed that it adopted the requirements to protect women’s safety. But abortion providers claimed that the requirements did nothing to protect safety, and that they were really designed to shut down abortion clinics in the state.

**Issue:** Does a state law that requires abortion doctors to have admitting privileges at a local hospital and that requires abortion clinics to meet the standards for ambulatory surgical centers create an undue burden on a woman’s right to an abortion before a fetus’s viability outside the womb?

**Yes.** Both the admitting-privileges and the surgical-center requirements place a substantial obstacle in the path of women seeking a previability abortion, constitute an undue burden on abortion access, and thus violate the Constitution.

**From the opinion by Justice Breyer** (joined by Justices Kennedy, Ginsburg, Sotomayor, and Kennedy): More fundamentally, in the face of no threat to women’s health, Texas seeks to force women to travel long distances to get abortions in crammed-to-capacity super facilities. Patients seeking these services are less likely to get the kind of individualized attention, serious conversation, and emotional support that doctors at less taxed facilities may have offered. Healthcare facilities and medical professionals are not fungible commodities. Surgical centers attempting to accommodate sudden, vastly increased demand … may find that quality of care declines. Another commonsense inference that the District Court made is that these effects would be harmful to, not supportive of, women’s health. …

**Concurring:** Justice Ginsburg

**From the dissenting opinion by Justice Thomas:** Today’s decision will prompt some to claim victory, just as it will stiffen opponents’ will to object. But the entire Nation has lost something essential. The majority’s embrace of a jurisprudence of rights-specific exceptions and balancing tests is “a regrettable concession of defeat—an acknowledgement that we have passed the point where ‘law,’ properly speaking, has any further application.”


**From the dissenting opinion by Justice Alito** (joined by Chief Justice Roberts and Justice Thomas): The constitutionality of laws regulating abortion is one of the most controversial issues in American law, but this case does not require us to delve into that contentious dispute. Instead, the dispositive issue here concerns a workaday question that can arise in any case no matter the subject, namely, whether the present case is barred by res judicata. As a court of law, we have an obligation to apply such rules in a neutral fashion in all cases, regardless of the subject of the suit. If anything, when a case involves a controversial issue, we should be especially careful to be scrupulously neutral in applying such rules. The Court has not done so here. On the contrary, determined to strike down two provisions of a new Texas abortion statute in all of their applications, the Court simply disregards basic rules that apply in all other cases.

Antiterrorism and Effective Death Penalty Act

*Woods v. Etherton*

Docket No. 15-723
Reversed: The Sixth Circuit

Argued: N/A
Decided: April 4, 2016
Analysis: N/A

**Overview:** Based on an anonymous tip, police stopped Timothy Etherton for speeding; a search of the car uncovered cocaine and Etherton was subsequently charged with intent to deliver cocaine. During the trial, three of the police officers described the content of the tip. After being convicted, Etherton appealed on the basis that the admission of the anonymous tip violated his rights under the Sixth Amendment.

**Issue:** Did the lower court err when it ruled that the defendant’s counsel was constitutionally ineffective when it failed to object to the admission of testimony regarding an anonymous tip?

**Yes.** Under the Antiterrorism and Effective Death Penalty Act (AEDPA), both the state appellate court and the defendant’s counsel should be afforded the benefit of the doubt in determining the possible reasons for determining whether to object to the admission of testimony regarding an anonymous tip.

**From the per curiam opinion:** In reaching these conclusions, the Sixth Circuit did not apply the appropriate standard of review under AEDPA. A “fairminded jurist” could conclude that repetition of the tip did not establish that the uncontested facts it conveyed were submitted for their truth. Such a jurist might reach that conclusion by placing weight on the fact that the truth of the facts was not disputed. No precedent of this Court clearly forecloses that view. It is also not beyond the realm of possibility that a fairminded jurist could conclude that Etherton was not prejudiced when the tip and Pollie’s [the other passenger in the car] testimony corresponded on uncontested facts. After all, Pollie himself was privy to all the information contained in the tip. A reasonable judge might accordingly regard
the fact that the tip and Pollie’s testimony corresponded to be unremarkable and not pertinent to Pollie’s credibility.

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**Appellate Procedure**  
**Johnson v. Lee**  
**Docket No. 15-789**  
**Reversed and Remanded:** The Ninth Circuit

**Argued:** N/A  
**Decided:** May 31, 2016  
**Analysis:** N/A

**Overview:** California, like all states, requires criminal defendants to raise available claims on direct appeal; this procedural rule is referred to as the “Dixon bar.” Respondent was convicted of two counts of first-degree murder and sentenced to life without the possibility of parole. Respondent unsuccessfully raised four claims on direct appeal; skipping state post-conviction review, respondent next filed the federal habeas petition at issue, raising mostly new claims. The Ninth Circuit held that the lower court’s application of the Dixon bar was irregular and inadequate to bar federal habeas review of respondent’s claims.

**Issue:** Did the Ninth Circuit err when it held that the “Dixon bar” is inadequate to bar federal habeas review?

**Yes.** Because California’s procedural bar is long-standing, oft-cited, and shared by habeas courts across the nation, the Ninth Circuit was incorrect in ruling that the Dixon bar is inadequate to bar federal habeas review of respondent’s claims.

**From the per curiam opinion:** California’s Dixon bar satisfies both adequacy criteria. It is “firmly established” because, decades before Lee’s June 1999 procedural default, the California Supreme Court warned defendants in plain terms that, absent “special circumstances,” habeas “will not lie where the claimed errors could have been, but were not, raised upon a timely appeal from a judgment of conviction.” … And the California Supreme Court eliminated any arguable ambiguity surrounding this bar by reaffirming Dixon in two cases decided before Lee’s default. See *In re Harris*, 5 Cal. 4th 813 (1993); *In re Robbins*, 18 Cal. 4th 770 (1998).

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**Appellate Procedure**  
**Kernan v. Hinojosa**  
**Docket No. 15-833**  
**Reversed: The Ninth Circuit**

**Argued:** N/A  
**Decided:** May 16, 2016  
**Analysis:** N/A

**Overview:** Respondent, Antonio Hinojosa, was serving a prison term for armed robbery when California prison officials “validated” him as a prison-gang associate and placed him in a secure housing unit. California subsequently passed a law preventing prisoners placed in secure housing due to their gang association from continuing to accrue “good-time credits.” Hinojosa sued claiming that the application of the new law violated the prohibition of ex post facto laws. The state court ruled that it was not the proper venue to hear Hinojosa’s motion. The Ninth Circuit determined that the lower court decision was not “on the merits,” and therefore the court was not bound by the Antiterrorism and Effective Death Penalty Act’s (AEDPA)’s deferential review requirements. The Ninth Circuit subsequently granted Hinojosa’s petition.

**Issue:** Was the Ninth Circuit correct when it ruled that the lower court’s summary denial of the respondent’s habeas petition was not “on the merits” and therefore not eligible to the Antiterrorism and Effective Death Penalty Act’s (AEDPA)’s deferential review?

**No.** The Ninth Circuit should have reviewed the respondent’s ex post facto claim through the AEDPA’s deferential lens.

**From the per curiam opinion:** In *Ylst v. Nunnemaker*, 501 U.S. 797 (1991), we said that where “the last reasoned opinion on the claim explicitly imposes a procedural default, we will presume that a later decision rejecting the claim did not silently disregard that bar and consider the merits.” … We adopted this presumption because “silence implies consent, not the opposite—and courts generally behave accordingly, affirming without further discussion when they agree, not when they disagree, with the reasons given below.” … But we pointedly refused to make the presumption irrebuttable; “strong evidence can refute it.” … It is amply refuted here.

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**Appellate Procedure**  
**White v. Wheeler**  
**Docket No. 14-1372**  
**Reversed and Remanded:** The Sixth Circuit

**Argued:** N/A  
**Decided:** December 14, 2015  
**Analysis:** N/A

**Overview:** During jury selection for the petitioner’s trial for two murders, the trial court excused a juror for an inability to be neutral on the imposition of the death penalty. During questioning, the juror gave equivocal and inconsistent answers regarding the death penalty. The trial judge did not immediately grant the prosecution’s motion to exclude this juror; the following day, the judge indicated she had reconsidered the juror’s comments and would excuse him. The Court of Appeals determined that in excusing the juror, the lower court had violated the Sixth and Fourteenth Amendments.

**Issue:** Did the Court of Appeals fail to accord the correct level of deference to a state court judge’s decision to excuse a juror for cause?

**Yes.** By dismissing the trial judge’s consideration of a juror’s voir dire testimony, the Court of Appeals failed to apply the deference it was required to accord the state-court ruling.

**From the per curiam opinion:** And the implicit suggestion that a trial judge is entitled to less deference for having deliberated after her initial ruling is wrong.
In the ordinary case the conclusion should be quite the opposite. It is true that a trial court’s contemporaneous assessment of a juror’s demeanor, and its bearing on how to interpret or understand the juror’s responses, are entitled to substantial deference; but a trial court ruling is likewise entitled to deference when made after a careful review of a formal transcript or recording. If the trial judge chooses to reflect and deliberate further, as this trial judge did after the proceedings recessed for the day, that is not to be faulted; it is to be commended.

Arbitration

DIRECTV, Inc. v. Imburgia

Docket No. 14-462
Reversed and Remanded:
The California Court of Appeal, Second District

Argued: October 6, 2015
Decided: December 14, 2015
Analysis: ABA PREVIEW 4 Issue 1

Overview: Respondent Amy Imburgia filed a class action complaint against petitioner DIRECTV in California court, alleging claims for unjust enrichment, declaratory relief, false advertising, and violation of various state statutes. Imburgia alleged that DIRECTV has improperly charged early termination fees to its customers. All DIRECTV customers, including Imburgia, signed a service agreement including a binding arbitration provision with a class-arbitration waiver. The agreements specified that it was unenforceable if the “law of your state” made class arbitration waivers unenforceable. At the time, California law, where Imburgia lived, made class arbitration waivers unenforceable; however, the U.S. Supreme Court consequently ruled that law was preempted by the Federal Arbitration Act. In this case, the Court was asked to determine whether a reference to state law in an arbitration agreement governed by the Federal Arbitration Act requires the application of state law preempted by the Federal Arbitration Act?

Yes. Because the California Court of Appeal’s interpretation is preempted by the Federal Arbitration Act, that court must enforce the arbitration agreement.

From the opinion by Justice Breyer (joined by Chief Justice Roberts and Justices Scalia, Kennedy, Alito, and Kagan): Taking these considerations together, we reach a conclusion that, in our view, falls well within the confines of (and goes no further than) present well-established law. California’s interpretation of the phrase “law of your state” does not place arbitration contracts “on equal footing with all other contracts,” … For that reason, it does not give “due regard … to the federal policy favoring arbitration.” … Thus, the Court of Appeal’s interpretation is pre-empted by the Federal Arbitration Act.

Dissenting: Justice Thomas
Dissenting: Justice Ginsburg (joined by Justice Sotomayor)

Attorney’s Fees

James v. City of Boise

Docket No. 15-493
Reversed and Remanded:
The Supreme Court of Idaho

Argued: N/A
Decided: January 25, 2016
Analysis: N/A

Overview: Supreme Court precedent held that a prevailing defendant in a civil rights lawsuit could only recover attorney’s fees if the plaintiff’s action was “frivolous, unreasonable, or without foundation.” The Idaho Supreme Court held it was not bound by this interpretation. The Idaho court, relying on federal law, awarded attorney’s fees without first determining whether the plaintiff’s action was “frivolous, unreasonable, or without foundation.”

Issue: Can a state court award attorney’s fees to a civil rights defendant based on federal law without first determining whether the plaintiff’s action was “frivolous, unreasonable, or without foundation?”

No. State and federal courts are bound by the Supreme Court’s interpretation of federal law.

From the per curiam opinion: As Justice Story explained 200 years ago, if state courts were permitted to disregard this Court’s rulings on federal law, “the laws, the treaties, and the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states. The public mischiefs that would attend such a state of things would be truly deplorable.” Martin v. Hunter’s Lessee, 1 Wheat. 304 (1816).

Banking

Hawkins v. Community Bank of Raymore

Docket No. 14-520
Affirmed: The Eighth Circuit

Argued: October 5, 2015
Decided: March 22, 2016
Analysis: ABA PREVIEW 12 Issue 1

Overview: Community Bank of Raymore (CBR) extended and renewed four loans over several years to a limited liability company. The member-owners of the limited liability company are a trust, by and through its trustees, and an individual. Valerie Hawkins (Hawkins) is married to the individual member-owner, Janice Patterson (Patterson), along with her husband, is a cotrustee and beneficiary of the trust. Patterson and Hawkins (collectively, the Wives) serve as guarantors of the loans. The loans defaulted and CBR demanded immediate payment from all parties. The Wives filed suit against CBR for marital discrimination under the Equal Credit Opportunity Act (ECOA, or the Act), alleging that they were required to sign as guarantors on the loans due to their marital status. The district court granted summary judgement to CBR, concluding that the Wives lacked standing under the ECOA because they were not “applicants” as defined in the Act. The district court further determined that it would not be necessary to defer to the definition of “applicant” provided in Regulation B, the implementing statute for the Act, because the term as defined by the Act was not ambiguous.

Issue: Does the ECOA’s definition of “applicants” include guarantors?
The term "actual fraud" in section 523(a)(2)(A) of the Bankruptcy Code section 523(a)(2)(A) for debts arising from "actual fraud" require the debtor to have made a false representation.

From the opinion by Justice Sotomayor

(Joining by Chief Justice Roberts and Justices Kennedy, Breyer, Alito, and Kagan): Although "fraud" connotes deception or trickery generally, the term is difficult to define more precisely. See 1 J. Story, Commentaries on Equity Jurisprudence § 189, p. 221 (6th ed. 1853) (Story) ("Fraud ... being so various in its nature, and so extensive in its application to human concerns, it would be difficult to enumerate all the instances in which Courts of Equity will grant relief under this head"). There is no need to adopt a definition for all times and all circumstances here because, from the beginning of English bankruptcy practice, courts and legislatures have used the term "fraud" to describe a debtor's transfer of assets that, like Ritz' scheme, impairs a creditor's ability to collect the debt.

Dissenting: Justice Thomas

From the opinion by Justice Thomas

(Joining by Chief Justice Roberts and Justices Kennedy, Breyer, and Kagan): As discussed, a State's role under the gateway provision is to do just that: The State must define (or "decide upon") which entities may seek Chapter 9 relief. Barring Puerto Rico from defining who may be a debtor under chapter 9 is tantamount to barring Puerto Rico from "specifically authorizing" which municipalities may file Chapter 9 petitions under the gateway provision. The amended definition of "State" unequivocally excludes Puerto Rico as a "State" for purposes of the gateway provision. The text of the definition extends no further. The exception excludes Puerto Rico only for purposes of the gateway provision. Puerto Rico is no less a "State" for purposes of the pre-emption provision than it was before Congress amended the definition. The Code's pre-emption provision has prohibited States and Territories defined as "States" from enacting their own municipal bankruptcy schemes for 70 years... Had Congress intended to "alter th[is] fundamental detail" of municipal bankruptcy, we would expect the text of the amended definition to say so. Whitman v. American Trucking Assns., Inc., 531 U. S. 457 (2001). Congress "does not, one might say, hide elephants in mouseholes."

Dissenting: Justice Sotomayor (joined by Justice Ginsburg)

Taking no part in consideration or decision: Justice Alito
Overview: Stockholders, former employees of Amgen, Inc., participated in individual account plans offering ownership in employer stock as an option to employees. The value of Amgen stock subsequently fell and the stockholders filed a class action suit against petitioner fiduciaries alleging that they breached their fiduciary duties. The Ninth Circuit reversed the lower court’s decision to grant the fiduciaries’ motion to dismiss, based on its conclusion that removing Amgen stock from the list of investment options was a plausible alternative.

Issue: Did the Ninth Circuit err when it held that respondent stockholders’ complaint states a claim against petitioner fiduciaries for breach of the duty of prudence?

Yes. The district court, in the first instance, should determine whether stockholders may amend their complaint in order to adequately plead a claim for breach of the duty of prudence.

From the per curiam opinion: The Ninth Circuit’s proposition that removing the Amgen Common Stock Fund from the list of investment options was an alternative action that could plausibly have satisfied Fifth Third’s standards may be true. If so, the facts and allegations supporting that proposition should appear in the stockholders’ complaint. Having examined the complaint, the Court has not found sufficient facts and allegations to state a claim for breach of the duty of prudence.

Civil Procedure
Amgen, Inc. v. Harris
Docket No. 15-278
Reversed and Remanded: The Ninth Circuit

Argued: N/A
Decided: January 25, 2016
Analysis: N/A

Overview: Petitioner, a trooper with the Texas Department of Public Safety (DPS), was involved in a car chase attempting to detain Israel Leija Jr., whose estate was the respondent before the Court. Leija led police on an 18-minute chase reaching speeds of 110 miles per hour. Petitioner fired at the car six times, killing Leija. Respondent sued petitioner under 42 U.S.C. § 1983, alleging a violation of Fourth Amendment. The lower courts denied petitioner’s motion for summary judgment, finding that there was a genuine issue of fact as to whether petitioner had acted recklessly.

Issue: Did the lower court err in finding that petitioner was not entitled to qualified immunity because a reasonable officer would have known that shooting at a car during a high-speed chase, absent a sufficiently substantial and immediate threat, would violate the Fourth Amendment?

Yes. The Court’s precedent has never found the use of deadly force in connection with a dangerous car chase to violate the Fourth Amendment nor as a basis for denying qualifying immunity.

From the per curiam opinion: In any event, none of our precedents “squarely governs” the facts here. Given Leija’s conduct, we cannot say that only someone “plainly incompetent” or who “knowingly violate[s] the law” would have perceived a sufficient threat and acted as Mullenix [the trooper] did.

Concurring: Justice Scalia
Dissenting: Justice Sotomayor

Civil Procedure
Mullenix v. Luna
Docket No. 14-1143
Reversed: The Fifth Circuit

Argued: N/A
Decided: November 9, 2015
Analysis: N/A

Overview: Respondents, employees of petitioner Tyson Foods’ pork processing plant, sued for overtime compensation for the time spent donning and doffing protective gear. The Supreme Court was asked to decide whether a court may certify a class action under Federal Rule of Civil Procedure 23(b)(3) or a collective action under the Fair Labor Standards Act, determining the defendant’s liability and damages through representative proof based on statistical methodology. The Court was also asked to address whether courts may certify such actions where some class members allegedly have sustained no injuries and have no right to damages.

Issue: May a court determine whether a class or collective action may be certified where numerous class members allegedly have suffered no injury and have no right to damages?

Yes. A district court does not commit error in certifying and maintaining a class if it relies on a reasonable statistical sample to determine whether the common question is susceptible to class-wide resolution even if not all the class members have relevant same experiences.

From the opinion by Justice Kennedy (joined by Chief Justice Roberts and Justices Ginsburg, Breyer, Sotomayor, and Kagan): Once a district court finds evidence to be admissible, its persuasiveness is, in general, a matter for the jury. Reasonable minds may differ as to whether the average time Mericle calculated is probative as to the time actually worked by each employee. Resolving that question, however, is the near-exclusive province of the jury. The District Court could have denied class certification on this ground only if it concluded that no reasonable juror could have believed that the employees spent roughly equal time donning and doffing. Cf. Anderson v. Liberty Lobby, Inc.,
requirement. The only limit to § 1997e(a)’s exception onto the PLRA’s exhaustion is an unwritten “special circumstances” exception. Courts may not engraft this exception onto the text and history of the PLRA. The Fourth Circuit’s “special circumstances” exception to the PLRA is inconsistent with the text and history of the PLRA. No. The Fourth Circuit’s “special circumstances” exception is inconsistent with the text and history of the PLRA.

From the opinion by Justice Kagan (joined by Chief Justice Roberts and Justices Kennedy, Ginsburg, Alito, and Sotomayor): Courts may not engraft an unwritten “special circumstances” exception onto the PLRA’s exhaustion requirement. The only limit to § 1997e(a)’s mandate is the one baked into its text: An inmate need exhaust only such administrative remedies as are “available.” On remand, the court below must consider how that modifying term affects Blake’s case—that is, whether the remedies he failed to exhaust were “available” under the principles set out here.

Concurring in part and in judgment: Justice Thomas

Concurring in part: Justice Breyer

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Copyright Act
Kirtsaeng v. John Wiley & Sons, Inc.

Docket No. 15-375
Vacated and Remanded: The Second Circuit

Argued: April 25, 2016
Decided: June 16, 2016
Analysis: ABA PREVIEW 249 Issue 7

Overview: In this case, the Supreme Court was asked to determine what constitutes the appropriate standard for awarding attorney’s fees to a prevailing party under Section 505 of the Copyright Act of 1976. Section 505 states that a court “may award a reasonable attorney’s fee to the prevailing party” in a contested copyright claim. Specifically, the Court was asked to examine whether an award is an appropriate one, where the losing party has pursued an objectively reasonable claim under the relevant factual circumstances.

Issue: Is an award of attorney’s fees under Section 505 of the Copyright Act of 1976 appropriate if the losing party has pursued an objectively reasonable claim under copyright law?

Yes. When deciding whether to award attorney’s fees under Section 505, a district court should give substantial weight to the objective reasonableness of the losing party’s position, while still taking into account all other circumstances relevant to granting fees.

From the unanimous opinion by Justice Kagan: The objective-reasonableness approach that Wiley favors passes that test because it both encourages parties with strong legal positions to stand on their rights and deters those with weak ones from proceeding with litigation. When a litigant—whether plaintiff or defendant—is clearly correct, the likelihood that he will recover fees from the opposing (i.e., unreasonable) party gives him an incentive to litigate the case all the way to the end. The holder of a copyright that has obviously been infringed has good reason to bring and maintain a suit even if the damages at stake are small; and likewise, a person defending against a patently meritless copyright claim has every incentive to keep fighting, no matter that attorney’s fees in a protracted suit might be as or more costly than a settlement. Conversely, when a person (again, whether plaintiff or defendant) has an unreasonable litigating position, the likelihood that he will have to pay two sets of fees discourages legal action. The copyright holder with no reasonable infringement claim has good reason not to bring suit in the first instance (knowing he cannot force a settlement and will have to proceed to judgment); and the infringer with no reasonable defense has every reason to give in quickly, before each side’s litigation costs mount. All of those results promote the Copyright Act’s purposes, by enhancing the probability that both creators and users (i.e., potential plaintiffs and defendants) will enjoy the substantive rights the statute provides.

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Criminal Forfeiture
Luis v. United States

Docket No. 14-419
Vacated and Remanded: The Eleventh Circuit

Argued: November 10, 2015
Decided: March 30, 2016
Analysis: ABA PREVIEW 71 Issue 2

Overview: Sila Luis was charged by indictment with paying and conspiring to pay illegal kickbacks for patient referrals, and conspiring to commit Medicare fraud. Although she has not yet been arraigned, the government obtained a preliminary injunction that bars her from using the proceeds derived from the alleged offenses, or “property of an equivalent value.” The injunction was intended to ensure that assets would remain available to satisfy the monetary judgment for forfeiture and restitution the government hopes to obtain.
should Luis be convicted. In this appeal, the Court was asked to decide: (1) whether the Sixth Amendment prohibits the pretrial restraint of assets unrelated to a charged criminal offense; (2) what standard of proof is required to justify such a restraint, if constitutionally permissible; and (3) whether the accused has a due process right to confront adverse witnesses at a hearing to determine whether an injunction freezing her assets should be entered.

**Issue:** Is a criminal defendant’s Sixth Amendment right to counsel of choice violated by a pretrial injunction that prohibits the defendant from using assets unconnected to any crime to retain private counsel?

**Yes.** The pretrial restraint of legitimate, untainted assets needed to retain counsel of choice violates the Sixth Amendment.

**From the opinion by Justice Breyer** (joined by Chief Justice Roberts and Justices Ginsburg and Sotomayor): The Government cannot, and does not, deny Luis’ right to be represented by a qualified attorney whom she chooses and can afford. But the Government would undermine the value of that right by taking from Luis the ability to use the funds she needs to pay for her chosen attorney. The Government points out that, while freezing the funds may have this consequence, there are important interests on the other side of the legal equation: It wishes to guarantee that those funds will be available later to help pay for statutory penalties (including forfeiture of untainted assets) and restitution, should it secure convictions. And it points to two cases from this Court, Caplin & Drysdale and Monsanto, which, in the Government’s view, hold that the Sixth Amendment does not pose an obstacle to its doing so here. In our view, however, the nature of the assets at issue here differs from the assets at issue in those earlier cases. And that distinction makes a difference.

**Concurring in judgment:** Justice Thomas

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

**Dissenting:** Justice Kagan

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**Criminal Law**  
**Lockhart v. United States**  
**Docket No. 14-8358**  
**Affirmed: The Second Circuit**

Argued: November 3, 2015  
Decided: March 1, 2016  
Analysis: ABA PREVIEW 64 Issue 2

**Overview:** Petitioner, Avondale Lockhart, was convicted under New York state law for first-degree sexual abuse for conduct involving his then 53-year-old girlfriend. Lockhart subsequently pled guilty to the possession of child pornography.

The presentencing report for the second conviction offered a guideline range of 78 to 97 months and concluded that Lockhart qualified for the maximum minimum sentence due to his prior conviction relating to “aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor.” The Court was asked to determine whether the phrase “involving a minor or ward” applies to all three listed crimes or only “abusive sexual conduct.”

**Issue:** In the federal sentencing statute for increasing the maximum minimum sentence for possession of child pornography, does the phrase “involving a minor or ward” modify all the items in the list of predicate crimes (“aggravated sexual abuse,” “sexual abuse,” and “abusive sexual conduct”)?

**No.** Under the federal statute for possession of child pornography, the phrase “involving a minor or ward” only applies to “abusive sexual conduct” and not all of the predicate crimes.

**From the opinion by Justice Sotomayor** (joined by Chief Justice Roberts, Justices Kennedy, Thomas, Ginsburg, and Alito): This case concerns that provision’s list of state sexual abuse offenses. The issue before us is whether the limiting phrase that appears at the end of that list—“involving a minor or ward”—applies to all three predicate crimes preceding it in the list or only the final predicate crime. We hold that “involving a minor or ward” modifies only “abusive sexual conduct.”

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**Criminal Law**  
**Musacchio v. United States**  
**Docket No. 14-1095**  
**Affirmed: The Fifth Circuit**

Argued: November 30, 2015  
Decided: January 25, 2016  
Analysis: ABA PREVIEW 114 Issue 3

**Overview:** Petitioner Michael Musacchio was convicted pursuant to 18 U.S.C. § 1030 (a)(2)(c), which makes it unlawful for individuals to intentionally access a protected computer without authorization or to intentionally exceed authorized access. The Court granted certiorari to consider whether the law-of-the-case doctrine requires the government to satisfy a heightened burden of proof because the district court, without objection, erroneously instructed the jury that it must find petitioner guilty of unauthorized access and exceeding authorized access.
**Issue:** Does the law-of-the-case doctrine require the sufficiency of the evidence in a criminal case to be measured against the elements described in the jury instructions where those instructions, without objection, require the government to prove additional or more stringent elements than do the statute and indictment?

**No.** A sufficiency challenge should be assessed against the elements of the charged crime, not against the elements set forth in an erroneous jury instruction.

**Issue:** Is the statute of limitations reviewable on appeal if the defense was not raised at or before trial?

**No.** A defendant cannot successfully raise the statute-of-limitations bar for the first time on appeal.

From the unanimous opinion by Justice Thomas: A reviewing court’s limited determination on sufficiency review thus does not rest on how the jury was instructed. When a jury finds guilt after being instructed on all elements of the charged crime plus one more element, the jury has made all the findings that due process requires. If a jury instruction requires the jury to find guilt on the elements of the charged crime, a defendant will have had a “meaningful opportunity to defend” against the charge. … And if the jury instruction requires the jury to find those elements “beyond a reasonable doubt,” the defendant has been accorded the procedure that this Court has required to protect the presumption of innocence. … The Government’s failure to introduce evidence of an additional element does not implicate the principles that sufficiency review protects. All that a defendant is entitled to on a sufficiency challenge is for the court to make a “legal” determination whether the evidence was strong enough to reach a jury at all. … The Government’s failure to object to the heightened jury instruction thus does not affect the court’s review for sufficiency of the evidence.

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**Criminal Law**  
**Ocasio v. United States**  
**Docket No. 14-361**  
**Affirmed: The Fourth Circuit**  
Argued: October 6, 2015  
Decided: May 2, 2016  
Analysis: ABA PREVIEW 27 Issue 1  
**Overview:** Samuel Ocasio, a former Baltimore police officer, was convicted in federal court of conspiring with other officers to violate the Hobbs Act by extorting money and services from an auto repair shop. The owners of the repair shop were charged as coconspirators because they agreed to exchange the money and services for business referrals from Ocasio and the other officers. In the U.S. Supreme Court, Ocasio claimed that he cannot be convicted of conspiring to extort the repair shop owners because the Hobbs Act requires that the public official obtain property “from another,” which Ocasio interpreted to mean a victim outside of a conspiracy, to violate the Hobbs Act. Thus, the repair shop owners’ role as coconspirators to Ocasio prevented them from being the “another” necessary for Ocasio’s conspiracy conviction.

**Issue:** Does a conviction of a Hobbs Act extortion conspiracy require proof that the public official obtained property from a victim outside of a conspiracy?

**No.** A defendant may be convicted of conspiring to violate the Hobbs Act based on proof that he reached an agreement with the owner of the property in question to obtain that property under color of official right.

From the opinion by Justice Alito (joined by Justices Kennedy, Ginsburg, Breyer, and Kagan): Suppose that the owner and manager of a nightclub reach an agreement with a public official under which the owner will bribe an official to approve the club’s liquor license application. Under petitioner’s approach, the public official and the club manager may be guilty of conspiring to commit extortion, because they agreed that the official would obtain property “from another”—that is, the owner. But as “the ‘another’ from whom the property is obtained,” … the owner could not be prosecuted. There is no apparent reason, however, why the manager but not the owner should be culpable in this situation.

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**Criminal Law**  
**Taylor v. United States**  
**Docket No. 14-6166**  
**Affirmed: The Fourth Circuit**  
Argued: February 23, 2016  
Decided: June 20, 2016  
Analysis: ABA PREVIEW 189 Issue 5  
**Overview:** David Anthony Taylor was convicted of two counts under the federal Hobbs Act for participating in robberies or attempted robberies of drugs and drug-related items. The government proved the commercial element of the Act merely by showing that Taylor’s targets were drug dealers. The government claimed that this was enough to satisfy the commercial element because all drug dealing necessarily affects interstate commerce. But Taylor argued that the government had to prove that the particular targeted drugs in this case affected interstate commerce. He said that the contrary view violated his right to put on a defense.

**Issue:** Does the Hobbs Act require the government to prove that a robber’s specific, targeted drugs affected interstate commerce?

**No.** The prosecution in a Hobbs Act robbery case satisfies the Act’s commerce element if it shows that the defendant robbed or attempted to rob a drug dealer of drugs or drug proceeds.

From the opinion by Justice Alito (joined by Chief Justice Roberts and Justices Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan): The case now before us requires no more than that we graft our holding in **Raich** onto the commerce element of the Hobbs Act. The Hobbs Act criminalizes robberies affecting “commerce over which the United States has jurisdiction.” § 1951(b)(3). Under **Raich**, the market for marijuana, including its intrastate aspects, is “commerce over which the United States has jurisdiction.” It therefore follows as a simple matter of logic that a robber who affects or attempts to affect even the intrastate sale of marijuana grown within
the State affects or attempts to affect commerce over which the United States has jurisdiction.

**Dissenting:** Justice Thomas

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**Criminal Law**

**Voisine v. United States**

**Docket No. 14-10154**

**Affirmed:** The First Circuit

**Argued:** February 29, 2016  
**Decided:** June 27, 2016  
**Analysis:** ABA PREVIEW 169 Issue 5

**Overview:** Petitioners were previously convicted in Maine state courts of violating Maine's assault and domestic assault statutes. Petitioners were subsequently convicted in federal court of violating federal laws that prohibit possession of firearms by those who have previously been convicted of misdemeanor crimes of domestic violence. The federal statute defined a misdemeanor crime of domestic violence as one that has as an element the "use . . . of physical force." Petitioners argued that their state convictions were based upon reckless behavior that does not involve the use of physical force and is therefore not the type of conviction contemplated by the federal weapons ban.

**Issue:** Does a misdemeanor crime with a mens rea of recklessness qualify as a "misdemeanor crime of domestic violence" as defined by 18 U.S.C. §§ 921(a)(33)(A) and 922(g)(9)?

**Yes.** A reckless domestic assault qualifies as a "misdemeanor crime of domestic violence" under § 922(g)(9).

**From the opinion by Justice Kagan** (joined by Chief Justice Roberts and Justices Kennedy, Ginsburg, Breyer, and Alito): Consider a couple of examples to see the ordinary meaning of the word "use" in this context. If a person with soapy hands loses his grip on a plate, which then shatters and cuts his wife, the person has not "use[d]" physical force in common parlance. But now suppose a person throws a plate in anger against the wall near where his wife is standing. That hurl counts as a "use" of force even if the husband did not know for certain (or have as an object), but only recognized a substantial risk, that a shard from the plate would ricochet and injure his wife. Similarly, to spin out a scenario discussed at oral argument, if a person lets slip a door that he is trying to hold open for his girlfriend, he has not actively employed ("used") force even though the result is to hurt her. But if he slams the door shut with his girlfriend following close behind, then he has done so—regardless of whether he thinks it absolutely sure or only quite likely that he will catch her fingers in the jamb. . . . Once again, the word "use" does not exclude from § 922(g)(9)'s compass an act of force carried out in conscious disregard of its substantial risk of causing harm.

**From the dissenting opinion by Justice Thomas** (joined by Justice Sotomayor as to Parts I and II): Today the majority expands § 922(g)(9)'s sweep into patently unconstitutional territory. Under the majority's reading, a single conviction under a state assault statute for recklessly causing an injury to a family member—such as by texting while driving—can now trigger a lifetime ban on gun ownership. And while it may be true that such incidents are rarely prosecuted, this decision leaves the right to keep and bear arms up to the discretion of federal, state, and local prosecutors. We treat no other constitutional right so cavalierly. At oral argument the Government lost forever by a single conviction for an injury punishable only by a fine. . . . I have little doubt that the majority would strike down an absolute ban on publishing that could not identify any other fundamental constitutional right that a person could lose forever by a single conviction for an infraction punishable only by a fine. . . . I go along with that "sort of sandbagging of every end is instead a new beginning" for the State, effects or attempts to affect commerce over which the United States has jurisdiction.

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**Criminal Procedure**

**Foster v. Chatman**

**Docket No. 14-8349**

**Reversed and Remanded:** The Supreme Court of Georgia  
**Decided:** May 23, 2016  
**Analysis:** ABA PREVIEW 67 Issue 2

**Issue:** Did the Georgia courts err in failing to recognize race discrimination under Batson and the Fourteenth Amendment given the circumstances of jury selection in this death penalty case?

**Yes.** The decision that Foster failed to show purposeful discrimination was clearly erroneous.

**From the opinion by Chief Justice Roberts** (joined by Justices Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan): As we explained in Miller-El v. Dretke, “[i]f a prosecutor’s proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack [panelist] who is permitted to serve, that is evidence tending to prove purposeful discrimination.” 545 U. S. 231 (2005). With respect to both Garrett and Hood, such evidence is compelling. But that is not all. There are also the shifting explanations, the misrepresentations of the record, and the persistent focus on race in the prosecution’s file. Considering all of the circumstantial evidence that “bear[s] upon the issue of racial animosity,” we are left with the firm conviction that the strikes of Garrett and Hood were “motivated in substantial part by discriminatory intent.” Snyder v. Louisiana, 552 U. S. 472 (2008).

**Concurring:** Justice Alito

**From the dissenting opinion by Justice Thomas:** [T]he Court today invites state prisoners to go searching for new “evidence” by demanding the files of the prosecutors who long ago convicted them. If those prisoners succeed, then apparently this Court’s doors are open to conduct the credibility determination anew. Alas, “every end is instead a new beginning” for a majority of this Court. Welch v. United States, (THOMAS, J., dissenting). I cannot go along with that “sort of sandbagging of state courts.” Miller-El v. Dretke, (THOMAS,
Arizona is executive clemency. … So the Arizona’s only form of early release in this Court holds that requires more. A correct recitation of Arizona law, the though the trial court’s instruction was Thomas From the dissenting opinion by Justice Simmons did not apply. It relied on the fact the others this Court had considered that sentencing law sufficiently different from Mathis’s prior Iowa burglary convictions met the federal definition of generic burglary and were crimes of violence, and could therefore be used to enhance Mathis’s sentence pursuant to the Armed Career Criminal Act (ACCA), which would increase Mathis’s minimum prison sentence to 15 years. To qualify as an armed career criminal, a defendant must have been previously convicted of three violent felony or serious drug offenses. ACCA includes as a violent felony a burglary conviction that is punishable by more than one year. The federal sentencing court determined that Mathis’s prior Iowa burglary convictions met the federal definition of generic burglary and were crimes of violence, and could therefore be used to enhance Mathis’s sentence pursuant to ACCA. The Eighth Circuit Court of Appeals affirmed. In this case, the Supreme Court was asked to decide how sentencing courts should interpret state statutes, specifically how to define those that are indivisible, triggering the ACCA element-based categorical approach, as opposed to those that are divisible, triggering the ACCA modified categorical approach. Issue: Is it permissible to use the modified categorical approach to determine if a state burglary statute is a violent felony for purposes of ACCA sentencing enhancement if the state statute is indivisible and lists different means of committing the crime? No. Because the elements of Iowa’s burglary law are broader than those of generic burglary, Mathis’s convictions cannot give rise to ACCA’s sentence enhancement.

From the opinion by Justice Kagan (joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Sotomayor): Our precedents make this a straightforward case. For more than 25 years, we have repeatedly made clear that application of ACCA involves, and involves only, comparing elements. Courts must ask whether the crime of conviction is the same as, or narrower than, the relevant generic offense. They may not ask whether the defendant’s conduct—his particular means of committing the crime—falls within the generic definition. And that rule does not change when a statute happens to list possible alternative means of commission: Whether or not made explicit, they remain what they ever were—just the facts, which ACCA (so we have held, over and over) does not care about.

Concurring: Justice Kennedy
Concurring: Justice Thomas
Dissenting: Justice Breyer (joined by Justice Ginsburg)
Dissenting: Justice Alito

Criminal Procedure
Nichols v. United States
Docket No. 15-5238
Reversed: The Tenth Circuit

Argued: March 1, 2016
Decided: April 4, 2016
Analysis: ABA PREVIEW 192 Issue 5

Overview: The Sex Offender Registration and Notification Act (SORNA) requires sex offenders to keep their registration updated with current information. The law clearly applies when a sex offender moves from one state to another. The offender must then keep his registration current in the jurisdiction where he resides, is employed, or is in school. The question in this case was whether these registration obligations attach when the sex offender moves to a foreign country, which is not a covered jurisdiction under the federal law.

Issue: Does a registered sex offender violate the law by failing to register when he moves from the United States to a foreign country?
No. SORNA does not require sex offenders to update their registration once they move from the United States.

From the unanimous opinion by Justice Alito: If the drafters of SORNA had thought about the problem of sex offenders who leave the country and had sought to require them to (de)register in the departure jurisdiction, they could easily have said so; indeed, that is exactly what the amended Wetterling Act had required. 42 U. S. C. § 14071(b)(5) (2000 ed.) … Congress could have chosen to retain the language in the amended Wetterling Act, or to adopt location similar to that of the Kansas statute (and echoed in the statutes of many other States … ). It did neither. SORNA’s plain text—in particular, § 16913(a)’s consistent use of the present tense—therefore did not require Nichols to update his registration in Kansas once he no longer resided there.

Criminal Procedure

Wearry v. Cain

Docket No. 14-10008
Reversed and Remanded:
The District Court of Louisiana, Livingston Parish

Argued: N/A
Decided: March 7, 2016
Analysis: N/A

Overview: Petitioner, Michael Wearry, was implicated by Sam Scott in a murder. Scott’s report of the crime included vital mistakes, including how and where the victim died. Scott subsequently changed his account over four later statements in material ways, including at trial. The jury convicted Wearry of capital murder and sentenced him to death. It subsequently became known that the prosecution had withheld information that could have assisted Wearry.

Issue: Did the prosecution’s failure to disclose material evidence violate the defendant’s due process rights?

Yes. The prosecution violates a defendant’s due process rights if it fails to turn over evidence that would undermine the confidence in the defendant’s conviction and the impact of such evidence should be viewed cumulatively.

From the per curiam opinion: Beyond doubt, the newly revealed evidence suffices to undermine confidence in Wearry’s conviction. The State’s trial evidence resembles a house of cards, built on the jury crediting Scott’s account rather than Wearry’s alibi.

Dissenting: Justice Alito (joined by Justice Thomas)

Death Penalty

Hurst v. Florida

Docket No. 14-7505
Reversed and Remanded:
The Supreme Court of Florida

Argued: October 13, 2015
Decided: January 12, 2016
Analysis: ABA PREVIEW 19 Issue 1

Overview: Petitioner Timothy Lee Hurst was convicted and sentenced to death in Florida after his jury voted 7 to 5 to recommend a death sentence. The trial court issued an order that sentenced Hurst to death based on its finding two aggravating circumstances. On direct appeal, Hurst argued his death sentence was unconstitutional under Ring v. Arizona, 536 U.S. 582 (2002), because the jury was not required to (1) make fact findings as to aggravating circumstances or (2) make a unanimous recommendation as to sentence. The state court rejected his arguments. The Supreme Court was asked to decide if the Sixth and/or Eighth Amendment require that a jury make specific findings of aggravating circumstances or return a unanimous jury recommendation as to sentence in light of Ring.

Issue: Does Florida’s death sentencing scheme violate the Sixth Amendment or the Eighth Amendment in light of this Court’s decision in Ring v. Arizona?

Yes. Under Ring v. Arizona, Florida’s capital sentencing structure violates the Sixth Amendment.

From the opinion by Justice Sotomayor (joined by Chief Justice Roberts and Justices Scalia, Thomas, Ginsburg, and Kagan): The analysis the Ring Court applied to Arizona’s sentencing scheme applies equally to Florida’s. Like Arizona at the time of Ring, Florida does not require the jury to make the critical findings necessary to impose the death penalty. Rather, Florida requires a judge to find these facts. Fla. Stat. § 921.141(3). Although Florida incorporates an advisory jury verdict that Arizona lacked, we have previously made clear that this distinction is immaterial: “It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge. A Florida trial court no more has the assistance of a jury’s findings of fact with respect to sentencing issues than does a trial judge in Arizona.” Walton v. Arizona, 497 U. S. 639 (1990).

Concurring: Justice Breyer
Dissenting: Justice Alito

Death Penalty

Williams v. Pennsylvania

Docket No. 15-5040
Vacated and Remanded:
The Supreme Court of Pennsylvania

Argued: February 29, 2016
Decided: June 9, 2016
Analysis: ABA PREVIEW 174 Issue 5

Overview: Terrance Williams was sentenced to death for killing a man who had sexually abused him when he was a minor. Shortly before Williams’s scheduled execution, a state trial judge granted a new sentencing hearing because the prosecutor had knowingly withheld critical evidence. On appeal, Williams tried to recuse a justice of the state supreme court—who had been the elected District Attorney at the time of his trial and who had also approved the case for the death penalty—but the motion was denied. Williams argued that the denial of the recusal motion violated his due process rights, and that the error was structural and not subject to harmless error review.

Issue: Are the Eighth and Fourteenth Amendments violated by the participation of a potentially biased jurist on a multi-member tribunal deciding a capital case, regardless of whether his vote is ultimately decisive?

Yes. The participation of the potentially biased judge violated the defendant’s right under the Due Process Clause of the Fourteenth Amendment.
From the opinion by Justice Kennedy (joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan): Even if decades intervene before the former prosecutor revisits the matter as a jurist, the case may implicate the effects and continuing force of his or her original decision. In these circumstances, there remains a serious risk that a judge would be influenced by an improper, if inadvertent, motive to validate and preserve the result obtained through the adversary process. The involvement of multiple actors and the passage of time do not relieve the former prosecutor of the duty to withdraw in order to ensure the neutrality of the judicial process in determining the consequences that his or her own earlier, critical decision may have set in motion.

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

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Diversity Jurisdiction

**Americold Realty Trust v. ConAgra Food, Inc.**

**Docket No. 14-1382**
**Affirmed: The Tenth Circuit**

Argued: January 19, 2016
Decided: March 7, 2016
Analysis: ABA PREVIEW 152 Issue 4

**Overview:** ConAgra Foods, Inc., and Swift-Eckrich, Inc. (respondents), along with multiple additional plaintiffs, originally brought suit against Americold Logistics, LLC, and Americold Realty Trust (collectively, petitioners) in a Kansas state court. Petitioners removed the case to the United States District Court for the District of Kansas, which granted summary judgment in their favor. On appeal, noting its independent duty to ensure proper jurisdiction, the United States Court of Appeals for the Tenth Circuit concluded that the citizenship of the trust could not be determined based solely on the citizenship of its trustees. The Tenth Circuit remanded to the district court with instructions to vacate the judgment in favor of petitioners and to remand the matter for resolution by the state court. In this appeal, the Supreme Court was asked to decide whether the citizenship of a trust should be determined based on the citizenship of the trustees, the citizenship of the beneficiaries, or whether some alternative test is appropriate.

**Issue:** For purposes of federal diversity jurisdiction, is the citizenship of a trust determined based on the citizenship of its members?

Yes. For purposes of diversity jurisdiction, Americold’s citizenship is based on the citizenship of its members, which include its shareholders.

From the unanimous opinion by Justice Sotomayor: In Maryland, a real estate investment trust is an “unincorporated business trust or association” in which property is held and managed “for the benefit and profit of any person who may become a shareholder.” Md. Corp. & Assns. Code Ann. §§ 8–101(c), 8–102 (2014). As with joint stock companies or partnerships, shareholders have “ownership interests” and votes in the trust by virtue of their “shares of beneficial interest.” §§ 8–704(b)(5), 8–101(d). These shareholders appear to be in the same position as the shareholders of a joint-stock company or the partners of a limited partnership—both of whom we viewed as members of their relevant entities. … We therefore conclude that for purposes of diversity jurisdiction, Americold’s members include its shareholders.

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Double Jeopardy Clause

**Puerto Rico v. Sanchez Valle**

**Docket No. 15-108**
**Affirmed: The Supreme Court of Puerto Rico**

Argued: January 13, 2016
Decided: June 9, 2016
Analysis: ABA PREVIEW 150 Issue 4

**Overview:** The legal status of Puerto Rico long has been an interesting and intriguing issue. In this case, the Court was asked to determine whether Puerto Rico was a separate sovereign from the United States or whether it was a territory that was not a separate sovereign. The distinction mattered because if Puerto Rico was a separate sovereign, then the Double Jeopardy Clause prohibited subsequent prosecution in a Puerto Rican court over the same offense when the individuals already have pled guilty in federal court.

**Issue:** Is Puerto Rico a separate sovereign from the United States for double jeopardy purposes?

No. The Double Jeopardy Clause bars Puerto Rico and the United States from successively prosecuting a single person for the same conduct under equivalent criminal laws.

From the opinion by Justice Kagan (joined by Chief Justice Roberts and Justices Kennedy, Ginsburg, and Alito): Puerto Rico cannot benefit from our dual-sovereignty doctrine. For starters, no one argues that when the United States gained possession of Puerto Rico, its people possessed independent prosecutorial power, in the way that the States or tribes did upon becoming part of this country. Puerto Rico was until then a colony “under Spanish sovereignty.” Treaty of Paris, Art. 2, 30 Stat. 1755. And local prosecutors in the ensuing decades, as petitioner itself acknowledges, exercised only such power as was “delegated by Congress” through federal statutes. Their authority derived from, rather than pre-existed association with, the Federal Government.

Concurring: Justice Ginsburg (joined by Justice Thomas)
Concurring in part and in judgment: Justice Thomas
Dissenting: Justice Breyer (joined by Justice Sotomayor)

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Eighth Amendment

**Kansas v. Carr and Kansas v. Gleason**

**Docket Nos. 14-449, 14-450, and 14-452**
**Reversed and Remanded: The Supreme Court of Kansas**

Argued: October 7, 2015
Decided: January 20, 2016
Analysis: ABA PREVIEW 36 Issue 1

**Overview:** These consolidated cases examined two similar questions arising
under the Eighth Amendment concerning mitigating evidence in capital-sentencing proceedings. These cases both involved Kansas Supreme Court reversals of death sentences pursuant to procedural requirements under the Eighth Amendment. Specifically, both cases concerned the manner and substance of jury consideration of mitigating evidence at capital sentencing proceedings.

**Issue:** Does the Eighth Amendment require that a capital-sentencing jury be **affirmatively** instructed that mitigating circumstances “need not be proven beyond a reasonable doubt,” as the Kansas Supreme Court held here?

No. The Eighth Amendment does not require capital-sentencing courts to instruct a jury that mitigating circumstances need not be proved beyond a reasonable doubt.

**Issue:** Did the trial court’s decision not to sever the sentencing phase of the codefendants’ trial here—a decision that comports with the traditional approach preferring joinder in circumstances like this—violate an Eighth Amendment right to an “individualized sentencing” determination and was not harmless in any event?

No. The Constitution does not require severance of the sentencing phase of the codefendants here.

From the opinion by Justice Scalia (joined by Chief Justice Roberts and Justices Kennedy, Thomas, Ginsburg, Breyer, Alito, and Kagan): It would mean nothing, we think, to tell the jury that the defendants must deserve mercy beyond a reasonable doubt; or must more likely-than-not deserve it. It would be possible, of course, to instruct the jury that the facts establishing mitigating circumstances need only be proved by a preponderance, leaving the judgment whether those facts are indeed mitigating, and whether they outweigh the aggravators, to the jury’s discretion without a standard of proof. If we were to hold that the Constitution requires the mitigating factor determination to be divided into its factual component and its judgmental component, and the former to be accorded a burden-of-proof instruction, we doubt whether that would produce anything but jury confusion. In the last analysis, jurors will accord mercy if they deem it appropriate, and withhold mercy if they do not, which is what our case law is designed to achieve.

**Dissenting:** Justice Sotomayor

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**Electricity Regulation**

**FERC v. Electric Power Supply Association and EnerNOC, Inc. v. Electric Power Supply Association**

**Docket Nos. 14-840 and 14-841**

**Reversed and Remanded:**

The District of Columbia Circuit

Argued: October 14, 2015
Decided: January 25, 2016
Analysis: ABA PREVIEW 15 Issue 1

**Overview:** Much of the nation’s wholesale electricity market is run by regional nonprofit entities. These wholesale-market operators ensure that the supply of wholesale electricity continuously matches demand. The operators match supply and demand partly by paying certain electricity consumers and their agents for commitments to reduce their consumption at particular times. In this case, Federal Energy Regulatory Commission (FERC) issued orders regulating payments for such “demand response” commitments. The Court was asked to review FERC’s orders and decide whether they are within FERC’s authority and reasonable.

**Issue:** Does the Federal Power Act (FPA) authorize the Federal Energy Regulatory Commission (FERC) to regulate how operators of the wholesale electricity market pay electricity consumers and their agents for commitments to reduce electricity consumption?

Yes. The FPA provides FERC with the authority to regulate wholesale market operators’ compensation of demand response bids.

**Issue:** If FERC has this authority, is its regulation nonetheless invalid because it is “arbitrary and capricious” within the meaning of the federal Administrative Procedure Act?

No. FERC’s decision to compensate demand response providers at the same price paid to generators is not arbitrary and capricious; FERC was serious and careful in its decision.

**From the opinion by Chief Justice Roberts** (joined by Justices Kennedy, Ginsburg, Breyer, and Sotomayor): The FPA mandates that FERC review, and ensure the reasonableness of, every wholesale rule and practice. . . . If FERC could not carry out that duty for demand response, then those programs could not go forward. And that outcome would flout the FPA’s core objects. The statute aims to protect “against excessive prices” and ensure effective transmission of electric power. Pennsylvania Water & Power Co. v. FPC, 343 U. S. 414 (1952); see Gulf States Util. Co. v. FPC, 411 U. S. 747 (1973). As shown above, FERC has amply explained how wholesale demand response helps to achieve those ends, by bringing down costs and preventing service interruptions in peak periods. . . . No one taking part in the rulemaking process—not even EPSA—seriously challenged that account.

**Dissenting:** Justice Scalia (joined by Justice Thomas)
Taking no part in consideration or decision: Justice Alito

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**Employment Law**

**CRST Van Expedited, Inc. v. EEOC**

**Docket No. 14-1375**

**Vacated and Remanded:**

The Eighth Circuit

Argued: March 28, 2016
Decided: May 19, 2016
Analysis: ABA PREVIEW 209 Issue 6

**Overview:** Before the Equal Employment Opportunity Commission (EEOC) may bring a lawsuit against an employer, the EEOC must conduct an investigation, make a reasonable cause determination, and attempt to eliminate the unlawful employment practice through conciliation. This case asked the Court to determine whether the EEOC’s failure to satisfy these pre-suit obligations authorizes a court to order the EEOC to pay the defendant employer’s attorney’s fees.

**Issue:** When a court concludes that the EEOC has failed to satisfy Title VII’s pre-suit obligations, may the court order the EEOC to pay the defendant employer’s attorney’s fees?
Yes. A favorable ruling on the merits is not a necessary predicate to a finding that a defendant is a prevailing party.

From the unanimous opinion by Justice Kennedy: It would make little sense if Congress’ policy of “sparing defendants from the costs of frivolous litigation,” … depended on the distinction between merits-based and non-merits-based frivolity. Congress must have intended that a defendant could recover fees expended in frivolous, unreasonable, or groundless litigation when the case is resolved in the defendant’s favor, whether on the merits or not. Imposing an on-the-merits requirement for a defendant to obtain prevailing party status would undermine that congressional policy by blocking a whole category of defendants for whom Congress wished to make fee awards available.

Concurring: Justice Thomas

Employment Law
Green v. Brennan

Docket No. 14–613
Vacated and Remanded: The Tenth Circuit

Argued: November 30, 2015
Decided: May 23, 2016
Analysis: ABA PREVIEW 121 Issue 3

Overview: When an employee’s working conditions become too intolerable, the employee may resign from her or his employment and claim that she or he was constructively discharged. Employment discrimination law recognizes this concept of constructive discharge. However, courts are deeply divided on when the cause of action accrues for administrative filing purposes. Does the claim accrue on the last discriminatory act committed by the employer or when the employee gives notice of resignation or when the employee officially resigns?

Issue: Does the limitations period for a constructive discharge claim begin at the last discriminatory act?

No. Because part of the “matter alleged to be discriminatory” in a constructive-discharge claim is an employee’s resignation, the 45-day limitations period for such action begins running only after an employee resigns.

From the opinion by Justice Sotomayor (joined by Chief Justice Roberts and Justices Kennedy, Ginsburg, Breyer, and Kagan): Applying this default rule, we are persuaded that the “matter alleged to be discriminatory” in a constructive-discharge claim necessarily includes the employee’s resignation for three reasons. First, in the context of a constructive-discharge claim, a resignation is part of the “complete and present cause of action” necessary before a limitations period ordinarily begins to run. Second, nothing in the regulation creating the limitations period here, § 1614.105, clearly indicates an intent to displace this standard rule. Third, practical considerations confirm the merit of applying the standard rule here. We therefore interpret the term “matter alleged to be discriminatory” for a constructive-discharge claim to include the date Green resigned.

Concurring: Justice Alito
Dissenting: Justice Thomas

Environmental Law
United States Army Corps of Engineers v. Hawkes Co., Inc.

Docket No. 15–290
Affirmed: The Eighth Circuit

Argued: March 30, 2016
Decided: May 31, 2016
Analysis: ABA PREVIEW 215 Issue 6

Overview: This case is about the timing of judicial review. In particular, landowners can ask the U.S. Army Corps whether the Clean Water Act applies to certain wetlands. If the landowner disagrees, the question is whether the landowner needs to wait until the end of the permitting process to challenge the jurisdictional determination in federal court. The Army Corps contended the landowner has to wait until the permitting process is complete because only “final agency actions” are subject to judicial review under the Administrative Procedure Act (APA).

Issue: Was it a “final agency action” when the United States Army Corps of Engineers determined that the property owned by Hawkes contained “waters of the United States” and therefore triggered the obligations of the Clean Water Act?

Yes. The Corps’s approved “jurisdictional determination” is a final agency action that is judicially reviewable under the APA.

From the opinion by Chief Justice Roberts (joined by Justices Kennedy, Thomas, Breyer, Alito, Sotomayor, and Kagan): The Corps may revise an approved JD within the five-year period based on “new information.” 2005 Guidance Letter § 1(a). That possibility, however, is a common characteristic of agency action, and does not make an otherwise definitive decision nonfinal. See Sackett v. EPA, 566 U. S. ___ (2012); see also National Cable & Telecommunications Assn. v. Brand X Internet Services, 545 U. S. 967 (2005). By issuing respondents an approved JD, the Corps for all practical purposes “has ruled definitively” that respondents’ property contains jurisdictional waters.

Concurring: Justice Kennedy (joined by Justices Thomas and Alito)
Concurring: Justice Kagan
Concurring in part and in judgment: Justice Ginsburg

Equal Protection
Fisher v. University of Texas at Austin

Docket No. 14–981
Affirmed: The Fifth Circuit

Argued: December 9, 2015
Decided: June 23, 2016
Analysis: ABA PREVIEW 88 Issue 3

Overview: Plaintiff Abigail Fisher, a white woman, was denied admission to the University of Texas at Austin undergraduate program and sued the school, arguing that it violated the Equal Protection Clause of the Fourteenth Amendment by considering race as a factor in the admissions decision. After the Supreme Court reversed an appellate court decision for the University, the appellate court again ruled against Fisher. The Supreme Court was asked to consider whether the University satisfied the burdens required by the earlier Supreme Court ruling.

Issue: Did the University of Texas violate the Equal Protection Clause when it considered the race of the applicants as a factor in its admissions decisions affecting 20 percent of the entering class?
Differing, or even parallel, regulations from multiple jurisdictions could create wasteful administrative costs and threaten to subject plans to wide-ranging liability. … Pre-emption is necessary to prevent the States from imposing novel, inconsistent, and burdensome reporting requirements on plans.

Concurring: Justice Thomas
Concurring: Justice Breyer
Dissenting: Justice Ginsburg (joined by Justice Sotomayor)

ERISA
Montanile v. Board of Trustees of the National Elevator Industry Health Benefit Plan

Docket No. 14-723
Reversed and Remanded: The Eleventh Circuit

Argued: November 9, 2015
Decided: January 20, 2016
Analysis: ABA PREVIEW 56 Issue 2

Overview: Many employee benefit plans under the Employee Retirement Income Security Act of 1974 (ERISA) allow plan sponsors to recover plan assets wrongly in the hands of participants. Under ERISA, however, the judicial remedies available to a plan sponsor to enforce this right are limited to an injunction or “other appropriate equitable relief,” a phrase that typically does not include money damages. The Supreme Court was asked to decide whether any equitable remedies allow a plan sponsor to recover from a participant’s general assets when the participant has dissipated the particular assets belonging to the plan.

Issue: Does a lawsuit by an ERISA fiduciary against a participant to recover an alleged overpayment by the plan seek “equitable relief” within the meaning of ERISA Section 502(a)(3), 29 U.S.C. § 1132(a)(3), if the fiduciary has not identified a particular fund that is in the participant’s possession and control at the time the fiduciary asserts its claim?

No. When an ERISA-plan participant wholly dissipates a third-party settlement on nontraceable items, the plan fiduciary may not bring suit under § 502(a)(3) to attach the participant’s separate assets.

ERISA
Gobeille v. Liberty Mutual Insurance, Co.

Docket No. 14-181
Affirmed: The Second Circuit

Argued: December 2, 2015
Decided: March 1, 2016
Analysis: ABA PREVIEW ’95 Issue 3

Overview: Vermont requires all public and private entities that pay for health care services provided to its residents to supply data to its “all-payer database.” The requirements apply to insurers and third-party administrators, among others. The Liberty Mutual Insurance Company filed suit to block Vermont from obtaining claims data for its employee health plan, claiming that the Employee Retirement Income Security Act of 1974 (ERISA) preempts any requirement that Liberty Mutual’s third-party administrator provide information to Vermont’s health care database. This case called for the Court to decide whether Vermont’s effort to track the health care services that are provided to its residents and the cost of those services runs afoul of ERISA’s superseding authority over the regulation of employee benefit plans. The case has potential for national significance because many states currently have similar databases in place or in development in an effort to better control health care costs and outcomes.

Issue: Is the Vermont health care database law preempted by ERISA as applied to self-insured employee benefit plans?

Yes. ERISA preempts Vermont’s database law as applied to ERISA plans.

From the opinion by Justice Kennedy
(joined by Chief Justice Roberts and Justices Thomas, Breyer, Alito and Kagan): Vermont’s reporting regime, which compels plans to report detailed information about claims and plan members, both intrudes upon “a central matter of plan administration” and “interferes with nationally uniform plan administration.” … The State’s law and regulation govern plan reporting, disclosure, and—by necessary implication—recordkeeping. These matters are fundamental components of ERISA’s regulation of plan administration.

No. The race-conscious admissions program in use at the time of petitioner’s application is lawful under the Equal Protection Clause.

From the opinion by Justice Kennedy
(joined by Justices Ginsburg, Breyer, and Sotomayor): In striking this sensitive balance, public universities, like the States themselves, can serve as “laboratories for experimentation.” … The University of Texas at Austin has a special opportunity to learn and to teach. The University now has at its disposal valuable data about the manner in which different approaches to admissions may foster diversity or instead dilute it. The University must continue to use this data to scrutinize the fairness of its admissions program; to assess whether changing demographics have undermined the need for a race-conscious policy; and to identify the effects, both positive and negative, of the affirmative-action measures it deems necessary. The Court’s affirmation of the University’s admissions policy today does not necessarily mean the University may rely on that same policy without refinement. It is the University’s ongoing obligation to engage in constant deliberation and continued reflection regarding its admissions policies.

From the dissenting opinion by Justice Alito
(joined by Chief Justice Roberts and Justice Thomas): On remand, UT failed to do what our prior decision demanded. The University has still not identified with any degree of specificity the interests that its use of race and ethnicity is supposed to serve. Its primary argument is that its use of race and ethnicity is supposed to serve, or is actually serving, those interests. This is nothing less than the plea for deference that we emphatically rejected in our prior decision. Today, however, the Court inexplicably grants that request.

Dissenting: Justice Thomas
Taking no part in consideration or decision: Justice Kagan
From the opinion by Justice Thomas (joined by Chief Justice Roberts and Justices Scalia, Kennedy, Breyer, Sotomayor, and Kagan and Justice Alito joined except for Part III-C): In sum, at equity, a plaintiff ordinarily could not enforce any type of equitable lien if the defendant once possessed a separate, identifiable fund to which the lien attached, but then dissipated it all. The plaintiff could not attach the defendant’s general assets instead because those assets were not part of the specific thing to which the lien attached. This rule applied to equitable liens by agreement as well as other types of equitable liens.

Dissenting: Justice Ginsburg

Fair Debt Collection Practices Act  
Sheriff v. Gillie

Docket No. 15-338  
Reversed and Remanded:  
The Sixth Circuit

Argued: March 29, 2016  
Decided: May 16, 2016  
Analysis: ABA PREVIEW 241 Issue 6

Overview: To collect certain debts owed to it, Ohio used a scheme whereby it authorized the attorney general to retain outside lawyers and law firms, referred to as special counsel, to collect the debts. The special counsel used the attorney general’s letterhead to communicate with consumers. This case asked the Court to consider whether such special counsel are “state officers,” thereby excluding them from the reach of the Fair Debt Collection Practices Act.

Issue: Is the use of attorney general letterhead by such “special counsel” misleading under the Act?

No. Even assuming that special counsel do not rank as “state officers” within the meaning of the Fair Debt Collection Practices Act, petitioners’ use of the attorney general’s letterhead, nevertheless, is not “false or misleading.”

From the unanimous opinion by Justice Ginsburg: Special counsel’s use of the Attorney General’s letterhead at the Attorney General’s direction does not offend § 1692e’s general prohibition against “false … or misleading representation[s].” The letterhead identifies the principal—Ohio’s Attorney General—and the signature block names the agent—a private lawyer hired as outside counsel to the Attorney General. It would not transgress § 1692e, respondents acknowledge, if, in lieu of using the Attorney General’s letterhead, special counsel’s communications opened with a bold-face statement: “We write to you as special counsel to the Attorney General who has authorized us to collect a debt you owe to [the State or an instrumentality thereof].” … If that representation is accurate, i.e., not “false … or misleading,” it would make scant sense to rank as unlawful use of a letterhead conveying the very same message, particularly in view of the inclusion of special counsel’s separate contact information and the conspicuous notation that the letter is sent by a debt collector.

False Claims Act  
Universal Health Services, Inc. v. United States ex rel. Escobar

Docket No. 15-17  
Vacated and Remanded:  
The First Circuit

Argued: April 19, 2016  
Decided: June 16, 2016  
Analysis: ABA PREVIEW 244 Issue 7

Overview: The petitioner claimed Medicaid reimbursement for providing mental health services to the daughter of respondents Julio Escobar and Carmen Correa. After their daughter died, respondents learned that petitioner had violated regulations governing its eligibility for Medicaid reimbursement. Petitioner knew of these violations when it claimed reimbursement. The Court was asked to decide whether petitioner’s claims were “false or fraudulent” under the False Claims Act even though, when filing the claims, petitioner did not expressly state that it satisfied all conditions for payment.

Issue: Does a party violate the False Claims Act (FCA) when it files a claim for payment knowing that it violated the conditions for payment, even if it does not expressly state, when filing the claim, that it has satisfied those conditions?

Yes. The implied false certification theory can be a basis for FCA liability when a
The defendant submitting a claim makes specific representations about the goods or services provided, but fails to disclose noncompliance with material statutory, regulatory, or contractual requirements that make those representations misleading with respect to those goods or services.

**Issue:** Must the conditions for payment be expressly designated as conditions for payment, in order for the claim to violate the FCA?

No. FCA liability for failing to disclose violations of legal requirements does not turn upon whether those requirements were expressly designated as conditions of payment.

From the unanimous opinion by Justice Thomas: By punishing defendants who submit “false or fraudulent claims,” the False Claims Act encompasses claims that make fraudulent misrepresentations, which include certain misleading omissions. When, as here, a defendant makes representations in submitting a claim but omits its violations of statutory, regulatory, or contractual requirements, those omissions can be a basis for liability if they render the defendant’s representations misleading with respect to the goods or services provided.

**Federal Courts**

**Shapiro v. McManus**

**Docket No. 14-990**

Reversed and Remanded: The Fourth Circuit

Argued: November 4, 2015
Decided: December 8, 2015
Analysis: ABA *PREVIEW* 47 Issue 2

**Overview:** The Three-Judge Court Act provides that “[a] district court of three judges shall be convened … when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.” 28 U.S.C. § 2284(a). The chief judge of the judicial circuit must be notified of a request for a three-judge panel, and must designate two additional judges to serve on the panel, unless the judge to whom the request is presented determines that three judges are not required. In this case, the Court was asked to decide whether the determination that three judges are not required continues to be limited to cases deemed “obviously frivolous” under the substantiality doctrine or whether the 1976 amendment to the Act permits a single district court judge to conclude that three judges are not required and dismiss the case based upon a finding that the complaint fails to state a claim under Fed. R. Civ. P. 12(b)(6).

**Issue:** Under the Three-Judge Court Act (28 U.S.C. § 2284), may a district court judge decline a request for a three-judge panel and dismiss the case on the ground that the complaint fails to state a claim?

No. Section 2284 entitles petitioners to make their case before a three-judge court.

From the unanimous opinion by Justice Scalia: Whatever the purposes of a three-judge court may be, respondents’ argument needlessly produces a contradiction in the statutory text. That text’s initial prescription could not be clearer: “A district court of three judges shall be convened … when an action is filed challenging the constitutionality of the apportionment of congressional districts. …” 28 U. S. C. § 2284(a). Nobody disputes that the present suit is “an action … challenging the constitutionality of the apportionment of congressional districts.” It follows that the district judge was required to refer the case to a three-judge court, for § 2284(a) admits of no exception, and “the mandatory ‘shall’ … normally creates an obligation impervious to judicial discretion.”

**Federal Indian Law**

**United States v. Bryant**

**Docket No. 15-420**

Reversed and Remanded: The Ninth Circuit

Argued: April 19, 2016
Decided: June 13, 2016
Analysis: ABA *PREVIEW* 252 Issue 7

**Overview:** This case involved the interpretation of 18 U.S.C. § 117(a), a section of the Violence Against Women and Department of Justice Reauthorization Act dealing directly with domestic violence perpetrated against Native American women. Particularly, this case examined whether Congress intended to allow the use of tribal court convictions for the purpose of providing a foundation for subsequent federal prosecutions under § 117(a), and, if so, whether this practice was nonetheless unconstitutional.

**Issue:** Do Indian tribal courts have jurisdiction to adjudicate civil tort claims against nonmembers, as a means to regulate the conduct of nonmembers who enter into consensual relationships with a tribe or the tribe’s members?

From the per curiam opinion: The judgment is affirmed by an equally divided Court.

**Federal Indian Law**

**Dollar General Corp. v. Mississippi Band of Choctaw Indians**

**Docket No. 13-1496**

Affirmed: The Fifth Circuit

Argued: December 7, 2015
Decided: June 23, 2016
Analysis: ABA *PREVIEW* 99 Issue 3

**Overview:** This case explored the authority of a tribal court to adjudicate civil tort claims brought by tribal members against a nontribal member, where: (1) the nonmember civil defendant operates the retail store on premises leased from a tribal governmental entity; and (3) the tort claims arise from the retail store manager’s alleged sexual assaults upon a minor tribal member who was, pursuant to an agreement with the tribe, working at the retail store as an intern.

**Issue:** Does reliance on valid, but uncounseled, tribal court misdemeanor convictions to prove the predicate-offense element of 18 U.S.C. § 117(a) violate the United States Constitution?

No. Bryant’s tribal-court convictions occurred in proceedings that complied with the ICRA and were therefore valid when entered; consequently, the use of those convictions as predicate offenses in § 117(a) prosecution does not violate the Constitution.
From the unanimous opinion by Justice Ginsburg: In keeping with Nichols, we resist creating a “hybrid” category of tribal-court convictions, “good for the punishment actually imposed but not available for sentence enhancement in a later prosecution.” … Nichols indicates that use of Bryant’s uncounseled tribal court convictions in his §117(a) prosecution did not “transform his prior, valid, tribal court convictions into new, invalid, federal ones.”

From the concurring opinion by Justice Thomas: It is time that the Court reconsider these precedents. Until the Court ceases treating all Indian tribes as an undifferentiated mass, our case law will remain bedeviled by amorphous and ahistorical assumptions about the scope of tribal sovereignty. And, until the Court rejects the fiction that Congress possesses plenary power over Indian affairs, our precedents will continue to be based on the paternalistic theory that Congress must assume all encompassing control over the “remnants of a race” for its own good.

Federal Jurisdiction
Merrill Lynch v. Manning
Docket No. 14-1132
Affirmed: The Third Circuit

Argued: December 1, 2015
Decided: May 16, 2016
Analysis: ABA PREVIEW 107 Issue 3

Overview: Section 27 of the Securities Exchange Act of 1934 provides that federal courts “shall have exclusive jurisdiction” of: (1) violations of, and (2) equitable and legal actions “brought to enforce any liability or duty created by” the Exchange Act or the rules and regulations thereunder.” In this case, the plaintiffs’ complaint against the defendants included numerous allegations that the defendants had violated regulations under the Exchange Act but asserted claims only under state statutory and common law. The Court was asked to determine what relationship must exist between a plaintiff’s state law claims and allegations implicating the Exchange Act and its regulations before Section 27 provides federal courts with exclusive jurisdiction.

Issue: In order to trigger exclusive federal jurisdiction over state-law claims under

Section 27 of the Exchange Act, must alleged violations of that act and its regulations be a necessary element of the state-law claims asserted?

Yes. The jurisdictional test in Section 27 is the same as Section 1331’s test for deciding if a case “arises under” a federal law.

From the opinion by Justice Kagan (joined by Chief Justice Roberts and Justices Kennedy, Ginsburg, Breyer, and Alito): As this Court has explained, a federal court has jurisdiction of a state-law claim if it “necessarily raise[s] a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance” of federal and state power. That description typically fits cases, like those described just above, in which a state-law cause of action is “brought to enforce” a duty created by the Exchange Act because the claim’s very success depends on giving effect to a federal requirement. Accordingly, we agree with the court below that § 27’s jurisdictional test matches the one we have formulated for § 1331, as applied to cases involving the Exchange Act. If (but only if) such a case meets the “arising under” standard, § 27 commands that it go to federal court.

Concurring in judgment: Justice Thomas (joined by Justice Sotomayor)

Federal Tort Claims Act
Simmons v. Himmelreich
Docket No. 15-109
Affirmed and Remanded: The Sixth Circuit

Argued: March 22, 2016
Decided: June 6, 2016
Analysis: ABA PREVIEW 224 Issue 6

Overview: This case involved the interpretation of two particular provisions of the Federal Tort Claims Act (FTCA)—28 U.S.C. § 2680 and 28 U.S.C. § 2676—to determine what constitutes a “final judgment” triggering the application of the FTCA’s “judgment bar” to preclude other actions sharing a factual nexus with the FTCA claim.

Issue: When a FTCA action is dismissed (pursuant to one of the exceptions to FTCA liability under 28 U.S.C. § 2680) rather than adjudicated on its merits, does the dismissal act as a judgment bar to other actions brought by the claimant against the federal employee(s) whose acts gave rise to the FTCA claim(s)?

No. A judgment bar provision does not apply to the claims dismissed for falling within the “Exceptions” section of the FTCA.

From the unanimous opinion by Justice Sotomayor: Where an FTCA claim is dismissed because it falls within one of the “Exceptions,” by contrast, the judgment bar provision makes much less sense. The dismissal of a claim in the “Exceptions” section signals merely that the United States cannot be held liable for a particular claim; it has no logical bearing on whether an employee can be held liable instead. … To apply the judgment bar so as to foreclose a future suit against an employee thus would be passing strange.

First Amendment
Friedrichs v. California Teachers Association
Docket No. 14-915
Affirmed: The Ninth Circuit

Argued: January 11, 2016
Decided: March 29, 2016
Analysis: ABA PREVIEW 145 Issue 4

Overview: California law requires nonunion members in an agency shop to pay a fair-share fee (also called an agency fee) to cover their proportional share of the union’s collective bargaining activities. California law also requires nonmembers to affirmatively and annually opt out of paying for the union’s ideological and political activities.

Issues: Should the Supreme Court overrule Abood and invalidate public sector fair-share fee requirements?

Does a rule that requires nonmembers to opt out of paying for a union’s ideological and political activities violate the First Amendment?

From the per curiam opinion: The judgment is affirmed by an equally divided Court.
First Amendment
Heffernan v. City of Paterson, New Jersey
Docket No. 14-1280
Reversed and Remanded: The Third Circuit

Argued: January 19, 2016
Decided: April 26, 2016
Analysis: ABA PREVIEW 139 Issue 4

Overview: Paterson, New Jersey, had a mayoral election in 2006. Jeffrey Heffernan, a long-time police officer in Paterson, obtained a lawn sign for his mother promoting a candidate in the election. Heffernan was a friend of the candidate but did not participate in or support the campaign. Still, when Heffernan’s supervisors learned that he had obtained the lawn sign, they demoted him because they thought he supported that candidate, and because their boss, the mayor, was the opposing candidate.

Issue: Does the First Amendment protect a government employee from retaliation based on a supervisor’s perception that the employee supports a political candidate?

Yes. When an employer demotes an employee out of a desire to prevent the employee from engaging in protected political activity, the employee is entitled to challenge that unlawful action under the First Amendment, even if the employer’s actions are based on a factual mistake about the employee’s behavior.

From the opinion by Justice Breyer (joined by Chief Justice Roberts and Justices Kennedy, Ginsburg, Sotomayor, and Kagan): We note that a rule of law tracks the language of the First Amendment.

Dissenting: Justice Thomas (joined by Justice Alito)

Foreign Sovereign Immunity
OBB Personenverkehr AG v. Sachs
Docket No. 13-1067
Reversed: The Ninth Circuit

Argued: October 5, 2015
Decided: December 1, 2015
Analysis: ABA PREVIEW 8 Issue 1

Overview: Respondent, Carol Sachs, a Massachusetts-based company. Sachs suffered traumatic injuries after falling while using the pass to board a train in Austria operated by petitioner, OBB Personenverkehr AG (OBB). OBB argued the suit was barred by the Foreign Sovereign Immunities Act (FSIA). The Ninth Circuit disagreed, holding that the sale of the pass could be attributed to OBB through agency, justifying the application of the Act’s commercial activity exception.

Issue: Can a travel agency’s sale of a train ticket be imputed to the train’s operator for jurisdictional purposes and, if so, are Sachs’s personal injury claims based upon the ticket sale in the United States?

No. Sachs’s suit falls outside the FISA’s commercial activity exception and is therefore barred by sovereign immunity.

From the unanimous opinion by Chief Justice Roberts: Under any theory of the case that Sachs presents, however, there is nothing wrongful about the sale of the Eurail pass standing alone. Without the existence of the unsafe boarding conditions in Innsbruck, there would have been nothing to warn Sachs about when she bought the Eurail pass. However Sachs frames her suit, the incident in Innsbruck remains at its foundation.

Fourth Amendment
Docket Nos. 14-1468, 14-1470, and 14-1507
Reversed and Remanded: The Supreme Court of North Dakota
Affirmed: The Supreme Court of Minnesota
Vacated and Remanded: The Supreme Court of North Dakota

Argued: April 20, 2016
Decided: June 23, 2016
Analysis: ABA PREVIEW 273 Issue 7

Overview: North Dakota and Minnesota (along with ten other states and the federal government) have “implied consent” laws that provide criminal penalties for a driver’s refusal to consent to a chemical test for alcohol in the driver’s blood. The petitioners in these consolidated cases either refused to consent (and were then penalized for failure to consent) or consented and then challenged the test as violating the Fourth Amendment.

Issue: May a state penalize a driver’s refusal to consent to a chemical test of the driver’s blood, breath, or urine to detect the presence of alcohol?

No. The Fourth Amendment permits warrantless breath tests incident to arrest for drunk driving but not warrantless blood tests.

From the opinion by Justice Alito (joined by Chief Justice Roberts and Justices Kennedy, Breyer, and Kagan): Blood tests are a different matter. They “require piercing the skin” and extract a part of the subject’s body. … And while humans exhale air from their lungs many times per minute, humans do not continually shed blood. It is true, of course, that people voluntarily submit to the taking of blood samples as part of a physical examination, and the process involves little pain or risk. … Nevertheless, for many, the process is not one they relish. It is significantly more intrusive than blowing into a tube. Perhaps that is why many States’ implied consent laws, including Minnesota’s, specifically
prescribe that breath tests be administered in the usual drunk-driving case instead of blood tests or give motorists a measure of choice over which test to take.

Concurring in part and dissenting in part: Justice Sotomayor (joined by Justice Ginsburg)
Concurring in judgment in part and dissenting in part: Justice Thomas

Fourth Amendment
Utah v. Strieff
Docket No. 14-1373
Reversed: The Supreme Court of Utah

Argued: February 22, 2016
Decided: June 20, 2016
Analysis: ABA PREVIEW 156 Issue 5

Overview: A police officer investigating illegal drug use unlawfully detained Edward Strieff and then arrested him for a minor traffic offense after discovering an outstanding arrest warrant. Pursuant to the arrest, the officer conducted a search and uncovered methamphetamine and drug paraphernalia. Strieff was charged with possession of methamphetamine and sought to suppress the evidence. The trial court denied the motion, and Strieff was convicted. Reversing the conviction, the Utah Supreme Court held that the illegal detention led to the evidence and that the existence of the warrant did not attenuate the taint of the Fourth Amendment violation. The United States Supreme Court granted certiorari to review the decision and to determine whether the evidence should be suppressed.

Issue: Can a trial court admit evidence obtained in a search incident to arrest when the arrest was effected pursuant to a valid warrant that was discovered as a result of an unconstitutional detention?

Yes. The evidence seized incident to Strieff’s arrest is admissible based on application of the Brown v. Illinois attenuation factors; in this case, there is no flagrant police misconduct and, therefore, the discovery of a valid, preexisting, and untainted arrest warrant attenuated the connection between the unconstitutional investigatory stop and the evidence seized incident to lawful arrest.

From the opinion by Justice Thomas
(joined by Chief Justice Roberts and Justices Kennedy, Breyer, and Alito):
Applying these factors, we hold that the evidence discovered on Strieff’s person was admissible because the unlawful stop was sufficiently attenuated by the preexisting arrest warrant. Although the illegal stop was close in time to Strieff’s arrest, that consideration is outweighed by two factors supporting the State. The outstanding arrest warrant for Strieff’s arrest is a critical intervening circumstance that is wholly independent of the illegal stop. The discovery of that warrant broke the causal chain between the unconstitutional stop and the discovery of evidence by compelling Officer Fackrell to arrest Strieff. And, it is especially significant that there is no evidence that Officer Fackrell’s illegal stop reflected flagrantly unlawful police misconduct.

From the dissenting opinion by Justice Sotomayor
(joined by Justice Ginsburg as to Parts, I, II, and III): By legitimizing the conduct that produces this double consciousness, this case tells everyone, white and black, guilty and innocent, that an officer can verify your legal status at any time. It says that your body is subject to invasion while courts excuse the violation of your rights. It implies that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be cataloged. We must not pretend that the countless people who are routinely targeted by police are “isolated.” They are the canaries in the coal mine whose deaths, civil and literal, warn us that no one can breathe in this atmosphere. See L. Guinier & G. Torres, The Miner’s Canary 274–283 (2002). They are the ones who recognize that unlawful police stops corrode all our civil liberties and threaten all our lives. Until their voices matter too, our justice system will continue to be anything but.

Dissenting: Justice Kagan (joined by Justice Ginsburg)

Full Faith and Credit Clause
V.L v. E.L.
Docket No. 15-648
Reversed and Remanded:
The Supreme Court of Alabama

Argued: N/A
Decided: March 7, 2016
Analysis: N/A

Overview: V.L and E.L. lived and raised children together that E.L. had given birth to in Georgia. A Georgia court entered a judgment of adoption making V.L. a legal parent to the children. V.L. and E.L. eventually separated while living in Alabama; an Alabama court refused to enforce the Georgia judgment, ruling that the Full Faith and Credit Clause of the U.S. Constitution does not require it to enforce Georgia judgment.

Issue: Did the state supreme court err when it ruled that the Full Faith and Credit Clause of the U.S. Constitution does not require it to enforce another state’s judgment of adoption?

Yes. As the Georgia state court had proper jurisdiction to issue the adoption judgment, the Alabama court erred in refusing to grant that judgment full faith and credit.

From the per curiam opinion: As Justice Holmes observed more than a century ago, “it sometimes may be difficult to decide whether certain words in a statute are directed to jurisdiction or to merits.” Fauntleroy v. Lum, 210 U. S. 230 (1908). In such cases, especially where the Full Faith and Credit Clause is concerned, a court must be “slow to read ambiguous words, as meaning to leave the judgment open to dispute, or as intended to do more than fix the rule by which the court should decide.” That time-honored rule controls here. The Georgia judgment appears on its face to have been issued by a court with jurisdiction, and there is no established Georgia law to the contrary. It follows that the Alabama Supreme Court erred in refusing to grant that judgment full faith and credit.
Government Contracts
Kingdomware Tech, Inc. v. U.S.

Docket No. 14-916
Reversed and Remanded:
The Federal Circuit

Argued: February 22, 2016
Decided: June 16, 2016
Analysis: ABA PREVIEW 165 Issue 5

Overview: In 2006, Congress passed a statute designed, in part, to improve the U.S. Department of Veterans Affairs’ track record of awarding contracts to companies owned and controlled by veterans. Although veterans groups believed that the statute required the Department, or VA, to put “veterans first” in nearly all contracting actions, the VA has taken the position that the statutory preferences do not apply to certain procurements that amount to billions of dollars annually. The U.S. Government Accountability Office (GAO) ruled against the VA, but the Court of Federal Claims (COFC) and Federal Circuit reached the opposite conclusion. The Supreme Court was asked to determine the breadth of the statutory preference.

Issue: Is the U.S. Department of Veterans Affairs, or VA, required to prioritize contracting with veteran-owned firms whenever certain statutory prerequisites are met?

No. Section 8127(d)’s contracting procedures are mandatory and apply to all the Department’s contracting determinations.

From the unanimous opinion by Justice Thomas: Congress’ use of the word “shall” demonstrates that § 8127(d) mandates the use of the Rule of Two in all contracting before using competitive procedures. Unlike the word “may,” which implies discretion, the word “shall” usually connotes a requirement. Compare Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U. S. 26 (1998) (recognizing that “shall” is “mandatory” and “normally creates an obligation impervious to judicial discretion”), with United States v. Rodgers, 461 U. S. 677 (1983) (explaining that “[t]he word ‘may,’ when used in a statute, usually implies some degree of discretion”). Accordingly, the Department shall (or must) prefer veteran owned small businesses when the Rule of Two is satisfied.

Habeas Corpus
Duncan v. Owens

Docket No. 14-1516
Dismissed: The Seventh Circuit

Argued: January 12, 2016
Decided: January 20, 2016
Analysis: ABA PREVIEW 124 Issue 4

Overview: At Lawrence Owens’s murder trial, the state relied exclusively on the conflicting testimony of two eyewitnesses to prove that Owens had killed Ramon Nelson. The trial judge made comments about what wasn’t presented at trial and then found Owens guilty—connecting his comments to the verdict. The state court found harmless error, but the Seventh Circuit granted habeas relief, ruling that a criminal conviction cannot be based on nonrecord findings. The state challenged that ruling, arguing that the habeas statute requires more deference to the state court.

Issue: Did the Seventh Circuit violate 28 U.S.C. § 2254 and a long line of the Supreme Court’s decisions by awarding habeas relief in the absence of clearly established precedent from the Supreme Court?

From the per curiam opinion: The writ of certiorari is dismissed as improvidently granted.

Habeas Corpus
Montgomery v. Louisiana

Docket No. 14-280
Reversed and Remanded:
The Supreme Court of Louisiana

Argued: October 13, 2015
Decided: January 25, 2016
Analysis: ABA PREVIEW 31 Issue 1

Overview: In November 1963, Henry Montgomery, a 17-year-old African American, was charged with the murder of white Sheriff Deputy Charles Hurt. The jury convicted Montgomery of murder, and under Louisiana law, he automatically received the death penalty. In Miller v. Alabama, 567 U.S. ___ (2012), the Court held that mandatory life without parole for juvenile homicide offenders violates the Eighth Amendment. Montgomery argued that Miller rendered his sentence illegal.

Issue: Did Miller v. Alabama adopt a new substantive rule that applies retroactively on collateral review to people condemned as juveniles to die in prison?

No. Miller’s prohibition on mandatory life without parole for juveniles announced a new substantive rule and is therefore retroactive in cases on state collateral review.

Issue: Does the Supreme Court have jurisdiction to decide whether the Supreme Court of Louisiana correctly refused to give retroactive effect in this case to this Court’s decision in Miller v. Alabama?

Yes. The Court has jurisdiction to decide whether the Louisiana Supreme Court correctly refused to give retroactive effect to Miller.

From the opinion by Justice Kennedy (joined by Chief Justice Roberts and Justices Ginsburg, Breyer, Sotomayor, and Kagan): Miller, it is true, did not bar a punishment for all juvenile offenders, as the Court did in Roper or Graham. Miller did bar life without parole, however, for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility. For that reason, Miller is no less substantive than are Roper and Graham. Before Miller, every juvenile convicted of a homicide offense could be sentenced to life without parole. After Miller, it will be the rare juvenile offender who can receive that same sentence. The only difference between Roper and Graham, on the one hand, and Miller, on the other hand, is that Miller drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption. The fact that life without parole could be a proportionate sentence for the latter kind of juvenile offender does not mean that all other children imprisoned under a disproportionate sentence have not suffered the deprivation of a substantive right.

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

Immigration
United States v. Texas
Docket No. 15-674
Affirmed: The Fifth Circuit

Argued: April 18, 2016
Decided: June 23, 2016
Analysis: ABA PREVIEW 269 Issue 7

Overview: The Secretary of the Department of Homeland Security issued a memo in 2014 granting deferred action from deportation for certain classes of unlawfully present aliens. In particular, the memo granted deferred action for parents of U.S. citizens and lawful permanent residents who meet certain other qualifications. The policy was called Deferred Action for Parents of Americans and Lawful Permanent Residents, or “DAPA.” Texas and 25 other states sued the Secretary of the Department of Homeland Security, claiming that DAPA violated the Immigration and Naturalization Act; that it amounted to a new regulatory rule, which required notice-and-comment rulemaking; and that it violated the President’s constitutional duty to “take care that the laws be faithfully executed.”

Issues: Does a state have standing to challenge DAPA in federal court? Does DAPA violate the Immigration and Naturalization Act, the Administrative Procedure Act’s requirement of “notice-and-comment” rulemaking, or the Take Care Clause of the Constitution?

From the per curiam opinion: The judgment is affirmed by an equally divided Court.

Indian Law
Nebraska v. Parker
Docket No. 14-1406
Affirmed: The Eighth Circuit

Argued: January 20, 2016
Decided: March 22, 2016
Analysis: ABA PREVIEW 135 Issue 4

Overview: Members of the Omaha Tribe occupy reservation land in Nebraska. In 1882, certain property on the reservation was opened to settlement by non-Indian settlers; since then, the land has been governed by the state of Nebraska. Litigation ensued after the Tribe imposed a liquor tax in the disputed area of the reservation. Individuals living in the disputed area sought a declaratory judgment that the land belonged to the state. Nebraska intervened in support of the individuals. The United States intervened on behalf of the Tribe. After the Tribal court determined that the boundaries had not been diminished, the case went to federal court. The Supreme Court was asked to decide whether a court may reach the issue of de facto diminishment if congressional intent to diminish the reservation is not established.

Issue: Did an 1882 Act diminish the boundaries of the Omaha Tribe Reservation?

No. The 1882 Act did not diminish the boundaries of the Omaha Indian Reservation.

From the unanimous opinion by Justice Thomas: The 1882 Act bore none of these hallmarks of diminishment. The 1882 Act empowered the Secretary to survey and appraise the disputed land, which then could be purchased in 160-acre tracts by nonmembers. 22 Stat. 341. The 1882 Act states that the disputed lands would be “open for settlement under such rules and regulations as [the Secretary of the Interior] may prescribe.” Ibid. And the parcels would be sold piecemeal in 160-acre tracts. Ibid. So rather than the Tribe’s receiving a fixed sum for all of the disputed lands, the Tribe’s profits were entirely dependent upon how many nonmembers purchased the appraised tracts of land.

Jury Procedures
Dietz v. Bouldin
Docket No. 15-458
Affirmed: The Ninth Circuit

Argued: April 26, 2016
Decided: June 9, 2016
Analysis: ABA PREVIEW 260 Issue 7

Overview: Normally, juries have completed their civic duties after a judge discharges them from service. However, on rare occasions, trial judges will recall juries if there has been some kind of mistake or
legally impossible verdict. Such an event occurred in this case, where the jury’s verdict was not compatible with a damages stipulation. The judge recalled the jury shortly after discharge. The case presented the Court with an interesting question of whether to create a bright-line rule against such recalls or to establish guidelines for trial courts to follow in such circumstances.

**Issue:** After a judge has discharged a jury from service in a case and the jurors have left the judge’s presence, may the judge recall the jurors for further service in the same case?

Yes. A federal district court has limited inherent power to rescind a jury discharge order and recall a jury in a civil case for further deliberations after identifying an error in the jury’s verdict; the court did not abuse that power here.

*From the opinion by Justice Sotomayor* (joined by Chief Justice Roberts and Justices Ginsburg, Breyer, Alito, and Kagan): This Court’s recognition of these other inherent powers designed to resolve cases expeditiously is consistent with recognizing an inherent power to recall a discharged jury and reempanel the jurors with curative instructions. Compared to the alternative of conducting a new trial, recall can save the parties, the court, and society the costly time and litigation expense of conducting a new trial with a new set of jurors.

*From the dissenting opinion by Justice Thomas* (joined by Justice Kennedy): In contrast, the only thing that is clear about the majority’s multifactor test is that it will produce more litigation. This multifactor test may aid in identifying relevant facts for analysis, but—like most multifactor tests—it leaves courts adrift once those facts have been identified. The majority instructs district judges to look at “the length of delay between discharge and recall,” “whether the jurors have spoken to anyone about the case after discharge,” “the reaction to the verdict,” and whether jurors have had access to their cellphones or the Internet.... But in collecting these factors, the majority offers little guidance on how courts should apply them. Is one hour too long? How about two hours or two days? Does a single Internet search by a juror preclude recalling the entire jury? How many factors must be present to shift the balance against recalling the jury? All the majority says is that any factor “standing alone could be dispositive in a particular case.”

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**Justiciability**

**Campbell-Ewald Co. v. Gomez**

**Docket No. 14-857**

**Affirmed and Remanded:**

**The Ninth Circuit**

Argued: October 14, 2015

Decided: January 20, 2016

Analysis: ABA *PREVIEW* 23 Issue 1

**Overview:** Campbell-Ewald contracted with the U.S. Navy to solicit potential recruits using text messaging. Messages were to go to 150,000 persons who had consented to receiving such text messages. Campbell-Ewald subcontracted the work to MindMatics. MindMatics sent a solicitation by text message to Jose Gomez, a person outside the Navy’s target audience and a person who did not consent to receiving the message. Gomez brought a class-action suit against Campbell-Ewald for violation of the Telephone Consumer Protection Act of 1991. Campbell-Ewald offered to settle with Gomez for complete individual relief, but not for Gomez’s class claims. Gomez rejected the offer.

**Issue:** Does a defendant’s settlement offer of complete individual relief render a plaintiff’s case moot, and thus nonjusticiable?

No. An unaccepted settlement offer or offer of judgment does not moot a plaintiff’s case, so the district court retained jurisdiction to adjudicate Gomez’s complaint.

**Issue:** Does “derivative sovereign immunity” extend beyond claims against government contractors for property damage arising out of public works projects?

No. Campbell’s status as a federal contractor does not entitle it to immunity from suit for its violation of the TCPA.

*From the opinion by Justice Ginsburg* (joined by Justices Kennedy, Breyer, Sotomayor, and Kagan): Under basic principles of contract law, Campbell’s settlement bid and Rule 68 offer of judgment, once rejected, had no continuing efficacy. ... Absent Gomez’s acceptance, Campbell’s settlement offer remained only a proposal, binding neither Campbell nor Gomez. See App. to Pet. for Cert. 59a. ... Having rejected Campbell’s settlement bid, and given Campbell’s continuing denial of liability, Gomez gained no entitlement to the relief Campbell previously offered. See *Eliason v. Henshaw*, 4 Wheat. 225 (1819). ... In short, with no settlement offer still operative, the parties remained adverse; both retained the same stake in the litigation they had at the outset.

**Concurring:** Justice Thomas

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

**Dissenting:** Justice Alito

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**Patent Law**

**Cuozzo Speed Technologies, LLC v. Lee**

**Docket No. 15-446**

**Affirmed:** The Federal Circuit

Argued: April 25, 2016

Decided: June 20, 2016

Analysis: ABA *PREVIEW* 262 Issue 7

**Overview:** In this case, the Supreme Court was asked to consider whether the Patent Trial and Appeal Board (PTAB or Board) should continue to apply the “broadest reasonable interpretation” (BRI) standard for patent claim construction during inter partes review (IPR) or should instead apply the “ordinary and customary meaning” standard. Petitioner Cuozzo appealed the claim construction of the PTAB applying the BRI standard, which was upheld by the U.S. Court of Appeals for the Federal Circuit. Petitioner further appealed whether the original determination by the Board to institute IPR is appealable, after the Federal Circuit found that the institution determination could not be appealed even after the final written decision of the IPR was issued.

**Issue:** Did the court of appeals err in holding that, in IPR proceedings, the Board may construe claims in an issued patent according to their broadest reasonable interpretation rather than their plain and ordinary meaning?

No. The Patent Office regulation requiring the Board to apply the broadest reasonable constructions standard to interpret patent claims is a reasonable exercise of the rulemaking authority granted to the Patent Office by statute.

**Issue:** Did the court of appeals err in holding that, even if the Board exceeds its
statutory authority in instituting an IPR proceeding, the Board’s decision whether to institute an IPR proceeding is judicially unreviewable?

No. Section 314(d) bars Cuozzo’s challenge to the Patent Office’s decision to institute inter partes review.

From the unanimous opinion by Justice Breyer as to Parts I and III and the opinion of the Court with respect to Part II (joined by Chief Justice Roberts and Justices Kennedy, Thomas, Ginsburg, and Kagan): [A] contrary holding would undercut one important congressional objective, namely, giving the Patent Office significant power to revisit and revise earlier patent grants. See H. R. Rep., at 45, 48 (explaining that the statute seeks to “improve patent quality and restore confidence in the presumption of validity that comes with issued patents”); 157 Cong. Rec. 9778 (2011) (remarks of Rep. Goodlatte) (noting that inter partes review “screen[s] out bad patents while bolstering valid ones”). We doubt that Congress would have granted the Patent Office this authority, including, for example, the ability to continue proceedings even after the original petitioner settles and drops out, § 317(a), if it had thought that the agency’s final decision could be unwound under some statutory authority in instituting an IPR proceeding. Our recent decision in Octane Fitness arose in a different context but points in the same direction. In that case we considered § 285 of the Patent Act, which allows district courts to award attorneys’ fees under the similarly worded 35 U.S.C. § 285?

Yes. The Seagate test is not consistent with 35 U.S.C. § 284.

From the unanimous opinion by Chief Justice Roberts: Our recent decision in Octane Fitness arose in a different context but points in the same direction. In that case we considered § 285 of the Patent Act, which allows district courts to award attorney’s fees to prevailing parties in “exceptional” cases. 35 U. S. C. § 285. The Federal Circuit had adopted a two-part test for determining when a case qualified as exceptional, requiring that the claim asserted be both objectively baseless and brought in subjective bad faith. We rejected that test on the ground that a case presenting “subjective bad faith” alone could “sufficiently set itself apart from mine-run cases to warrant a fee award.”… So too here. The subjective willfulness of a patent infringer, intentional or knowing, may warrant enhanced damages, without regard to whether his infringement was objectively reckless.

Concurring: Justice Breyer (joined by Justices Kennedy and Alito)
error affected the defendant’s substantial rights?

Yes. Courts reviewing Guideline errors cannot apply a categorical “additional evidence” rule in cases, like this one, where a district court applies an incorrect range but sentences the defendant within the correct range.

From the opinion by Justice Kennedy

Docket Nos. 14-614 and 14-623
Affirmed: The Fourth Circuit

Argued: February 24, 2016
Decided: April 19, 2016
Analysis: ABA PREVIEW 185 Issue 5

Overview: The Federal Power Act authorizes the Federal Energy Regulatory Commission (FERC) to regulate the transmission and wholesale sales of electricity on the interstate market. FERC’s regulatory scheme includes a market mechanism to ensure a wholesale rate that is just and reasonable. The mechanism also helps ensure continued sufficient generation by incentivizing new generation when necessary. Maryland, concerned that FERC’s scheme did not sufficient incentivize new generation in the state, enacted its own regulatory scheme. The Maryland scheme provides subsidies, through state-mandated contracts, to a new generator, which sells electricity in the FERC market. Competitors of Maryland’s new electricity generator and the federal government argued that FERC’s regulatory scheme preempts Maryland’s scheme, rendering it unconstitutional.

Issue: Does Maryland’s scheme impermissibly regulate in the wholesale electricity market, a field that Congress reserved to the federal government alone?

Yes. Maryland’s program is preempted because it disregards the interstate wholesale rate FERC requires.

From the unanimous opinion by Justice Ginsburg:

Docket No. 14-844
Affirmed: The District of Columbia Circuit

Argued: November 4, 2015
Decided: January 12, 2016
Analysis: ABA PREVIEW 44 Issue 2

Overview: Indigent prisoners are allowed to pay the filing fees for civil lawsuits they initiate in installments under the Prison Litigation Reform Act, 28 U.S.C. § 1915 (b) (2). The law covers civil suits brought by prisoners but not motions and petitions connected to their criminal case. The PLRA states that the prisoner must pay monthly installment payments of 20 percent of the prisoner’s monthly income until the fee is paid. The question before the Court was how to calculate the monthly payment when the prisoner owes installment payments on more than one case.

Issue: Does 28 U.S.C. § 1915 require an indigent prisoner to pay toward filing fees 20 percent of his or her total income, the per-prisoner approach?

No. Section 1915(b)(2) calls for simultaneous, not sequential, recoupment of multiple monthly installment payments.

From the unanimous opinion by Justice Ginsburg:

Docket No. 14-1209
Vacated and Remanded: The Ninth Circuit

Argued: January 20, 2016
Decided: March 22, 2016
Analysis: ABA PREVIEW 127 Issue 4

Overview: For many years, petitioner John Sturgeon sued to challenge this restriction. He argued that the restriction is barred
by Section 103(c) of the Alaska National Interest Lands Conservation Act (ANILCA).

**Issue**: Does Section 103(c) of the Alaska National Interest Lands Conservation Act bar the National Park Service from banning hovercrafts on navigable waters in Alaska’s national parks?

No. The Ninth Circuit’s interpretation of Section 103(c) of the Alaska National Interest Lands Conservation is inconsistent with both the text and context of the ANILCA.

From the unanimous opinion by Chief Justice Roberts: Under the reading of the statute adopted below, the Park Service may apply nationally applicable regulations to “non-public” lands within the boundaries of conservation system units in Alaska, but it may not apply Alaska specific regulations to those lands. That is a surprising conclusion. ANILCA repeatedly recognizes that Alaska is different—from its “unrivaled scenic and geological values,” to the “unique” situation of its “rural residents dependent on subsistence uses,” to “the need for development and use of Arctic resources with appropriate recognition and consideration given to the unique nature of the Arctic environment.”

**Religious Freedom**

*Zubik v. Burwell; Priests for Life v. Department of H&HS; Roman Catholic Archbishop v. Burwell; East Texas Baptist University v. Burwell; Little Sisters v. Burwell; Southern Nazarene University v. Burwell; and Geneva College v. Burwell*


**Vacated and Remanded: The Third, D.C., Fifth, and Tenth Circuits**

Argued: March 23, 2016

Decided: May 16, 2016

Analysis: ABA PREVIEW 219 Issue 6

**Overview**: The federal government created an accommodation for religious nonprofits to opt out of the contraceptive coverage requirement under the Affordable Care Act. The accommodation requires a religious nonprofit simply to write a letter, or complete a simple form, telling the government that it objects to providing contraceptive coverage for its employees and students as part of its regular health-care coverage. Upon receipt of notice, the federal government requires a religious nonprofit’s health insurer or third-party administrator to provide contraceptive coverage directly to the nonprofit’s employees and students, without the involvement of the objecting nonprofit.

**Issue**: Does the federal accommodation to the contraceptive-coverage requirement for religious nonprofits substantially burden their religious practices, and, if so, is the accommodation the least restrictive way to promote a compelling government interest?

In light of the positions asserted by the parties in their supplemental briefs, the Court vacates the judgments below and remands.

From the *per curiam* opinion: In light of the positions asserted by the parties in their supplemental briefs, the Court vacates the judgments below and remands to the respective United States Courts of Appeals for the Third, Fifth, Tenth, and D. C. Circuits. Given the gravity of the dispute and the substantial clarification and refinement in the positions of the parties, the parties on remand should be afforded an opportunity to arrive at an approach going forward that accommodates petitioners’ religious exercise while at the same time ensuring that women covered by petitioners’ health plans “receive full and equal health coverage, including contraceptive coverage.” … We anticipate that the Courts of Appeals will allow the parties sufficient time to resolve any outstanding issues between them.

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

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**Retroactivity**

*Welch v. United States*

**Docket No. 15-6418**

**Vacated and Remanded: The Eleventh Circuit**

Argued: March 30, 2016

Decided: April 18, 2016

Analysis: ABA PREVIEW 232 Issue 6

**Overview**: Petitioner Gregory Welch pled guilty to being a felon in possession of a firearm and ammunition, which carries a maximum sentence of 10 years’ imprisonment. Over Welch’s objection, the district court sentenced him to 15 years in prison, finding he was subject to a 15-year statutory minimum-mandatory sentence under the Armed Career Criminal Act (ACCA) based on three predicate felonies, including a Florida conviction for robbery by sudden snatching. The Eleventh Circuit affirmed Welch’s sentence on direct appeal, concluding that robbery by sudden snatching was a violent felony under ACCA’s residual clause. Welch filed a pro se 28 U.S.C. § 2255 motion to vacate his sentence challenging the constitutionality of his ACCA sentence. The district court denied his § 2255 motion and declined to issue a certificate of appealability (COA). Welch separately filed a motion for COA in the Eleventh Circuit and motion to hold his case in abeyance, noting that the Supreme Court had calendared Johnson v. United States for reargument on the question of “whether the residual clause” in ACCA is unconstitutionally vague. The court denied Welch a COA without addressing his abeyance motion before the Supreme Court decided Johnson, which held that ACCA’s residual clause is unconstitutionally vague. Welch filed a pro se certiorari petition that was granted. The Supreme Court was asked to decide if its decision in Johnson applies retroactively to cases on collateral review.

**Issue**: Did Johnson v. United States, 135 S. Ct. 2551 (2015), announce a new substantive rule of constitutional law that applies retroactively to cases that are on collateral review?

Yes. Johnson announced a new substantive rule that has retroactive effect in cases on collateral review.
From the opinion by Justice Kennedy (joined by Chief Justice Roberts and Justices Ginsburg, Breyer, Alito, Sotomayor, and Kagan): It should be noted, of course, that not every decision striking down a statute is ipso facto a substantive decision. A decision that strikes down a procedural statute—for example, a statute regulating the types of evidence that can be presented at trial—would itself be a procedural decision. It would affect only the “manner of determining the defendant’s culpability,” not the conduct or persons to be punished. … A decision of this kind would have no retroactive effect under Teague unless it could be considered a “watershed” procedural rule. … Johnson, however, struck down part of a criminal statute that regulates conduct and prescribes punishment. It thereby altered “the range of conduct or the class of persons that the law punishes.” … It follows that Johnson announced a substantive rule that has retroactive effect in cases on collateral review.

Dissenting: Justice Thomas

RICO Act
RJR Nabisco, Inc. v. European Community

Docket No. 15-138
Reversed and Remanded: The Second Circuit

Argued: March 21, 2016
Decided: June 20, 2016
Analysis: ABA PREVIEW 205 Issue 6

Overview: The European Community (EC) brought a Racketeer Influenced and Corrupt Organizations Act (RICO) claim against RJR Nabisco, Inc. (RJR), alleging that RJR directed a scheme to launder euros, acquired by drug-dealing criminal organizations in Europe, through the purchase of RJR cigarettes. The district court dismissed the claim, concluding that RICO has no extraterritorial application. The Second Circuit reversed, holding that RICO can apply to extraterritorial activity when the claim was predicated on a criminal statute, such as 18 U.S.C. § 1956 (money laundering), with explicit extraterritorial reach.

From the opinion by Justice Ginsburg (joined by Chief Justice Roberts and Justices Kennedy and Thomas and joined as to Parts I, II, and III by Justices Ginsburg, Breyer, and Kagan): Although we find that RICO imposes no domestic enterprise requirement, this does not mean that every foreign enterprise will qualify. Each of RICO’s substantive prohibitions requires proof of an enterprise that is “engaged in, or the activities of which affect, interstate or foreign commerce.” §§ 1962(a), (b), (c). We do not take this reference to “foreign commerce” to mean literally all commerce occurring abroad. Rather, a RICO enterprise must engage in, or affect in some significant way, commerce directly involving the United States—e.g., commerce between the United States and a foreign country. Enterprises whose activities lack that anchor to U.S. commerce cannot sustain a RICO violation.

From the opinion by Justice Alito (joined by Chief Justice Roberts and Justices Kennedy and Thomas and joined as to Parts I, II, and III by Justices Ginsburg, Breyer, and Kagan): Although we find that RICO imposes no domestic enterprise requirement, this does not mean that every foreign enterprise will qualify. Each of RICO’s substantive prohibitions requires proof of an enterprise that is “engaged in, or the activities of which affect, interstate or foreign commerce.” §§ 1962(a), (b), (c). We do not take this reference to “foreign commerce” to mean literally all commerce occurring abroad. Rather, a RICO enterprise must engage in, or affect in some significant way, commerce directly involving the United States—e.g., commerce between the United States and a foreign country. Enterprises whose activities lack that anchor to U.S. commerce cannot sustain a RICO violation.

Issue: Does the Racketeer Influenced and Corrupt Organizations Act (RICO) have any application to extraterritorial criminal activity?

No. The presumption against extraterritoriality has been rebutted with respect to certain applications of RICO’s substantive prohibitions in § 1962; however, § 1964(c)’s private right of action does not overcome the presumption against extraterritoriality, and thus a private RICO plaintiff must allege and prove a domestic injury.

From the opinion by Justice Sotomayor (joined by Justices Breyer and Kagan): Although we find that RICO imposes no domestic enterprise requirement, this does not mean that every foreign enterprise will qualify. Each of RICO’s substantive prohibitions requires proof of an enterprise that is “engaged in, or the activities of which affect, interstate or foreign commerce.” §§ 1962(a), (b), (c). We do not take this reference to “foreign commerce” to mean literally all commerce occurring abroad. Rather, a RICO enterprise must engage in, or affect in some significant way, commerce directly involving the United States—e.g., commerce between the United States and a foreign country. Enterprises whose activities lack that anchor to U.S. commerce cannot sustain a RICO violation.

From the per curiam opinion: The court offered three explanations to support its holding that the Second Amendment does not extend to stun guns. First, the court explained that stun guns are not protected because they “were not in common use at the time of the Second Amendment’s
enactment.” … This is inconsistent with Heller’s clear statement that the Second Amendment “extends … to … arms … that were not in existence at the time of the founding.”

From the concurring opinion by Justice Alito (joined by Justice Thomas): The lower court’s ill treatment of Heller cannot stand. The reasoning of the Massachusetts court poses a grave threat to the fundamental right of self-defense. The Supreme Judicial Court suggested that Caetano could have simply gotten a firearm to defend herself. … But the right to bear other weapons is “no answer” to a ban on the possession of protected arms. … Moreover, a weapon is an effective means of self-defense only if one is prepared to use it, and it is presumptuous to tell Caetano she should have been ready to shoot the father of her two young children if she wanted to protect herself. Courts should not be in the business of demanding that citizens use more force for self-defense than they are comfortable wielding.

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**Sixth Amendment**

**Betterman v. Montana**

**Docket No. 14-1457**

**Affirmed: The Supreme Court of Montana**

Argued: March 28, 2016  
Decided: May 19, 2016  
Analysis: ABA PREVIEW 213 Issue 6

**Overview:** The first guarantee in the Sixth Amendment of the U.S. Constitution provides for a right to a speedy trial. This right definitely applies to a presumptively innocent defendant who must wait a long time before being brought to trial. The question in this case was whether the speedy trial right applies to a defendant who has been convicted (by pleading guilty) and then must wait a long time before his sentencing.

**Issue:** Does the Sixth Amendment’s Speedy Trial Clause apply to the sentencing phase of a criminal prosecution, protecting a criminal defendant from inordinate delay in final disposition of his case?

**No.** The Sixth Amendment’s speedy trial guarantee does not apply once a defendant has been found guilty at trial or has pleaded guilty to criminal charges.

**From the unanimous opinion by Justice Ginsburg:** [A]: The third phase of the criminal-justice process, i.e., between conviction and sentencing, the Constitution’s presumption-of-innocence protective speedy trial right is not engaged. That does not mean, however, that defendants lack any protection against undue delay at this stage. The primary safeguard comes from statutes and rules. The federal rule on point directs the court to “impose sentence without unnecessary delay.” Fed. Rule Crim. Proc. 32(b)(1). Many States have provisions to the same effect and some States prescribe numerical time limits. Further, as at the prarest stage, due process serves as a backstop against exorbitant delay. … After conviction, a defendant’s due process right to liberty, while diminished, is still present.

**Concurring:** Justice Thomas (joined by Justice Alito)  
**Concurring:** Justice Sotomayor

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**Sixth Amendment**

**Maryland v. Kulbicki**

**Docket No. 14-848**

**Reversed: The Court of Appeals of Maryland**

Argued: N/A  
Decided: October 5, 2015  
Analysis: N/A

**Overview:** James Kulbicki was charged with murdering his mistress. At trial, Kulbicki’s attorneys failed to question the legitimacy of the Comparative Bullet Lead Analysis (CBLA) offered by an FBI agent; the analysis showed that the bullet from Kulbicki’s gun was not an exact match to that removed from the victim. By the time the conviction came up on appeal, CBLA evidence had fallen out of favor with the scientific community. The Court of Appeals of Maryland determined that the attorneys’ failure to challenge this evidence during the trial was a prejudicial deficiency.

**Issue:** Was the lower court correct in finding that the defendant’s attorneys were unconstitutionally ineffective on the basis that the attorneys had failed to challenge evidence that would eventually fall out of scientific favor?

**No.** The lower court inappropriately concluded that the defense attorneys were constitutionally required to predict the demise of analysis relied upon as evidence; an appellate court must assess the
the required notice to a user of the agency's consumer information, that information regardless may be entirely accurate. In addition, not all inaccuracies cause harm or present any material risk of harm. An example that comes readily to mind is an incorrect zip code. It is difficult to imagine how the dissemination of an incorrect zip code, without more, could work any concrete harm.

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

State Sovereign Immunity
Franchise Tax Board of California v. Hyatt
Docket No. 14-1175
Vacated and Remanded:
The Supreme Court of Nevada

Argued: December 7, 2015
Decided: April 19, 2016
Analysis: ABA PREVIEW 104 Issue 3

Overview: Petitioner, the Franchise Tax Board of California, audited respondent Gilbert Hyatt and determined that he owed back taxes. Asserting that the Board committed torts during the audit, Hyatt sued the Board in Nevada state court. The Nevada Supreme Court partially upheld an award of money damages against the Board. The U.S. Supreme Court was then asked to decide whether a state and its agencies have constitutional immunity from private lawsuits in the courts of another state.

Issue: Does the Constitution require Nevada to give a California state agency the same immunity from a private lawsuit that a Nevada agency would have in Nevada’s courts?

Yes. The Constitution does not permit Nevada to apply a rule of Nevada law that awards damages against California that are greater than could be awarded against Nevada in similar circumstances.

Issue: Should the Court overrule Nevada v. Hall, 440 U.S. 410 (1979), which held that the Constitution permits a state and its agencies to be sued in the courts of another state?

The Court is equally divided on the questions whether Nevada v. Hall should be overruled; the Nevada courts’ exercise of jurisdiction over California’s state agency is affirmed.

From the opinion by Justice Breyer
(joined by Justices Kennedy, Ginsburg, Sotomayor, and Kagan): In light of the “constitutional equality” among the States, Coyle v. Smith, 221 U.S. 559 (1911), Nevada has not offered “sufficient policy considerations” to justify the application of a special rule of Nevada law that discriminates against its sister States. … In our view, Nevada’s rule lacks the “healthy regard for California’s sovereign status” that was the hallmark of its earlier decision, and it reflects a constitutionally impermissible “policy of hostility to the public Acts’ of a sister State.”

Concurring in judgment: Justice Alito
Dissenting: Chief Justice Roberts (joined by Justice Thomas)

Statute of Limitations
Menominee Indian Tribe of Wisconsin v. U.S.
Docket No. 14-510
Affirmed: The District of Columbia Circuit

Argued: December 1, 2015
Decided: January 25, 2016
Analysis: ABA PREVIEW 111 Issue 3

Overview: The petitioner is the Menominee Indian Tribe of Wisconsin, a federally recognized Indian tribe. It claimed that the federal government breached its obligations under the Indian Self-Determination and Education Assistance Act (ISDA), 25 U.S.C. §§ 450 et seq., by not fully funding tribal support costs under the ISDA. The liability of the federal government for these support costs, which pay administrative and overhead expenses, had been the subject of litigation in various courts for decades. The petitioner was a member of a putative class in a case filed by the Cherokee Nation as a putative class action, but the Cherokee Nation lost that case. In a later case for claims for contract support for other years, the Cherokee Nation prevailed at the Supreme Court. The petitioner proceeded with its contract support claim after that, believing that the statute of limitations was tolled, or suspended, during the first Cherokee Nation litigation. The courts held
that it was not and that the petitioner was not entitled to equitable tolling.

**Issue:** Did the D.C. Circuit err in its interpretation of *Holland v. Florida* by determining that the petitioner must show “external obstacles” to a timely filing to successfully invoke equitable tolling of the statute of limitations?

**No.** Equitable tolling does not apply to the presentation of petitioner’s claims.

**From the unanimous opinion by Justice Alito:** The Tribe’s other excuses are even less compelling. Its belief that presentment was futile was not an obstacle beyond its control but a species of the same mistake that kept it out of the putative Cherokee Nation class. And the fact that there may have been significant risk and expense associated with presenting and litigating its claims is far from extraordinary. As the District Court noted below, “it is common for a litigant to be confronted with significant costs to litigation, limited financial resources, an uncertain outcome based upon an uncertain legal landscape, and impending deadlines. These circumstances are not ‘extraordinary.’”

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**Voting Rights**

*Evenwel v. Abbott*

**Docket No. 14-940**

**Affirmed: The Western District of Texas**

Argued: December 8, 2015
Decided: April 4, 2016
Analysis: ABA PREVIEW 84 Issue 3

**Overview:** Under the “one-person, one-vote” principle in the Equal Protection Clause, states must draw their state legislative districts based on roughly equal population. But the Supreme Court had never before specified which population a state must equalize across districts. Indeed, the Court had said that states can choose their own population metric, within certain bounds. This case tested whether a state can choose one metric (total population), even when it produces unequal districts as measured by a different metric (voter eligible population). Texas, like all other states, drew its state legislative districts based on total population. Texas voters challenged this method of districting, however, arguing that it devalued their votes in relation to citizens’ votes in other districts. They claimed that Texas should draw its legislative districts based on voter-eligible population, not total population, in order to achieve equality across districts.

**Issue:** Can a state draw its state legislative districts based on total population, even when those districts are unequal when measured by voter-eligible population?

**Yes.** A state or locality may draw its legislative districts based on total population according to constitutional history, precedent, and practice.

**From the opinion by Justice Ginsburg** (joined by Chief Justice Roberts and Justices Kennedy, Breyer, Sotomayor, and Kagan): What constitutional history and our prior decisions strongly suggest, settled practice confirms. Adopting voter-eligible apportionment as constitutional command would upset a well-functioning approach to districting that all 50 States and countless local jurisdictions have followed for decades, even centuries. Appellants have shown no reason for the Court to disturb this longstanding use of total population. … As the Framers of the Constitution and the Fourteenth Amendment comprehended, representatives serve all residents, not just those eligible or registered to vote.

**Concurring in judgment:** Justice Thomas

**Concurring in judgment:** Justice Alito

(joined by Justice Thomas except as to Part III-B)

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**Voting Rights**

*Wittman v. Personhuballah*

**Docket No. 14-1504**

**Dismissed: The Eastern District of Virginia**

Argued: March 21, 2016
Decided: May 23, 2016
Analysis: ABA PREVIEW 236 Issue 6

**Overview:** The Equal Protection Clause forbids a state legislature from unjustifiably using race as the predominate factor in redrawing state legislative and congressional districts. At the same time, some states were required under the Voting Rights Act to ensure against retrogression, the diminution of a minority group’s ability to elect a preferred candidate of their choice. This means that a covered state had
to consider race in redistricting. This case tested how a covered state can consider race.

Issue: Does a member of Congress from an adjoining district have standing to challenge the court-ordered map, on the theory that the map may make it harder for him to win reelection?

No. Appellants lack standing to pursue this appeal.

From the unanimous opinion by Justice Breyer: We have made clear that the “party invoking federal jurisdiction bears the burden of establishing” that he has suffered an injury by submitting “affidavit[s] or other evidence.” … When challenged by a court (or by an opposing party) concerned about standing, the party invoking the court’s jurisdiction cannot simply allege a nonobvious harm, without more. Here, there is no “more.” Representatives Wittman and Brat claim that unless the Enacted Plan is reinstated, their districts will be flooded with Democratic voters and their chances of reelection will accordingly be reduced. But we have examined the briefs, looking for any evidence that an alternative to the Enacted Plan (including the Remedial Plan) will reduce the relevant intervenors’ chances of reelection, and have found none. The briefs focus on Congressional District 3 and Congressional District 4, districts with Representatives Wittman and Brat are not associated.

Water Law
Montana v. Wyoming and North Dakota

Docket No. 137, Orig.
Ordered, Judged, and Remanded: The Special Master

Argued: N/A
Decided: March 21, 2016
Analysis: N/A

Overview: A conflict exists between Montana, Wyoming, and North Dakota over the available water in the Tongue River.


Issue: N/A

From the order and judgment: Wyoming is liable to Montana for reducing the volume of water available in the Tongue River at the Stateline between Wyoming and Montana.

White Collar Criminal Law
McDonnell v. United States

Docket No. 15-474
Vacated and Remanded:
The Fourth Circuit

Argued: April 27, 2016
Decided: June 27, 2016
Analysis: ABA PREVIEW 277 Issue 7

Overview: A federal jury convicted Virginia Governor Robert F. McDonnell of conspiring and committing honest services wire fraud and extortion under color of official right after he allegedly accepted more than $175,000 in goods and money from Star Scientific, Inc., CEO Jonnie Williams in exchange for assisting Williams and his company. The United States District Court for the Eastern District of Virginia denied McDonnell’s repeated motions for acquittal. McDonnell appealed his convictions to the United States Court of Appeals for the Fourth Circuit, which affirmed the judgment of the district court. McDonnell filed a successful petition for certiorari challenging the district court’s jury instruction defining an “official action.” The United States Supreme Court also granted McDonnell’s application for a stay of the mandate pending judgment of the Court.

Issue: Is “official action” under the Hobbs Act and honest-services statute limited to exercising sovereign governmental power, threatening to exercise such power, or pressuring others to exercise such power; or if not so limited, are the Hobbs Act and honest-services fraud statute unconstitutional?

No. An “official act” is a decision or action on a “question, matter, cause, suit, proceeding or controversy”; to qualify, the public official must make a decision or take an action on that question or matter, or agree to do so and therefore, setting up a meeting, talking to another official, or organizing an event—without more—does not fit that definition.

From the unanimous opinion by Chief Justice Roberts: Setting up a meeting, hosting an event, or calling an official (or agreeing to do so) merely to talk about a research study or to gather additional information, however, does not qualify as a decision or action on the pending question of whether to initiate the study. Simply expressing support for the research study at a meeting, event, or call—or sending a subordinate to such a meeting, event, or call—similarly does not qualify as a decision or action on the study, as long as the public official does not intend to exert pressure on another official or provide advice, knowing or intending such advice to form the basis for an “official act.” Otherwise, if every action somehow related to the research study were an “official act,” the requirement that the public official make a decision or take an action on that study, or agree to do so, would be meaningless.
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**Supreme Court on the Fourth Amendment**
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