Civil Cases in the Supreme Court's October 2018 Term

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The October 2018 Term will not best be remembered for the Court's rulings on such matters as the National Park Service's regulatory authority over the Nation River in Alaska,[1] the relationship between state and federal law for events occurring on the Outer Continental Shelf,[2] or whether maritime law permits punitive damages on claims of unseaworthiness.[3] Anyone who tells this Term's story will surely focus instead on two 5-4 rulings with potentially enormous political implications: one finding that partisan-gerrymandering claims are beyond federal courts' authority, and the other blocking the Trump Administration from including a citizenship question on the 2020 census (at least for the time being).

Although the gerrymandering and census cases dominated the national media's coverage of the Court, the Justices also took on a wide range of additional important matters on the civil side of their docket, from abortion to takings, from alcohol to taxes, from arbitration to Title VII. Below is a full accounting of the Court's most broadly noteworthy civil cases of the 2018 Term.

NEW ABORTION RULING

The Justices took on one abortion case this past Term—*Box v. Planned Parenthood of Indiana and Kentucky, Inc*.[4]— at least in part. The case garnered large media coverage because the Court denied certiorari on one of the claims on appeal: whether Indiana may bar abortions when the abortion provider knows that a woman seeks to terminate her pregnancy because of the fetus's race, sex, or disability. With respect to that question, Justice Thomas filed an opinion, arguing that "abortion is an act rife with the potential for eugenic manipulation"[5] and predicting that "the Court will soon need to confront the constitutionality of laws like Indiana's."[6]

Perhaps more important was the claim that was accepted and ruled upon regarding Indiana's law about incineration of fetal remains. An Indiana law bars the incineration of fetal remains with surgical byproducts but permits groups of fetal remains to be incinerated together. As a coauthor of the Court's watershed plurality opinion in 1992's *Planned Parenthood of Southeastern Pennsylvania v. Casey* (undue burden standard),[7] Justice Kennedy long provided a vote for preserving some variant of the abortion right first recognized in *Roe v. Wade*.[8] With Justice Kavanaugh now filling the seat that Justice Kennedy once held, there has been a great deal of speculation about *Roe* and *Casey*'s fate and about the role that *stare decisis* should play when the Court squarely confronts that question. But Planned Parenthood did not argue that the surgical-byproduct provision placed an undue burden on a woman's right to obtain an abortion,[9] so the Justices were not pressed to decide whether to retain the *Casey* standard.[10] Instead, Planned Parenthood argued that the surgical-byproduct provision failed ordinary rational-basis review because the law was based on the premise that fetuses are human beings—a premise that would be contrary to the Court's account of today's abortion right, and seemingly at odds with Indiana's simultaneous-cremation provision. The Seventh Circuit agreed but, in a brief *per curiam* ruling, the Justices reversed. Noting that "[t]his Court has already acknowledged that a State has a 'legitimate interest in proper disposal of fetal remains,'" the Justices held without elaboration that "Indiana's law is rationally related to the State's interest in proper disposal of fetal remains."[11]So the parties' dispute did not provide an occasion to revisit *Roe* and *Casey*, nor did its outcome provide any clues about Justice Kavanaugh's views regarding those rulings' longevity.

ALCOHOL AND INTERSTATE COMMERCE

Section 2 of the Twenty-first Amendment declares that "[t]he transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."[12] To what degree does Section 2 authorize states to enact protectionist legislation that would otherwise violate the dormant Commerce Clause? That was the question before the Court in *Tennessee Wine & Spirits Retailers Association v. Thomas*.[13] Tennessee had declared that individuals could not obtain licenses to operate liquor stores unless they had resided in the state for the prior two years and that corporations could not obtain such licenses unless all of their officers, directors, and shareholders satisfied the same two-year residency requirement. No one disputed the fact that Tennessee's facially discriminatory law violated well-established dormant Commerce Clause principles. The question was whether Section 2 shielded the law from dormant Commerce Clause scrutiny.

Writing for the 7-2 majority, Justice Alito concluded that Tennessee's law was unconstitutional. Section 2's chief purpose, he

Footnotes

1. Sturgeon v. Frost, 139 S. Ct. 1066 (2019) (holding that the Nation River is exempt from the National Park Service's ordinary regulatory authority).
2. Parker Drilling Management Services, Ltd. v. Newton, 139 S. Ct. 1881, 1889 (2019) (holding "that where federal law addresses the relevant issue, state law is not adopted as surrogate federal law on the OCS").
3. Dutra Group v. Batterton, 139 S. Ct. 2275 (2019) (holding that punitive damages are not available on unseaworthiness claims).
4. 139 S. Ct. 1780 (2019).
5. *Id*. at 1787 (Thomas, J., concurring).
6. *Id*. at 1784 (Thomas, J., concurring).
7. 505 U.S. 833 (1992).
8. 410 U.S. 113 (1973).
9. See *id*. at 1781, 1782 (twice emphasizing this point).
10. Casey, 505 U.S. at 874 (plurality opinion).
11. Box, 139 S. Ct. at 1782 (quoting Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 452 n. 45 (1983)).
12. U.S. Const. amend. XXI, § 2.
13. 139 S. Ct. 2449 (2019).

explained, was to lock into place "the basic structure of the federal-state alcohol regulatory authority that prevailed prior to the adoption of the [Prohibition-installing] Eighteenth Amendment."[14] In the years immediately prior to Prohibition, the Court said, it was established that "the Commerce Clause did not permit the States to impose protectionist measures clothed as police-power regulations."[15] The Court found that, rather than authorize economically protectionist legislation, Section 2 simply "allows each State leeway to enact the measures that its citizens believe are appropriate to address the public health and safety effects of alcohol and to serve other legitimate interests."[16] The Court held that those defending Tennessee's law had failed to identify any way in which the residency requirements were needed to achieve a health, safety, or other legitimate state interest.[17]

WHO DECIDES IF ARBITRATION APPLIES?

The Federal Arbitration Act (FAA) declares that, as a general matter, courts are obliged to enforce agreements to arbitrate. In two unanimous rulings handed down within a week of one another, the Court helped to illuminate the scope of that enforcement obligation. In a third ruling on the FAA, however, the justices were deeply divided.

In his first opinion, Justice Brett Kavanaugh wrote for the unanimous Court in *Henry Schein, Inc. v. Archer & White Sales, Inc.*[18] In that case, the parties had agreed that any disputes arising between them would be resolved by arbitration unless the dispute concerned injunctive relief or intellectual property. When one party subsequently filed an antitrust lawsuit against the other and requested both injunctive relief and damages, the defendant asked the district court to send the dispute to an arbitrator. Was the dispute indeed subject to arbitration? And who should answer that question—the district court or an arbitrator?

The district court and Fifth Circuit held that, even if the parties had agreed that an arbitrator would resolve disputes about arbitrability, the court could resolve the arbitrability question for itself because the defendant's insistence upon arbitration was "wholly groundless."[19] The Supreme Court, however, unanimously rejected the lower courts' "wholly groundless" exception to the FAA's pro-arbitration norm. Under that legislation, Justice Kavanaugh explained, "[w]hen the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract."[20] The Court remanded for the lower courts to determine whether the parties had indeed agreed that an arbitrator would resolve disputes about arbitrability.

Different questions about arbitrability arose in *New Prime, Inc. v. Oliveira*.[21] Section 1 of the FAA states that courts' obligation to enforce arbitration agreements does not apply to "contracts of employment of . . . workers engaged in foreign or interstate commerce."[22] That statutory language gave rise to two questions in this federal lawsuit brought by a truck driver against the company with which he contracted. First, suppose the parties in a given case disagree about whether a "contract[] of employment" exists between them and thus disagree about whether their dispute must be sent to an arbitrator. Does the FAA require courts to let an arbitrator resolve the question of Section 1's application? Led by Justice Gorsuch, the Court unanimously agreed that courts must resolve the question of Section 1's application for themselves.

"'When the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract.'"

The second question in *New Prime* was whether Section 1's phrase "contracts of employment" applies to contracts with independent contractors (such as, arguably, the truck driver here) or whether it applies only to employer-employee relationships. The Court unanimously concluded that, when Congress framed Section 1's language in 1925, the phrase "contract of employment" ordinarily referred to "nothing more than an agreement to perform work," and thus did not reflect any meaningful distinction between those who worked as independent contractors and those who worked as employees.[23] Absent direction by Congress to the contrary, moreover, courts must assign statutory language the meaning it carried at the time of enactment. The FAA thus did not authorize the court in which the truck driver filed his lawsuit to send the dispute to arbitration.

In a third FAA case, however, the justices divided 5-4. In *Lamps Plus, Inc. v. Varela*,[24] a computer hacker had managed to secure the tax information of roughly 1,300 Lamps Plus employees. Frank Varela was among them and, after a fraudulent tax return was filed in his name, he filed a putative class action against Lamps Plus on behalf of himself and all other Lamps Plus employees whose information had been stolen. Lamps Plus moved to compel arbitration—on an individual basis—and to dismiss the lawsuit. The district court dismissed the action, issued an order compelling arbitration and ordered the arbitration to proceed on a classwide basis. When Lamps Plus appealed, insisting that only individual arbitration was appropriate, the Ninth Circuit affirmed, reasoning that the employment contract was ambiguous on whether class arbitration was authorized and that this ambiguity ought to be resolved against Lamps Plus, the drafter of the agreement.

Led by Chief Justice Roberts, the Supreme Court reversed. Accepting the Ninth Circuit's finding that the employment contract was ambiguous on the question of class arbitration, the Court held that "[c]ourts may not infer from an ambiguous agreement that parties have consented to arbitrate on a classwide basis."[25] Empha-

14. *Id*. at 2463.
15. *Id*. at 2467.
16. *Id*. at 2474.
17. Joined by Justice Thomas, Justice Gorsuch dissented, arguing that, "in this area, at least, we should not be in the business of imposing our own judge-made 'dormant Commerce Clause' limitations on state powers." *Id*. at 2478 (Gorsuch, J., dissenting).
18. 139 S. Ct. 524 (2019).
19. *Id*. at 528.
20. *Id*. at 529.
21. 139 S. Ct. 532 (2019).
22. 9 U.S.C. § 1.
23. *New Prime*, 139 S. Ct. at 539.
24. 139 S. Ct. 1407 (2019).
25. *Id*. at 1419.

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sizing that "arbitration 'is a matter of consent, not coercion,'"[26] the court found that "ambiguity does not provide a sufficient basis to conclude that parties to an arbitration agreement agreed to 'sacrifice[] the principal advantage of arbitration'"—namely, its informality.[27] Justices Ginsburg, Breyer, Sotomayor, and Kagan each filed dissenting opinions, objecting on grounds ranging from jurisdiction, to the FAA's original purposes, to the majority's resistance to classwide arbitration as a general matter, to whether the parties' agreement was indeed ambiguous on the matter of classwide arbitration.

AGENCY DEFERENCE (*AUER*) UPHELD

Under the Court's 1997 ruling in *Auer v. Robbins*[28] and its comparable 1945 ruling in *Bowles v. Seminole Rock & Sand Co.*,[29] federal courts commonly defer to federal agencies' interpretations of those agencies' own ambiguous regulations. *Auer* deference (as it is commonly called) is controversial, however, and in this Term's *Kisor v. Wilkie*[30]—a case concerning the meaning of a regulation issued by the Department of Veterans Affairs—a litigant asked the Court to halt that deference practice. By a slim 5-4 margin, the Court declined to do so. In the process, the Court placed restraints on *Auer* deference that, in the view of at least three Justices, reduces the significance of the debate about *Auer* deference's legitimacy.

In portions of her opinion for which Chief Justice Roberts provided the crucial fifth vote,[31] Justice Kagan stressed that *Auer* deference is not appropriate unless a regulation is "genuinely ambiguous";[32] a court should not deem a regulation ambiguous unless it has "exhaust[ed] all the 'traditional tools' of construction";[33] deference is inappropriate if the agency's interpretation is unreasonable; and even a reasonable interpretation of an ambiguous regulation is not appropriate unless the interpretation has been made by the agency itself, the interpretation "in some way implicate[s the agency's] substantive expertise,"[34] the interpretation is a product of the agency's "'fair and considered judgment,'"[35] and the interpretation does not "create[] 'unfair surprise' to regulated parties."[36] Justice Kagan's majority also concluded that *Auer* deference was entitled to the benefits of *stare decisis*.

Joined in relevant part by Justices Thomas, Alito, and Kavanaugh, Justice Gorsuch argued that *Auer* deference violates the judicial-review and rulemaking provisions of the Administrative Procedure Act and "sits uneasily with the Constitution."[37] Chief Justice Roberts filed a short opinion concurring in part, suggesting that the disagreements between Justices Kagan and Gorsuch are not as significant as they might initially seem, because "the cases in which *Auer* deference is warranted largely overlap with the cases in which it would be unreasonable for a court not to be persuaded by an agency's interpretation of its own regulation."[38] Joined by Justice Alito, Justice Kavanaugh filed a short opinion of his own, underscoring Chief Justice Roberts's point.

CITIZENSHIP AND THE CENSUS

In *Department of Commerce v. New York*,[39] one of the most closely watched cases of the Term, the Court blocked Secretary of Commerce Wilbur Ross's effort to include a question about American citizenship on the 2020 census.[40] As readers surely already know, Secretary Ross had announced the Department of Commerce's intention to place that question on the upcoming decennial census, saying that the Department of Justice had requested the question to aid enforcement of the Voting Rights Act. Alleging violations of the Enumeration Clause and the Administrative Procedure Act (APA), numerous states, municipalities, and nonprofit organizations filed suit, arguing that including the citizenship question would result in reduced response rates among certain racial and ethnic minority groups, thereby resulting in inaccurate population counts that would cause harms in areas ranging from legislative apportionment to the distribution of federal funding. The Justices divided largely along familiar lines, with Chief Justice Roberts—the author of the Court's opinion—aligning himself with his conservative colleagues on some matters and with his more liberal colleagues on one key other.

Joined by his fellow conservatives, Chief Justice Roberts first concluded that the Enumeration Clause does not bar the Secretary

26. *Id*. at 1415 (quoting Stolt-Nielsen S.A. v. AnimalFeeds International Corp., 559 U.S. 662, 681 (2010)).
27. *Id*. at 1416 (quoting AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 348 (2011)).
28. 519 U.S. 452 (1997).
29. 325 U.S. 410 (1945).
30. 139 S. Ct. 2400 (2019).
31. In the portions of her opinion that Chief Justice Roberts did not join, Justice Kagan offered a substantive defense of *Auer* deference, focusing on Congress's intentions, agencies' policy expertise, and the benefits of uniformity; she argued that *Auer* deference is consistent with the judicial-review and rulemaking provisions of the Administrative Procedure Act; and she argued that *Auer* deference does not violate the separation of powers.
32. *Id*. at 2415.
33. *Id*. (quoting Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 n.9 (1984)).
34. *Id*. at 2417.
35. *Id*. (quoting Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 155 (2012)).
36. *Id*. at 2418 (quoting Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 170 (2007)).
37. *Id*. at 2437.
38. *Id*. at 2424 (Roberts, C.J., concurring in part).
39. 139 S. Ct. 2551(2019).
40. A week after the Court's ruling came down, members of the Trump Administration announced that they were abandoning the effort to include the citizenship question on the upcoming census. See Ann E. Marimow et al., ***2020 Census Will Not Include Citizenship Question, Justice Department Confirms***, WASH. POST, July 2, 2019. The President tweeted his disapproval, however, and so there was a brief period when the Administration's attorneys sought a different path that would lead to the question's inclusion. *See* Tara Bahrampour et al., ***Trump Administration Scrambles to Save Citizenship Question on Census***, WASH. POST, July 4, 2019. The President ultimately abandoned the effort. *See* Katie Rogers et al., ***President Seeks Citizenship Data by Other Means***, N.Y. TIMES, July 11, 2019, at A1.

from adding the citizenship question to the census, notwithstanding any population-count inaccuracies that inclusion of the question might yield.[41] Since the nation's founding, Chief Justice Roberts pointed out, the government has used the census as an opportunity to gather demographic information extending far beyond a mere headcount, and citizenship has frequently been among the areas of inquiry. The Court found nothing in the Enumeration Clause that would bar the government from asking about citizenship again in 2020. The same group of five Justices concluded that the Secretary's decision was supported by the evidence before him and thus—on those grounds, at least—was not "arbitrary" or "capricious" within the meaning of the APA.[42] These Justices further found that Secretary Ross had not violated provisions of the Census Act that set deadlines for notifying Congress of the Secretary's plans for the upcoming census and that expressed a preference for using existing administrative records rather than the census for gathering information of interest to the government.

On one key issue, however, Chief Justice Roberts split from his fellow Republican appointees and joined the Court's four other members. Based on an expansive review of the record, this five-Justice majority held that Secretary Ross's Voting Rights Act rationale for including a citizenship question was merely pretextual. Secretary Ross had desired a citizenship question long before talking with anyone about the Voting Rights Act, the Court observed, and he solicited the Justice Department's request for the question (doing so after other agencies rebuffed his efforts to persuade them to ask the Department of Commerce to seek citizenship information on the census). "Our review is deferential," Chief Justice Roberts wrote, "but we are not required to exhibit a naiveté from which ordinary citizens are free."[43] The Court concluded that Secretary Ross's invocation of the Voting Rights Act "was more of a distraction" than a result of the "[r]easoned decisionmaking" that the APA requires.[44]

Joined by Justices Gorsuch and Kavanaugh, Justice Thomas argued that the majority's ruling against Secretary Ross rested upon "an unauthorized inquiry into evidence not properly before us"[45] and exhibited "an unprecedented departure from our deferential review of discretionary agency decisions."[46] Justice Thomas warned that, "[w]ith today's decision, the Court has opened a Pandora's box of pretext-based challenges in administrative law."[47] Justice Alito argued that Secretary Ross's decision was entirely shielded from APA review. "To put the point bluntly," he wrote, "the Federal Judiciary has no authority to stick its nose into the question whether it is good policy to include a citizenship question on the census or whether the reasons given by Secretary Ross for that decision were his only reasons or his real reasons."[48]

'"[F]ederal judges are appointed for life... not for eternity.'"

COPYRIGHTS ONLY ENFORCEABLE AFTER REGISTRATION

Suppose you have filed the paperwork necessary to register a copyright, but the Copyrights Office has not yet completed processing your application, and suppose further that you believe someone is already infringing your copyright. Congress has declared that, with only narrow exceptions, "no civil action for infringement of the copyright in any United States work shall be instituted until . . . registration of the copyright claim has been made in accordance with this title."[49] Does the statute bar you from filing an infringement claim until after your application has been fully processed? It does indeed, the Court unanimously ruled in *Fourth Wall Public Benefit Corp. v. Wall-Street.com, LLC*.[50] On the most natural reading of the statute, the Court said, "registration occurs, and a copyright claimant may commence an infringement suit, when the Copyright Office registers a copyright."[51]

DEATH AND JUDICIAL POWER

In *Yovino v. Rizo*,[52] the Court held in a *per curiam* ruling that the votes of deceased federal judges may not be counted when determining a case's resolution. The Ninth Circuit's Judge Stephen Reinhardt had participated in the adjudication of the dispute at issue here—indeed, he was credited as being the author of what was styled as the court's majority opinion—but he died eleven days before the opinion was issued. Judge Reinhardt's vote was important. With it, the *en banc* court would have the votes needed to overturn circuit precedent on an Equal Pay Act issue; without it, the *en banc* court would have narrowly fallen short of the number needed to accomplish that result. After noting that judges are free to change their minds right up to the moment when they issue their rulings, the Supreme Court concluded that the Ninth Circuit had "allowed a deceased judge to exercise the judicial power of the United States after his death."[53] This was impermissible. "[F]ederal judges are appointed for life," the Court wrote, "not for eternity."[54]

41. See U.S. Const. art. I, § 2, cl. 3 (requiring a population count every ten years for the purpose of allocating seats in the House of Representatives).
42. 5 U.S.C. § 702(2)(A). Joined by Justices Ginsburg, Sotomayor, and Kagan, Justice Breyer disagreed:
    > The Secretary did not give adequate consideration to issues that should have been central to his judgment, such as the high likelihood of an undercount, the low likelihood that a question would yield more accurate citizenship data, and the apparent lack of any need for more accurate citizenship data to begin with. The Secretary's failures in considering those critical issues make his decision unreasonable. They are the kinds of failures for which, in my view, the APA's arbitrary and capricious provision was written.

    Department of Commerce, 139 S. Ct. at 2595 (Breyer, J., concurring in part and dissenting in part).
43. *Department of Commerce*, 139 S. Ct. at 2575 (internal quotation omitted).
44. *Id.* at 2576.
45. *Id.* at 2578 (Thomas, J., concurring in part and dissenting in part).
46. *Id.* at 2576 (Thomas, J., concurring in part and dissenting in part).
47. *Id.* at 2583 (Thomas, J., concurring in part and dissenting in part).
48. *Id.* at 2597 (Alito, J., concurring in part and dissenting in part).
49. 17 U.S.C. § 411.
50. 139 S. Ct. 881 (2019).
51. *Id.* at 886.
52. 139 S. Ct. 706 (2019).
53. *Id.* at 710.
54. *Id.*

"[P]artisan gerrymandering claims present non-justiciable political questions."

EQUITABLE TOLLING TO APPEAL CLASS CERTIFICATION DENIAL

Rule 23(f) of the Federal Rules of Civil Procedure imposes a fourteen-day deadline for seeking a court of appeals' permission to appeal an order granting or denying class certification. In *Nutraceutical Corp. v. Lambert*,[55] a federal district court in California had decertified the plaintiff's class. Rather than promptly seek the Ninth Circuit's permission to file an appeal, however, the plaintiff had filed a motion for reconsideration. By the time the district court denied that motion more than three months later, the time to appeal the court's decertification ruling had long since expired. The Court held that the fourteen-day deadline is not subject to equitable tolling. The Court conceded that Rule 23(f)'s deadline is not jurisdictional in nature, but found this concession inconsequential. "Whether a rule precludes equitable tolling turns not on its jurisdictional character," Justice Sotomayor explained, "but rather on whether the text of the rule leaves room for such flexibility."[56] The Court found no such flexibility in Rule 23(f) and its accompanying provisions. As a result, equitable tolling is impermissible "even where good cause for equitable tolling might otherwise exist."[57]

PARTISAN GERRYMANDERING

Partisan gerrymandering has been with us ever since the nation's birth but—with the aid of increasingly powerful data and technological tools—it now is easier than ever for a political party to secure legislative representation that grossly outpaces its share of the popular vote. As Chief Justice Roberts put it in his opinion for a 5-4 majority in this Term's *Rucho v. Common Cause*,[58] those electoral results can "seem unjust."[59] But are federal courts constitutionally authorized to do anything about it? No, they are not, Chief Justice Roberts and four colleagues concluded in *Rucho*.

At issue were congressional maps in North Carolina and Maryland that, by any reasonable measure, were highly partisan in nature—Republicans got the benefit of the gerrymandering in North Carolina, while Democrats were the beneficiaries in Maryland. The lower courts had found those states' maps unconstitutional, but the Court here reversed. Distinguishing the Court's precedents in the areas of one-person-one-vote and racial gerrymandering—areas in which the Court has fashioned clear and judicially manageable standards—Chief Justice Roberts's majority concluded that partisan gerrymandering claims present non-justiciable political questions. Observing that the Constitution does not guarantee proportional representation along partisan lines in the nation's legislative bodies and that some degree of partisan gerrymandering is undoubtedly permissible, the Court concluded that there is no clear, precise, politically neutral standard that federal courts can use to mark a point at which partisan gerrymandering becomes unconstitutionally unfair. Chief Justice Roberts reminded us that egregious partisan gerrymandering can be battled without the assistance of federal courts, such as through state or federal legislation.[60]

Justice Kagan dissented, joined by Justices Ginsburg, Breyer, and Sotomayor. The dissenters warned that "gerrymanders like the ones here may irreparably damage our system of government" and concluded that, by declining to provide a remedy for "blatant constitutional harms," the majority had gone "tragically wrong."[61] Lower courts across the country had coalesced around limited, manageable, politically neutral standards to combat "the worst-of-the-worst cases of democratic subversion" through partisan gerrymandering,[62] Justice Kagan wrote, and the Court's rejection of those efforts here was nothing less than an ill-timed abdication of judicial duty.

PREEMPTION OF STATE-LAW CASES

Although unable to agree upon a majority opinion, six Justices concluded in *Virginia Uranium, Inc. v. Warren*[63] that the federal Atomic Energy Act (the AEA) did not preempt a Virginia law banning uranium mining. Announcing the judgment of the Court and joined by Justices Thomas and Kavanaugh, Justice Gorsuch pointed out that the AEA does not contain an explicit preemption provision and does not purport to regulate uranium mining unless the mining is occurring on federal land. Along the way, Justice Gorsuch prominently stressed that, when trying to determine whether state legislation has intruded into a field Congress has occupied or whether state legislation is frustrating Congress's ability to achieve its desired objectives, it is important to focus on the text and structure of the state and federal legislation at issue, rather than on the legislative motives that might underlie it.

Joined by Justices Sotomayor and Kagan, Justice Ginsburg agreed that the AEA did not preempt Virginia's law, but said that Justice Gorsuch's "discussion of the perils of inquiring into legislative motive sweeps well beyond the confines of this case, and therefore seems to me inappropriate in an opinion speaking for the Court, rather than for individual members of the Court."[64] Joined by Justices Breyer and Alito in dissent, Chief Justice Roberts argued that Virginia was impermissibly regulating "a non-preempted field (mining safety) with the purpose and effect of indirectly regulating a preempted field (milling and tailings)."[65]

In *Merck Sharp & Dohme Corp. v. Albrecht*,[66] the Court addressed a narrow but important preemption issue that can arise in pharmaceutical failure-to-warn cases. The plaintiffs in the case were more than 500 individuals who suffered atypical femoral fractures while taking Fosamax, a drug sold by Merck. The plaintiffs suffered those injuries during the roughly decade-

55. 139 S. Ct. 710 (2019).
56. *Id*. at 714.
57. *Id*. at 715.
58. 139 S. Ct. 2484 (2019).
59. *Id*. at 2506.
60. *Id*. at 2507.
61. *Id*. at 2509 (Kagan, J., dissenting).
62. *Id*. (Kagan, J., dissenting).
63. 139 S. Ct. 1894 (2019).
64. *Id*. at 1909 (Ginsburg, J., concurring in the judgment) (citation omitted).
65. *Id*. at 1916 (Roberts, C.J., dissenting).
66. 139 S. Ct. 1668 (2019).

long period prior to when the Food and Drug Administration ordered Merck to add a warning about the risk of such fractures to Fosamax's label. Merck argued that the plaintiffs' state-law claims were preempted by federal law because (Merck said) the FDA would not have allowed it to add that warning, thus making it impossible for the company to comply with any duty to warn imposed by state law.

Led by Justice Breyer, the Court held that a preemption-seeking drug manufacturer in a case like this one must "show that it fully informed the FDA of the justifications for the warning required by state law and that the FDA, in turn, informed the drug manufacturer that the FDA would not approve changing the drug's label to include that warning."[67] The Court further determined that whether the manufacturer has made this showing is a question of law for the judge to decide: answering the question "often involves the use of legal skills," judges are better equipped to interpret the relevant documents, and—given their familiarity with administrative law—"judges are better suited than are juries to understand and to interpret agency decisions in light of the governing statutory and regulatory context."[68] The Court remanded to the Third Circuit for application of these standards.

RELIGION—LARGE CROSS ON PUBLIC LAND

In *American Legion v. American Humanist Association*,[69] the Court rejected an Establishment Clause challenge brought against Maryland's decision to keep and maintain a large cross on public land, erected in 1925 as a memorial for local soldiers who were killed in World War I. Writing for the majority, Justice Alito identified four reasons why the Establishment Clause analysis famously prescribed in 1971's *Lemon v. Kurtzman*[70] was unsuitable for deciding the constitutionality of this particular display. *Lemon* says that the permissibility of a challenged government practice turns on whether the government's actions have a secular purpose, whether a primary effect of the government's actions is to further or impede religion, and whether the government's actions entail an excessive entanglement with religion. Justice Alito explained that, when dealing with monuments established long ago, it can be exceptionally difficult to discern the government's original animating purposes; monuments' purposes can change and multiply as time passes; the messages conveyed by monuments can change and multiply over time, as well; and tearing down monuments that trace their distant origins to religious purposes would strike many today as unduly hostile to religion.[71] As a result, Justice Alito wrote, "[t]he passage of time gives rise to a strong presumption of constitutionality."[72]

Those opposing the Maryland cross failed to overcome that presumption to the majority's satisfaction. For a great many, the Court found, the cross-shaped monument has been less a reference to Christianity and more a reference to the deeply moving sight of row after row of white crosses erected on World War I battlefields. Moreover, as time has passed, the cross has taken on added secular significance, such as reminding those who see it of the honorable sacrifices that America's veterans have made. To order the cross dismantled under these circumstances, the Court said, "would not be neutral and would not further the ideals of respect and tolerance embodied in the First Amendment."[73]

"[T]he messages conveyed by monuments can change and multiply over time..."

Justice Thomas concurred in the judgment, questioning the Establishment Clause's application to the states; arguing that, even when the Establishment Clause applies, it only forbids coercion, notably absent here; and arguing that *Lemon* should be altogether abandoned. Joined by Justice Thomas, Justice Gorsuch also concurred in the judgment, arguing that the cross's opponents lacked standing because (he argued) merely feeling offended by a government's allegedly religious practice or display does not rise to the level of an Article III injury.

Justices Ginsburg and Sotomayor were the only dissenters. Writing for the two of them, Justice Ginsburg argued that the cross-shaped monument "elevates Christianity over other faiths, and religion over nonreligion."[74]

REMOVAL OF COUNTERCLAIMS FROM STATE TO FEDERAL COURT

In *Home Depot U.S.A., Inc. v. Jackson*,[75] Citibank filed an action against George Jackson in North Carolina state court, alleging that Jackson failed to pay a charge he placed on his Citibank-issued Home Depot credit card when buying a water-treatment system. Jackson, in turn, filed third-party class-action claims against Home Depot U.S.A., Inc., and Carolina Water Systems, Inc., alleging misconduct relating to the sale of such water-treatment systems. Citibank subsequently dismissed its claim against Jackson, and one month later, Home Depot filed a notice of removal of the third-party counterclaim to federal court. Did either the general removal statute (28 U.S.C. § 1441(a)) or the Class Action Fairness Act authorize Home Depot—as a third-party counterclaim defendant—to remove the counterclaim filed against it?

No, Justice Thomas answered in a majority opinion joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan. Justice Thomas explained that Section 1441(a) "does not permit removal based on counterclaims at all," since that statute only grants removal

67. *Id*. at 1679 (clarifying an ambiguity left by Wyeth v. Levine, 555 U.S. 571 (2009)).
68. *Id*. at 1680.
69. 139 S. Ct. 2067 (2019).
70. 403 U.S. 602 (1971).
71. In portions of his opinion that garnered only the votes of Chief Justice Roberts and Justices Breyer and Kavanaugh, Justice Alito cast further doubt on *Lemon*'s utility because it does not take account of the degree to which challenged governmental practices—such as prayer before legislative sessions—have their roots in longstanding traditions.
72. *American Legion*, 139 S. Ct. at 2082.
73. *Id*. at 2090. Joined by Justice Kagan, Justice Breyer filed a short concurrence, saying that the outcome might have been different if the cross had been erected more recently. Justice Kavanaugh also filed a brief concurrence, underscoring *Lemon*'s shortcomings and pointing out that those who oppose the Maryland monument can still seek relief through Maryland politics. After all, he said, the Establishment Clause does not require Maryland to retain the monument.
74. *Id*. at 2104 (Ginsburg, J., dissenting).
75. 139 S. Ct. 1743 (2019).

"'The Constitution implicitly strips States of any power they once had to refuse each other sovereign immunity...'"

rights to a defendant (such as Jackson) whom a plaintiff (such as Citibank) has sued in an original "civil action."[76] With respect to 28 U.S.C. § 1453(b)—the removal provision of the Class Action Fairness Act—the Court determined that this legislation merely makes a couple of removal-law adjustments that Congress deemed appropriate for class actions (such as not requiring the approval of all defendants as a prerequisite for removal), and does not change "§ 1441(a)'s limitation on *who* can remove."[77]

SECURITIES FRAUD

The Securities and Exchange Commission's Rule 10b-5(b) makes it unlawful "[t]o make any untrue statement of a material fact . . . in connection with the purchase or sale of any security."[78] Suppose that, at the direction of someone else, a person issues a false statement concerning the purchase or sale of a security and does so with the intent to defraud. Can he or she be held liable under Rule 10b-5's *other* provisions, which make it unlawful to "employ any device, scheme, or artifice to defraud" or "engage in any act, practice, or course of business which operates or would operate as a fraud or deceit"?[79]

That was the question before the Court this Term in *Lorenzo v. SEC*.[80] At the direction of his supervisor, an investment banker named Francis Lorenzo had sent prospective investors an email making false statements about the value of a company's assets. In 2011, the Court ruled in *Janus Capital Group, Inc. v. First Derivative Traders*[81] that a person "make[s]" a statement within the meaning of this provision only if he or she "is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it."[82] The SEC and the Second Circuit both concluded that, even though Lorenzo was not the "maker" of the statement under Rule 10b-5(b) and *Janus Capital Group*, he could still be held liable under Rule 10b-5's other provisions. The Supreme Court agreed, finding the textual analysis "obvious" and "eas[y]."[83] "[W]e see nothing borderline about this case," Justice Breyer wrote for the majority, "where the relevant conduct (as found by the Commission) consists of disseminating false or misleading information to prospective investors with the intent to defraud."[84] The Court conceded that liability might be inappropriate for "other actors tangentially involved in dissemination—say, a mailroom clerk." But Lorenzo had "sent false statements directly to investors, invited them to follow up with questions, and did so in his capacity as vice president of an investment banking company."[85]

Joined by Justice Gorsuch in dissent, Justice Thomas argued that the majority had provided "no legal principle . . . that would preclude [the mailroom clerk or] the secretary from being pursued for primary violations of the securities laws."[86] In his view, the majority had erased the distinction "between primary and secondary liability in fraudulent-misstatement cases," yielding a ruling "that is likely to have far-reaching consequences."[87]

SOVEREIGN IMMUNITY AND THE FUTURE OF STARE DECISIS

In 1979, the Court ruled in *Nevada v. Hall*[88] that a state may be sued without its consent by a private party in another state's courts. The Justices were asked to reexamine that conclusion this Term in *Franchise Tax Board of California v. Hyatt*.[89] The dispute concerned California's effort to collect income taxes from Gilbert Hyatt, whose purported move from California to Nevada was, in the eyes of California's tax authorities, a sham calculated to shield Hyatt from his California income-tax obligations. Hyatt believed that California's Franchise Tax Board had committed torts when auditing him, so he filed an action for damages against it in Nevada state court. Nevada took the case (an unusual step[90]) and ultimately entered a damages verdict in Hyatt's favor.

Led by Justice Thomas and divided 5-4, the Court reversed, abandoning *Hall* and concluding that "Hyatt unfortunately will suffer the loss of two decades of litigation expenses and a final judgment against the Board for its egregious conduct."[91] The majority found that "Federalists and Antifederalists alike agreed in their preratification debates that States could not be sued [without their consent] in the courts of other States,"[92] and that "[t]he Constitution implicitly strips States of any power they once had to refuse each other sovereign immunity."[93] So far as *stare decisis* is concerned, the Court devoted three short paragraphs to the issue, finding that the doctrine does not carry great weight on matters of constitutional interpretation and that the only factor weighing in favor of *Hall*'s retention was Hyatt's reliance upon it when incurring two decades' worth of litigation expenses. But Hyatt's litigation expenditures, Justice Thomas explained, "are not among the reliance interests that would persuade us to adhere to an incorrect resolution of an important constitutional question."[94]

76. *Id*. at 1748.
77. *Id*. at 1750.
78. 17 C.F.R. § 240.10b-5(b).
79. 17 C.F.R. § 240.10b-5(a), (c).
80. 139 S. Ct. 1094 (2019).
81. 564 U.S. 135 (2011).
82. *Id*. at 142.
83. *Id*. at 1101.
84. *Id*.
85. *Id*.
86. *Id*. at 1111 (Thomas, J., dissenting).
87. *Id*. at 1106 (Thomas, J., dissenting).
88. 440 U.S. 410 (1979).
89. 139 S. Ct. 1485 (2019). At an earlier stage of this complicated and decades-long litigation, the eight-member Court had divided evenly on whether to overturn *Hall*. See Franchise Tax Board v. Hyatt, 136 S. Ct. 1277, 1279 (2016).
90. See *Hyatt*, 139 S. Ct. at 1506 (Breyer, J., dissenting) ("The *Hall* issue so rarely arises because most States, like most sovereign nations, are reluctant to deny a sister State the immunity that they would prefer to enjoy reciprocally.").
91. *Id*. at 1499.
92. *Id*. at 1494.
93. *Id*. at 1498.
94. *Id*. at 1499.

Justice Breyer led the four-member dissent, arguing that *Hall* was rightly decided, that overruling it would be appropriate only if the decision was "obviously wrong,"[95] and that "[t]oday's decision can only cause one to wonder which cases the Court will overrule next."[96]

SPEECH AND THE FIRST AMENDMENT CASES

The Court handed down two significant cases concerning First Amendment speech rights this Term. In the first, *Manhattan Community Access Corp. v. Halleck*,[97] the Court was asked to decide whether privately operated public-access cable channels are state actors, such that their actions can bring the First Amendment into play. The dispute in that case arose when the Manhattan Neighborhood Network (MNN) —a private nonprofit corporation chosen by New York City to operate the public-access channels on Time Warner's cable system in Manhattan— barred DeeDee Halleck and Jesus Papoleto Melendez from further use of those channels, allegedly in response to their criticism of MNN in a film they aired on one of the MNN-operated channels. Halleck and Melendez sued, claiming that MNN had violated their First Amendment rights.

Led by Justice Kavanaugh, the five-member majority concluded that the First Amendment did not apply because private operators of public-access channels are not state actors. The Court acknowledged that "a private entity may qualify as a state actor when it exercises 'powers traditionally [and] exclusively reserved to the State.'"[98] Emphasizing how rare it is for a private entity's activities to fall within that description, however, the Court concluded that operating a public-access cable channel is not a traditional and exclusive government function. Across the country, Justice Kavanaugh explained, public-access channels have been operated by a range of actors, "including private cable operators; private nonprofit organizations; municipalities; and other public and private community organizations, such as churches, schools, and libraries."[99] The Court further found that a private entity does not become subject to First Amendment constraints simply by opening its property for speech by members of the public.[100]

Joined by Justices Ginsburg, Breyer, and Kagan, Justice Sotomayor dissented. She contended that New York City had a property interest in the public-access cable channels, that those channels were public forums, and that because MNN was operating those public forums on the City's behalf, the First Amendment's protections for Halleck and Melendez applied no less than they would if the City had exercised its legal authority to operate those channels itself.

The Term's other speech case, *Iancu v. Brunetti*,[101] is the successor to 2017's *Matal v. Tam*.[102] In Tam, the Justices struck down the Lanham Act's ban on registering trademarks that "disparage" people because, the *Tam* Court concluded, the ban impermissibly discriminated based upon viewpoint. In *Brunetti*, the Justices turned their attention to the Lanham Act's ban on registering "immoral . . . or scandalous" trademarks.[103] Erik Brunetti had sought registration of the trademark "FUCT" for his clothing line, but the U.S. Patent and Trademark Office refused, finding the mark exceptionally offensive.

"[T]he First Amendment did not apply because private operators of public-access channels are not state actors."

With Justice Kagan writing for the majority, the Court held that the "immoral . . . or scandalous" bar impermissibly discriminated based on viewpoint no less than the registration bar struck down in *Tam*. "[O]n its face," Justice Kagan explained, "the statute . . . distinguishes between two opposed sets of ideas: those aligned with conventional moral standards and those hostile to them; those inducing societal nods of approval and those provoking offense and condemnation."[104] Justice Kagan's majority rejected the Government's suggestion that the statute should be read to bar marks that are offensive not because of the ideas they convey but rather because "their *mode* of expression" is "vulgar."[105] "To cut the statute off where the Government urges," Justice Kagan wrote, "is not to interpret the statute Congress enacted, but to fashion a new one."[106]

In separate opinions, Justices Breyer and Sotomayor agreed that the ban on "immoral" marks violated the First Amendment, but argued (for differing reasons) that the ban on "scandalous" marks did not.

STANDING

A lower court concluded that Virginia legislators had racially gerrymandered its state legislative districts in violation of the Fourteenth Amendment. Shortly after the decision came down, Virginia's attorney general announced that the state would not appeal the ruling. Dissatisfied with that decision, the Virginia House of Delegates sought to pick up the appellate torch itself. In *Virginia House of Delegates v. Bethune-Hill*,[107] the Court ruled 5-4 that Virginia's House of Delegates did not have Article III standing to invoke the Supreme Court's appellate jurisdiction. Led by Justice Ginsburg, the Court ruled that the House lacked standing for two chief reasons. First, Virginia legislation assigned the task of representing the state's interests in civil litigation to the state's

95. *Id*. at 1505 (Breyer, J., dissenting).
96. *Id*. at 1506 (Breyer, J., dissenting).
97. 139 S. Ct. 1921 (2019).
98. *Id*. at 1928 (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352 (1974)).
99. *Id*. at 1929.
100. Possibly signaling future interest in a different question, the Court noted that it was not being asked here to evaluate "the degree to which the First Amendment protects private entities such as Time Warner or MNN from government legislation or regulation requiring those private entities to open their property for speech by others." *Id*. at 1931, n. 2.
101. 139 S. Ct. 2294 (2019).
102. 137 S. Ct. 1744 (2017).
103. 15 U.S.C. § 1052(a).
104. *Iancu*, 139 S. Ct. at 2300.
105. *Id*. at 2301.
106. *Id*. at 2302.
107. 139 S. Ct. 1945 (2019).

"[T]he ruling has been persistently criticized by Justices and commentators alike..."

attorney general. Second, the House itself had not suffered any cognizable injury from the lower court's ruling. The House had said it was injured when redistricting authority was essentially shifted from it to the lower court, but Justice Ginsburg's majority found that the state's redistricting authority rested with the entire legislature, not with the House itself. Moreover, Justice Ginsburg wrote, "the House as an institution has no cognizable interest in the identity of its members."[108]

Joined by Chief Justice Roberts and Justices Breyer and Kavanaugh, Justice Alito dissented. He argued that the House had alleged an Article III injury because "[a] legislative districting plan powerfully affects a legislative body's output of work."[109] When a legislative district's boundaries are redrawn, he wrote, the groupings of constituents and representatives are changed, and those changes are likely to alter "the way in which the district's representative does his or her work."[110]

TAKINGS, STATE-FEDERAL JURISDICTION, AND FURTHER STARE DECISIS ISSUES

When a Pennsylvania township told Rose Mary Knick that she had to provide public access to family gravesites located on her land, she sued in federal court under the Takings Clause. Because she had not yet brought a state action for inverse condemnation, the lower federal courts dismissed her Fifth Amendment takings claim as unripe. Those who litigate or adjudicate Fifth Amendment takings claims have long been familiar with the Court's 1985 ruling in *Williamson County Regional Planning Commission v. Hamilton Bank*,[111] in which the Court held that a federal court must dismiss a property owner's federal takings claim against a state or local government unless the owner has first unsuccessfully tried to obtain just compensation through available state procedures, such as by bringing an inverse-condemnation claim in state court. One need not celebrate or chafe against *Williamson County* any longer because, in *Knick v. Township of Scott*,[112] the 5-4 Court overruled it.

Led by Chief Justice Roberts, the majority jettisoned *Williamson County*, holding that the Court in that case had fundamentally erred by failing to recognize that "[t]he Fifth Amendment right to full compensation arises at the time of the taking, regardless of post-taking remedies that may be available to the property owner."[113] "A later payment of compensation may remedy the constitutional violation that occurred at the time of the taking," Chief Justice Roberts wrote, "but that does not mean the violation never took place."[114] In the majority's view, *Williamson County* was not entitled to the benefits of *stare decisis* because its constitutional interpretation was egregiously wrong, the ruling has been persistently criticized by Justices and commentators alike, and the state-litigation rule is unworkable due to the preclusive effects of state courts' rulings in subsequent federal litigation.[115] The Court noted that property owners who have suffered a taking should still be denied injunctive relief against the governmental actions constituting the taking, "[a]s long as an adequate provision for obtaining just compensation exists."[116]

Joined by Justices Ginsburg, Breyer, and Sotomayor in dissent, Justice Kagan argued that *Williamson County* had been decided in accordance with roughly a century's worth of precedent on when a federal takings claim arises, that the majority's ruling will "channel a mass of quintessentially local cases involving complex state-law issues into federal courts," and that the decision to overrule *Williamson County* "transgresses all usual principles of *stare decisis*."[117]

TAXES, DISCRIMINATION, ESTATES

Congress has declared that states may tax federal employees' wages or retirement benefits, so long as "the taxation does not discriminate against the officer or employee because of the source of the pay or compensation."[118] In *Dawson v. Steager*,[119] the Court unanimously concluded that West Virginia had violated this legislation when it taxed the federal pension benefits of James Dawson—a retired employee of the U.S. Marshals Service—but exempted from taxation the retirement benefits of former state law-enforcement employees. Writing for the Court, Justice Gorsuch explained that West Virginia had defined the class of tax-exempt retirees by reference to their former job duties, and there weren't "any 'significant differences' between Mr. Dawson's former job responsibilities and those of the tax-exempt state law enforcement retirees."[120] It thus was clear that West Virginia's reason for treating Mr. Dawson less favorably was that his pension benefits were coming from the federal government, rather than from the state, a discriminatory distinction that the federal statute expressly forbids.

In *North Carolina Department of Revenue v. Kimberley Rice Kastner 1992 Family Trust*,[121] the Court unanimously held that the Fourteenth Amendment's Due Process Clause bars a state from taxing trust income based solely on the trust beneficiary's residence in the state. North Carolina had sent a hefty $1.3 million income-tax bill to a trust whose beneficiaries resided there. But no income had been distributed to those beneficiaries, nor did those beneficiaries have any right to demand an income distribution, nor did the trustee administer the trust within North Carolina. "When a tax is premised on the in-state residence of a

108. *Id*. at 1955.
109. *Id*. at 1956 (Alito, J., dissenting).
110. *Id*. (Alito, J., dissenting).
111. 473 U.S. 172 (1985).
112. 139 S. Ct. 2162 (2019).
113. *Id*. at 2170.
114. *Id*. at 2172.
115. Those preclusive effects had been secured by the Court's ruling in San Remo Hotel, L.P. v. City and County of San Francisco, 545 U.S. 323 (2005).
116. *Id*. at 2176.
117. *Id*. at 2181 (Kagan, J., dissenting).
118. 4 U.S.C. § 111.
119. 139 S. Ct. 698 (2019).
120. *Id*. at 704 (quoting Phillips Chemical Co. v. Dumas Independent School District, 361 U.S. 376, 383 (1960)).
121. 139 S. Ct. 2213 (2019).

beneficiary," Justice Sotomayor wrote for the Court, "the Constitution requires that the resident have some degree of possession, control, or enjoyment of the trust property or a right to receive that property before the State can tax the asset."[122]

TITLE VII

Title VII of the Civil Rights Act of 1964—which bars employment discrimination on the basis of race, color, national origin, sex, or religion—requires complainants to file a charge with the Equal Employment Opportunity Commission before commencing a Title VII lawsuit in court. Suppose a complainant does not file a charge, sues in court, and the employer does not timely seek dismissal of the complainant's lawsuit. Can the employer raise that objection later in the litigation, or is the charge-filing requirement jurisdictional in nature, and accordingly a basis for dismissal at any point?

In *Fort Bend County, Texas v. Davis*,[123] the justices unanimously ruled that Title VII's charge-filing requirement is not jurisdictional in nature, because it does not restrict courts' adjudicatory authority. Rather, Justice Ginsburg explained for the Court, the charge-filing prerequisite to suit is simply a claim-processing rule that is "mandatory if timely raised," but that must indeed "be timely raised to come into play."[124]

TORT LAW AND MANUFACTURERS' LIABILITY IN MARITIME CASES

Absent congressional intervention, federal courts sit as common-law courts in maritime cases.[125] That fact gave the Court an opportunity to tackle an interesting question of maritime tort law in *Air & Liquid Systems Corp. v. DeVries*.[126] After contracting cancer that they believed resulted from asbestos exposure, two Navy veterans sued the manufacturers of equipment that had been installed on Navy ships, contending that the manufacturers had negligently failed to warn them of the asbestos danger. Most of the equipment did not contain any asbestos when delivered to the Navy, but, to function properly, the equipment required the addition of asbestos insulation or asbestos-containing parts. The Navy thus added the asbestos to the equipment. Could the manufacturers be held liable for failing to warn the two plaintiffs of the risks they faced when working with or near the assembled products?

Surveying an array of tort-law authorities, the Court considered and rejected two approaches that sat on opposite ends of the spectrum of possibilities: hold the manufacturers liable so long as it was foreseeable that their products would be used with asbestos-containing parts ("the foreseeability rule") or hold that the manufacturers are not liable because they did not themselves make or deliver asbestos-containing equipment ("the bare-metal defense"). Led by Justice Kavanaugh, the Court instead took a middle path:

> In the maritime tort context, a product manufacturer has a duty to warn when (i) its product requires incorporation of a part, (ii) the manufacturer knows or has reason to know that the integrated product is likely to be dangerous for its intended uses, and (iii) the manufacturer has no reason to believe that the product's users will realize that danger.[127]

"Title VII's charge-filing requirement is not jurisdictional in nature..."

OTHER NOTABLE RULINGS

ADEA AND STATE EMPLOYEES

In *Mount Lemmon Fire District v. Guido*,[128] the Court unanimously held that the Age Discrimination in Employment Act applies to state and local governmental employers no matter how many individuals they employ. (In contrast, a private employer is bound by the ADEA only if it has twenty or more employees.)

FOIA AND PRIVATE INFORMATION

In *Food Marketing Institute v. Argus Leader Media*,[129] the 6-3 Court determined that, between 1974 and the present day, numerous lower courts erred by concluding that private-sector commercial information in the government's possession is "confidential" within the meaning of the Freedom of Information Act—and thus shielded from mandatory disclosure—only if the information's disclosure would result in substantial competitive harm for the party that provided the government with the information.

SSA ATTORNEYS FEES CAP

In *Culbertson v. Berryhill*,[130] the Court unanimously ruled that the Social Security Act does not impose an aggregate 25% cap on the fees that attorneys may charge for representing claimants in proceedings before the Social Security Administration and the courts. Rather, the 25% cap described in 42 U.S.C. § 406(b) applies only to attorney fees for successful representation in court proceedings.

DHHS VIOLATED LAW BY FAILING TO PROVIDE NOTICE AND COMMENT

In *Azar v. Allina Health Services*,[131] the 7-1 Court held (with Justice Kavanaugh not participating) that the U.S. Department of Health and Human Services had inexcusably violated its duty under 42 U.S.C. § 1395hh(a)(2) to provide notice and an opportunity for public comment before establishing or changing a "substantive legal standard" affecting Medicare benefits. The agency had posted on its website—without prior notice or public comment—a new formula for determining the amount of additional payments the agency would make to hospitals that provide

122. *Id*. at 2222.
123. 139 S. Ct. 1843 (2019).
124. *Id*. at 1846. The Court noted that it has not yet determined whether claim-processing rules of this sort "may ever be subject to equitable exceptions." *Id*. at 1849, n. 5 (internal quotation and alteration omitted).
125. See Exxon Shipping Co. v. Baker, 554 U.S. 471, 507-08 & n. 21 (2008).
126. 139 S. Ct. 986 (2019).
127. *Id*. at 995. Joined by Justices Thomas and Alito in dissent, Justice Gorsuch argued that the Court should have applied the bare-metal defense.
128. 139 S. Ct. 22 (2018).
129. 139 S. Ct. 2356 (2019).
130. 139 S. Ct. 517 (2019).
131. 139 S. Ct. 1804 (2019).

services for unusually large numbers of low-income Medicare patients.

NATIVE AMERICAN FUEL IMPORTERS ARE TAX EXEMPT

In *Washington State Department of Licensing v. Cougar Den, Inc.*,[132] the 5-4 Court held that, under an 1855 treaty, the Yakama Nation tribe's fuel importers are exempt from a tax imposed on such importers by the State of Washington.

NON-JUDICIAL FORECLOSURE IS NOT "DEBT COLLECTION"

The Court unanimously concluded in *Obduskey v. McCarthy & Holthus LLP*[133] that, for most purposes, a business that merely engages in nonjudicial foreclosure proceedings is not a "debt collector" subject to the restrictions imposed by the Fair Debt Collection Practices Act.

CREDITOR IN CONTEMPT FOR BANKRUPTCY CONDUCT

Rejecting both strict liability and a subjective good-faith standard, the Court unanimously held in *Taggart v. Lorenzen*[134] that a creditor may be held in civil contempt for violating a bankruptcy court's discharge order "if there is no objectively reasonable basis for concluding that the creditor's conduct might be lawful."[135] Justice Breyer explained for the Court that this is the traditional standard "for determining when a party may be held in civil contempt for violating an injunction."[136]

GOPHER FROG HABITAT DESIGNATION CAN BE REVIEWED

In *Weyerhaeuser Co. v. U.S. Fish and Wildlife Service*[137]—a case concerning the Fish and Wildlife Service's designation of a tract of land as "critical habitat" for the endangered dusky gopher frog in Louisiana—the 8-0 Court held (with Justice Kavanaugh not participating) that the Service's critical-habitat designations under the Endangered Species Act are subject to judicial review and that an area can be "critical habitat" for a species only if it is indeed habitat for that species. The Court remanded for further assessment of statutory and factual issues concerning the land in question.

SERVICE ON FOREIGN COUNTRY MUST BE AT PRINCIPAL OFFICE (NOT EMBASSY)

In *Republic of Sudan v. Harrison*,[138] the 8-1 Court held that litigants relying upon 28 U.S.C. § 1608(a)(3) to serve civil process upon a foreign state must mail service to the foreign minister at his or her principal office in the foreign state, rather than to the foreign minister at his or her embassy office in the United States.

RAILROAD EMPLOYEE'S LOST WAGE CLAIM IS TAXABLE

In *Burlington Northern Santa Fe Railway Co. v. Loos*,[139] the 7-2 Court held that a railroad's payment to an employee for lost wages resulting from a workplace injury amounts to taxable compensation under the Railroad Retirement Tax Act.

TVA CAN BE SUED

In *Thacker v. Tennessee Valley Authority*,[140] the Court unanimously held that, in the Tennessee Valley Authority Act of 1933, Congress waived the TVA's immunity against tort suits arising from its performance of discretionary functions.

LOOKING AHEAD

The Court is slated to decide a wide range of important questions in civil cases during its October 2019 Term. These include whether Congress validly abrogated the states' sovereign immunity in actions for copyright infringement,[141] whether Title VII prohibits discrimination against transgender people[142] and discrimination based on sexual orientation,[143] whether a plaintiff claiming a racially discriminatory refusal to contract in violation of 42 U.S.C. § 1981 must show that race was merely a motivating factor in the refusal to contract or whether the claimant must instead establish but-for causation,[144] whether members of the Financial Oversight and Management Board for Puerto Rico are subject to the Appointments Clause,[145] and whether the Department of Homeland Security's decision to terminate the Deferred Action for Childhood Arrivals program is judicially reviewable and lawful.[146]

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132. 139 S. Ct. 1000 (2019).
133. 139 S. Ct. 1029 (2019).
134. 139 S. Ct. 1795 (2019).
135. *Id.* at 1799.
136. *Id.* at 1801.
137. 139 S. Ct. 361 (2018).
138. 139 S. Ct. 1048 (2019).
139. 139 S. Ct. 893 (2019).
140. 139 S. Ct. 1435 (2019). The Court remanded to determine whether the TVA might be able to assert immunity under a governmental-activities theory.
141. Allen v. Cooper, No. 18-877.
142. R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, No. 18-107.
143. Altitude Express, Inc. v. Zarda, No. 17-1623; Bostock v. Clayton County, No. 17-1618.
144. Comcast Corp. v. National Association of African American-Owned Media, No. 18-1171.
145. Financial Oversight and Management Board for Puerto Rico v. Aurelius Investment, LLC, No. 18-1334; Official Committee of Debtors v. Aurelius Investments, LLC, No. 18-1496; United States v. Aurelius Investment, LLC, No. 18-1514.
146. Department of Homeland Security v. Regents of the University of California, No. 18-587; McAleenan v. Vidal, No. 18-589; Trump v. NAACP, No. 18-588.