

The Roberts Court 2013-14: First Amendment, Equal Protection, Privacy, And More (or Less) Unanimity

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INTRODUCTION¹

The eighth full term of the Roberts Court featured two First Amendment blockbuster decisions, a headline-grabbing privacy decision, an important equal protection case, and an extraordinary number of unanimous judgments, if not unanimous opinions, or unanimous opinions that avoided issues to obtain unanimity.

In the 2013-14 term, 74 cases were addressed, five fewer than in the 2012-13 Term and one more than in 2011-12.² Of the 74 cases, seven were *per curiam* opinions, including two dismissals because the writ of certiorari was improvidently granted. Of the 67 remaining decisions, Justices Alito, Kennedy, Scalia, and Sotomayor each authored eight majority opinions, and the other five justices authored seven decisions. Overall, a remarkable 63.5% of the decisions were unanimous,³ up from the prior record of 49.4% in 2012-13.

At the other end of the vote spectrum, the 2013-14 Term saw the lowest number and percentage of five-vote majorities in the history of the Roberts Court. There were only 11 decisions with five-vote majorities representing 14.9% of the decisions, down considerably from 2012-13, when 29.1% of the decisions had five-vote majorities.

The five-vote majorities did not, however, have the traditional conservative four-liberal four votes with Justice Kennedy deciding the outcome. Of the 11 decisions, Justice Thomas authored one, *Prado Navarete v. California*, from which Justice Scalia dissented but which Justice Breyer joined. In *Paroline v. United States*, Justice Kennedy authored the opinion and was joined by the more liberal Justices except for Justice Sotomayor. But the fifth vote was supplied by Justice Alito, who chose not to join in the dissent of Chief Justice Roberts. In *Scialabba v. Cuellar de Osorio*, Justice Kagan wrote the opinion. Justice Sotomayor dissented joined by Justice Breyer and in part by Justice Thomas. Chief Justice Roberts concurred in the judgment joined by Justice Scalia. Justice Alito dissented separately. And Justices Kennedy and Ginsburg

¹ A very big “thank you” goes to my colleague, Katherine Mastrucci, who charted the Justices’ votes throughout the Term and provided me with the underlying table from which the 2013-14 statistics in this paper were generated.

² See the Supreme Court’s website: <http://www.supremecourt.gov/opinions/opinions.aspx>.

³ Two decisions, *United States v. Quality Stores, Inc.* and *POM Wonderful LLC v. Coca-Cola Co.*, were 8-0 decisions. Justice Kagan did not participate in the former case and Justice Breyer did not participate in the latter. *Quality Stores* provides an affirmative answer to this question: Whether severance payments made to employees whose employment was involuntarily terminated are taxable under the Federal Insurance Contributions Act, 26 U.S.C § 3101 *et seq.*? In *POM Wonderful*, discussed further below, the Court held that even though a product label is regulated under the Food, Drug, and Cosmetic Act, a competitor may bring Lanham Act claims alleging unfair competition from false or misleading descriptions on food and beverage labels.

joined in Justice Kagan’s opinion. In *Michigan v. Bay Mills Indian Community*, again Justice Kagan wrote the opinion, but Justice Thomas dissented. Justices Alito, Scalia, and Ginsburg joined that dissent while the Chief Justice and Justices Kennedy, Breyer, and Sotomayor joined in the majority opinion.

Harris v. Quinn, *Burwell v. Hobby Lobby Stores, Inc.*, *Town of Greece v. Galloway*, and part of *Utility Air Regulatory Group v. EPA* were 5-4 votes where Justice Kennedy was the swing vote in favor of the conservative bloc. *Abramski v. United States* and *Hall v. Florida* were 5-4 decisions where Justice Kennedy provided the fifth vote for the liberal bloc. Justice Kennedy joined the conservative bloc in *McCutcheon v. Federal Election Commission*, but Justice Thomas concurred in the judgment only, leaving the Chief Justice’s opinion as a plurality opinion.

Once again, Justice Kennedy had the fewest dissents/partial dissents—four. Justice Alito wrote the two 5-4 decisions issued on the last day of the term, *Harris v. Quinn* and *Burwell v. Hobby Lobby Stores, Inc.*

An in-depth analysis of the 2013-14 Term follows.

VOTE COUNTS

The table in Appendix I contains a breakdown of the vote counts for the Supreme Court’s past eight terms.

VOTE COUNT TRENDS

Except for the 2007-08 and 2008-09 Terms, there is a genuine trend towards unanimity in decision-making since 2006-07 as reflected in the following table:

Term	Percentage of Decisions with 8 or 9 Votes
2006-07	48.0%
2007-08	40.2%
2008-09	43.2%
2009-10	49.9%
2010-11	54.7%
2011-12	52.0%
2012-13	51.9%
2013-14	63.5%

The 2013-14 term involved 11 decisions with a five-vote majority, the lowest ever for the Roberts Court:

Term	Number of Decisions with 5 Votes
2006-07	24 (33.3%)
2007-08	10 (18.1%)
2008-09	22 (27.2%)
2009-10	19 (20.7%)
2010-11	17 (20.3%)
2011-12	16 (21.9%)
2012-13	23 (29.1%)
2013-14	11 (14.9%)

In contrast, how many cases had seven or more votes (including *per curiam* decisions)? In 2013-14 it was 71.6% compared to 62% in 2012-13 and 57.5% in 2011-12. And 13.5% of the decisions garnered six votes.

***PER CURIAM* DECISIONS**

The 2009-10 Term had been marked by an extraordinary number of *per curiam* decisions. There were 18 of them compared to just seven in 2008-09, two in 2007-08, and eight in 2006-07. And of the 18, 12 were 9-0 votes. In 2010-11, where there were eight fewer cases decided than in the prior term (84 compared to 92 in 2009-10), there were nine *per curiam* decisions, six of which were 9-0 or 8-0 decisions.

In 2011-12 when there were 11 fewer cases decided than in 2010-11 (73 compared to 84), there were ten *per curiam* decisions (not including two *per curiam* decisions where the writ of certiorari was dismissed as improvidently granted).

In 2012-13, there were only six *per curiam* decisions and all were 9-0 vote counts.

In 2013-14, there were seven *per curiam* decisions, and all were 9-0 votes except for one: *Unite Here Local 355 v. Mulhall*, where the writ was dismissed as improvidently granted, but Justices Breyer, Sotomayor, and Kagan dissented.⁴

AUTHORSHIP COUNT

As noted above, in 2013-14, authorship was generally spread evenly among the Justices, with each Justice writing seven or eight opinions.

The “dissenting” vote counts for 2013-14, 2012-13, 2011-12, and 2010-11 appear in the table below. Justice Kennedy and the Chief Justice again are at the low end. Justices Sotomayor and Ginsburg are at the high end. In 2013-14, there were a lot fewer issues over which the Justices disagreed.

<i>Justice</i>	<i>Dissents 2013-14</i>	<i>Partial Dissents 2013-14</i>	<i>Dissents 2012-13</i>	<i>Partial Dissents 2012-13</i>	<i>Dissents 2010-11</i>	<i>Partial Dissents 2010-11</i>	<i>Dissents 2011-12</i>	<i>Partial Dissents 2011-12</i>
Kennedy	4	0	7	0	5	0	5	0
Roberts	6	0	10	1	7	0	7	0
Scalia	7	0	16	1	10	0	14	1
Thomas	6	1	15	0	10	0	11	1
Alito	7	1	15	0	10	1	12	1
Breyer	10	0	13	0	17	1	13	4
Kagan	7	0	14	0	11	0	12	2
Sotomayor	14	0	17	0	13	1	13	4
Ginsburg	11	0	16	0	17	1	18	5

⁴ *Mulhall* involved the reach of Sections 302(a)(2) and (b)(1) of the Labor Management Relations Act (LMRA), 29 U.S.C. § 186(a)(2) and (b)(1), which make it a crime for an employer to pay money or a thing of value to a labor union that seeks to represent its employees and for any person to request or demand money or some other thing of value prohibited by subsection (a)(2). An employer had promised a union that sought to represent its employees that the employer would remain neutral with respect to organizing efforts, that the union would have access to nonpublic areas, and that the union would receive a list of employees’ names and contact information. The Eleventh Circuit held that these were “things of value” and that a promise by the employer to “pay” them violated the LMRA if the employer “intends to use the payment to ‘corrupt’ the union.” The writ was dismissed because, after briefing and oral argument, it appeared that the case was moot and that *Mulhall* may not have standing. Justice Breyer thought the better course was to receive briefing on these issues and, if it were possible to address the merits, to do so since the circuits were split on the scope of Section 302.

JUSTICE KENNEDY

The role that Justice Kennedy played on the Court in 2006-07, Justice Roberts' first full year as Chief Justice, was remarkable because, in 75 decisions, he dissented only twice (in both cases the vote margin was 6-3, and in both cases he was joined by Justice Alito, and then either by Justice Stevens or Justice Breyer). In 2007-08, in contrast, Justice Kennedy dissented nine times and in part in a tenth case, including in two 5-4 decisions. In 2008-09, Justice Kennedy was back to old form: he dissented three times, all in 5-4 decisions. In 2009-10, Justice Kennedy issued or joined in nine dissenting opinions, and six of them were 5-4 or 5-3 decisions. In 2010-11, Justice Kennedy dissented only five times. In 2011-12, Justice Kennedy dissented again only five times; including *per curiam* decisions, he was in the majority 92% of the time.

In 2012-13, this trend continued. Justice Kennedy was in the majority 91% of the time. He dissented seven times—four fewer than the Chief Justice—and wrote only one of those dissents. In 2013-14, Justice Kennedy was in the majority in 94.6% of the decisions. He authored only one dissent and joined in dissents rendered by Justices Sotomayor or Breyer, or the Chief Justice, in the three other matters in which he dissented.

DECISIONS WITH FIVE-VOTE MAJORITIES

As noted above, there were 11 decisions with five-vote majorities. Justices Breyer, Ginsburg, and Sotomayor did not author any five-vote decisions in 2013-14. Below is an analysis of the five-vote decisions authored by the other Justices.

Justice Kennedy

Justice Kennedy authored three five-vote decisions in the 2013-14 Term.

Paroline v. United States: Allocation of Damages for Possession of Child Pornography

Justice Kennedy addressed the amount of restitution that must be paid by a “possessor of child pornography” to “the victim whose childhood abuse appears in the pornographic materials possessed” under a part of the Violence Against Women Act of 1994. Under 18 U.S.C. § 2259, a district court must order restitution for certain offenses involving the sexual exploitation of children and child pornography. A victim is entitled to receive the “full amount of the victim’s losses.” Who proves up this amount? The answer to this question comes from Section 3664 of a different law, the Mandatory Victims Restitution Act of 1996, referenced in Section 2259. The Restitution Act establishes general restitution guidelines for many violations of federal law. Section 3664(e) specifically provides that “[a]ny dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government.”

The victim here sought close to \$3 million in lost income and about \$500,000 in future treatment and counseling costs from Paroline, who admitted to knowing possession of between 150 and 300 pornographic images, including two that depicted the victim. The victim, however, did not know Paroline and the victim’s images were viewable on the Internet meaning that they could have been downloaded by hundreds of (or more) other persons. The district court refused to provide restitution saying the Government had failed to prove that the claimed losses were proximately caused by Paroline’s offense, but the Fifth Circuit reversed. To resolve a conflict in the circuits over the proper causation standard, the Supreme Court granted *certiorari* and reversed.

Justice Kennedy explained that the statute enumerates six categories of covered losses, including: medical services; physical and occupational therapy; transportation, temporary housing, and child care; lost income; attorney's fees and costs; and a final catchall category for "any other losses suffered by the victim as a proximate result of the offense." The issue was whether the grammatical rule of the last antecedent—that the limiting phrase "as a proximate result of the offense" would modify only the phrase immediately preceding it—applied. The Court held that reading the text as a whole, this phrase modified the six covered losses and not just the last one.

Applying this test to the facts proved a much more difficult task. It threw Justice Kennedy into tort treatises on proof of causation and on contribution claims among tortfeasors. The result was the creation of federal common law on allocation of loss based on the defendant's "relative role" in causing the victim's losses:

In this special context, where it can be shown both that a defendant possessed a victim's images and that a victim has outstanding losses caused by the continuing traffic in those images but where it is impossible to trace a particular amount of those losses to the individual defendant by recourse to a more traditional causal inquiry, a court applying §2259 should order restitution in an amount that comports with the defendant's relative role in the causal process that underlies the victim's general losses. The amount would not be severe in a case like this, given the nature of the causal connection between the conduct of a possessor like Paroline and the entirety of the victim's general losses from the trade in her images, which are the product of the acts of thousands of offenders. It would not, however, be a token or nominal amount. The required restitution would be a reasonable and circumscribed award imposed in recognition of the indisputable role of the offender in the causal process underlying the victim's losses and suited to the relative size of that causal role. This would serve the twin goals of helping the victim achieve eventual restitution for all her child-pornography losses and impressing upon offenders the fact that child-pornography crimes, even simple possession, affect real victims.⁵

Hall v. Florida: IQ Scores and the Death Penalty

In *Atkins v. Virginia*, 536 U.S. 304 (2002), the Court held that the Eighth Amendment as applied to the States by the Fourteenth Amendment did not permit the execution of persons with an intellectual disability. Florida

⁵ Justice Kennedy said it would not be fair to hold a single possessor liable for a victim's entire losses. There would not be any "legal or practical" right to contribution, for example, he explained, and holding a single possessor liable for all of victim's losses might raise questions under the Excessive Fines Clause of the Eighth Amendment. To conduct the allocation called for by Justice Kennedy's construct does not involve a "mathematical inquiry" but instead the use of a court's "discretion and sound judgment." District courts should determine the amount of the victim's losses "caused by the continuing traffic in the victim's images," and then evaluate "relative causal significance" by considering "the number of past criminal defendants found to have contributed to the victim's general losses; reasonable predictions of the number of future offenders likely to be caught and convicted for crimes contributing to the victim's general losses; any available and reasonably reliable estimate of the broader number of offenders involved (most of whom will, of course, never be caught or convicted); whether the defendant reproduced or distributed images of the victim; whether the defendant had any connection to the initial production of the images; how many images of the victim the defendant possessed; and other facts relevant to the defendant's relative causal role." Justice Kennedy admitted this approach "is not without its difficulties," but said "courts can only do their best to apply the statute as written in a workable manner, faithful to the competing principles at stake: that victims should be compensated and that defendants should be held to account for the impact of their conduct on those victims, but also that defendants should be made liable for the consequences and gravity of their own conduct, not the conduct of others."

law used an IQ test score to determine if a person is intellectually disabled. A score of 70 or lower and no death penalty would be permitted. A score of 71 or higher and a criminal defendant could be put to death without further inquiry. Freddie Hall was on death row when *Atkins* was decided. As part of a post-*Atkins* challenge to his death sentence, Hall was given an IQ test—one of nine such tests he had received over 40 years with scores ranging from 60 to 80. At a hearing, the trial court excluded two scores below 70 for evidentiary reasons but allowed into evidence two other scores, both between 71 and 80. Because of these IQ scores, Hall was not intellectually disabled as a matter of Florida law, and the challenge to his death sentence was rejected. The Florida Supreme Court affirmed.

In *Hall v. Florida*, Justice Kennedy explained for the Court why this rule was too rigid and represented cruel and unusual punishment. After explaining how imprecise IQ tests are⁶ and how other states have rejected a fixed IQ cutoff for death-penalty decisions,⁷ Justice Kennedy concluded:

Florida seeks to execute a man because he scored a 71 instead of 70 on an IQ test. Florida is one of just a few States to have this rigid rule. Florida's rule misconstrues the Court's statements in Atkins that intellectually (sic) disability is characterized by an IQ of "approximately 70." 536 U. S., at 308, n. 3. Florida's rule is in direct opposition to the views of those who design, administer, and interpret the IQ test. By failing to take into account the standard error of measurement, Florida's law not only contradicts the test's own design but also bars an essential part of a sentencing court's inquiry into adaptive functioning. Freddie Lee Hall may or may not be intellectually disabled, but the law requires that he have the opportunity to present evidence of his intellectual disability, including deficits in adaptive functioning over his lifetime.

The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution. Florida's law contravenes our Nation's commitment to dignity and its duty to teach human decency as the mark of a civilized world. The States are laboratories for experimentation, but those experiments may not deny the basic dignity the Constitution protects.

Town of Greece v. Galloway: Opening a Town Board Meeting with a Prayer

The Town of Greece opened its monthly board meetings with a prayer that, respondents claimed, preferred Christians over other prayer givers. They sought to limit opening prayers to a “generic God.” The district court rejected the claim but the Second Circuit reversed. The Court vacated that decision, finding no First Amendment violation. Justice Kennedy explained that in *Marsh v. Chambers*, 463 U.S. 783 (1983), the Court upheld the practice of opening a state legislative session with a prayer. “The decision concluded that legislative prayer, while religious in nature, has long been understood as compatible with the Establishment

⁶ “Florida’s rule disregards established medical practice in two interrelated ways. It takes an IQ score as final and conclusive evidence of a defendant’s intellectual capacity, when experts in the field would consider other evidence. It also relies on a purportedly scientific measurement of the defendant’s abilities, his IQ score, while refusing to recognize that the score is, on its own terms, imprecise.”

⁷ “In summary, every state legislature to have considered the issue after *Atkins*—save Virginia’s—and whose law has been interpreted by its courts has taken a position contrary to that of Florida.”

Clause. As practiced by Congress since the framing of the Constitution, legislative prayer lends gravity to public business, reminds lawmakers to transcend petty differences in pursuit of a higher purpose, and expresses a common aspiration to a just and peaceful society.” Applying *Marsh*, Justice Kennedy explained: “The First Amendment is not a majority rule, and government may not seek to define permissible categories of religious speech. Once it invites prayer into the public sphere, government must permit a prayer giver to address his or her own God or gods as conscience dictates, unfettered by what an administrator or judge considers to be nonsectarian.”⁸ He then concluded that the Town of Greece’s prayers fell within the tradition of prayers recognized by the Court.⁹

In part II-B of the opinion which did not command a majority, Justice Kennedy offered his views on when “coercion” to support or participate in any religion is established. He called the inquiry a “fact-sensitive one that considers both the setting in which the prayer arises and the audience to whom it is directed.” But here, the prayers did not “chastis[e] dissenters” nor attempt “lengthy disquisition on religious dogma” and instead were part of a long tradition and were directed at the Town’s board members. Justices Scalia and Thomas did not join this part of the opinion, however, taking a different view of “coercion.”¹⁰

Chief Justice Roberts

The Chief Justice authored one decision with a five-vote majority in 2013-14.

McCutcheon v. Federal Election Commission: Aggregate Limits on Campaign Contributions

This case involved “aggregate limits” on campaign contributions, or “how much money a donor may contribute in total to all candidates or committees.”¹¹ The United States contended that aggregate limits serve the “permissible objective of combating corruption.” The Chief Justice explained the burden of proof facing the United States:

Any regulation must [] target what we have called “quid pro quo” corruption or its appearance. That Latin phrase captures the notion of a direct exchange of an official act for money. “The hallmark of corruption is the financial quid pro quo: dollars for political

⁸ That is not to say that there are no limits on invocations before government meetings: “If the course and practice over time shows that the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion, many present may consider the prayer to fall short of the desire to elevate the purpose of the occasion and to unite lawmakers in their common effort. That circumstance would present a different case than the one presently before the Court.”

⁹ “A number of the prayers did invoke the name of Jesus, the Heavenly Father, or the Holy Spirit, but they also invoked universal themes, as by celebrating the changing of the seasons or calling for a ‘spirit of cooperation’ among town leaders.” The town also “made reasonable efforts to identify all of the congregations located within its borders and represented that it would welcome a prayer by any minister or layman who wished to give one.”

¹⁰ Justice Thomas argued that at the founding of the Nation, the hallmark of historical establishment of religion was “coercion of religious orthodoxy and of financial support by *force of law and threat of penalty*,” quoting Justice Scalia’s dissent in *Lee v. Weisman*, 505 U.S. 577, 640 (1992) (emphasis in original).

¹¹ Under the Federal Election Campaign Act of 1971 (FECA), as amended by the Bipartisan Campaign Reform Act of 2002 (BCRA), for the 2013-14 election cycle, an individual could contribute up to \$2,600 per election to a candidate, \$32,400 per year to a national party committee, \$10,000 per year to a state or local party committee, and \$5,000 per year to a political action committee, or “PAC.” 2 U. S. C. § 441a(a)(1). These are called “base limits.” They were not in issue. The aggregate limits for the 2013-14 election cycle were \$48,600 to federal candidates and a total of \$74,600 to other political committees. Under the \$74,600 limit, \$48,600 could be contributed to state or local party committees and PACs, as opposed to national party committees. In total, an individual could contribute up to \$123,000 to candidate and non-candidate committees during each two-year election cycle.

favours.” Campaign finance restrictions that pursue other objectives, we have explained, impermissibly inject the Government “into the debate over who should govern.” And those who govern should be the last people to help decide who should govern. (Citations omitted; emphasis in original.)

In his plurality opinion, he explained that the aggregate limits “do little, if anything, to address that concern, while seriously restricting participation in the democratic process. The aggregate limits are therefore invalid under the First Amendment.”

After first explaining why *Buckley v. Valeo*, 424 U.S. 1 (1976)¹² did not control the outcome, the Chief Justice explained the “significant First Amendment costs” for individual citizens that resulted from the aggregate limits:

To put it in the simplest terms, the aggregate limits prohibit an individual from fully contributing to the primary and general election campaigns of ten or more candidates, even if all contributions fall within the base limits Congress views as adequate to protect against corruption. The individual may give up to \$5,200 each to nine candidates, but the aggregate limits constitute an outright ban on further contributions to any other candidate (beyond the additional \$1,800 that may be spent before reaching the \$48,600 aggregate limit). At that point, the limits deny the individual all ability to exercise his expressive and associational rights by contributing to someone who will advocate for his policy preferences. A donor must limit the number of candidates he supports, and may have to choose which of several policy concerns he will advance—clear First Amendment harms that the dissent never acknowledges.

He then wrote that the government failed to demonstrate a legitimate risk of *quid pro quo* corruption as required to overcome these First Amendment costs:

Spending large sums of money in connection with elections, but not in connection with an effort to control the exercise of an officeholder’s official duties, does not give rise to such quid pro quo corruption. Nor does the possibility that an individual who spends large sums may garner “influence over or access to” elected officials or political parties. And because the Government’s interest in preventing the appearance of corruption is equally confined to the appearance of quid pro quo corruption, the Government may not seek to limit the appearance of mere influence or access. (All citations omitted.)

The Chief Justice then explained why a number of examples of aggregate limits on campaign spending were either illegal or divorced from reality, and offered “multiple alternatives” to Congress to achieve a governmental interest in avoiding circumvention of base limits without unnecessarily abridging First Amendment rights.¹³ The Chief Justice added that, given the almost-immediate availability of contribution

¹² *Buckley* upheld base limits on campaign contributions under a “closely drawn” test as opposed to a compelling state interest test. *Buckley* made reference to the aggregate limits in three sentences and upheld them as a “modest restraint” on protected political activity and a corollary to the base limit. 424 U.S. at 38.

¹³ For example, the Chief Justice said that the Congress could consider “targeted restrictions on transfers among candidates and political committees.”

reports on the Internet, disclosure of contributions “minimizes the potential for abuse of the campaign finance system.”

Justice Thomas concurred in the judgment only, believing that *Buckley* should be overruled. Justice Breyer’s dissent invoked *Buckley*’s approval of aggregate limits, saying that the plurality opinion “creates a loophole that will allow a single individual to contribute millions of dollars to a political party or to a candidate’s campaign.”

Justice Alito

Justice Alito authored two opinions with five-vote majorities, both decided on the last day of the Term.

Burwell v. Hobby Lobby Stores, Inc.: Religious Objections to Insurance Coverage for Certain Contraceptives

Justice Alito, joined by the conservative members of the Court, addressed the interplay of the Religious Freedom Restoration Act of 1993 (RFRA), the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), and the Patient Protection and Affordable Care Act of 2010 (ACA), all in relation to three closely held corporations’ claims that a requirement under ACA that they must provide insurance coverage to female employees for certain contraceptives violated RFRA. With respect to two of the corporations, the Tenth Circuit held that the requirement violated RFRA. With respect to the other, the Third Circuit reached a different conclusion. The Court agreed with the Tenth Circuit and reversed the Third Circuit.

ACA requires generally that employers with 50 or more full-time employees offer group insurance that provides “minimum essential coverage.” An employer who fails to do so pays a substantial penalty. Absent an exception, required coverage includes “preventive care and screenings” for women without any cost-sharing requirement. ACA does not describe the nature of “preventive care and screenings.” That determination was delegated to the Health Resources and Services Administration (HRSA), a component of the Department of Health and Human Services (HHS). HRSA then issued guidelines that provide that nonexempt employers were required to provide coverage without cost sharing for all Food and Drug Administration-approved contraceptive methods. Some of those methods prevent fertilization of an egg. But four of them—all in issue before the Court—prevent an already fertilized egg from development “by inhibiting its attachment to the uterus.”

HHS exempted “religious employers” from the mandate to provide contraceptive coverage. It also exempted certain religious nonprofit organizations. Certain “grandfathered” plans were also exempted, as are the plans of employers with less than 50 employees.

The owners of each of the corporations believed that “life begins at conception and that it would violate their religion to facilitate access to contraceptive drugs or devices that operate after that point.” So they sued under RFRA and the First Amendment.¹⁴

The Court first explained RFRA’s prohibitions:

¹⁴ The Tenth Circuit did not reach the questions of whether plaintiffs’ claims also violated the First Amendment’s Free Exercise Clause or whether individual owners of the corporations could pursue the same claims.

RFRA prohibits the “Government [from] substantially burden[ing] a person’s exercise of religion even if the burden results from a rule of general applicability” unless the Government “demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” 42 U. S. C. §§2000bb–1(a), (b). (Emphasis in original.)

It also explained the role of RLUIPA. Prior to the adoption of this law, RFRA defined the “exercise of religion” as “the exercise of religion under the First Amendment.” In RLUIPA, Congress “deleted the reference to the First Amendment and defined the ‘exercise of religion’ to include ‘any exercise of religion, whether or not compelled by, or central to, a system of religious belief.’ [42 U.S.C.] §2000cc–5(7)(A).” Congress further “mandated that this concept ‘be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.’ [42 U.S.C.] § 2000cc–3(g).”

The Court first had to decide whether the corporate plaintiffs were “person”s under RFRA and then whether a corporation could engage in the “exercise of religion.” It answered both questions affirmatively.

As to the former, because RFRA does not define “person,” the Court looked to the Dictionary Act, 1 U.S.C. § 1, which does define “person” to include corporations. The majority also determined that RFRA does not demonstrate a Congressional intent to depart from this definition. Finally, it found dispositive HHS’s concession that a nonprofit corporation is a “person” under RFRA.

No known understanding of the term “person” includes some but not all corporations. The term “person” sometimes encompasses artificial persons (as the Dictionary Act instructs), and it sometimes is limited to natural persons. But no conceivable definition of the term includes natural persons and nonprofit corporations, but not for-profit corporations. (Emphasis in original.)

As to the second question, the Court said that corporate form does not prevent a corporation from engaging in the exercise of religion since a nonprofit corporation can do so. Having a profit-making objective also did not matter: “In [*Braunfeld v. Brown*, 366 U. S. 599 (1961)],¹⁵ we entertained the free-exercise claims of individuals who were attempting to make a profit as retail merchants, and the Court never even hinted that this objective precluded their claims.” Finally, the Court explained that the laws of the states of incorporation permitted the corporations to pursue any lawful purpose and added that this language was broad enough to encompass conformity with the owners’ religious beliefs.

Because of the penalty provisions of ACA, the Court then had no difficulty concluding that ACA substantially burdened the exercise of religion.

The last statutory step required a determination whether HHS had shown that the contraceptive mandate furthered a compelling state interest and was the least restrictive means to further that interest. The Court elected to assume the former without deciding the question because it then held that HHS did not employ the least restrictive means to further the state interest.

¹⁵ *Braunfeld* was a plurality opinion involving Jewish merchants objecting to a law requiring them to close on Sundays.

The Court offered less restrictive alternatives. One is that HHS could pay for the coverage.¹⁶ Another is to allow an accommodation for corporations with religious objections, as HHS has done for nonprofit organizations with such objections. Under that accommodation, the corporation's group health provider would have to remove contraceptive coverage from the group health plan but separately continue to provide the contraceptive coverage without cost sharing from the employer or the employee.¹⁷

After rejecting the dissent's worries about opening the floodgates of claims in federal court under RFRA and explaining that, in any event, it must apply the law to the specific facts before it and was not deciding any other

¹⁶ "HHS has not shown, see §2000bb-1(b)(2), that this is not a viable alternative. HHS has not provided any estimate of the average cost per employee of providing access to these contraceptives, two of which, according to the FDA, are designed primarily for emergency use. See Birth Control: Medicines to Help You, online at <http://www.fda.gov/forconsumers/byaudience/forwomen/freepublications/ucm313215.htm>. Nor has HHS provided any statistics regarding the number of employees who might be affected because they work for corporations like Hobby Lobby, Conestoga, and Mardel. Nor has HHS told us that it is unable to provide such statistics. It seems likely, however, that the cost of providing the forms of contraceptives at issue in these cases (if not all FDA-approved contraceptives) would be minor when compared with the overall cost of ACA. According to one of the Congressional Budget Office's most recent forecasts, ACA's insurance-coverage provisions will cost the Federal Government more than \$1.3 trillion through the next decade. See CBO, Updated Estimates of the Effects of the Insurance Coverage Provisions of the Affordable Care Act, April 2014, p. 2. (Footnote omitted). If, as HHS tells us, providing all women with cost-free access to all FDA-approved methods of contraception is a Government interest of the highest order, it is hard to understand HHS's argument that it cannot be required under RFRA to pay *anything* in order to achieve this important goal." (Emphasis in original).

¹⁷ "Under that accommodation, the organization can self-certify that it opposes providing coverage for particular contraceptive services. See 45 CFR §§147.131(b)(4), (c)(1); 26 CFR §§54.9815-2713A(a)(4), (b). If the organization makes such a certification, the organization's insurance issuer or third-party administrator must '[e]xpressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan' and '[p]rovide separate payments for any contraceptive services required to be covered' without imposing 'any cost-sharing requirements . . . on the eligible organization, the group health plan, or plan participants or beneficiaries.' 45 CFR §147.131(c)(2); 26 CFR §54.9815-2713A(c)(2)." In a footnote, the Court explained that HHS had determined that the cost to insurers would not increase because the costs of providing contraceptive coverage are "balanced by cost savings from lower pregnancy-related costs and from improvements in women's health."

case, the Court affirmed the Tenth Circuit and reversed the Third Circuit. Because of its holding under RFRA, the Court did not reach the First Amendment claims raised.¹⁸

Justice Kennedy wrote a concurring opinion that may become significant in future cases. He started out by seeking to limit the sweep of the majority's opinion in light of Justice Ginsburg's very strong dissent: "At the outset it should be said that the Court's opinion does not have the breadth and sweep ascribed to it by the respectful and powerful dissent." Justice Kennedy then proceeded to break down the elements of proof required to establish a violation of RFRA after it is established that plaintiffs were exercising their religious beliefs "within the context of their own closely held, for-profit corporations."

The Government must demonstrate that the application of a substantial burden to a person's exercise of religion "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." §2000bb-1(b).

Justice Kennedy said it was "important to confirm" that the Court's opinion is premised on the "assumption that the HHS regulation here in issue furthers a legitimate and compelling interest in the health of female employees. (Citation omitted.)" Justice Kennedy, however, then explained why the Government failed to use the least restrict means to further than interest since an accommodation existed that would provide the contraceptive coverage without cost sharing, just as the Government was doing in the case of nonprofit religious organizations.

On this record and as explained by the Court, the Government has not met its burden of showing that it cannot accommodate the plaintiffs' similar religious objections under this

¹⁸ On July 3, 2014, the Court issued the following order in *Wheaton College v. Burwell*: "If the applicant informs the Secretary of Health and Human Services in writing that it is a nonprofit organization that holds itself out as religious and has religious objections to providing coverage for contraceptive services, the respondents are enjoined from enforcing against the applicant the challenged provisions of the Patient Protection and Affordable Care Act and related regulations pending final disposition of appellate review." The Order explained that the circuits were split on whether to enjoin the requirement that religious nonprofit organizations use a certain Government form, EBSA Form 700, to claim the exemption, and such "division is a traditional ground for certiorari." The Order pointed out that applicant's employees and students can still obtain, without cost, "the full range of FDA approved contraceptives" since the Government "contends that the applicant's health insurance issuer and third-party administrator are required by federal law to provide full contraceptive coverage regardless whether the applicant completes EBSA Form 700." The Court added: "Nothing in this order precludes the Government from relying on this notice, to the extent it considers it necessary, to facilitate the provision of full contraceptive coverage under the Act," and further that in light of its analysis, "this order should not be construed as an expression of the Court's views on the merits." Justice Sotomayor's dissent from this Order was joined by Justices Ginsburg and Kagan. She pointed out that there was no dispute that Wheaton was entitled to "the religious-nonprofit exemption from the contraceptive coverage requirement." But Wheaton was arguing that completing EBSA Form 700 to confirm the exemption itself violates RFRA. Justice Sotomayor said that the form does not trigger contraceptive coverage; federal law does. Hence, completion of the form would not make Wheaton complicit in the provision of contraceptives. But even if it did, Justice Sotomayor explained that in *Hobby Lobby*, the Court relied on this accommodation to religious-nonprofit institutions as an "alternative that achieves all of the Government's aims while providing greater respect for religious liberty." In other words, as Justice Sotomayor explained, the accommodation represents "the least restrictive means of furthering the Government's compelling interests in public health and women's well-being." That being the case, Wheaton's application should have been rejected. Justice Sotomayor minced no words: "Those who are bound by our decisions usually believe they can take us at our word. Not so today. After expressly relying on the availability of the religious-nonprofit accommodation to hold that the contraceptive coverage requirement violates RFRA as applied to closely held for-profit corporations, the Court now, as the dissent in *Hobby Lobby* feared it might, see *ante*, at 29-30 (GINSBURG, J., dissenting), retreats from that position. That action evinces disregard for even the newest of this Court's precedents and undermines confidence in this institution." Justice Sotomayor added that the high bar required to issue an injunction ("the legal rights at issue are indisputably clear") was not met where, in part, some lower courts have refused to issue such an injunction.

established framework. RFRA is inconsistent with the insistence of an agency such as HHS on distinguishing between different religious believers—burdening one while accommodating the other—when it may treat both equally by offering both of them the same accommodation.

Justice Kennedy made it clear that the Court did not address the plaintiffs’ arguments that a proper response to a “legitimate” claim for religious freedom “in the health care arena” is for the Government to pay the cost of eliminating the infringement because here there was no need to reach that argument:

The Court properly does not resolve whether one freedom should be protected by creating incentives for additional government constraints. In these cases, it is the Court’s understanding that an accommodation may be made to the employers without imposition of a whole new program or burden on the Government. As the Court makes clear, this is not a case where it can be established that it is difficult to accommodate the government’s interest, and in fact the mechanism for doing so is already in place.

Plainly trying to limit the reach of the majority opinion to the facts before it, Justice Kennedy further explained that because there was an existing accommodation available to the Government, this case was not necessarily precedential for other religious freedom claims:

Among the reasons the United States is so open, so tolerant, and so free is that no person may be restricted or demeaned by government in exercising his or her religion. Yet neither may that same exercise unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling. In these cases the means to reconcile those two priorities are at hand in the existing accommodation the Government has designed, identified, and used for circumstances closely parallel to those presented here. RFRA requires the Government to use this less restrictive means. As the Court explains, this existing model, designed precisely for this problem, might well suffice to distinguish the instant cases from many others in which it is more difficult and expensive to accommodate a governmental program to countless religious claims based on an alleged statutory right of free exercise.

In contrast to Justice Kennedy’s characterization, Justice Ginsburg’s dissent called the majority decision one of “startling breath.”

[T]he Court holds that commercial enterprises, including corporations, along with partnerships and sole proprietorships, can opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs. See ante, at 16–49. Compelling governmental interests in uniform compliance with the law, and disadvantages that religion-based opt-outs impose on others, hold no sway, the Court decides, at least when there is a “less restrictive alternative.” And such an alternative, the Court suggests, there always will be whenever, in lieu of tolling an enterprise claiming a religion-based exemption, the government, i.e., the general public, can pick up the tab. See ante, at 41–43.

She argued that the First Amendment would not have produced such a result, and further that the Court ignores the interests of “thousands of women” and their dependents who do not share the corporate owners’ religious faith.

The Court does not pretend that the First Amendment's Free Exercise Clause demands religion-based accommodations so extreme, for our decisions leave no doubt on that score. See infra, at 6–8. Instead, the Court holds that Congress, in the Religious Freedom Restoration Act of 1993 (RFRA), 42 U. S. C. §2000bb et seq., dictated the extraordinary religion-based exemptions today's decision endorses. In the Court's view, RFRA demands accommodation of a for-profit corporation's religious beliefs no matter the impact that accommodation may have on third parties who do not share the corporation owners' religious faith—in these cases, thousands of women employed by Hobby Lobby and Conestoga or dependents of persons those corporations employ. Persuaded that Congress enacted RFRA to serve a far less radical purpose, and mindful of the havoc the Court's judgment can introduce, I dissent.¹⁹

Harris v. Quinn: Challenge to Union Fees by a Quasi-Public Employee

This case involves a successful First Amendment challenge to payment of a fee to a union that a quasi-public employee refuses to join.

Medicaid recipients can hire “personal assistants” to provide home health care. The Medicaid program benefits because individuals in need of this care do not need to be institutionalized. Hence, the Medicaid program provides federal funds to states, including Illinois, to compensate these caregivers. Illinois law calls the person receiving care a “customer,” and provides that the customer is the employer of the personal assistant. The customer is also responsible for locating, hiring, and training the personal assistant, and evaluating the work of the personal assistant. The customer can also discipline the personal assistant and terminate the employment relationship. A document called a “Service Plan” dictates the services the customer will receive; the customer controls the contents of that document as well.

The one thing the customer does not do is pay the personal assistant. The state of Illinois does that. Beyond providing compensation, the State sets “basic threshold qualifications for employment,” “mandates an annual performance review” by the customer, and “mediates disagreements between customers and personal assistants,” among other “comparatively small” roles the State plays in the customer-personal assistant relationship.

Illinois adopted a statute that declared personal assistants to be public employees solely for purposes of coverage under the Illinois Public Labor Relations Act. Service Employees International Union (SEIU) became the exclusive representative of the personal assistants for collective bargaining purposes. A subsequently entered collective bargaining agreement provided that personal assistants who elected not to join the union had to pay a “fair share” fee to the SEIU. Petitioners before the Court sought a declaration that requiring them to pay this fee violated their First Amendment rights, since they did not support the union.

¹⁹ In her dissent, Justice Ginsburg disputed a subject that the majority opinion did not emphasize: whether the contraceptive coverage rule substantially burdened the exercise of their religious faith: “Undertaking the inquiry that the Court forgoes, I would conclude that the connection between the families’ religious objections and the contraceptive coverage requirement is too attenuated to rank as substantial. The requirement carries no command that Hobby Lobby or Conestoga purchase or provide the contraceptives they find objectionable. Instead, it calls on the companies covered by the requirement to direct money into undifferentiated funds that finance a wide variety of benefits under comprehensive health plans. Those plans, in order to comply with the ACA, see *supra*, at 3–6, must offer contraceptive coverage without cost sharing, just as they must cover an array of other preventive services.”

Writing for the conservative members of the Court, Justice Alito had to determine whether the outcome was preordained by the Court's decision in *Abood v. Detroit Board of Education*, 431 U. S. 209 (1977), which had upheld fair share fee payments to a public-sector union. Justice Alito examined *Abood's* application of progeny decisions and, a subsequent opinion that called *Abood* an anomaly, in concluding that the analysis in *Abood* was questionable. Among his criticisms, he wrote:

Abood failed to appreciate the difference between the core union speech involuntarily subsidized by dissenting public-sector employees and the core union speech involuntarily funded by their counterparts in the private sector. In the public sector, core issues such as wages, pensions, and benefits are important political issues, but that is generally not so in the private sector. In the years since Abood, as state and local expenditures on employee wages and benefits have mushroomed, the importance of the difference between bargaining in the public and private sectors has been driven home.

But rather than overrule *Abood*, the five-vote majority distinguished it because *Abood* involved “full-fledged public employees,” whereas here personal assistants are public employees for purposes of collective bargaining only. Otherwise, they are regarded under Illinois law as private-sector employees and are deprived of a host of benefits applicable to public employees.

Because of Abood's questionable foundations, and because the personal assistants are quite different from full fledged public employees, we refuse to extend Abood to the new situation now before us. (Footnote omitted). Abood itself has clear boundaries; it applies to public employees. Extending those boundaries to encompass partial-public employees, quasi-public employees, or simply private employees would invite problems.

The majority then had no difficulty finding that the compelled payments violated First Amendment standards because the fair share fee requirement did not serve a “compelling state interest” that could not be achieved through means “less restrictive of associational freedoms.” The Court held that “labor peace” was not advanced by the fee since the petitioners did not seek to establish a competing union. As to an argument that the welfare of personal assistants has improved because of collective bargaining efforts, the majority was also not persuaded: “The agency-fee provision cannot be sustained unless the cited benefits for personal assistants could not have been achieved if the union had been required to depend for funding on the dues paid by those personal assistants who chose to join. No such showing has been made.”

After rejecting additional arguments made by Illinois, the Solicitor General, and supporting *amici*,²⁰ the Court concluded:

For all these reasons, we refuse to extend Abood in the manner that Illinois seeks. If we accepted Illinois' argument, we would approve an unprecedented violation of the bedrock

²⁰ The Court rejected the adoption of a balancing test (where speech is unprotected if it is not on a matter of public concern) to decide the First Amendment question. But the Court also held that even if it applied a balancing test, the result would be the same since the speech here involved increased wages and benefits under the Medicaid payment system which, the Court said, was a matter of public concern that was not outweighed by arguments about labor peace or free-riding. The Court also had no worry that its precedent approving the payment of Bar dues by lawyers or activity fees by university students would be undermined by its holding, since both requirements are supported by compelling state interests (to ensure that lawyers “adhere to ethical practices” and to promote student expression that is “viewpoint neutral.”

principle that, except perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support. The First Amendment prohibits the collection of an agency fee from personal assistants in the Rehabilitation Program who do not want to join or support the union.

Justice Scalia

Justice Scalia wrote the 5-4 portion of one decision (some issues were decided by a 7-2 vote).

Utility Air Regulatory Group v. EPA: Clean Air Regulations on Greenhouse Gases

This is a complicated Clean Air Act (CAA) opinion, but only because the Clean Air Act is such a byzantine law.

Under the Act, the Environmental Protection Agency (EPA) establishes what are called “national ambient air quality standards,” or “NAAQS.” To date, EPA has established standards for six pollutants. States apply these standards by creating “state implementation plans,” or “SIPs.” A SIP is a map of the State showing areas that “attain” standards for each of these six pollutants and those that don’t, as well as areas that are “unclassifiable.” An area might attain the NAAQS for one of the six pollutants but might be a “nonattainment area” for one or more of the others.

As one might expect, sources of air pollution within each area of a SIP are then permitted. In attainment or unclassifiable areas, sources obtain a “PSD” permit, designed for “prevention of significant deterioration” of the air quality. In other words and not illogically, if an area meets the air quality standard, the goal is to ensure that existing or new sources within the area maintain the standard.

Putting aside mobile sources of air pollution (e.g., a vehicle) for the moment, the CAA refers to new or existing sources as “stationary” (e.g., a factory). Within the PSD program, which is part of Title I of the statute, the Act focuses on “major emitting sources” (a stationary source with the potential to emit 250 tons per year of “any air pollutant”). It is unlawful to construct or modify a major emitting source without obtaining a PSD permit. Compliance with the permit means that the major emitting facility will not cause or contribute to the violation of an applicable air-quality standard and that the source uses “best available control technology” (BACT) for each pollutant subject to regulation under the Act.

Separately, under Title V of the CAA, it is unlawful to operate any “major source” (one with the potential to emit 100 tons per year of “any air pollutant”) wherever it might be located without a comprehensive operating permit. Title V does not impose a substantive pollution-control requirement on a facility; rather, it identifies all emissions limitations and standards that are applicable to the source and associated inspection, monitoring, and reporting requirements.

Under Title II of the Act, EPA regulates mobile sources. In *Massachusetts v. EPA*, 549 U.S. 497 (2007), the Court held that Title II authorizes EPA to regulate greenhouse gases from new motor vehicles if EPA decides that such emissions contributed to climate change. Here’s the rub: if EPA made that decision, then EPA felt it had to regulate greenhouse gases under both the PSD and Title V permitting programs. Because emissions of greenhouse gases are much larger than emissions of conventional pollutants, EPA projected that large numbers of small sources not regulated under the PSD or Title V programs (e.g., large office and apartment buildings or retail establishments) would require permits.

In 2009, treating six greenhouse gases (carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride) as a single air pollutant, EPA decided that they contributed to climate change. In 2010, EPA announced its “Triggering Rule,” deciding that stationary sources would be subject to PSD and Title V permits if they emitted greenhouse gases once EPA applied greenhouse-gas standards to motor vehicles. EPA then announced its “Tailoring Rule” to limit the number of sources that would have to be regulated under the PSD and Title V permitting programs. EPA also adopted a “phase-in” approach for permitting purposes. A source that had to obtain a permit because of emissions of conventional pollutants—referred to as an “anyway source”—would have to immediately comply with BACT for greenhouse gas emissions that exceeded a certain threshold. Other sources had later deadlines to become permitted.

The questions before the Supreme Court were: (1) did EPA properly determine that a stationary source may be subject to the PSD and Title V permitting programs solely because the source emitted greenhouse gases; and (2) did an “anyway” source (already subject to the permitting programs based on conventional pollutant emissions) have to employ BACT to limit greenhouse gas emissions?

The answer to the first question turned on a statutory interpretation. Under the Clean Air Act the words “air pollutant” are given a very broad meaning. But the PSD permitting program applies to major emitters of “any air pollutant.” Are the pollutants referred to in the permitting program part of the CAA, a subset of “air pollutant” as defined for the CAA as a whole? Phrased another way, does “any air pollutant” refer to the same pollutants as “air pollutant”?

Based on EPA’s past interpretations of the Act that “any air pollutant” refers only to “regulated” air pollutants, five members of the Court answered this question in the negative. They also held that *Massachusetts* supported this view:

Massachusetts does not strip EPA of authority to exclude greenhouse gases from the class of regulable air pollutants under other parts of the Act where their inclusion would be inconsistent with the statutory scheme. The Act-wide definition to which the Court gave a “sweeping” and “capacious” interpretation, id., at 528, 532, is not a command to regulate, but a description of the universe of substances EPA may consider regulating under the Act’s operative provisions. Massachusetts does not foreclose the Agency’s use of statutory context to infer that certain of the Act’s provisions use “air pollutant” to denote not every conceivable airborne substance, but only those that may sensibly be encompassed within the particular regulatory program. As certain amici felicitously put it, while Massachusetts “rejected EPA’s categorical contention that greenhouse gases could not be ‘air pollutants’ for any purposes of the Act,” it did not “embrace EPA’s current, equally categorical position that

greenhouse gases must be air pollutants for all purposes” regardless of the statutory context. Brief for Administrative Law Professors et al. as Amici Curiae 17.²¹ (Emphasis in original.)

Having dispensed with the view that the CAA “compelled” an interpretation that required EPA to include greenhouse gases within the phrase “any air pollutant” under the PSD and Title V permitting requirements, the five-member majority then held that *Chevron* deference²² did not permit EPA to reach this conclusion as a reasonable interpretation of the statute. After first agreeing with EPA’s own words that “requiring permits for sources based solely on their emission of greenhouse gases at the 100- and 250-tons-per-year levels set forth in the statute would be ‘incompatible’ with ‘the substance of Congress’ regulatory scheme” (citation omitted), the Court also determined that “EPA’s interpretation is also unreasonable because it would bring about an enormous and transformative expansion in EPA’s regulatory authority without clear congressional authorization.”²³

But what about “anyway sources”? Since they were using best available control technology for conventional pollutants, could they be required to have permits imposing BACT for greenhouse gas emissions also? In this part of the opinion, Justices Alito and Thomas abandoned Justice Scalia, but Justices Breyer, Ginsburg, Sotomayor, and Kagan joined him and the Chief Justice and Justice Kennedy in answering this question “yes,” but only as to an “anyway” source that emits more than a “de minimis” amount²⁴ of greenhouse gases:

The text of the BACT provision is far less open-ended than the text of the PSD and Title V permitting triggers. It states that BACT is required “for each pollutant subject to regulation under this chapter” (i.e., the entire Act), §7475(a)(4), a phrase that—as the D. C. Circuit wrote 35 years ago— “would not seem readily susceptible [of] misinterpretation.” Alabama Power Co. v. Costle, 636 F. 2d 323, 404 (1979). Whereas the dubious breadth of “any air pollutant” in the permitting triggers suggests a role for agency judgment in identifying the subset of pollutants covered by the particular regulatory program at issue, the more specific phrasing of the BACT provision suggests that the necessary judgment has already been made by Congress. The wider statutory context likewise does not suggest that the BACT provision can bear a narrowing construction: There is no indication that the Act elsewhere uses, or that

²¹ Justice Scalia acknowledged this approach might raise statutory-construction eyebrows: “To be sure, Congress’s profligate use of ‘air pollutant’ where what is meant is obviously narrower than the Act-wide definition is not conducive to clarity. One ordinarily assumes ‘that identical words used in different parts of the same act are intended to have the same meaning.’ *Environmental Defense v. Duke Energy Corp.*, 549 U. S. 561, 574 (2007). In this respect (as in countless others), the Act is far from a *chef d’oeuvre* of legislative draftsmanship. But we, and EPA, must do our best, bearing in mind the ‘fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.’” (Citation and internal quotation marks omitted.)

²² In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Court held that when an agency-administered statute is ambiguous, it may be presumed that Congress authorized the agency to resolve the ambiguity, and a reviewing court should determine only whether the agency acted reasonably and within the scope of its statutory authority in doing so.

²³ Saying that “[a]n agency has no power to ‘tailor’ legislation to bureaucratic policy goals by rewriting unambiguous statutory terms,” the Court also invalidated the Tailoring Rule that was designed by EPA to ameliorate the effects of its own interpretation of the Act.

²⁴ The Court held that EPA had to establish an appropriate *de minimis* threshold below which BACT is not required and justify its selection on “proper grounds.”

*EPA has interpreted, “each pollutant subject to regulation under this chapter” to mean anything other than what it says.*²⁵

Just before reaching this conclusion, back to a 5-4 part of the holding, Justice Scalia does offer some comfort to “anyway sources” saying that BACT cannot be used to order a fundamental redesign of a facility; that EPA has interpreted BACT as required only for pollutants emitted by the source; and that EPA guidance “suggests that BACT should not require every conceivable change that could result in minor improvements in energy efficiency.”

Justice Thomas

Justice Thomas wrote one five-vote majority decision in 2013-14.

Prado Navarette v. California: Reasonable Suspicion to Search Based on a 911 Call

This Fourth Amendment decision continues the split between Justices Thomas and Scalia over the proper interpretation of the Fourth Amendment’s prohibition of unreasonable searches.

A 911 dispatcher relayed to California Highway Patrol (CHP) officers a “tip” that the driver of a Silver Ford 150 pickup with a license tag number of 8-D-94925 had run a 911 caller off the road at mile marker 88 on the road in question about five minutes earlier. A CHP officer spotted the pickup truck and pulled the truck over. A second officer who responded to the dispatch also arrived at the scene. As they approached the vehicle, they smelled marijuana. They searched the truck and found 30 pounds of marijuana. The driver and his passenger were arrested. After their motion to suppress the evidence failed, they pleaded guilty to a charge of transporting marijuana, preserving the right to appeal their Fourth Amendment claim. A California appellate court rejected the argument, concluding that the officer who stopped the truck had reasonable suspicion to conduct an investigative stop.

In *United States v. Cortez*, 449 U.S. 411, 417-18 (1981), the Court held that a law enforcement officer is permitted to make an investigative stop when the officer has “a particularized and objective basis for suspecting the particular person stopped of criminal activity.” The “reasonable suspicion” required to justify such a stop is a function of the content of the information the officer has available and the reliability of the information. *Alabama v. White*, 496 U. S. 325, 330 (1990).

Does an anonymous 911 caller providing a tip satisfy this standard? Quoting from *Alabama v. White*, 496 U.S. at 327, Justice Thomas wrote that it could: “[U]nder appropriate circumstances, an anonymous tip can demonstrate ‘sufficient indicia of reliability to provide reasonable suspicion to make [an] investigatory stop.’” Here, because the truck was identified by make, model, and license tag, the 911 caller “necessarily claimed eyewitness knowledge of the alleged dangerous driving.” The 911 caller’s information was also reliable in that the truck was located about 19 miles from the mile-marker number reported in the 911 call and about 18 minutes after the 911 call. “That sort of contemporaneous report has long been treated as especially reliable,”

²⁵ Justice Scalia did caution EPA that the Court’s holding was a narrow one: “We acknowledge the potential for greenhouse-gas BACT to lead to an unreasonable and unanticipated degree of regulation, and our decision should not be taken as an endorsement of all aspects of EPA’s current approach, nor as a free rein for any future regulatory application of BACT in this distinct context. Our narrow holding is that nothing in the statute categorically prohibits EPA from interpreting the BACT provision to apply to greenhouse gases emitted by ‘anyway’ sources.”

Justice Thomas explained. The mere use of the 911 system also lent credibility to the tip, Justice Thomas explained, since 911 calls are recorded and callers can be identified and are subject to prosecution if a false report is made. Finally, Justice Thomas concluded that the 911 caller's statement that the driver of the truck had run the caller off the road is sufficient to create reasonable suspicion that the driver of the truck was drunk—providing the necessary predicate under *Terry v. Ohio*, 392 U. S. 1, 30 (1968), that “criminal activity may be afoot.” Calling this a “close case,” Justice Thomas nonetheless concluded that the traffic stop was lawful: “Under the totality of the circumstances, we find the indicia of reliability in this case sufficient to provide the officer with reasonable suspicion that the driver of the reported vehicle had run another vehicle off the road. That made it reasonable under the circumstances for the officer to execute a traffic stop.”

Justice Scalia focused on the Court's jurisprudence that an anonymous tip must be corroborated before it can be relied upon to justify a search. He dissected the Court's various justifications to demonstrate why he felt that each was flawed, not the least of which was the fact that the officer followed the truck for five minutes without seeing any evidence of careless or reckless driving (thereby questioning whether indeed a crime of reckless driving had been or would be committed).

The Court's opinion serves up a freedom-destroying cocktail consisting of two parts patent falsity: (1) that anonymous 911 reports of traffic violations are reliable so long as they correctly identify a car and its location, and (2) that a single instance of careless or reckless driving necessarily supports a reasonable suspicion of drunkenness. All the malevolent 911 caller need do is assert a traffic violation, and the targeted car will be stopped, forcibly if necessary, by the police. If the driver turns out not to be drunk (which will almost always be the case), the caller need fear no consequences, even if 911 knows his identity. After all, he never alleged drunkenness, but merely called in a traffic violation—and on that point his word is as good as his victim's.

Drunken driving is a serious matter, but so is the loss of our freedom to come and go as we please without police interference. To prevent and detect murder we do not allow searches without probable cause or targeted Terry stops without reasonable suspicion. We should not do so for drunken driving either. After today's opinion all of us on the road, and not just drug dealers, are at risk of having our freedom of movement curtailed on suspicion of drunkenness, based upon a phone tip, true or false, of a single instance of careless driving. I respectfully dissent.

Justice Kagan

Justice Kagan wrote three five-vote majority decisions in 2013-14. All involved statutory interpretations.

Scialabba v. Cuellar de Osorio: The Problem of “Aging Out” Under the Immigration Law

This statutorily intricate case involved the problem in immigration of “aging out.” Under the Immigration and Nationality Act, a citizen or lawful permanent resident of the United States may petition for certain family members—called principal beneficiaries under the statute—to obtain immigrant visas. The minor child of a principal beneficiary automatically receives a visa if his or her principal beneficiary receives one. A minor child is defined as an unmarried child under the age of 21. It can take some time before a petition to obtain an immigrant visa is granted. If a minor child at the start of the process reaches the age of 21 during the process,

he or she no longer qualifies for immigration status provided to minors. A related statute, the Child Status Protection Act (CSPA), provides that time spent by the government processing immigration petitions will not count against a beneficiary in assessing the beneficiary's status, and lists five "family-preference" categories that refer to derivative beneficiaries. The Board of Immigration Appeals interpreted the CSPA to allow aged-out children to retain "priority status" for only one of the five family-preference categories.

Relying on *Chevron* deference,²⁶ Justice Kagan announced the judgment of the Court and wrote an opinion joined only by Justices Kennedy and Ginsburg that approved of the decision of the BIA. Justice Sotomayor's dissent (joined by Justice Breyer, and also by Justice Thomas except for one footnote) argued that the BIA misconstrued the statute, and children in all five categories deserved to retain their priority status. Justice Alito agreed but dissented on separate grounds. The Chief Justice and Justice Scalia concurred in the judgment. They did not like the plurality's characterization of *Chevron* deference, referring to the BIA's interpretation of a conflict in two clauses of the statute in question:

To the extent the plurality's opinion could be read to suggest that deference is warranted because of a direct conflict between these clauses, that is wrong. Courts defer to an agency's reasonable construction of an ambiguous statute because we presume that Congress intended to assign responsibility to resolve the ambiguity to the agency. Chevron, supra, at 843–844. But when Congress assigns to an agency the responsibility for deciding whether a particular group should get relief, it does not do so by simultaneously saying that the group should and that it should not. Direct conflict is not ambiguity, and the resolution of such a conflict is not statutory construction but legislative choice. Chevron is not a license for an agency to repair a statute that does not make sense.

Abramski v. United States: False Statements on a Registration Form to Buy a Gun

In this matter, Abramski bought a handgun for his uncle. Federal regulations required him to complete a form that asked whether he was the actual buyer of the gun and warned that if he was buying the gun for someone else, he was not the actual buyer. Abramski lied on the form about being the actual buyer. He was convicted under federal law for knowingly making a false statement with respect to "any fact material to the lawfulness of the sale" of a gun, 18 U.S.C. § 922(a)(6), and for making a false statement "with respect to the information required ... to be kept" in the gun dealer's records under § 924(a)(1)(A). He unsuccessfully appealed his conviction to the Fourth Circuit. The Supreme Court was also not persuaded. The Court took the case primarily to resolve a split in the federal circuits over the interpretation of Section 922(a)(6). It held that giving a false answer to the question about who was the true buyer was material even if the buyer could have legally bought the firearm for himself or herself.

Michigan v. Bay Mills Indian Community: No Waiver of Indian Tribal Immunity

In this 5-4 opinion, Justice Kagan affirmed a judgment of the Sixth Circuit that, based on the non-waiver of tribal immunity, had barred the State of Michigan from pursuing legal action against an Indian tribe that had opened a casino off of Indian lands. Under the Indian Gaming Regulatory Act, Michigan and the Bay Mills Indian Community entered into what the IGRA calls a "compact" that governed the rights and obligations of

²⁶ *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), discussed earlier.

the State and the Tribe with respect to gaming activities in a casino on Indian lands. The compact was silent on gaming activities on other property. The Tribe bought property on which it opened a second casino. The IGRA allowed the State to sue the Tribe to prevent gaming activity “on Indian lands” that was conducted in violation of the compact. But the Sixth Circuit held that there had not been a waiver of tribal immunity and thus suit was barred. How was this conclusion reached in light of the language of the IGRA? The answer was simple: the statute allowed suit for gaming located “on Indian lands,” but the second casino was not on Indian lands. The State could have used its leverage in negotiating the compact to bargain for a waiver of sovereign immunity and also could sue tribal officials civilly or criminally, but it could not pursue the Tribe without a waiver of the Tribe’s immunity. The real fight in the matter was over a decision entitled *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998), that had extended tribal immunity to commercial activity outside of Indian territory. Based on the doctrine of *stare decisis*, Justice Kagan offered several reasons why *Kiowa* should not be revisited by the Court,²⁷ despite the dissenters’ views that it should be overruled.

EQUAL PROTECTION AND UNIVERSITY ADMISSIONS: *SCHUETTE V. BAMN*

Moving away from the five-vote majority decisions, in *Schuette v. BAMN*, the Court rejected an equal protection challenge to a constitutional amendment adopted by Michigan voters 58% to 42% in 2006. I use Justice Sotomayor’s dissent to state the background facts:

Prior to the enactment of the constitutional initiative at issue here, all of the admissions policies of Michigan’s public colleges and universities—including race-sensitive admissions policies—were in the hands of each institution’s governing board. The members of those boards are nominated by political parties and elected by the citizenry in statewide elections. After over a century of being shut out of Michigan’s institutions of higher education, racial minorities in Michigan had succeeded in persuading the elected board representatives to adopt admissions policies that took into account the benefits of racial diversity. And this Court twice blessed such efforts—first in Regents of Univ. of Cal. v. Bakke, 438 U. S. 265 (1978), and again in Grutter v. Bollinger, 539 U. S. 306 (2003), a case that itself concerned a Michigan admissions policy.

²⁷ “First, *Kiowa* itself was no one-off. Rather, in rejecting the identical argument Michigan makes, our decision reaffirmed a long line of precedents, concluding that ‘the doctrine of tribal immunity’—without any exceptions for commercial or off-reservation conduct—is settled law and controls this case.’ 523 U. S., at 756; see *id.*, at 754–755; *supra*, at 5–7. Second, we have relied on *Kiowa* subsequently: In another case involving a tribe’s off-reservation commercial conduct, we began our analysis with *Kiowa*’s holding that tribal immunity applies to such activity (and then found that the Tribe had waived its protection). See *C & L Enterprises*, 532 U. S., at 418. Third, tribes across the country, as well as entities and individuals doing business with them, have for many years relied on *Kiowa* (along with its forebears and progeny), negotiating their contracts and structuring their transactions against a backdrop of tribal immunity. As in other cases involving contract and property rights, concerns of *stare decisis* are thus ‘at their acme.’ *State Oil Co. v. Khan*, 522 U. S. 3, 20 (1997). And fourth (a point we will later revisit, see *infra*, at 17–20), Congress exercises primary authority in this area and ‘remains free to alter what we have done’—another factor that gives ‘special force’ to *stare decisis*. *Patterson v. McLean Credit Union*, 491 U. S. 164, 172–173 (1989). To overcome all these reasons for this Court to stand pat, Michigan would need an ace up its sleeve.” (Footnote omitted.)

In the wake of Grutter, some voters in Michigan set out to eliminate the use of race-sensitive admissions policies.

They succeeded. What became Article I, Section 26 of the Michigan Constitution reads in pertinent part:

(1) The University of Michigan, Michigan State University, Wayne State University, and any other public college or university, community college, or school district shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

(2) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

The vote count upholding this amendment was 6-2, but there was not a majority opinion. Justice Kennedy, joined by the Chief Justice and Justice Alito, announced the judgment of the Court. Justice Scalia concurred in the judgment in an opinion joined by Justice Thomas. Justice Breyer concurred in the judgment. Justice Sotomayor dissented. Justice Ginsburg joined Justice Sotomayor's opinion. Justice Kagan took no part in the consideration or decision of the matter.

Justice Kennedy was quick to let readers know what the case was *not* about:

It is not about the constitutionality, or the merits, of race-conscious admissions policies in higher education. The consideration of race in admissions presents complex questions, in part addressed last Term in Fisher v. University of Texas at Austin, 570 U. S. — (2013). In Fisher, the Court did not disturb the principle that the consideration of race in admissions is permissible, provided that certain conditions are met. In this case, as in Fisher, that principle is not challenged. The question here concerns not the permissibility of race-conscious admissions policies under the Constitution but whether, and in what manner, voters in the States may choose to prohibit the consideration of racial preferences in governmental decisions, in particular with respect to school admissions.

Justice Kennedy's opinion took a circuitous route, reinterpreting prior Court precedents to explain why the Michigan voters' decision did not represent an effort to deprive a protected class of equal protection. He first explained two precedents as involving proof of a discriminatory purpose: *Reitman v. Mulkey*, 387 U. S. 369 (1967) (barring a California constitutional amendment because it allowed landlords to discriminate in the leasing of property), and *Hunter v. Erickson*, 393 U. S. 385 (1969) (overturning a decision by voters in Akron, Ohio that required any antidiscrimination housing ordinance to be approved only by referendum, effectively endorsing existing unhealthy and unsafe housing conditions which had been found to exist because of widespread racial discrimination in the sale and rental of housing).

He then recast *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982). There, the Court overturned a state initiative adopted to prevent school busing as a desegregation measure by requiring advocates of busing to seek relief from the state legislature or the statewide electorate before busing could be approved. "*Seattle* is best understood as a case in which the state action in question...had the serious risk, if not purpose, of causing specific injuries on account of race, just as had been the case in *Mulkey* and *Hunter*." Justice Kennedy rejected

an interpretation of *Seattle* that subjected to strict scrutiny any state action with a racial focus that made it more difficult for a racial minority than for other groups to achieve legislation in their interest.

After a lengthy essay on democracy and fundamental rights to speak and be heard,²⁸ and after considering that similar constitutional provisions had been upheld by state courts elsewhere and would be jeopardized by a failure to uphold the Michigan amendment, Justice Kennedy concluded that:

Mulkey, Hunter, and Seattle are not precedents that stand for the conclusion that Michigan's voters must be disempowered from acting. Those cases were ones in which the political restriction in question was designed to be used, or was likely to be used, to encourage infliction of injury by reason of race. What is at stake here is not whether injury will be inflicted but whether government can be instructed not to follow a course that entails, first, the definition of racial categories and, second, the grant of favored status to persons in some racial categories and not others. The electorate's instruction to governmental entities not to embark upon the course of race-defined and race-based preferences was adopted, we must assume, because the voters deemed a preference system to be unwise, on account of what voters may deem its latent potential to become itself a source of the very resentments and hostilities based on race that this Nation seeks to put behind it. Whether those adverse results would follow is, and should be, the subject of debate. Voters might likewise consider, after debate and reflection, that programs designed to increase diversity—consistent with the Constitution—are a necessary part of progress to transcend the stigma of past racism.

Justice Scalia viewed the Michigan amendment, by its terms, as providing equal protection and thought it ill advised to base the rationale upholding the amendment on any other basis. Referring to Justice Kennedy's opinion, he writes:

I do not agree with its reinterpretation of Seattle and Hunter, which makes them stand in part for the cloudy and doctrinally anomalous proposition that whenever state action poses "the serious risk . . . of causing specific injuries on account of race," it denies equal protection. Ante, at 9. I would instead reaffirm that the "ordinary principles of our law [and] of our democratic heritage" require "plaintiffs alleging equal protection violations" stemming from facially neutral acts to "prove intent and causation and not merely the existence of racial disparity." Freeman v. Pitts, 503 U. S. 467, 506 (1992) (SCALIA, J., concurring) (citing Washington v. Davis, 426 U. S. 229 (1976)). I would further hold that a law directing state actors to provide equal protection is (to say the least) facially neutral, and cannot violate the Constitution. Section 26 of the Michigan Constitution (formerly Proposal 2) rightly stands.

²⁸ This is a sampling: "Here Michigan voters acted in concert and statewide to seek consensus and adopt a policy on a difficult subject against a historical background of race in America that has been a source of tragedy and persisting injustice. That history demands that we continue to learn, to listen, and to remain open to new approaches if we are to aspire always to a constitutional order in which all persons are treated with fairness and equal dignity. Were the Court to rule that the question addressed by Michigan voters is too sensitive or complex to be within the grasp of the electorate; or that the policies at issue remain too delicate to be resolved save by university officials or faculties, acting at some remove from immediate public scrutiny and control; or that these matters are so arcane that the electorate's power must be limited because the people cannot prudently exercise that power even after a full debate, that holding would be an unprecedented restriction on the exercise of a fundamental right held not just by one person but by all in common. It is the right to speak and debate and learn and then, as a matter of political will, to act through a lawful electoral process."

Justice Breyer supported the judgment for different reasons. He explained that the amendment to Michigan's constitution was not being addressed "insofar as it forbids the use of race-conscious admissions programs designed to remedy past exclusionary racial discrimination or the direct effects of that discrimination." Rather, the context here, he felt, is using race in admissions solely for the purpose of obtaining the values of a diverse student body. Justice Breyer believed that "diversity-seeking" programs are constitutional, but that the Constitution does not require them. He characterized *Hunter* and *Seattle* as involving "efforts to manipulate the political process in a way not here at issue." Decision-making through the democratic process "strongly supports the right of the people, or their elected representatives, to adopt race-conscious policies for reasons of inclusion" but, that being the case, it must also "give them the right to vote not to do so."

As I have said, my discussion here is limited to circumstances in which decisionmaking is moved from an unelected administrative body to a politically responsive one, and in which the targeted race-conscious admissions programs consider race solely in order to obtain the educational benefits of a diverse student body. We need now decide no more than whether the Federal Constitution permits Michigan to apply its constitutional amendment in those circumstances. I would hold that it does. Therefore, I concur in the judgment of the Court.

Justice Sotomayor's dissent felt that the amendment "burdened racial minorities" because the only way that race could be considered in an individualized manner in college admissions in Michigan was now through a constitutional amendment, what she called a "daunting task":

As a result of §26, there are now two very different processes through which a Michigan citizen is permitted to influence the admissions policies of the State's universities: one for persons interested in race-sensitive admissions policies and one for everyone else. A citizen who is a University of Michigan alumnus, for instance, can advocate for an admissions policy that considers an applicant's legacy status by meeting individually with members of the Board of Regents to convince them of her views, by joining with other legacy parents to lobby the Board, or by voting for and supporting Board candidates who share her position. The same options are available to a citizen who wants the Board to adopt admissions policies that consider athleticism, geography, area of study, and so on. The one and only policy a Michigan citizen may not seek through this long-established process is a race-sensitive admissions policy that considers race in an individualized manner when it is clear that race-neutral alternatives are not adequate to achieve diversity. For that policy alone, the citizens of Michigan must undertake the daunting task of amending the State Constitution.

Believing that the precedents distinguished by Justice Kennedy prohibited the creation of "one process for racial minorities and a separate, less burdensome process for everyone else," she felt that there was more than enough to justify strict scrutiny analysis that, here, would have resulted in a violation of equal protection:

*The plurality's decision fundamentally misunderstands the nature of the injustice worked by §26. This case is not, as the plurality imagines, about "who may resolve" the debate over the use of race in higher education admissions. Ante, at 18. I agree wholeheartedly that nothing vests the resolution of that debate exclusively in the courts or requires that we remove it from the reach of the electorate. Rather, this case is about how the debate over the use of race-sensitive admissions policies may be resolved, contra, *ibid.*—that is, it must be resolved in constitutionally permissible ways. While our Constitution does not guarantee minority groups*

victory in the political process, it does guarantee them meaningful and equal access to that process. It guarantees that the majority may not win by stacking the political process against minority groups permanently, forcing the minority alone to surmount unique obstacles in pursuit of its goals—here, educational diversity that cannot reasonably be accomplished through race-neutral measures. Today, by permitting a majority of the voters in Michigan to do what our Constitution forbids, the Court ends the debate over race-sensitive admissions policies in Michigan in a manner that contravenes constitutional protections long recognized in our precedents. (Emphasis in original.)

FOURTH AMENDMENT, CELL PHONES, AND PRIVACY: RILEY V. CALIFORNIA

In two matters involving warrantless searches of cell phones seized during lawful arrests, the Court held that the arrestee’s Fourth Amendment rights were violated and resulting evidence should have been suppressed.

There is ample precedent for the proposition that police officers may, in the case of a home, search property found on or near an arrestee to protect the police officers from potential harm or to prevent the destruction of evidence [*Chimel v. California*, 395 U.S. 752 (1969)]; in the case of a person, that police may inspect personal property “immediately associated with the person of an arrestee” [*United States v. Robinson*, 414 U.S. 218 (1973) (involving a cigarette package that the officer knew did not contain cigarettes)]; and in the case of a vehicle, that they may search a vehicle when the arrestee is unsecured and within reach of the passenger compartment at the time of the search, and may search the passenger compartment if the officers have a reasonable belief that evidence relevant to the crime resulting in the arrest might be found in the vehicle [*Arizona v. Gant*, 556 U.S. 332 (2009)].

Writing for a unanimous Court, Chief Justice Roberts required officers to obtain a warrant before searching the contents of an arrestee’s cell phone:

Absent more precise guidance from the founding era, we generally determine whether to exempt a given type of search from the warrant requirement “by assessing, on the one hand, the degree to which it intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.” Wyoming v. Houghton, 526 U. S. 295, 300 (1999). Such a balancing of interests supported the search incident to arrest exception in Robinson, and a mechanical application of Robinson might well support the warrantless searches at issue here.

But while Robinson’s categorical rule strikes the appropriate balance in the context of physical objects, neither of its rationales has much force with respect to digital content on cell phones. On the government interest side, Robinson concluded that the two risks identified in Chimel—harm to officers and destruction of evidence—are present in all custodial arrests. There are no comparable risks when the search is of digital data. In addition, Robinson regarded any privacy interests retained by an individual after arrest as significantly diminished by the fact of the arrest itself. Cell phones, however, place vast quantities of personal information literally in the hands of individuals. A search of the information on a cell phone bears little resemblance to the type of brief physical search considered in Robinson.

The Chief Justice had little difficulty expressing the proposition that a cell phone’s contents posed no safety risk to officers. The real focus was on whether a warrantless search could be made to prevent a loss of evidence through “remote wiping and data encryption.”²⁹ The latter would involve a phone’s ordinary features and not an active attempt by a defendant to conceal or destroy evidence. The former was not shown to be prevalent and may not be preventable if officers are preoccupied with the machinery of completing an arrest, Chief Justice Roberts said, but, in any event can be addressed in other ways:

Remote wiping can be fully prevented by disconnecting a phone from the network. There are at least two simple ways to do this: First, law enforcement officers can turn the phone off or remove its battery. Second, if they are concerned about encryption or other potential problems, they can leave a phone powered on and place it in an enclosure that isolates the phone from radio waves. ... Such devices are commonly called “Faraday bags,” after the English scientist Michael Faraday. They are essentially sandwich bags made of aluminum foil: cheap, light-weight, and easy to use. See Brief for Criminal Law Professors as Amici Curiae 9. They may not be a complete answer to the problem, ... , but at least for now they provide a reasonable response. In fact, a number of law enforcement agencies around the country already encourage the use of Faraday bags. (Citations omitted).³⁰

The Chief Justice then emphasized that even though a person is in custody, privacy-related concerns do not totally disappear. The United States had argued that a search of cell phone data was not distinguishable from a search of a billfold, an address book, a wallet, or a purse—all items approved in circuit court precedents. The Chief Justice was not persuaded:

That is like saying a ride on horseback is materially indistinguishable from a flight to the moon. Both are ways of getting from point A to point B, but little else justifies lumping them together. Modern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse. A conclusion that inspecting the contents of an arrestee’s pockets works no substantial additional intrusion on privacy beyond the arrest itself may make sense as applied to physical items, but any extension of that reasoning to digital data has to rest on its own bottom.

In explicating the distinctions, the Chief Justice focused on the implications of the storage capacity of cell phones:

First, a cell phone collects in one place many distinct types of information—an address, a note, a prescription, a bank statement, a video—that reveal much more in combination than

²⁹ “Remote wiping occurs when a phone, connected to a wireless network, receives a signal that erases stored data. This can happen when a third party sends a remote signal or when a phone is preprogrammed to delete data upon entering or leaving certain geographic areas (so-called ‘geofencing’). See Dept. of Commerce, National Institute of Standards and Technology, R. Ayers, S. Brothers, & W. Jansen, Guidelines on Mobile Device Forensics (Draft) 29, 31 (SP 800–101 Rev. 1, Sept. 2013) []. Encryption is a security feature that some modern cell phones use in addition to password protection. When such phones lock, data becomes protected by sophisticated encryption that renders a phone all but ‘unbreakable’ unless police know the password. Brief for United States as Amicus Curiae in No. 13–132, p. 11.”

³⁰ The Chief Justice also allowed for the potential application of “exigent circumstances” to search a phone or the taking of a preventative measure to disable a phone’s automatic-lock feature (akin to securing a scene to preserve evidence while officers awaited issuance of a warrant).

any isolated record. Second, a cell phone's capacity allows even just one type of information to convey far more than previously possible. The sum of an individual's private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions; the same cannot be said of a photograph or two of loved ones tucked into a wallet. Third, the data on a phone can date back to the purchase of the phone, or even earlier. A person might carry in his pocket a slip of paper reminding him to call Mr. Jones; he would not carry a record of all his communications with Mr. Jones for the past several months, as would routinely be kept on a phone.

After then emphasizing the pervasiveness of data on a cell phone (“many of the more than 90% of American adults who own a cell phone keep on their person a digital record of nearly every aspect of their lives”), the Chief Justice then noted how cell phones can also reveal a person's private interests or concerns (by the Internet sites visited), or location, and a montage of a person's life (by the “apps” on the phone). He also reflected on the reality that today, cell phones are also used to access data stored in the “cloud”:

The United States concedes that the search incident to arrest exception may not be stretched to cover a search of files accessed remotely—that is, a search of files stored in the cloud. See Brief for United States in No. 13–212, at 43–44. Such a search would be like finding a key in a suspect's pocket and arguing that it allowed law enforcement to unlock and search a house. But officers searching a phone's data would not typically know whether the information they are viewing was stored locally at the time of the arrest or has been pulled from the cloud.

Although the Government recognizes the problem, its proposed solutions are unclear. It suggests that officers could disconnect a phone from the network before searching the device—the very solution whose feasibility it contested with respect to the threat of remote wiping. Compare Tr. of Oral Arg. in No. 13–132, at 50–51, with Tr. of Oral Arg. in No. 13–212, pp. 13–14. Alternatively, the Government proposes that law enforcement agencies “develop protocols to address” concerns raised by cloud computing. Reply Brief in No. 13–212, pp. 14–15. Probably a good idea, but the Founders did not fight a revolution to gain the right to government agency protocols. The possibility that a search might extend well beyond papers and effects in the physical proximity of an arrestee is yet another reason that the privacy interests here dwarf those in Robinson.

Rejecting other solutions offered by the government respondents, the Chief Justice concluded:

Our cases have recognized that the Fourth Amendment was the founding generation's response to the reviled “general warrants” and “writs of assistance” of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity. Opposition to such searches was in fact one of the driving forces behind the Revolution itself. In 1761, the patriot James Otis delivered a speech in Boston denouncing the use of writs of assistance. A young John Adams was there, and he would later write that “[e]very man of a crowded audience appeared to me to go away, as I did, ready to take arms against writs of assistance.” 10 Works of John Adams 247–248 (C. Adams ed. 1856). According to Adams, Otis's speech was “the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.” Id., at 248 (quoted in Boyd v. United States, 116 U. S. 616, 625 (1886)).

Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans “the privacies of life,” Boyd, supra, at 630. The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought. Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant.³¹

FIRST AMENDMENT AND BUFFER ZONES: *McCULLEN V. COAKLEY*

In this First Amendment decision, Chief Justice Roberts held for the Court that a Massachusetts law that restricted access of abortion opponents to abortion clinics was not sufficiently tailored to survive constitutional challenge. While the vote was 9-0, Justice Scalia filed an opinion concurring in the judgment in which Justices Kennedy and Thomas joined. Justice Alito filed a separate opinion concurring in the judgment.

The law in question made it a crime to “knowingly stand on ‘a public way or sidewalk’ within 35 feet of an entrance or driveway to any place, other than a hospital, where abortions are performed.” It contained exemptions:

The Act exempts four classes of individuals: (1) “persons entering or leaving such facility”; (2) “employees or agents of such facility acting within the scope of their employment”; (3) “law enforcement, ambulance, firefighting, construction, utilities, public works and other municipal agents acting within the scope of their employment”; and (4) “persons using the public sidewalk or street right-of-way adjacent to such facility solely for the purpose of reaching a destination other than such facility.”

Petitioners were persons who attempted to engage women in “sidewalk counseling” regarding alternatives to abortion. The buffer zone made that kind of engagement very difficult because of the entrance points to the three clinic locations in issue.

There was no dispute over the test to be applied from *Ward v. Rock Against Racism*, 491 U.S. 781 (1989):

“[E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions ‘are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.’” *Ward*, 491 U. S., at 791 (quoting *Clark v. Community for Creative Non-Violence*, 468 U. S. 288, 293 (1984)). (Footnote omitted).

The Court held that the Massachusetts law was content neutral:

³¹ The Chief Justice had earlier explained how easy getting a warrant can be: “Recent technological advances similar to those discussed here have, in addition, made the process of obtaining a warrant itself more efficient. See [*Missouri v. McNeely*, 569 U. S., at ___ (slip op., at 11–12) [133 S. Ct. 1552, 1561-62]; *id.*, at ___ [133 S. Ct. at 1572] (ROBERTS, C. J., concurring in part and dissenting in part) (slip op., at 8) (describing jurisdiction where ‘police officers can e-mail warrant requests to judges’ iPads [and] judges have signed such warrants and e-mailed them back to officers in less than 15 minutes’).”

The broad reach of a statute can help confirm that it was not enacted to burden a narrower category of disfavored speech. See Kagan, Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine, 63 U. Chi. L. Rev. 413, 451–452 (1996).³² At the same time, however, “States adopt laws to address the problems that confront them. The First Amendment does not require States to regulate for problems that do not exist.” Burson v. Freeman, 504 U. S. 191, 207 (1992) (plurality opinion). The Massachusetts Legislature amended the Act in 2007 in response to a problem that was, in its experience, limited to abortion clinics. There was a record of crowding, obstruction, and even violence outside such clinics. There were apparently no similar recurring problems associated with other kinds of healthcare facilities, let alone with “every building in the State that hosts any activity that might occasion protest or comment.” Brief for Petitioners 24. In light of the limited nature of the problem, it was reasonable for the Massachusetts Legislature to enact a limited solution. When selecting among various options for combating a particular problem, legislatures should be encouraged to choose the one that restricts less speech, not more.

The Court also held that the second exemption in the Massachusetts Act covering employees or agents of the reproductive healthcare facility did not represent “viewpoint discrimination.”

There is nothing inherently suspect about providing some kind of exemption to allow individuals who work at the clinics to enter or remain within the buffer zones. In particular, the exemption cannot be regarded as simply a carve-out for the clinic escorts; it also covers employees such as the maintenance worker shoveling a snowy sidewalk or the security guard patrolling a clinic entrance, see App. 95 (affidavit of Michael T. Baniukiewicz).

Since the Act was content neutral and did not represent viewpoint discrimination, the Act would not be judged under the strict scrutiny standard, but instead by whether it was “narrowly tailored to serve a significant governmental interest.” There was no question that buffer zones restricted the ability of petitioners to “convey their message.” And the Court found it concerning that no other state had a similar law, suggesting that other options exist to serve Massachusetts’ interest in public safety “without substantially burdening the kind of speech in which petitioners wish to engage.” The Court then identified such options:

The Commonwealth’s interests include ensuring public safety outside abortion clinics, preventing harassment and intimidation of patients and clinic staff, and combating deliberate obstruction of clinic entrances. The Act itself contains a separate provision, subsection (e)—unchallenged by petitioners—that prohibits much of this conduct. That provision subjects to criminal punishment “[a]ny person who knowingly obstructs, detains, hinders, impedes or blocks another person’s entry to or exit from a reproductive health care facility.” Mass. Gen. Laws, ch. 266, §120E1/2(e). If Massachusetts determines that broader prohibitions along the same lines are necessary, it could enact legislation similar to the federal Freedom of Access to Clinic Entrances Act of 1994 (FACE Act), 18 U. S. C. §248(a)(1), which subjects to both criminal and civil penalties anyone who “by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure,

³² For those wondering, this is one of Justice Kagan’s articles.

intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services.” Some dozen other States have done so. See Brief for State of New York et al. as Amici Curiae 13, and n. 6. If the Commonwealth is particularly concerned about harassment, it could also consider an ordinance such as the one adopted in New York City that not only prohibits obstructing access to a clinic, but also makes it a crime “to follow and harass another person within 15 feet of the premises of a reproductive health care facility.” N. Y. C. Admin. Code §8–803(a)(3) (2014).

The Court also held that there were alternatives to deal with concerns over congestion,³³ even though the record reflected only one location (Boston) where congestion might be an issue, prompting the Chief Justice to observe: “For a problem shown to arise only once a week in one city at one clinic, creating 35-foot buffer zones at every clinic across the Commonwealth is hardly a narrowly tailored solution.” Concluding that it was not enough to say that alternatives “do not work,” the Chief Justice, as is his custom, summarized the holding of the Court:

Petitioners wish to converse with their fellow citizens about an important subject on the public streets and sidewalks—sites that have hosted discussions about the issues of the day throughout history. Respondents assert undeniably significant interests in maintaining public safety on those same streets and sidewalks, as well as in preserving access to adjacent healthcare facilities. But here the Commonwealth has pursued those interests by the extreme step of closing a substantial portion of a traditional public forum to all speakers. It has done so without seriously addressing the problem through alternatives that leave the forum open for its time-honored purposes. The Commonwealth may not do that consistent with the First Amendment.³⁴

RECESS APPOINTMENTS: *NLRB V. NOEL CANNING*

This was not a 5-4 decision in its outcome (the vote was 9-0), but Justice Kennedy provided the swing vote supporting Justice Breyer’s opinion for the Court. Justice Scalia wrote an opinion concurring only in the judgment. He was joined by the Chief Justice and Justices Alito and Thomas.

³³ “According to respondents, even when individuals do not deliberately obstruct access to clinics, they can inadvertently do so simply by gathering in large numbers. But the Commonwealth could address that problem through more targeted means. Some localities, for example, have ordinances that require crowds blocking a clinic entrance to disperse when ordered to do so by the police, and that forbid the individuals to reassemble within a certain distance of the clinic for a certain period. See Brief for State of New York et al. as Amici Curiae 14–15, and n. 10. We upheld a similar law forbidding three or more people “to congregate within 500 feet of [a foreign embassy], and refuse to disperse after having been ordered so to do by the police,” [*Boos v. Barry*, 485 U. S. 312, 316 (1988)] (quoting D. C. Code §22–1115 (1938))—an order the police could give only when they “reasonably believe[d] that a threat to the security or peace of the embassy [was] present,” 485 U. S., at 330 (quoting *Finzer v. Barry*, 798 F. 2d 1450, 1471 (CADDC 1986)).”

³⁴ Justice Scalia’s opinion concurring in the judgment lamented the Court’s practice of “giving abortion-rights advocates a pass when it comes to suppressing the free-speech rights of their opponents.” He acknowledged that the Court’s “tailoring” approach to invalidating the Massachusetts law was “attractive to those of us who oppose an abortion-speech edition of the First Amendment,” but said because of this outcome the Court’s “content-neutral” discussion was gratuitous. Justice Alito felt that the Massachusetts law discriminated against persons who oppose abortion on the basis of viewpoint and thus violated the First Amendment.

Article II, Section 2, Clause 3 of the United States Constitution provides that the President has the power “to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.” President Obama made three appointments to the National Labor Relations Board on January 4, 2012. The appointments were made between *pro forma* sessions of the Senate on January 3 and 6. The Senate had voted on December 17, 2011 to take a recess but to hold *pro forma* sessions on each Tuesday and Friday until January 23, 2012 when it would reconvene. Hence, the appointments were made during a three-day “adjournment.” Was that long enough to constitute a “Recess” that would permit an appointment to be made?

It was not. Justice Breyer’s opinion conveniently summarizes the holding much better than I could:

The first concerns the scope of the words “recess of the Senate.” Does that phrase refer only to an inter-session recess (i.e., a break between formal sessions of Congress), or does it also include an intra-session recess, such as a summer recess in the midst of a session? We conclude that the Clause applies to both kinds of recess.

The second question concerns the scope of the words “vacancies that may happen.” Does that phrase refer only to vacancies that first come into existence during a recess, or does it also include vacancies that arise prior to a recess but continue to exist during the recess? We conclude that the Clause applies to both kinds of vacancy.

The third question concerns calculation of the length of a “recess.” The President made the appointments here at issue on January 4, 2012. At that time the Senate was in recess pursuant to a December 17, 2011, resolution providing for a series of brief recesses punctuated by “pro forma session[s],” with “no business . . . transacted,” every Tuesday and Friday through January 20, 2012. S. J., 112th Cong., 1st Sess., 923 (2011) (hereinafter 2011 S. J.). In calculating the length of a recess are we to ignore the pro forma sessions, thereby treating the series of brief recesses as a single, month-long recess? We conclude that we cannot ignore these pro forma sessions.

Our answer to the third question means that, when the appointments before us took place, the Senate was in the midst of a 3-day recess. Three days is too short a time to bring a recess within the scope of the Clause. Thus we conclude that the President lacked the power to make the recess appointments here at issue.

Justice Scalia’s concurring opinion equally summarizes well the differences between the Justices:

Today’s Court agrees that the appointments were invalid, but for the far narrower reason that they were made during a 3-day break in the Senate’s session. On its way to that result, the majority sweeps away the key textual limitations on the recess-appointment power. It holds, first, that the President can make appointments without the Senate’s participation even during short breaks in the middle of the Senate’s session, and second, that those appointments can fill offices that became vacant long before the break in which they were filled. The majority justifies those atextual results on an adverse-possession theory of executive authority: Presidents have long claimed the powers in question, and the Senate has not disputed those claims with sufficient vigor, so the Court should not “upset the compromises and working arrangements that the elected branches of Government themselves have reached.” Ante, at 9.

The Court's decision transforms the recess-appointment power from a tool carefully designed to fill a narrow and specific need into a weapon to be wielded by future Presidents against future Senates. To reach that result, the majority casts aside the plain, original meaning of the constitutional text in deference to late-arising historical practices that are ambiguous at best. The majority's insistence on deferring to the Executive's untenably broad interpretation of the power is in clear conflict with our precedent and forebodes a diminution of this Court's role in controversies involving the separation of powers and the structure of government. I concur in the judgment only.

OTHER DECISIONS OF NOTE

The discussion below covers other decisions of note in the 2013-14 Term.

Arbitration

BG Group plc v. Republic of Argentina

For the first time, the Court entered the world of bilateral investment treaty (BIT) arbitration. In a rare case where Chief Justice Roberts and Justice Kennedy were the only dissenters, the Court held that the arbitration tribunal, not a court, had the power to decide the limits of its own jurisdiction. The case involved BG Group plc, a British firm that had taken a majority interest in a privatized Argentine natural gas utility. At the time of the investment, Argentine law called for gas tariffs to be linked to the U.S. dollar, and those “tariffs would be set at levels sufficient to assure gas distribution firms . . . a reasonable return.” In 2001 and 2002, Argentina faced an economic crisis and enacted new laws that “changed the basis for calculating gas tariffs from dollars to pesos.” As a result, BG Group’s investment became unprofitable. In 2003, BG Group filed an arbitration claim pursuant to the 1990 BIT between the United Kingdom and Argentina. In 2007, the arbitration tribunal concluded that Argentina had not accorded BG Group “fair and equitable treatment” as required by Article 2(2) of the BIT and awarded BG Group \$185 million in damages.

BG Group then sought to confirm the award under the New York Convention and the Federal Arbitration Act³⁵ and Argentina sought to vacate it. The district court confirmed the award, but the District of Columbia Circuit Court reversed based on Article 8 of the BIT. Article 8 stated that when there is a dispute arising under the treaty, either party (investor or nation) shall submit its claim “to the decision of the competent tribunal of the Contracting Party in whose territory the investment was made,” or what the parties called the “local litigation requirement.” Article 8(a)(2) then stated that arbitration may then occur,

³⁵ “See Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Art. IV, June 10, 1958, 21 U. S. T. 2519, T. I. A. S. No. 6997 (New York Convention) (providing that a party may apply ‘for recognition and enforcement’ of an arbitral award subject to the Convention); 9 U. S. C. §§204, 207 (providing that a party may move ‘for an order confirming [an arbitral] award’ in a federal court of the ‘place designated in the agreement as the place of arbitration if such place is within the United States’).”

(i) where, after a period of eighteen months has elapsed from the moment when the dispute was submitted to the competent tribunal . . . , the said tribunal has not given its final decision;
[or]

(ii) where the final decision of the aforementioned tribunal has been made but the Parties are still in dispute.

BG Group never litigated its claim in the local Argentine courts. In the arbitration proceedings, Argentina argued that a condition precedent had not occurred, and, thus, the arbitrators were without jurisdiction. The arbitrators ultimately concluded that the local litigation requirement was “absurd and unreasonable” under the facts of the case because, in addition to the new tariff laws enacted by Argentina, Argentina had passed additional laws which restricted litigation in its courts. The court of appeals disagreed with the tribunal’s decision and concluded that BG Group had failed to satisfy the local litigation requirement, leaving the tribunal without jurisdiction.

The question before the Supreme Court was whether in reviewing an arbitration award made under the BIT, a court of the United States should interpret the local litigation requirement *de novo* or with the deference that courts ordinarily owe arbitration decisions. In other words, “who – court or arbitrator – bears primary responsibility for interpreting” the treaty provision?

Justice Breyer authored the majority opinion that approached the issue in a two-step process: “initially treat[ing] the document . . . as if it were an ordinary contract between private parties,” and then examining “whether the fact that the document in question is a treaty makes a critical difference.” Citing prior decisions of the Court, the majority explained that in cases involving ordinary contracts between private parties the presumption is that “courts, not arbitrators” will decide any dispute regarding arbitrability and that arbitrators will decide disputes about the “meaning and application of particular procedural preconditions for the use of arbitration.” After setting that stage, Justice Breyer wrote that “the text and structure of the [local litigation] provision make clear that it operates as a procedural condition precedent to arbitration.” “It determines when the contractual duty to arbitrate arises, not whether there is a contractual duty to arbitrate at all.” Thus, the Court concluded that “the litigation provision is consequently a purely procedural requirement,” the application and meaning of which are to be determined by the arbitrator (not the reviewing court) under normal contract interpretation rules.

The Court then looked to see whether its conclusion should be different here because the contract in question is a treaty between nations and not a contract between the parties to the dispute. In the end, the Court rejected the view expressed by Argentina—and the United States—that the local litigation requirement was not a procedural condition precedent to arbitration, but rather “a condition on the State’s consent” meriting *de novo* scrutiny. The Court, instead, applied “a [h]ighly [d]eferential” standard of review to the decision of the arbitrators and, then in analyzing the award, concluded that the arbitrators did not “‘stra[y] from interpretation and application of the agreement’” when they disregarded the validity of the local litigation requirement under the circumstances presented in this case.

Appellate Jurisdiction

Ray Haluch Gravel Co. v. Central Pension Fund of Operating Engineers and Participating Employers

Under 28 U.S.C. § 1291, federal courts of appeal have jurisdiction over “final” decisions of district courts. But if attorneys’ fees are awardable in a matter, is a judgment final before fees have been awarded? The answer to this question is important: Timely filing of an appeal is jurisdictional. Filing one day late is fatal.

In *Budinich v. Becton Dickinson & Co.*, 486 U. S. 196 (1988), the Supreme Court held that a judgment was still “final” if an attorneys’ fee award had not yet been made. But that case involved a statutory right to attorneys’ fees. Would a contractual right to attorneys’ fees make a difference? There was a circuit split on this question which Justice Kennedy, writing for a unanimous Court, resolved by holding that there is no difference. Whatever the basis for an attorneys’ fee claim, a judgment is final irrespective of whether attorneys’ fees have yet been addressed. As a result, the appeal in this matter was held to be untimely since it was filed within 30 days of the attorneys’ fees award but not within 30 days of the judgment on the merits.

Bankruptcy: Handling of Stern Claims

Executive Benefits Insurance Agency v. Arkison

This bankruptcy opinion is a logical follow-up to the Court’s decision in *Stern v. Marshall*, 564 U.S. ____ (2011), where the Court held that Article III of the United States Constitution prohibits bankruptcy courts from finally adjudicating certain matters³⁶ even though bankruptcy courts had statutory authorization to hear such claims. Calling these “*Stern* claims,” Justice Thomas wrote this straightforward opinion for the Court holding that “the proper course” for the bankruptcy court “is to issue proposed findings of fact and conclusions of law. The district court will then review the claim *de novo* and enter judgment. This approach accords with the bankruptcy statute and does not implicate the constitutional defect identified by *Stern*.” Because that approach was, in effect, followed in this matter, the judgment of the Ninth Circuit affirming a district court’s decision was upheld by the Court.

An alternative argument that the adjudication by the bankruptcy court had been the subject of consent was expressly not addressed by the Court, which elected to face that question another day.

³⁶ The 1984 Bankruptcy Act divided matters that could be referred to the Bankruptcy Court by a district into “core” and “non-core” categories. The Bankruptcy Court decides whether a matter is a “core” matter. If it is, the Act allowed the bankruptcy judge to adjudicate the matter, which then could be appealed to the district court. If it was not a core matter and the parties did not consent to adjudication by the bankruptcy judge, the bankruptcy judge proposed findings of fact and conclusions of law. The district court then had to review the matter *de novo* and enter a final judgment. *Stern* considered an Article III challenge to a bankruptcy judge’s determination that a claim (tortious interference against a creditor of a bankrupt estate) merited “core” status. The Court held that Congress had improperly vested bankruptcy judges with the “judicial Power of the United States” and therefore the bankruptcy judge did not have the authority to adjudicate the claim. *Stern* held that certain claims labeled by Congress as “core” could not be adjudicated by the bankruptcy court but it did not “address how the bankruptcy court should proceed under those circumstances.” That was the question answered in *Arkison*.

Chemical Weapons Convention Implementation Act of 1998

Bond v. United States

In another example of unanimity of judgment but not of logic, Chief Justice Roberts wrote the Court's opinion while Justices Scalia, Thomas, and Alito wrote separate opinions concurring in the judgment. The Chief Justice's opinion focuses on the interpretation of a statute. The concurring Justices felt that the interpretation was strained and ill-advised, that the spade should be called a spade, and the statute was unconstitutional.

The Chief Justice presents the question and the answer:

The question presented by this case is whether the Implementation Act also reaches a purely local crime: an amateur attempt by a jilted wife to injure her husband's lover, which ended up causing only a minor thumb burn readily treated by rinsing with water. Because our constitutional structure leaves local criminal activity primarily to the States, we have generally declined to read federal law as intruding on that responsibility, unless Congress has clearly indicated that the law should have such reach. The Chemical Weapons Convention Implementation Act contains no such clear indication, and we accordingly conclude that it does not cover the unremarkable local offense at issue here.

In 1997, the United States ratified the Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction, which, by its Preamble, was designed to achieve the "general and complete disarmament under strict and effective international control, including the prohibition and elimination of all types of weapons of mass destruction." The Geneva Protocol, adopted in 1925 in response to the deaths of over 100,000 in World War I from mustard gas and other chemicals, had prohibited the use of chemicals in warfare, and the Chemical Weapons Convention was conceived to update the Geneva Protocol. In the United States, the Convention was not self-executing. So Congress adopted the Chemical Weapons Convention Implementation Act. The Chief Justice described the statute:

It forbids any person knowingly "to develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon." 18 U. S. C. §229(a)(1). It defines "chemical weapon" in relevant part as "[a] toxic chemical and its precursors, except where intended for a purpose not prohibited under this chapter as long as the type and quantity is consistent with such a purpose." §229F(1)(A). "Toxic chemical," in turn, is defined in general as "any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals. The term includes all such chemicals, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere." §229F(8)(A). Finally, "purposes not prohibited by this chapter" is defined as "[a]ny peaceful purpose related to an industrial, agricultural, research, medical, or pharmaceutical activity or other activity," and other specific purposes. §229F(7). A person who violates section 229 may be subject to severe punishment: imprisonment "for any term of years," or if a victim's death results, the death penalty or imprisonment "for life." §229A(a).

Bond was upset that her husband had fathered a child with her closest friend, Haynes. She stole an arsenic-based compound from her employer and ordered a separate chemical from Amazon.com, and on at least 24 occasions "spread the chemicals on [Haynes's] car door, mailbox, and door knob." The chemicals were easy to

see and Haynes avoided them all except on one occasion when she suffered a minor chemical burn on her thumb that she treated by rinsing with water. Haynes called law enforcement officers and in surveillance, Bond was caught on camera stuffing the chemical in the muffler of Haynes's car. She was arrested and charged with mail theft and two counts of possessing and using a chemical weapon in violation of Section 229(a). Her conviction followed. It was upheld by the Third Circuit, which recognized that the Government's reading of Section 229(a) would turn every cleaning cabinet into a potential chemicals weapon cache.

The Chief Justice would not go that far. Eschewing the constitutional question since there was another ground upon which to dispose of the case, he applied the statutory construction rule that federal statutes do not "abrogate state sovereign immunity," and the related principle that courts must be "certain of" Congressional intent before determining that federal law supersedes the constitutional balance between federal and state powers. Then, after examining a number of precedents, the Chief Justice concluded that the statute did not reach what he called a "purely local crime":

These precedents make clear that it is appropriate to refer to basic principles of federalism embodied in the Constitution to resolve ambiguity in a federal statute. In this case, the ambiguity derives from the improbably broad reach of the key statutory definition given the term—"chemical weapon"—being defined; the deeply serious consequences of adopting such a boundless reading; and the lack of any apparent need to do so in light of the context from which the statute arose—a treaty about chemical warfare and terrorism. We conclude that, in this curious case, we can insist on a clear indication that Congress meant to reach purely local crimes, before interpreting the statute's expansive language in a way that intrudes on the police power of the States.

The concurring Justices felt that the statute literally covered Bond's activities but was unconstitutional as applied to Bond. Justice Alito's opinion nicely summarizes the concurring Justices' position that the Necessary and Proper Clause was not a basis to justify the statute and there was no other constitutional basis to support Section 229's application to Bond:

[T]he treaty power is limited to agreements that address matters of legitimate international concern. The treaty pursuant to which §229 was enacted, the Chemical Weapons Convention, is not self-executing, and thus the Convention itself does not have domestic effect without congressional action. The control of true chemical weapons, as that term is customarily understood, is a matter of great international concern, and therefore the heart of the Convention clearly represents a valid exercise of the treaty power. But insofar as the Convention may be read to obligate the United States to enact domestic legislation criminalizing conduct of the sort at issue in this case, which typically is the sort of conduct regulated by the States, the Convention exceeds the scope of the treaty power. Section 229 cannot be regarded as necessary and proper to carry into execution the treaty power, and accordingly it lies outside Congress' reach unless supported by some other power enumerated in the Constitution. The Government has presented no such justification for this statute.

Death Penalty

Hinton v. Alabama

In this *per curiam* opinion, the Court applied *Strickland v. Washington*, 466 U.S. 668 (1984) (where a trial attorney's performance falls below an objective standard of reasonableness and if there is a reasonable probability that the result of the trial would have been different but for the deficient act or omission, a defendant's Sixth Amendment right to counsel is violated), to vacate the judgment of the Eleventh Circuit and remand the matter for reconsideration to determine whether Hinton's counsel's trial performance was deficient. The only evidence linking Hinton to the murders in issue consisted of forensic comparisons of bullets recovered from the crime scene to a revolver owned by Hinton, who had been insistent that he was innocent. Hinton's attorney did not know that he could obtain from the State whatever funds he needed to pay an expert to perform an independent forensic examination of the bullets, instead believing he was limited to \$1,000 in reimbursement. He found an expert that he himself deemed to be inadequate for the task. Unsurprisingly, the credentials and credibility of the expert Hinton's lawyer located for this sum of money were easily and seriously undermined on cross-examination. The jury accepted the testimony of the State's two forensic experts instead. In post-conviction hearings, Hinton offered qualified experts who examined the physical evidence and testified that they could not conclude that any of the bullets had been fired from Hinton's revolver. The State did not attempt to rebut this evidence. "[O]ne of Hinton's experts testified that, pursuant to the ethics code of his trade organization, the Association of Firearm and Tool Mark Examiners, he had asked the State's expert, Yates, to show him how he had determined that the recovered bullets had been fired from the Hinton revolver. Yates refused to cooperate." On these facts, the Court held that Hinton's lawyer had performed deficiently in defending his client and that there was a reasonable probability that the result would have been different but for counsel's errors.

Double Jeopardy

Martinez v. Illinois

This *per curiam* decision involved the State's inability to find complaining witnesses and at what point in a criminal trial jeopardy of a potential conviction of a criminal defendant attaches.

Martinez was indicted in August 2006 on charges "of aggravated battery and mob action against" two persons, Binion and Scott. Martinez's trial was not scheduled until 2009. The State obtained one continuance because they could not find Binion and Scott, and a second and later a fourth continuance for the same reason (the third continuance was caused by Martinez's showing up late but Binion and Scott still had not been found). Finally, on May 17, 2010, a jury was empaneled, and after the trial court gave prosecutors more time to find Binion and Scott, the jury was sworn. The State then announced it would not be participating in the trial. Defense counsel promptly moved for a directed verdict and dismissal of the charges, which the trial court granted. The State appealed. The Illinois Supreme Court held that jeopardy never attached and Martinez could be retried. A dissenting Justice on the Illinois Supreme Court wrote that the majority's conclusion was contrary to well-established case law holding that once a jury is sworn, a criminal defendant faces jeopardy. Because the trial court acquitted defendant, an attempt to retry him would violate the Double Jeopardy clause.

The Court agreed:

The Illinois Supreme Court's error was consequential, for it introduced confusion into what we have consistently treated as a bright-line rule: A jury trial begins, and jeopardy attaches, when the jury is sworn. We have never suggested the exception perceived by the Illinois Supreme Court—that jeopardy may not have attached where, under the circumstances of a particular case, the defendant was not genuinely at risk of conviction. (Footnote omitted.) Martinez was subjected to jeopardy because the jury in his case was sworn.

[T]he trial court's action was an acquittal because the court "acted on its view that the prosecution had failed to prove its case." (Citations omitted.) And because Martinez was acquitted, the State cannot retry him.

Environmental

EPA v. EME Homer City Generation, L.P.

There was a second Clean Air Act (CAA) decision rendered in the 2013-14 Term. This decision involved EPA's Cross-State Air Pollution Rule, usually referred to as the "Transport Rule." The Transport Rule was promulgated under the authority of the "Good Neighbor Provision" of the CAA, 42 U.S.C. § 7410(a)(2)(D)(i), which directs States to prohibit in-state sources of air pollution "from emitting any air pollutant in amounts which will ... contribute significantly' to downwind States' 'nonattainment ... , or interfere with maintenance,' of any EPA-promulgated national air quality standard." Justice Ginsburg's opinion then describes the issue before the Court:

The [Transport Rule] calls for consideration of costs, among other factors, when determining the emission reductions an upwind State must make to improve air quality in polluted downwind areas. The Court of Appeals for the D. C. Circuit vacated the rule in its entirety. It held, 2 to 1, that the Good Neighbor Provision requires EPA to consider only each upwind State's physically proportionate responsibility for each downwind State's air quality problem. That reading is demanded, according to the D. C. Circuit, so that no State will be required to decrease its emissions by more than its ratable share of downwind-state pollution.

Was EPA reasonably interpreting the Good Neighbor Provision when it considered cost to achieve to emission reductions in upwind States? Taking *Chevron* deference into account, Justice Ginsburg held that EPA's decision to include costs among the considerations in implementing the provision was reasonable and reversed the judgment of the D.C. Circuit.

Without plodding through the CAA's requirements, in essence, States have to adopt a State Implementation Plan (SIP) (how a State will comply with the CAA), which must include compliance with the Good Neighbor Provision. If they fail to do that within a three-year period of time, then EPA must replace the SIP with a Federal Implementation Plan (FIP) within a two-year period. The D.C. Circuit found an exception to these time periods for the Good Neighbor Provision, but Justice Ginsburg first held that the text of the statute did not permit an exception to the time prescriptions. She then upheld EPA's application of the statutory mandate to eliminate emissions from upwind States that contribute significantly to downwind States' nonattainment of EPA's national ambient air quality standards. In essence, EPA screened in any upwind States whose emissions

contributed more than one percent of three regulated pollutants to a downwind State's levels of these pollutants. (For example, if the regulated ozone level were X parts per billion, an upwind State that contributed more than X/100 parts per billion of ozone in emissions to the downwind State would be included in the Transport Rule.) Using air modeling, EPA then determined the cost to control these offending emissions and tried to determine the best combination of costs likely to achieve pollutant reduction. It translated its cost thresholds "into amounts of emissions upwind States would be required to eliminate." Justice Ginsburg describes the rest of the regulation that the Court ultimately decided satisfied *Chevron* deference:

For each regulated upwind State, EPA created an annual emissions "budget." These budgets represented the quantity of pollution an upwind State would produce in a given year if its in-state sources implemented all pollution controls available at the chosen cost thresholds. If EPA's projected improvements to downwind air quality were to be realized, an upwind State's emissions could not exceed the level this budget allocated to it, subject to certain adjustments not relevant here. (Citation and footnote omitted.)

CTS Corp. v. Waldburger

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) addresses the cleanup of hazardous substances in soil and groundwater through both government and private actions. It also contains a provision affecting the limitations period in state tort lawsuits. 42 U.S.C. § 9658. Section 9658(a)(1) first provides:

In the case of any action brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility, if the applicable limitations period for such action (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the federally required commencement date in lieu of the date specified in such State statute.

Section 9658(b)(4)(A) then provides that the "federal commencement date" is "the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages referred to in subsection (a)(1) of this section were caused or contributed to by the hazardous substance or pollutant or contaminant concerned."

In this matter, CTS Corporation sold a North Carolina manufacturing plant in 1987. In 2011, a state-law nuisance action was brought against CTS claiming that the land was contaminated and seeking relief. There is a three-year limitations period in North Carolina for a nuisance action. Plaintiffs said they learned of the contamination in 2009. Because of the "federal commencement date," CTS could not seek a dismissal of the action on limitations grounds. But North Carolina has a statute of repose barring a tort suit "brought more than 10 years after the last culpable act of the defendant." Does Section 9658 cover statutes of repose? Because the Fourth Circuit said it did and other courts said it did not, the Court accepted the matter for review. Explaining the differences between statutes of limitation and repose, and relying on the plain text of the statute (it referenced only a statute of limitations), Justice Kennedy held that statutes of repose were not covered by Section 9658.

ERISA Statute of Limitations

Heimeshoff v. Hartford Life & Accident Insurance Co.

Among its areas of coverage, the Employee Retirement Income Security Act of 1984 (ERISA) governs the operation of employer health plans. In 2005, petitioner reported she was suffering from chronic pain and fatigue interfering with her duties as public relations manager at Wal-Mart Stores, Inc. She was later diagnosed with lupus and fibromyalgia. On August 22, 2005, petitioner filed a long-term disability claim with Hartford Life & Accident Insurance Co., the administrator of Wal-Mart's disability plan. In November 2005, Hartford denied the claim "for failure to provide satisfactory proof of loss." By October 2006, petitioner submitted additional medical evidence of her disability. Hartford then had a physician review the evidence, and this doctor concluded that petitioner could perform her duties since she had a sedentary position. In May 2007, petitioner obtained an extension of time to appeal the decision. After receiving more evidence, Hartford still denied the claim on November 26, 2007. On November 18, 2010, petitioner filed suit seeking review of the denial under Section 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B), which allows claimants to recover benefits due under the terms of a plan.

The disability plan in issue provided that a lawsuit could not be brought "against The Hartford ... [more than] 3 years after the time written proof of loss is required to be furnished according to the terms of the policy." ERISA does not itself contain a statute of limitations. Hence the question answered by the Court was whether this contractual limitations period was enforceable. If it was, petitioner had no claim, since she provided proof of loss in August 2005 but did not sue until 2010.

Justice Thomas's opinion for the Court held that the contractual limitations provision barred the claim since it allowed a reasonable period of time to bring the claim:

ERISA §502(a)(1)(B) does not specify a statute of limitations. Instead, the parties in this case have agreed by contract to a 3-year limitations period. The contract specifies that this period begins to run at the time proof of loss is due. Because proof of loss is due before a participant can exhaust internal review, Heimeshoff contends that this limitations provision runs afoul of the general rule that statutes of limitations commence upon accrual of the cause of action.

For the reasons that follow, we reject that argument. Absent a controlling statute to the contrary, a participant and a plan may agree by contract to a particular limitations period, even one that starts to run before the cause of action accrues, as long as the period is reasonable.

Realizing that this result could be harsh in certain circumstances, Justice Thomas explained that courts had tools to address those circumstances:

[E]ven in the rare cases where internal review prevents participants from bringing §502(a)(1)(B) actions within the contractual period, courts are well equipped to apply traditional doctrines that may nevertheless allow participants to proceed. If the administrator's conduct causes a participant to miss the deadline for judicial review, waiver or estoppel may prevent the administrator from invoking the limitations provision as a defense. To the extent the participant has diligently pursued both internal review and judicial review but was prevented from filing suit by extraordinary circumstances, equitable tolling

may apply. Irwin v. Department of Veterans Affairs, 498 U. S. 89, 95 (1990) (limitations defenses “in lawsuits between private litigants are customarily subject to ‘equitable tolling’”). Finally, in addition to those traditional remedies, plans that offer appeals or dispute resolution beyond what is contemplated in the internal review regulations must agree to toll the limitations provision during that time. 29 CFR §2560.503–1(c)(3)(ii). Thus, we are not persuaded that the Plan’s limitations provision is inconsistent with ERISA. (Citations omitted.)

ERISA and the Duty of Prudence by a Plan Administrator

Fifth Third Bancorp v. Dudenhoeffer

This case involved the Employee Stock Ownership Plan (ESOP) of Fifth Third. Fifth Third made matching contributions to the company’s pension plan (Plan). The terms of the Plan provided that all contributions made by Fifth Third would be used to buy shares of Fifth Third in the ESOP. An employee could sell the shares and move the money into one of 19 mutual funds offered under the Plan, but Fifth Third’s matching contributions always went first into the ESOP. Respondents filed a putative class action in Ohio. All were former employees. They claimed that Fifth Third officers acting as fiduciaries of the Plan violated their duty of prudence imposed by ERISA because they continued to invest matching contributions in Fifth Third’s stock when they knew it was “overvalued and excessively risky” for two separate reasons: (1) a large part of Fifth Third’s business involved the subprime lending market, which collapsed in 2008, and (2) petitioners knew that Fifth Third officers, as insiders, had “deceived the market by making material misstatements about the company’s financial prospects,” causing the market to overvalue Fifth Third stock with the result that petitioners paid more for Fifth Third’s shares in the ESOP than they were worth. A prudent fiduciary, respondents alleged, would have sold Fifth Third stock, refrained from buying it, canceled the ESOP’s option in the Plan, or disclosed the inside information so the stock would be properly valued by the market. During the financial crisis that followed the collapse of Lehman Brothers in September 2008, Fifth Third’s stock plunged 73%.

The district court dismissed the complaint, saying that respondents did not plead sufficient facts to overcome a “presumption of prudence” enjoyed by the Plan’s fiduciaries. The Sixth Circuit reversed, saying such a presumption existed only at the summary judgment, not the pleading, phase of an action. Justice Breyer’s opinion for a unanimous court, straightened out a conflict in the circuits in establishing that there is no presumption of prudence under ERISA. Rather, ESOP fiduciaries are subject to the standard of prudence as ERISA fiduciaries,³⁷ except, of course, they are not obliged to diversify the assets of the ESOP (the purpose of

³⁷ That standard of care is set forth at 29 U.S.C. § 1104(a)(1):

“(a) Prudent man standard of care.

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

the ESOP is to buy the stock of the employer). In response to the plea of Fifth Third that the presumption was needed to eliminate meritless claims, Justice Breyer responded:

[W]e do not believe that the presumption at issue here is an appropriate way to weed out meritless lawsuits or to provide the requisite “balancing.” The proposed presumption makes it impossible for a plaintiff to state a duty-of-prudence claim, no matter how meritorious, unless the employer is in very bad economic circumstances. Such a rule does not readily divide the plausible sheep from the meritless goats. That important task can be better accomplished through careful, context-sensitive scrutiny of a complaint’s allegations. We consequently stand by our conclusion that the law does not create a special presumption of prudence for ESOP fiduciaries.

And with that admonition, the Court then remanded the matter for an evaluation of the complaint’s allegations under *Iqbal* and *Twombly*:

We consider more fully one important mechanism for weeding out meritless claims, the motion to dismiss for failure to state a claim. That mechanism, which gave rise to the lower court decisions at issue here, requires careful judicial consideration of whether the complaint states a claim that the defendant has acted imprudently. See Fed. Rule Civ. Proc. 12(b)(6); Ashcroft v. Iqbal, 556 U. S. 662, 677–680 (2009); Bell Atlantic Corp. v. Twombly, 550 U. S. 544, 554–563 (2007). Because the content of the duty of prudence turns on “the circumstances . . . prevailing” at the time the fiduciary acts, §1104(a)(1)(B), the appropriate inquiry will necessarily be context specific.

The Court then held that in evaluating the complaint on remand, it is not imprudent for an ESOP fiduciary to rely on the market price of a publicly traded stock because “where a stock is publicly traded, allegations that a fiduciary should have recognized from publicly available information alone that the market was over- or undervaluing the stock are implausible as a general rule, at least in the absence of special circumstances.”³⁸

With respect to the claim of breach of fiduciary duty based on the knowledge of inside information, the Court offered up this view of plausibility: “[A] plaintiff must plausibly allege an alternative action that the defendant could have taken that would have been consistent with the securities laws and that a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it.” The Court offered “three points” to “inform the requisite analysis.” First, the duty of prudence under ERISA does not require a fiduciary “to break the law” – i.e., trade on inside information. Second, “courts should consider the extent to

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.”

³⁸ “Many investors take the view that “they have little hope of outperforming the market in the long run based solely on their analysis of publicly available information,” and accordingly they “rely on the security’s market price as an unbiased assessment of the security’s value in light of all public information.” *Halliburton Co. v. Erica P. John Fund, Inc.*, ___ U. S. ___, ___ (2014) (slip op., at 11–12) [134 S. Ct. 2398, 2411] (quoting *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, 568 U. S. ___, ___ (2013) (slip op., at 5) [133 S. Ct. 1184, 1192]). ERISA fiduciaries, who likewise could reasonably see “little hope of outperforming the market . . . based solely on their analysis of publicly available information,” *ibid.*, may, as a general matter, likewise prudently rely on the market price.”

which an ERISA-based obligation either to refrain on the basis of inside information from making a planned trade or to disclose inside information to the public could conflict with the complex insider trading and corporate disclosure requirements imposed by the federal securities laws or with the objectives of those laws.” And third, courts should consider

whether the complaint has plausibly alleged that a prudent fiduciary in the defendant’s position could not have concluded that stopping purchases—which the market might take as a sign that insider fiduciaries viewed the employer’s stock as a bad investment—or publicly disclosing negative information would do more harm than good to the fund by causing a drop in the stock price and a concomitant drop in the value of the stock already held by the fund.

The Court left it to the lower courts to apply these principles to judge the sufficiency of the complaint.

Fair Labor Standards Act: Time Spent “Changing Clothes”

Sandifer v. United States Steel

The Fair Labor Standards Act is the law that governs the payment of overtime wages to employees for work performed during a workweek. The Act did not, however, define “work” or “workweek.” In a 1946 decision, the Supreme Court said that a “workweek” includes “all time during which an employee is necessarily required to be on the employer’s premises, on duty or at a prescribed workplace.” *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 690-91 (1946). *Anderson* added that time spent pursuing “certain preliminary activities after arriving . . . , such as putting on aprons and overalls” are “clearly work” under the FLSA. *Id.* at 693. Following this decision, Congress adopted the Portal-to-Portal Act in 1946 to limit the scope of employer liability under the FLSA. The provision of the Portal-to-Portal Act relevant here provides that activities that are “preliminary to or postliminary to” the “principal activities” that an employee is employed to perform and “which occur prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities” are not encompassed within the terms “work” or “workweek” (i.e., this is not compensable time).

Thereafter, in 1947, the Department of Labor issued an interpretive bulletin that specified:

[W]hereas “changing clothes” and “washing up or showering” “would be considered ‘preliminary’ or ‘postliminary’ activities” when “performed outside the workday and . . . under the conditions normally present,” those same activities “may in certain situations be so directly related to the specific work the employee is employed to perform that [they] would be regarded as an integral part of the employee’s ‘principal activity.’” 12 Fed. Reg. 7659, and n. 49; 29 CFR §790.7, and n. 49.

In 1949, Congress amended the FLSA to address the conduct in the interpretive bulletin. It added Section 203(o) to Title 29 of the United States Code to exclude time spent changing clothes if a collective bargaining agreement so provided:

Hours Worked.—In determining for the purposes of [the minimum-wage and maximum-hours sections] of this title the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of

or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.

Petitioners worked for United States Steel. They had to don protective gear “because of hazards regularly encountered in steel plants” and sought back pay for time spent putting on and taking off the protective gear, which included safety glasses, earplugs, and a respirator. U.S. Steel’s collective bargaining agreement said that changing clothes was excluded from compensable time. Petitioners argued that putting on gear to protect themselves from workplace hazards was not “changing clothes,” and, even if some of the items that they changed into did represent “clothes,” the phrase “changing clothes” did not embrace putting on safety glasses, ear plugs, and a respirator. Justice Scalia’s opinion for the Court (except for one footnote which Justice Sotomayor found unacceptable) first determined that clothes, which he defined as items used to cover the body, included most of the protective gear donned by the workers and that “changing” clothes included both “substituting” and “altering” one’s dress. As to the safety glasses, ear plugs, and respirator, he eschewed a *de minimis* approach to inclusion of these items within the phrase “changing clothes” but agreed with the

basic perception of the Courts of Appeals that it is most unlikely Congress meant §203(o) to convert federal judges into time-study professionals. That is especially so since the consequence of dispensing with the intricate exercise of separating the minutes spent clothes-changing and washing from the minutes devoted to other activities is not to prevent compensation for the uncovered segments, but merely to leave the issue of compensation to the process of collective bargaining.

He then held that the phrase “time spent” in Section 203(o) could be read broadly enough to cover the time in issue here and thus that time was not compensable given the terms of the collective bargaining agreement:

Section 203(o), by contrast, is addressed not to certain “activities,” but to “time spent” on certain activities, viz., “changing clothes or washing.” Just as one can speak of “spending the day skiing” even when less- than-negligible portions of the day are spent having lunch or drinking hot toddies, so also one can speak of “time spent changing clothes and washing” when the vast preponderance of the period in question is devoted to those activities. To be sure, such an imprecise and colloquial usage will not ordinarily be attributed to a statutory text, but for the reasons we have discussed we think that appropriate here. The question for courts is whether the period at issue can, on the whole, be fairly characterized as “time spent in changing clothes or washing.” If an employee devotes the vast majority of the time in question to putting on and off equipment or other non-clothes items (perhaps a diver’s suit and tank) the entire period would not qualify as “time spent in changing clothes” under §203(o), even if some clothes items were donned and doffed as well. But if the vast majority of the time is spent in donning and doffing “clothes” as we have defined that term, the entire period qualifies, and the time spent putting on and off other items need not be subtracted.

*In the present case, the District Court stated that “the time expended by each employee donning and doffing” safety glasses and earplugs “is minimal,” 2009 WL 3430222, *6, a conclusion with which the Seventh Circuit agreed, 678 F. 3d, at 593. As for respirators, the District Court stated that they “are kept and put on as needed at job locations,” 2009 WL 3430222, *2, which would render the time spent donning and doffing them part of an employee’s normal workday and thus beyond the scope of §203(o). The Seventh Circuit did*

not address respirators at all, and we are not inclined to disturb the District Court's factual conclusion.

Fifth Amendment Protection Against Self-Incrimination

Kansas v. Cheever

Cheever was a methamphetamine user who, while intoxicated by this drug, killed a sheriff. He was charged with capital murder. Before he was tried, an unrelated decision was rendered by the Kansas Supreme Court finding the State's death penalty scheme unconstitutional. Cheever was then charged under federal law. Because he planned to raise the absence of specific intent to kill based on his methamphetamine usage, the district court ordered Cheever to undergo psychiatric evaluation. He was subsequently interviewed by a forensic psychiatrist, Welner, for about five and one-half hours. In the meantime, the U.S. Supreme Court reversed the Kansas Supreme Court's decision on the State's death penalty statute. The federal prosecution was not thereafter pursued, and instead the State started a second prosecution of Cheever. At his criminal trial, Cheever introduced expert testimony that his brain had been damaged by long-term methamphetamine usage and Cheever's actions were "very much" influenced by the use of the drug. The State sought to introduce the testimony of Welner, who had interviewed Cheever in the federal case. Defense counsel objected, arguing that Welner's opinions "were based in part on an examination to which Cheever had not voluntarily agreed," and thus the State expert's testimony "would violate the Fifth Amendment proscription against compelling an accused to testify against himself." "The State countered that the testimony was necessary to rebut Cheever's voluntary-intoxication defense." The trial court allowed the testimony. Cheever was convicted and the jury imposed the death penalty. Relying on *Estelle v. Smith*, 451 U.S. 454 (1981) (where the Court held that a court-ordered psychiatric examination violated the defendant's Fifth Amendment rights when the defendant did not initiate the examination or put his mental capacity in dispute at trial), the Kansas Supreme Court reversed.

The [Kansas Supreme Court] acknowledged, id., at 244–245, 284 P. 3d, at 1020, our holding that a State may introduce the results of a court-ordered mental examination for the limited purpose of rebutting a mental-status defense. Buchanan v. Kentucky, 483 U. S. 402, 423–424 (1987). But it distinguished Buchanan on the basis that under Kansas law, voluntary intoxication is not a "mental disease or defect." 295 Kan., at 250, 284 P. 3d, at 1023. Consequently, it vacated Cheever's conviction and sentence, holding that Cheever had not waived his Fifth Amendment privilege and that his federal court-ordered examination should not have been used against him at the state-court trial.

Justice Sotomayor's opinion for the Court took a different view. She held that just as a defendant who takes the witness stand to demonstrate innocence may not refuse to answer related questions on cross examination, a defendant who introduces an expert psychological evaluation of himself allows the government to "use the only effective means of challenging that evidence: testimony from an expert who has also examined him."

The prosecution here elicited testimony from its expert only after Cheever offered expert testimony about his inability to form the requisite mens rea. The testimony of the government expert rebutted that of Cheever's expert. See id. at 1114 ("Ordinarily the only effective rebuttal of psychiatric opinion testimony is contradictory opinion testimony; and for that purpose . . . the basic tool of psychiatric study remains the personal interview, which requires

rapport between the interviewer and the subject” (internal quotation marks omitted); State v. Druke, 143 Ariz. 314, 318, 693 P. 2d 969, 973 (App. 1984) (“[A]n inference would arise that the evidence presented by the [defendant] as to his mental condition is true because uncontradicted”). The trial court therefore did not violate the Fifth Amendment when it allowed Welner to testify that Cheever “made a choice to shoot,” App. 131, because the State permissibly followed where the defense led. Excluding this testimony would have undermined Buchanan and the core truth-seeking function of the trial.

Forum Selection Clauses

Atlantic Marine Construction Co. v. United States District Court for the Western District of Texas

Forum selection clauses are ubiquitous in contracts. How are they to be enforced in federal court? By a motion to dismiss under 28 U.S.C. §1406 or Fed. R. Civ. P. 12(b)(3), or a motion to transfer under 28 U.S.C. §1404? Justice Alito’s opinion in this 9-0 decision said it was the latter.

The contract in issue in this matter required that all disputes between the parties be litigated in state or federal courts in Norfolk, Virginia (the Eastern District of Virginia). But suit was brought by one of the contracting parties in the Western District of Texas and petitioner moved unsuccessfully to obtain a change in venue to enforce the forum selection clause. Its writ of mandamus to the Fifth Circuit was also unsuccessful.

Section 1406(a) provides that “[t]he district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.” Rule 12(b)(3) “states that a party may move to dismiss a case for ‘improper venue.’” Thus, Justice Alito first concluded that neither the statute nor the rule was applicable because venue in the Western District of Texas was neither “wrong” nor “improper.”

Proper venue, rather, is controlled by 28 U.S.C. §1391, which states that “this section shall govern the venue of all civil actions brought in district courts in the United States.” There was no question that venue was proper in the Western District of Texas—that is where the work under the contract was to be performed. Justice Alito explained that petitioner was confusing “venue” with “forum.”

How then is a forum-selection clause to be enforced? That is where Section 1404(a) comes in. It provides: “For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.” The Court held that a forum-selection clause must be given “controlling weight in all but the most exceptional cases” under Section 1404(a).

But what if the forum selected is a state or foreign tribunal? Filling this blank, the Court held that *forum non conveniens* is the solution:

[T]he appropriate way to enforce a forum-selection clause pointing to a state or foreign forum is through the doctrine of forum non conveniens. Section 1404(a) is merely a codification of the doctrine of forum non conveniens for the subset of cases in which the transferee forum is within the federal court system; in such cases, Congress has replaced the traditional remedy of outright dismissal with transfer. See Sinochem Int’l Co. v. Malaysia Int’l Shipping Corp., 549 U. S. 422, 430 (2007) (“For the federal court system, Congress has

codified the doctrine . . . “); see also notes following §1404 (Historical and Revision Notes) (Section 1404(a) “was drafted in accordance with the doctrine of forum non conveniens, permitting transfer to a more convenient forum, even though the venue is proper”). For the remaining set of cases calling for a nonfederal forum, §1404(a) has no application, but the residual doctrine of forum non conveniens “has continuing application in federal courts.” Sinochem, 549 U. S., at 430 (internal quotation marks and brackets omitted); see also ibid. (noting that federal courts invoke forum non conveniens “in cases where the alternative forum is abroad, and perhaps in rare instances where a state or territorial court serves litigational convenience best” (internal quotation marks and citation omitted). And because both §1404(a) and the forum non conveniens doctrine from which it derives entail the same balancing-of-interests standard, courts should evaluate a forum-selection clause pointing to a nonfederal forum in the same way that they evaluate a forum-selection clause pointing to a federal forum. See [Stewart Organization, Inc. v. Ricoh Corp., 487 U. S.22, 37 (1988)] (SCALIA, J., dissenting) (Section 1404(a) “did not change ‘the relevant factors’ which federal courts used to consider under the doctrine of forum non conveniens” (quoting Norwood v. Kirkpatrick, 349 U. S. 29, 32 (1955)).

Given that the parties had agreed to a valid forum-selection clause; that “a district court should ordinarily transfer the case to the forum specified in that clause”; and that no exceptional circumstances were present,³⁹ the judgment of the Fifth Circuit was reversed.⁴⁰

Fourth Amendment and Consent to Search

Fernandez v. California

In this 6-3 decision (Justice Ginsburg dissented joined by Justices Sotomayor and Kagan), Justice Alito addressed the issue of a consent to search an occupied residence in relation to the Fourth Amendment’s prohibition of unreasonable searches.

Fernandez, with the help of gang members, robbed an individual, Lopez, after Fernandez had cut the individual’s wrist with a knife. Lopez managed to call 911 for help. Two Los Angeles police officers drove to an alley frequented by the gang and were told by someone that “the guy is in the apartment.” The officers then observed a man “run through the alley and into the building where the man was pointing. A minute or two later, the officers heard sounds of screaming and fighting coming from that building.” They went to the apartment unit from which the scream had come, knocked on the door, and were greeted by Roxanne Rojas, who had blood on her shirt, a large bump on her nose, and appeared to be crying. The officers asked her to

³⁹ “When parties have contracted in advance to litigate disputes in a particular forum, courts should not unnecessarily disrupt the parties’ settled expectations. A forum-selection clause, after all, may have figured centrally in the parties’ negotiations and may have affected how they set monetary and other contractual terms; it may, in fact, have been a critical factor in their agreement to do business together in the first place. In all but the most unusual cases, therefore, ‘the interest of justice’ is served by holding parties to their bargain.”

⁴⁰ The Court held that the district court placed the burden of proof improperly on petitioner, that inconvenience claims have no weight where a party has agreed to litigate in Virginia, and that having to interpret Texas law was not a basis to keep the matter in Texas. But it remanded, nonetheless, to allow the lower courts to decide whether any other public interest factor might support the motion to transfer.

step out of the apartment so that they could conduct a protective sweep. At that moment, Fernandez appeared and told the officers that they had no right to enter the apartment. Suspecting that he was the assailant, they arrested Fernandez. Lopez later identified Fernandez, and Fernandez was booked into custody. About an hour after Fernandez's arrest, the police returned to the apartment unit. They told Rojas that Fernandez had been arrested and asked Rojas for her oral and written consent to search the apartment. She gave them both. In the apartment, the police found gang paraphernalia, a butterfly knife, clothing worn by Fernandez, ammunition, and a sawed-off shotgun which resulted in Fernandez's conviction and a 14-year prison term.

Fernandez's motion to suppress the evidence of the search had been denied because of Rojas's consent and his conviction was upheld on appeal. In *Georgia v. Randolph*, 547 U. S. 103 (2006), the Court "recognized a narrow exception" to the rule that police officers may search jointly occupied premises if one of the occupants consents, namely that "the consent of one occupant is insufficient when another occupant is present and objects to the search." But what should the rule be if one occupant objects but is not present and the other occupant consents? In affirming, Justice Alito held that *Randolph* does not extend this far.

Fraud Claims and a Hint of Federalism

Chadbourne & Parke LLP v. Troice

This case involved the Ponzi scheme of Allen Stanford and his related entities. The specific issue was how to apply the Securities Litigation Uniform Standards Act of 1998. This law prohibits securities class actions (defined in the Act as involving more than 50 members) "based upon the statutory or common law of any State" where the plaintiffs are alleging "a misrepresentation or omission of material fact in connection with the purchase or sale of a covered security." The question before the Court was not whether "a covered security" (i.e., one, according to the Litigation Act, listed or authorized for listing on a national exchange) was in issue. It was not. What was in issue was whether the Litigation Act prohibits a state-law-based securities class action where the defendants told the fraud victims that uncovered securities were backed by covered securities. If this conduct was covered by the phrase, "misrepresentation or omission of material fact in connection with the purchase or sale of a covered security," then plaintiffs were out of court. If this conduct was not covered by this statutory text, plaintiffs could pursue their state-law-based class action in federal or state court.

In a 7-2 decision (Justice Kennedy dissented joined by Justice Alito), Justice Breyer held that a representation that an uncovered security was backed by a covered security was not one "in connection" with the sale of a covered security. Or as Justice Breyer otherwise put it, a fraudulent misrepresentation or omission is not made "in connection with" a "purchase or sale of a covered security" "unless it is material to a decision by one or more individuals (other than the fraudster) to buy or to sell a 'covered security.'" He reached this result because:

- The Litigation Act is focused on transactions in covered securities, not uncovered securities.
- The language of the Litigation Act supports the result: "The phrase 'material fact in connection with the purchase or sale' suggests a connection that matters. And for present purposes, a connection matters where the misrepresentation makes a significant difference to someone's decision to purchase or to sell a covered security, not to purchase or to sell an uncovered security, something about which the Act expresses no concern."

- All of the Court’s prior pronouncements on the phrase “in connection with” have involved victims “who took, who tried to take, who divested themselves of, who tried to divest themselves of, or who maintained an *ownership interest* in financial instruments that fall within the relevant statutory definition.” (Emphasis in original).
- The Court’s interpretation is consistent with the text of the Securities Exchange Act of 1934 and the Securities Act of 1933. “The[se] regulatory statutes refer to persons engaged in securities transactions that lead to the taking or dissolving of ownership positions. And they make it illegal to deceive a person when he or she is doing so.”
- The Court then expressed a federalism concern:

[T]o interpret the necessary statutory “connection” more broadly than we do here would interfere with state efforts to provide remedies for victims of ordinary state law frauds. A broader interpretation would allow the Litigation Act to cover, and thereby to prohibit, a lawsuit brought by creditors of a small business that falsely represented it was creditworthy, in part because it owns or intends to own exchange-traded stock. It could prohibit a lawsuit brought by homeowners against a mortgage broker for lying about the interest rates on their mortgages—if, say, the broker (not the homeowners) later sold the mortgages to a bank which then securitized them in a pool and sold off pieces as “covered securities.” Brief for Sixteen Law Professors as Amici Curiae 24.

Justice Breyer dismissed Justice Kennedy’s and the Government’s concerns about enforcement limits on the Securities and Exchange Commission that might result from the opinion. “Thus, despite the Government’s and the dissent’s hand wringing, neither has been able to point to an example of any prior SEC enforcement action brought during the past 80 years that our holding today would have prevented the SEC from bringing.”

Mississippi ex rel. Hood v. Optronics. Corp.

In another nod to state authority, the Court reversed the Fifth Circuit’s conclusion that when a State brings an action in state court for restitution for injuries allegedly suffered by its citizens, this is the equivalent of a “mass action” which the Class Action Fairness Act of 2005 (CAFA) allows to be removed to federal court.

CAFA defines a “mass action” as “any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs’ claims involve common questions of law or fact.” 28 U.S.C. § 1332(d)(11)(B)(i). Interpreting this text literally, Justice Sotomayor, writing for a unanimous Court, held that since the State was the sole plaintiff in the state action, the fact that the State was seeking relief for more than 100 of its citizens did not matter: “According to CAFA’s plain text, a ‘mass action’ must involve monetary claims brought by 100 or more persons who propose to try those claims jointly as named plaintiffs. Because the State of Mississippi is the only named plaintiff in the instant action, the case must be remanded to state court.”

Habeas Relief Denied: Refusal to Issue a No-Inference Instruction for Invoking the Fifth Amendment

White v. Woodall

The Court enforced the limitations on habeas relief contained in 28 U.S.C. §2254(d) in this reversal of a Sixth Circuit decision. Respondent was on death row for murdering a 16-year old girl. During the penalty phase of

Respondent’s criminal trial, the Kentucky state court judge refused to issue an instruction to the jury that a defendant is not required to testify and that the decision not to testify should not prejudice the defendant in the jury’s evaluation of punishment. The Kentucky Supreme Court affirmed, leading to a habeas action in federal court. “The District Court granted relief, holding, as relevant here, that the trial court’s refusal to issue a no-adverse-inference instruction at the penalty phase violated respondent’s Fifth Amendment privilege against self-incrimination.” Section 2254(d) does not permit habeas relief “with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.” Reviewing the Court’s precedents which were not clear on the question presented, Justice Scalia, joined by the conservative members of the Court and Justice Kagan, decided not to answer the question of whether a “no-adverse-inference instruction” would be required in a penalty phase of a criminal trial since this was not a direct appeal of a criminal judgment squarely presenting this issue. Rather, looking solely through the “lens” of Section 2254(d), he held that the Kentucky Supreme Court’s rejection of the Fifth Amendment claim was not “objectively unreasonable” under the Court’s prior jurisprudence.

Intellectual Property

The Court addressed a number of patent, copyright, and trademark/false designation of origin matters in the 2013-14 term. The Federal Circuit had a particularly poor track record, being overturned in a number of patent matters.

Copyright: American Broadcasting Cos., Inc. v. Aereo, Inc.

Aereo designed a system to capture over-the-air broadcast television signals for a television show, “transcode” the signal into data that could be transmitted over the Internet, save them to a hard drive, and then stream the show to a subscriber through an Internet connection. The system works on a subscriber-by-subscriber basis—each transmission is a private one available only to that subscriber; if several subscribers elect to watch the same show, each one receives its own transmission of the show.

Aereo’s system did not endear Aereo to television producers, marketers, distributors, and broadcasters with copyrights in programs streamed by Aereo. They claimed the “exclusive righ[t]” to “perform the copyright work publicly” within the meaning of 17 U.S.C. §106(4). The Copyright Act’s “Transmit Clause” defines this exclusive right as including the right to:

transmit or otherwise communicate a performance . . . of the [copyrighted] work . . . to the public, by means of any device or process, whether the members of the public capable of receiving the performance . . . receive it in the same place or in separate places and at the same time or at different times.

17 U.S.C. § 101. Is the Aereo system a “performance” of the copyrighted work? If so, is it a performance “to the public”? The Court answered both questions affirmatively.

On the question of “performance,” the Court considered the legislative history of amendments to the Copyright Act to bring cable systems within the scope of the Copyright Act and concluded that Aereo is more than an equipment provider; it “performs” or “transmits” in a manner substantially similar to cable television

companies “that Congress amended the Act to reach.”⁴¹ For similar reasons, the argument that there was no transmission to the “public” because each transmission is to only one subscriber also failed:

In terms of the Act’s purposes, these differences do not distinguish Aereo’s system from cable systems, which do perform “publicly.” Viewed in terms of Congress’ regulatory objectives, why should any of these technological differences matter? They concern the behind-the-scenes way in which Aereo delivers television programming to its viewers’ screens. They do not render Aereo’s commercial objective any different from that of cable companies. Nor do they significantly alter the viewing experience of Aereo’s subscribers. Why would a subscriber who wishes to watch a television show care much whether images and sounds are delivered to his screen via a large multisubscriber antenna or one small dedicated antenna, whether they arrive instantaneously or after a few seconds’ delay, or whether they are transmitted directly or after a personal copy is made? And why, if Aereo is right, could not modern CATV systems simply continue the same commercial and consumer-oriented activities, free of copyright restrictions, provided they substitute such new technologies for old? Congress would as much have intended to protect a copyright holder from the unlicensed activities of Aereo as from those of cable companies.

The Court noted that its opinion was not intended to discourage or control the emergence or use of other technologies. Explaining that it is not determining whether other content providers are engaging in a “performance” under the Transmit Clause, what the scope is of the word “public” especially if there is no transmission beyond a “family and its social circle,” or when the doctrine of fair use may be applicable, it added:

We cannot now answer more precisely how the Transmit Clause or other provisions of the Copyright Act will apply to technologies not before us. We agree with the Solicitor General that “[q]uestions involving cloud computing, [remote storage] DVRs, and other novel issues not before the Court, as to which ‘Congress has not plainly marked [the] course,’ should await a case in which they are squarely presented.” (Citation omitted.)

Copyright: Petrella v. Metro-Goldwyn-Mayer, Inc.

The Copyright Act has a three-year statute of limitations. 17 U.S.C. §507(b). Where a defendant asserts laches based on an alleged unreasonable, prejudicial delay in bringing suit within this three-year period, does Section 507(b) permit the defense? Justice Ginsburg’s opinion for the Court said “no” but did allow for proof of laches to potentially affect claims for equitable relief:

Laches, we hold, cannot be invoked to preclude adjudication of a claim for damages brought within the three-year window. As to equitable relief, in extraordinary circumstances, laches may bar at the very threshold the particular relief requested by the plaintiff. And a plaintiff’s

⁴¹ The analogy is not perfect because a cable signal is transmitted constantly while Aereo’s system is “inert” until a subscriber seeks to watch a program. The dissent seized on this difference, analogizing Aereo’s system to providing a subscriber with a library card. The majority was not persuaded: “But this difference means nothing to the subscriber. It means nothing to the broadcaster. We do not see how this single difference, invisible to subscriber and broadcaster alike, could transform a system that is for all practical purposes a traditional cable system into ‘a copy shop that provides its patrons with a library card.’”

delay can always be brought to bear at the remedial stage, in determining appropriate injunctive relief, and in assessing the “profits of the infringer . . . attributable to the infringement.” §504(b).

Patent Act: Octane Fitness, LLC v. Icon Health & Fitness, Inc.

The Patent Act allows a district court to award fees to a prevailing party in “exceptional cases.” 35 U.S.C. § 285. In *Brooks Furniture Mfg., Inc. v. Dutailier Int’l, Inc.*, 393 F.3d 1378, 1381 (2005), the Federal Circuit interpreted §285 as authorizing fee awards only in two circumstances: “when there has been some material inappropriate conduct,” or when it is both “brought in subjective bad faith” and “objectively baseless.” Justice Sotomayor’s opinion for the Court explains that this standard was not consistent with the text of Section 285. Calling the Federal Circuit’s test “overly rigid,” the Court established the proper test:

We hold, then, that an “exceptional” case is simply one that stands out from others with respect to the substantive strength of a party’s litigating position (considering both the governing law and the facts of the case) or the unreasonable manner in which the case was litigated. District courts may determine whether a case is “exceptional” in the case-by-case exercise of their discretion, considering the totality of the circumstances. (Footnote omitted.) As in the comparable context of the Copyright Act, “[t]here is no precise rule or formula for making these determinations,’ but instead equitable discretion should be exercised ‘in light of the considerations we have identified.’” Fogerty v. Fantasy, Inc., 510 U. S. 517, 534 (1994).

Patent Act: Highmark Inc. v. Allcare Health Management System, Inc.

In a companion case to *Octane Fitness*, the Court again reversed the Federal Circuit. The district court in this matter awarded Highmark its attorneys’ fees saying the claim in issue was “objectively baseless” under the Federal Circuit’s now discarded *Bridge* standard. The Federal Circuit reversed the decision in part by engaging in a *de novo* review of this determination instead of giving deference to the decision under an abuse of discretion standard. Writing for the Court, Justice Sotomayor held that “an appellate court should review all aspects of a district court’s §285 determination for abuse of discretion.”

Patent Act: Limelight Networks, Inc. v. Akamai Technologies, Inc.

Under 35 U.S.C. § 271(a), the Patent Act allows a patent holder to sue a direct infringer for patent infringement. Under Section 271(b), the Act creates liability for a defendant who has induced infringement of a patent. This case presents the question of whether Limelight could be liable for inducing infringement when there is no one directly infringing the patent in issue (held by the Massachusetts Institute of Technology for a method to deliver electronic data using a “content delivery network”). The Federal Circuit said such liability could exist based on its 2008 decision in *Muniauction, Inc. v. Thomson Corp.*, 532 F.3d 1318. In that case, the Federal Circuit held that direct infringement requires one party to perform every step of a claimed method, and that this test could be satisfied if the party exercises “control or direction” over the process “such that every step is attributable to the controlling party.” *Id.*, at 1329. Limelight did not meet this standard because the patented method involved a process called “tagging” and Limelight did not control or direct its customers’ tagging. Nonetheless, while it recognized that there can be no indirect infringement without direct infringement, the Federal Circuit said Limelight induced infringement because it carried out some of the

patented method's steps and encouraged others to carry out the remaining steps. In a 9-0 decision, Justice Alito held otherwise:

The Federal Circuit's analysis fundamentally misunderstands what it means to infringe a method patent. A method patent claims a number of steps; under this Court's case law, the patent is not infringed unless all the steps are carried out. See, e.g., [Aro Mfg. Co. v. Convertible Top Replacement Co., 365 U.S. 336, 344 (1961)] (a "patent covers only the totality of the elements in the claim and ... no element, separately viewed, is within the grant"). This principle follows ineluctably from what a patent is: the conferral of rights in a particular claimed set of elements. "Each element contained in a patent claim is deemed material to defining the scope of the patented invention," Warner-Jenkinson Co. v. Hilton Davis Chemical Co., 520 U. S. 17, 29 (1997), and a patentee's rights extend only to the claimed combination of elements, and no further.

The Court acknowledged that its "interpretation of §271(b) [permits] a would-be infringer to evade liability by dividing performance of a method patent's steps with another whom the defendant neither directs nor controls." But as the Court explained:

Any such anomaly, however, would result from the Federal Circuit's interpretation of §271(a) in Muniacution. A desire to avoid Muniacution's natural consequences does not justify fundamentally altering the rules of inducement liability that the text and structure of the Patent Act clearly require—an alteration that would result in its own serious and problematic consequences, namely, creating for §271(b) purposes some free-floating concept of "infringement" both untethered to the statutory text and difficult for the lower courts to apply consistently.

And because the question was not squarely presented, the Court declined a request to review the merits of *Muniacution*.

Patent Act: Medtronic, Inc. v. Mirowski Family Ventures, LLC

The Federal Circuit fared no better in Justice Breyer's unanimous decision holding that "when a licensee seeks a declaratory judgment against a patentee to establish that there is no infringement, the burden of proving infringement remains with the patentee." In brief, Medtronic licensed certain patents from Mirowski. Some years later, acting under the parties' agreement, Mirowski gave Medtronic notice that "it believed seven new Medtronic products violated various claims contained in two of its patents." Medtronic disagreed and brought a declaratory judgment action seeking a declaration of noninfringement or that Mirowski's patents were invalid. The district court said that Mirowski had the burden of proof as the party asserting infringement. The Federal Circuit reached the opposite conclusion, a short-lived outcome as Justice Breyer held. Saying that the Declaratory Judgment Act is a procedural law, that the "burden of proof" is a substantive aspect of a claim, and that it is well established that the "burden of proving infringement generally rests upon the patentee," the Court held that Mirowski had the burden of proof.

Patent Act: Nautilus, Inc. v. Biosig Instruments, Inc.

Writing for a unanimous court, Justice Ginsburg reversed the Federal Circuit yet again.

Under the Patent Act, 35 U.S.C. § 112, a patent specification must “conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as [the] invention.” To put this text in context, Biosig held a patent involving a heart rate monitor that claimed to improve on prior art in distinguishing between electrical signals sent by the heart (electrocardiograph or ECG signals) and those sent by skeletal muscles (electromyogram or EMG signals). The latter can mask ECG signals producing erroneous heart rate information. The claimed invention filters out EMG interference from the calculation of the heart rate. In practical terms, when a person on a treadmill grips the cylindrical bars which contain paired electrodes, the EMG signals are filtered out of the heart rate shown on treadmill screen.

Biosig sued Nautilus for infringement of this patent. After a reexamination of the patent by the Patent and Trademark Office and a determination confirming the validity of the patent, the district court conducted a *Markman* hearing (to determine the proper construction of the patent’s claims). The patent in question contained the phrase “in spaced relationship with each other” referring to the distance between a live electrode and a common electrode in each electrode pair. The district court interpreted this phrase to mean that there is a defined relationship between the two electrodes on each side of the cylindrical bars without any reference to the width of each electrode.

Nautilus moved for summary judgment. It argued that Section 112 requires greater definition in the claim since the words “spaced relationship” did not provide parameters for the appropriate spacing of the electrodes. The district court agreed and granted summary judgment. The Federal Circuit reversed. It held that a claim is indefinite under Section 112 only when it is “not amenable to construction” or “insolubly ambiguous.”

The Court had a different view of the standard. The Court first explained the patent principles on which there was agreement between the parties:

First, definiteness is to be evaluated from the perspective of someone skilled in the relevant art. See, e.g., General Elec. Co. v. Wabash Appliance Corp., 304 U. S. 364, 371 (1938). See also §112, ¶1 (patent’s specification “shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same” (emphasis added)). Second, in assessing definiteness, claims are to be read in light of the patent’s specification and prosecution history. (Citation omitted.) Third, “[d]efiniteness is measured from the viewpoint of a person skilled in [the] art at the time the patent was filed.” (Citation omitted.)

It then announced how much “imprecision §112, ¶2 “tolerates”:

Cognizant of the competing concerns, we read §112, ¶2 to require that a patent’s claims, viewed in light of the specification and prosecution history, inform those skilled in the art about the scope of the invention with reasonable certainty. The definiteness requirement, so understood, mandates clarity, while recognizing that absolute precision is unattainable. The standard we adopt accords with opinions of this Court stating that “the certainty which the law requires in patents is not greater than is reasonable, having regard to their subject-matter.”

The matter was remanded for an evaluation of the patent’s claims under this standard.

Patent Act: Alice Corp. v. CLS Bank Int'l

The Federal Circuit did survive one appeal (the court *en banc* affirmed the district court by an equally divided vote), as Justice Thomas affirmed the holding that an “abstract idea” does not become patent-eligible by requiring generic computer implementation of the idea.

The patents in issue “disclose schemes to manage certain forms of financial risk.” To address the risk that one party to a financial exchange may not satisfy its obligations, a computer system is used to create “‘shadow’ credit and debit records (i.e., account ledgers).” The ledgers mirror the balances in the parties’ actual accounts at banks or another “exchange institution.” As transactions are entered by an “intermediary,” the shadow records are updated so that only transactions for which there are sufficient resources to satisfy mutual obligations of the parties are allowed. At the end of each day, the intermediary then instructs the relevant financial institutions to carry out the “permitted” transactions “in accordance with the updated shadow records,” thereby “mitigating the risk that only one party will perform the agreed-upon exchange.”

The lawsuit on this patent did not go well for the patent holder. The district court held that the claims in the patent were directed to the “abstract idea of ‘employing a neutral intermediary to facilitate simultaneous exchange of obligations in order to minimize risk.’” The Federal Circuit *en banc* affirmed.

Justice Thomas explained the distinction between a patentable and a non-patentable idea under 35 U.S.C. § 101⁴²:

Accordingly, in applying the §101 exception, we must distinguish between patents that claim the “‘buildin[g] block[s]” of human ingenuity and those that integrate the building blocks into something more, [Mayo Collaborative Services v. Prometheus Laboratories, Inc., 132 S. Ct. 1289, 1303 (2012)], thereby “transform[ing]” them into a patent-eligible invention, [132 S. Ct. at 1294]. The former “would risk disproportionately tying up the use of the underlying” ideas, [132 S. Ct. at 1294], and are therefore ineligible for patent protection. The latter pose no comparable risk of pre-emption, and therefore remain eligible for the monopoly granted under our patent laws.

Relying on the Court’s rejection of a method for hedging against the financial risk of price fluctuation in *Bilski v. Kappos*, 561 U.S. 593 (2010), Justice Thomas held that the concept of an intermediated settlement is an abstract idea:

*On their face, the claims before us are drawn to the concept of intermediated settlement, i.e., the use of a third party to mitigate settlement risk. Like the risk hedging in *Bilski*, the concept of intermediated settlement is “‘a fundamental economic practice long prevalent in our system of commerce.” Ibid.; see, e.g., *Emery, Speculation on the Stock and Produce Exchanges of the United States, in 7 Studies in History, Economics and Public Law 283, 346–356 (1896) (discussing the use of a “clearing-house” as an intermediary to reduce settlement risk). The use of a third-party intermediary (or “clearing house”) is also a building block of the modern economy. See, e.g., Yadav, The Problematic Case of Clearinghouses in Complex**

⁴² Section 101 provides: “Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.”

Markets, 101 *Geo. L. J.* 387, 406–412 (2013); J. Hull, *Risk Management and Financial Institutions* 103–104 (3d ed. 2012). Thus, intermediated settlement, like hedging, is an “abstract idea” beyond the scope of §101.

He further held that requiring generic computer implementation did not transform the intermediated settlement into a patent-eligible invention:

Stating an abstract idea “while adding the words ‘apply it’” is not enough for patent eligibility. Mayo, supra, [132 S. Ct. at 1290]. Nor is limiting the use of an abstract idea “to a particular technological environment.” Bilski, supra, at 610–611. Stating an abstract idea while adding the words “apply it with a computer” simply combines those two steps, with the same deficient result. Thus, if a patent’s recitation of a computer amounts to a mere instruction to “implemen[t]” an abstract idea “on . . . a computer,” Mayo, supra, [132 S. Ct. at 1301], that addition cannot impart patent eligibility. This conclusion accords with the pre-emption concern that undergirds our §101 jurisprudence. Given the ubiquity of computers, (citation omitted), wholly generic computer implementation is not generally the sort of “additional featur[e]” that provides any “practical assurance that the process is more than a drafting effort designed to monopolize the [abstract idea] itself.” Mayo, [132 S. Ct. at 1291].

The Court also rejected claims “to a computer system and a computer-readable medium” for “substantially the same reasons”: “[T]he system claims are no different from the method claims in substance. The method claims recite the abstract idea implemented on a generic computer; the system claims recite a handful of generic computer components configured to implement the same idea.”

Section 43(a) of the Lanham Act: Lexmark International, Inc. v. Static Control Components, Inc.

Static Control makes a microchip that allows a remanufacturer of printer cartridges to refurbish and resell empty Lexmark printer cartridges that otherwise could not be refurbished because of a Lexmark microchip that disabled the cartridge when it ran out of ink. Lexmark was not happy about this development since it had invested in a “Prebate” program that enabled customers to obtain new toner cartridges from Lexmark at a twenty percent discount to entice customers to return empty cartridges to Lexmark rather than to companies using Static Control’s microchip. So Lexmark sued Static Control for, among other things, copyright infringement.

Justice Scalia’s opinion for the Court, however, was focused on Static Controls Lanham Act counterclaim for false advertising under Section 43 of the Lanham Act, 15 U.S.C. § 1125(a).

Static Control alleged two types of false or misleading conduct by Lexmark. First, it alleged that through its Prebate program Lexmark “purposefully misleads end-users” to believe that they are legally bound by the Prebate terms and are thus required to return the Prebate-labeled cartridge to Lexmark after a single use. App. 31, ¶39. Second, it alleged that upon introducing the Prebate program, Lexmark “sent letters to most of the companies in the toner cartridge remanufacturing business” falsely advising those companies that it was illegal to sell refurbished Prebate cartridges and, in particular, that it was illegal to use Static Control’s products to refurbish those cartridges. Id., at 29, ¶35.

The district court dismissed Static Control’s counterclaim saying that Static Control’s alleged injury was too remote since Static Control was not itself a remanufacturer of Lexmark printer cartridges. The Sixth Circuit reversed. To clarify the analytic framework for standing to bring a false advertising claim, the Supreme Court granted the writ. To establish that framework, Justice Scalia’s opinion then focused on the zone of interests protected by Section 1125(a) and proximate cause:

We thus hold that to come within the zone of interests in a suit for false advertising under §1125(a), a plaintiff must allege an injury to a commercial interest in reputation or sales. A consumer who is hoodwinked into purchasing a disappointing product may well have an injury-in-fact cognizable under Article III, but he cannot invoke the protection of the Lanham Act—a conclusion reached by every Circuit to consider the question. (Citations omitted.) Even a business misled by a supplier into purchasing an inferior product is, like consumers generally, not under the Act’s aegis.

We thus hold that a plaintiff suing under §1125(a) ordinarily must show economic or reputational injury flowing directly from the deception wrought by the defendant’s advertising; and that that occurs when deception of consumers causes them to withhold trade from the plaintiff. That showing is generally not made when the deception produces injuries to a fellow commercial actor that in turn affect the plaintiff. For example, while a competitor who is forced out of business by a defendant’s false advertising generally will be able to sue for its losses, the same is not true of the competitor’s landlord, its electric company, and other commercial parties who suffer merely as a result of the competitor’s “inability to meet [its] financial obligations.” (Citation omitted).

Static Control’s counterclaim satisfied this framework.

[T]he causal chain linking Static Control’s injuries to consumer confusion is not direct, but includes the intervening link of injury to the remanufacturers. Static Control’s allegations therefore might not support standing under a strict application of the ““general tendency”” not to stretch proximate causation ““beyond the first step.”” (Citation omitted.) But the reason for that general tendency is that there ordinarily is a “discontinuity” between the injury to the direct victim and the injury to the indirect victim, so that the latter is not surely attributable to the former (and thus also to the defendant’s conduct), but might instead have resulted from “any number of [other] reasons.” (Citation omitted.) That is not the case here. Static Control’s allegations suggest that if the remanufacturers sold 10,000 fewer refurbished cartridges because of Lexmark’s false advertising, then it would follow more or less automatically that Static Control sold 10,000 fewer microchips for the same reason, without the need for any “speculative . . . proceedings” or “intricate, uncertain inquiries.” (Citation omitted.) In these relatively unique circumstances, the remanufacturers are not “more immediate victim[s]” than Static Control. (Citation omitted.)

Section 43(a) of the Lanham Act: Pom Wonderful LLC v. Coca-Cola Co.

Section 43(a) of the Lanham Act was also in play in this case. Respondent’s Minute Maid Division makes a juice that gives prominence to “pomegranate blueberry” in the label. “In truth, the Coca-Cola product contains

but 0.3% pomegranate juice and 0.2% blueberry juice.” POM makes a pomegranate-blueberry product and sued under Section 43(a) claiming the Minute Maid product label is false or misleading. The Minute Maid product, however, satisfied Food, Drug and Cosmetic Act (FDCA) labeling regulations. That was enough for the lower courts to bar the claim. In this 8-0 decision (Justice Breyer did not participate in consideration of the matter), Justice Kennedy, applying traditional rules of statutory interpretation, held that the FDCA does not expressly bar or limit Lanham Act claims; that, in fact, the two statutes complement each other; and that it is unlikely that Congress intended “FDCA’s protection of health and safety to result in less policing of misleading food and beverage labels than in competitive markets for other products.”

Personal Jurisdiction

In two cases in the 2013-14 term, the Court continued its recent trend to limit the reach of state long-arm statutes that purport to create personal jurisdiction.

Walden v. Fiore

Walden worked as a police officer for the city of Covington, Georgia. He was part of a Drug Enforcement Administration task force that conducted investigative stops at Atlanta’s airport. Fiore was traveling from Puerto Rico to Nevada via Atlanta on August 8, 2006. She had been stopped in San Juan by DEA agents who found almost \$97,000 in cash in her luggage. Fiore told the DEA agents she had won the money gambling at a casino in San Juan. Fiore was cleared to depart but was met in Atlanta by Walden and another DEA agent for further questioning. Fiore told the agents that she was a professional gambler. The agents used a dog to “sniff” for possible drugs and seized the cash telling Fiore that the money would be returned if it was shown that the funds were legitimately obtained. Fiore arrived home that day and contacted a lawyer. Her lawyer called the DEA the next day and two more times during the next month. The lawyer also provided documentation “regarding the legitimacy of the funds.” In the meantime, Walden drafted an affidavit to show probable cause for forfeiture of the funds and forwarded the document to the United States Attorney in Atlanta. “According to respondents, the affidavit was false and misleading because petitioner misrepresented the encounter at the airport and omitted exculpatory information regarding the lack of drug evidence and the legitimate source of the funds. In the end, no forfeiture complaint was filed, and the DEA returned the funds to respondents in March 2007.”

Fiore sued Walden in federal district court in Nevada seeking damages for a violation of her Fourth Amendment rights by:

(1) seizing the cash without probable cause; (2) keeping the money after concluding it did not come from drug-related activity; (3) drafting and forwarding a probable cause affidavit to support a forfeiture action while knowing the affidavit contained false statements; (4) willfully seeking forfeiture while withholding exculpatory information; and (5) withholding that exculpatory information from the United States Attorney’s Office.

Was Walden subject to suit in Nevada? On the basis of the “false probable cause affidavit” which, it was alleged, would affect persons with a “significant connection” to Nevada and would cause “foreseeable harm” in Nevada, the Ninth Circuit said “yes.”

Writing for a unanimous Court, Justice Thomas reversed. In explaining the “minimum contacts” necessary to satisfy due process, Justice Thomas said that the defendant’s relationship to the forum state must “arise out of contacts that the ‘defendant *himself*’ creates with the forum State,” (emphasis in original), and focused on the defendant’s contacts “with the forum State itself, not the defendant’s contacts with persons who reside there.” The plaintiff, the Court held, “cannot be the only link between the defendant and the forum.” Even when an intentional tort is alleged by a plaintiff, the principles are the same, Justice Thomas emphasized. Applying these principles, Justice Thomas held that Walden lacked “minimal contacts” with Nevada, requiring dismissal of the cause of action:

Applying the foregoing principles, we conclude that petitioner lacks the “minimal contacts” with Nevada that are a prerequisite to the exercise of jurisdiction over him. (Citation omitted.) It is undisputed that no part of petitioner’s course of conduct occurred in Nevada. Petitioner approached, questioned, and searched respondents, and seized the cash at issue, in the Atlanta airport. It is alleged that petitioner later helped draft a “false probable cause affidavit” in Georgia and forwarded that affidavit to a United States Attorney’s Office in Georgia to support a potential action for forfeiture of the seized funds. (Citation omitted.) Petitioner never traveled to, conducted activities within, contacted anyone in, or sent anything or anyone to Nevada. In short, when viewed through the proper lens—whether the defendant’s actions connect him to the forum—petitioner formed no jurisdictionally relevant contacts with Nevada.

Daimler v. Bauman

In another 9-0 decision (Justice Sotomayor concurred only in the judgment), Justice Ginsburg held that a corporate defendant lacked minimum contacts with California in a suit brought by 22 Argentinian residents based on events “occurring entirely outside the United States.” The outcome was presaged by the Court’s opinion in *Goodyear Dunlop Tires Operations, S. A. v. Brown*, 564 U. S. ___ [131 S. Ct. 2846] (2011) (jurisdiction exists over a foreign corporation “to hear any and all claims against [it]” only when the corporation’s affiliations with the forum State are so constant and pervasive “as to render [it] essentially at home in the forum State”).

In a 2004 complaint, plaintiffs alleged that Mercedes-Benz Argentina (MB Argentina) “collaborated with Argentinian state security forces to kidnap, detain, torture, and kill plaintiffs and their relatives during the military dictatorship in place there from 1976 through 1983.” Plaintiffs asserted claims under the Alien Tort Statute (ATS) and the Torture Victim Protection Act of 1991 (TVPA) and under California and Argentine law. There was only one corporate defendant. DaimlerChrysler Aktiengesellschaft (Daimler), a German public stock company headquartered in Stuttgart, Germany. Plaintiff’s theory was that Daimler was vicariously liable for the acts of MB Argentina. Daimler had a subsidiary, Mercedes-Benz USA, LLC (MBUSA), incorporated in Delaware with its principal place of business in New Jersey. MBUSA distributed Daimler-made vehicles in California and the rest of the United States. Plaintiffs argued that MBUSA was Daimler’s agent and that MBUSA had sufficient contacts with California to require Daimler to defend itself in California. The Ninth Circuit agreed. Rehearing *en banc* was denied with eight judges dissenting.

Reaching back to *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), Justice Ginsburg’s opinion tracked the Court’s jurisprudence on specific jurisdiction and general jurisdiction. She first explained:

International Shoe distinguished between, on the one hand, exercises of specific jurisdiction, as just described,⁴³ and on the other, situations where a foreign corporation’s “continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities.” 326 U. S., at 318. As we have since explained, “[a] court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so ‘continuous and systematic’ as to render them essentially at home in the forum State.” Goodyear, 564 U. S., at ___ [131 S. Ct. 2846, 2851]; see id., at ___ [131 S. Ct. at 2853-54] (additional citation omitted).

She then described how few Supreme Court precedents discuss general jurisdiction before concluding that the Court has declined “to stretch general jurisdiction beyond limits traditionally recognized.” Applying *Goodyear*, Justice Ginsburg first assumed for purposes of the opinion that MB USA was amenable to suit in California and then held that the Ninth Circuit’s analysis could not stand. For one thing, she explained, the Ninth Circuit’s analysis turned on the importance of MBUSA’s services to Daimler. But asking the question this way, Justice Ginsburg said, “stacks the deck” because it will always yield a “pro-jurisdictional answer” since whatever a subsidiary did for a parent corporation presumably would have to get done if the subsidiary were not there to do it. “The Ninth Circuit’s agency theory thus appears to subject foreign corporations to general jurisdiction whenever they have an in-state subsidiary or affiliate, an outcome that would sweep beyond even the “sprawling view of general jurisdiction” we rejected in *Goodyear*. 564 U. S., at ___ [131 S. Ct. at 2856].” (Footnote omitted.)

Goodyear looks to whether the forum is one in which the corporation “is fairly regarded as at home.” Rejecting an argument that jurisdiction must exist when a corporation engages in a “substantial, continuous, and systematic course of business” in a forum, Justice Ginsburg explained:

Here, neither Daimler nor MBUSA is incorporated in California, nor does either entity have its principal place of business there. If Daimler’s California activities sufficed to allow adjudication of this Argentina-rooted case in California, the same global reach would presumably be available in every other State in which MBUSA’s sales are sizable. Such exorbitant exercises of all-purpose jurisdiction would scarcely permit out-of-state defendants “to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.” (Citation omitted.)

The Ninth Circuit had considered plaintiff’s assertions of claims under the ATS and TVPA. However, *Kiobel v. Royal Dutch Petroleum Co.*, 569 U. S. ___, ___ [133 S. Ct. 1659, 1665] (2013) there is a presumption against

⁴³ By “as just described,” Justice Ginsburg was referring to the following text of her opinion: “*International Shoe*’s conception of ‘fair play and substantial justice’ presaged the development of two categories of personal jurisdiction. The first category is represented by *International Shoe* itself, a case in which the in-state activities of the corporate defendant ‘ha[d] not only been continuous and systematic, but also g[a]ve rise to the liabilities sued on.’ 326 U. S., at 317. (Footnote omitted.) *International Shoe* recognized, as well, that ‘the commission of some single or occasional acts of the corporate agent in a state’ may sometimes be enough to subject the corporation to jurisdiction in that State’s tribunals with respect to suits relating to that in-state activity. *Id.*, at 318. Adjudicatory authority of this order, in which the suit ‘aris[es] out of or relate[s] to the defendant’s contacts with the forum,’ *Helicopteros Nacionales de Colombia, S. A. v. Hall*, 466 U. S. 408, 414, n. 8 (1984), is today called ‘specific jurisdiction.’ (Citations omitted.)”

extraterritorial application of claims under the ATS); *Mohamad v. Palestinian Authority*, 566 U. S. ___, ___ [132 S. Ct. 1702, 1705] (2012) (holding that only natural persons are subject to liability under the TVPA) had come down in the interim eliminating these pathways to potential jurisdiction. In a nod to international comity, Justice Ginsburg added:

*The Ninth Circuit, moreover, paid little heed to the risks to international comity its expansive view of general jurisdiction posed. Other nations do not share the uninhibited approach to personal jurisdiction advanced by the Court of Appeals in this case. In the European Union, for example, a corporation may generally be sued in the nation in which it is “domiciled,” a term defined to refer only to the location of the corporation’s “statutory seat,” “central administration,” or “principal place of business.” European Parliament and Council Reg. 1215/2012, Arts. 4(1), and 63(1), 2012 O. J. (L. 351) 7, 18. See also id., Art. 7(5), 2012 O. J. 7 (as to “a dispute arising out of the operations of a branch, agency or other establishment,” a corporation may be sued “in the courts for the place where the branch, agency or other establishment is situated” (emphasis added)). The Solicitor General informs us, in this regard, that “foreign governments’ objections to some domestic courts’ expansive views of general jurisdiction have in the past impeded negotiations of international agreements on the reciprocal recognition and enforcement of judgments.” U. S. Brief 2 (citing Juenger, *The American Law of General Jurisdiction*, 2001 U. Chi. Legal Forum 141, 161– 162). See also U. S. Brief 2 (expressing concern that unpredictable applications of general jurisdiction based on activities of U. S.-based subsidiaries could discourage foreign investors); Brief for Respondents 35 (acknowledging that “doing business” basis for general jurisdiction has led to “international friction”). Considerations of international rapport thus reinforce our determination that subjecting Daimler to the general jurisdiction of courts in California would not accord with the “fair play and substantial justice” due process demands. (Citation omitted.)*

Retaliation under Sarbanes Oxley

Lawson v. FMR LLC

The Sarbanes-Oxley Act of 2002 (SOX) contains a whistleblower provision. Section 1514A provides:

No [public] company⁴⁴ or any officer, employee, contractor, subcontractor, or agent of such company ... may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee—

⁴⁴ Like the Court, I use the phrase “public” company. The actual text is no “company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78i), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o (d)) including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company, or nationally recognized statistical rating organization (as defined in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c),” which in the first two instances refers to public companies.

Generally, subsection (1) adds as among the lawful acts protected, an employee’s provision of information or assistance in an investigation regarding conduct that the employee reasonably believes constitutes a violation of SOX, rules of the SEC, or any provision of federal law relating to fraud against shareholders; i.e., where the employee engages in whistleblowing.

Petitioners before the Court had sued FMR LLC or Fidelity Management & Research Co. (collectively FMR), which are *not* public companies but which provided investment advice to the Fidelity family of mutual funds, which is a public company. In separate actions, they claimed, respectively, that FMR had “overstated expenses associated with operating the mutual funds” or had made inaccurate statements in a draft SEC registration statement. Both petitioners separated from FMR’s employment (one was fired and one claimed a constructive discharge) and claimed retaliation. FMR moved to dismiss the actions arguing that it is privately held and that Section 1514A applies only to public company employees. The district court disagreed but the First Circuit accepted the argument. In the meantime, the Department of Labor’s Administrative Review Board issued a decision disagreeing with the First Circuit.

Justice Ginsburg’s 6-3 opinion (Justice Sotomayor dissented and was joined by Justices Kennedy and Alito) reversed the First Circuit. Parsing Section 1514A’s “syntactical elements,” she explained that the Section provides that “no contractor ... may discharge ... an employee.” “Absent any textual qualification, we presume the operative language means what it appears to mean: A contractor may not retaliate against its own employee for engaging in protected whistle-blowing activity.” Justice Ginsburg’s opinion added:

The prohibited retaliatory measures enumerated in §1514A(a)— discharge, demotion, suspension, threats, harassment, or discrimination in the terms and conditions of employment—are commonly actions an employer takes against its own employees. Contractors are not ordinarily positioned to take adverse actions against employees of the public company with whom they contract. FMR’s interpretation of §1514A, therefore, would shrink to insignificance the provision’s ban on retaliation by contractors.

She reviewed other statutory text⁴⁵ that confirmed that Congress “presumed an employer-employee relationship between the retaliator and the whistleblower” and also considered enforcement and remedial provisions that refer to the “respondent” as the employer and provides that reinstatement is a remedy.⁴⁶ Justice Ginsburg added legislative history to her arsenal of arguments favoring the Court’s result, prompting Justice Scalia’s concurrence (joined by Justice Thomas) that only the statutory text is needed here to confirm the result reached by the Court:

⁴⁵ “Employees gain protection for furnishing information to a federal agency, Congress, or ‘a person with supervisory authority over *the employee* (or such other person working for *the employer* who has the authority to investigate, discover, or terminate misconduct).’ §1514A(a)(1) (emphasis added). And under §1514A(a)(2), employees are protected from retaliation for assisting ‘in a proceeding filed or about to be filed (*with any knowledge of the employer*) relating to an alleged violation’ of any of the enumerated fraud provisions, securities regulations, or other federal law relating to shareholder fraud. §1514A(a)(2) (emphasis added). The reference to employer knowledge is an additional indicator of Congress’ expectation that the retaliator typically will be the employee’s employer, not another entity less likely to know of whistleblower complaints filed or about to be filed.”

⁴⁶ “As the Solicitor General, for the United States as *amicus curiae*, observed, ‘It is difficult, if not impossible, to see how a contractor or subcontractor could provide those remedies to an employee of a public company.’ Brief for United States as *Amicus Curiae* 15. The most sensible reading of §1514A’s numerous references to an employer-employee relationship between the respondent and the claimant is that the provision’s protections run between contractors and their own employees.”

I do not endorse, however, the Court's occasional excursions beyond the interpretative terra firma of text and context, into the swamps of legislative history. Reliance on legislative history rests upon several frail premises. First, and most important: That the statute means what Congress intended. It does not. Because we are a government of laws, not of men, and are governed by what Congress enacted rather than by what it intended, the sole object of the interpretative enterprise is to determine what a law says. Second: That there was a congressional "intent" apart from that reflected in the enacted text. On most issues of detail that come before this Court, I am confident that the majority of Senators and Representatives had no views whatever on how the issues should be resolved—indeed, were unaware of the issues entirely. Third: That the views expressed in a committee report or a floor statement represent those of all the Members of that House. Many of them almost certainly did not read the report or hear the statement, much less agree with it—not to mention the Members of the other House and the President who signed the bill.

Section 1983 and Qualified Immunity

The Supreme Court extended the reach of its qualified immunity jurisprudence in the 2013-14 term. Only one Section 1983⁴⁷ plaintiff's action survived. I address that case first before discussing the four decisions where government officials prevailed based on a qualified immunity defense.

Tolan v. Cotton

In a *per curiam* decision, because the trial court had improperly resolved disputed issues of fact in a summary judgment, the Court vacated a Fifth Circuit opinion in favor of an officer in a Section 1983 action in which the plaintiffs alleged that the officer, Cotton, used excessive force in violation of the Fourth Amendment in connection with the investigation of a stolen vehicle. The chain of events that resulted in Tolan being shot by Cotton, collapsing his lung and piercing his liver, started when another officer, Edwards, entered the wrong license number into his computer and thought that a vehicle that had been driven into a residential driveway was stolen. Tolan's mother and father, in their pajamas, tried to tell the officers that they owned the car, to no avail. According to Tolan's testimony, Cotton pushed his mother against a garage door and Tolan told him to get "your fucking hands off my mom." Cotton then drew his pistol and fired three shots at Tolan without any verbal warning. The Fifth Circuit held that Cotton's actions "did not violate clearly established law" but in so doing, they credited Cotton's testimony over Tolan's. That was error.

The witnesses on both sides come to this case with their own perceptions, recollections, and even potential biases. It is in part for that reason that genuine disputes are generally resolved by juries in our adversarial system. By weighing the evidence and reaching factual inferences contrary to Tolan's competent evidence, the court below neglected to adhere to the fundamental principle that at the summary judgment stage, reasonable inferences should be drawn in favor of the nonmoving party.

⁴⁷ 42 U.S.C. § 1983 is sometimes referred to as a "constitutional tort." It permits a person to seek damages for deprivation of a constitutional right.

Applying that principle here, the court should have acknowledged and credited Tolan's evidence with regard to the lighting, his mother's demeanor, whether he shouted words that were an overt threat, and his positioning during the shooting. This is not to say, of course, that these are the only facts that the Fifth Circuit should consider, or that no other facts might contribute to the reasonableness of the officer's actions as a matter of law. Nor do we express a view as to whether Cotton's actions violated clearly established law. We instead vacate the Fifth Circuit's judgment so that the court can determine whether, when Tolan's evidence is properly credited and factual inferences are reasonably drawn in his favor, Cotton's actions violated clearly established law.

Lane v. Franks

This case involved the resolution of a circuit split over this question: May a public employee be fired or suffer other adverse employment consequences “for providing truthful subpoenaed testimony outside the course of their ordinary job responsibilities”? And if the answer to this question is “no” (which it was), is the supervisor who fired the employee entitled to qualified immunity as a complete defense to a Section 1983 claim brought by the former employee? (He was).

The former debate involves the balancing of a public employee's First Amendment right to speak on matters of public concern with a public employer's interest in controlling an employee's speech to allow for the efficient provision of public services. Illustratively, in *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty*, 391 U.S. 563, 572-73 (1968), a teacher's letter to a newspaper about a school budget could not be the basis for dismissal where such speech did not affect the teacher's classroom performance or interfere with the operation of schools generally.

The Court had no difficulty in concluding that Lane's subpoenaed testimony in a criminal trial of another public employee for mail fraud and theft was protected speech under the First Amendment.⁴⁸ Just as obviously, the Court held that Lane's testimony in a public corruption trial involved a matter of public concern. Since there was no effort by the respondents to argue that there was a governmental interest in preventing truthful testimony that did not involve release of any confidential information, Lane's speech was entitled to First Amendment protection.

This holding was, however, a Pyrrhic victory for Lane. Franks argued that he was entitled to qualified immunity. Referring to *Ashcroft v. al-Kidd*, 563 U.S. ___, [131 S. Ct. 2074, 2080] (2011), Justice Sotomayor explained: “Under this doctrine, courts may not award damages against a government official in his personal capacity unless ‘the official violated a statutory or constitutional right,’ and ‘the right was “clearly

⁴⁸ “The importance of public employee speech is especially evident in the context of this case: a public corruption scandal. The United States, for example, represents that because “[t]he more than 1000 prosecutions for federal corruption offenses that are brought in a typical year . . . often depend on evidence about activities that government officials undertook while in office,” those prosecutions often “require testimony from other government employees.” Brief for United States as *Amicus Curiae* 20. It would be antithetical to our jurisprudence to conclude that the very kind of speech necessary to prosecute corruption by public officials—speech by public employees regarding information learned through their employment—may never form the basis for a First Amendment retaliation claim. Such a rule would place public employees who witness corruption in an impossible position, torn between the obligation to testify truthfully and the desire to avoid retaliation and keep their jobs.”

established” at the time of the challenged conduct.” Franks violated a constitutional right, but the Court held that the right was not clearly established at the time Franks terminated Lane:

The relevant question for qualified immunity purposes is this: Could Franks reasonably have believed, at the time he fired Lane, that a government employer could fire an employee on account of testimony the employee gave, under oath and outside the scope of his ordinary job responsibilities? Eleventh Circuit precedent did not preclude Franks from reasonably holding that belief. And no decision of this Court was sufficiently clear to cast doubt on the controlling Eleventh Circuit precedent.

Stanton v. Sims

In this *per curiam* opinion a police officer, Stanton, approached an area where an “unknown disturbance” had been reported. Stanton was looking for a person who was reportedly wielding a baseball bat. The officer saw three men walking in the street and saw they looked at the police vehicle. Two of the men turned into an apartment complex. The third, Patrick, crossed the street in front of the police vehicle and “ran or quickly walked” toward a residence. Stanton did not know whether the residence belonged to Patrick and did not see a baseball bat in Patrick’s hands. But he considered Patrick’s conduct suspicious so he decided to detain him to investigate. He exited the vehicle, yelled “police,” and ordered Patrick to stop. Patrick looked at Stanton but did not stop and went through the front gate of the residence, which closed behind him. Stanton believed that Patrick had committed a “jailable misdemeanor” by disobeying his order to stop. Stanton also feared for his safety, according to the record. He kicked open the gate not knowing that Sims, who owned the residence, was behind the gate. When the gate flew open, it struck Sims cutting her forehead and injuring her shoulder. She brought a Section 1983 claim alleging that Stanton violated her Fourth Amendment rights by searching her home without a warrant. Was Stanton entitled to qualified immunity on these facts? Because existing precedent on the lawfulness of the entry was unclear, Stanton’s decision to enter the home did not reflect that he was “plainly incompetent.” Hence, he prevailed on his defense:

To summarize the law at the time Stanton made his split-second decision to enter Sims’ yard: Two opinions of this Court were equivocal on the lawfulness of his entry; two opinions of the State Court of Appeal affirmatively authorized that entry; the most relevant opinion of the Ninth Circuit was readily distinguishable; two Federal District Courts in the Ninth Circuit had granted qualified immunity in the wake of that opinion; and the federal and state courts of last resort around the Nation were sharply divided.

We do not express any view on whether Officer Stanton’s entry into Sims’ yard in pursuit of Patrick was constitutional. But whether or not the constitutional rule applied by the court below was correct, it was not “beyond debate.” (Citation omitted). Stanton may have been mistaken in believing his actions were justified, but he was not “plainly incompetent.” (Citation omitted).

Wood v. Moss

This qualified immunity decision involved a First Amendment *Bivens* claim.⁴⁹ Protesters had been moved away by Secret Service agents from a restaurant where, in 2004, President George Bush made a last-minute decision to stop to have dinner. The agents were sued for violating the First Amendment rights of the protesters. The protesters “alleged that the agents engaged in viewpoint discrimination when they moved the protesters away from the Inn, while allowing the supporters to remain in their original location,” and, in an amended complaint, supplemented this allegation with examples of Secret Service agent conduct “designed to suppress expression critical of President Bush.” The agents’ motion to dismiss an amended complaint on qualified immunity grounds failed. Reversing the Ninth Circuit, Justice Ginsburg held that there was no clearly established precedent that the agents’ on-the-spot decision to move the security perimeter for the safety of the President violated the First Amendment.

No decision of which we are aware, however, would alert Secret Service agents engaged in crowd control that they bear a First Amendment obligation “to ensure that groups with different viewpoints are at comparable locations at all times.” Id., at 952 (O’Scannlain, J., dissenting from denial of rehearing en banc [in the Ninth Circuit’s opinion]). Nor would the maintenance of equal access make sense in the situation the agents confronted.

Recall that at the protesters’ location on the north side of California Street, see supra, at 4, they faced an alley giving them a direct line of sight to the outdoor patio where the President stopped to dine. The first move, to the corner of Fourth and California Streets, proved no solution, for there, only a parking lot stood between the protesters and the patio. True, at both locations, a six-foot wooden fence and an unspecified number of local police officers impeded access to the President. Even so, 200 to 300 protesters were within weapons range, and had a largely unobstructed view, of the President’s location. See Tr. of Oral Arg. 41 (counsel for respondents acknowledged that “in hindsight, you could . . . conclude” that “proximity [of the protesters to the President] alone . . . is enough to create a security [risk]”).

The Court also held that the amended complaint did not demonstrate that the agents’ security concerns were disingenuous, saying people already in the restaurant did not know the President was going to stop there and the numbers were small enough to be manageable, and that agents’ conduct in other instances that may represent viewpoint discrimination does not permit the inference that all agents have that goal as their motive in making security determinations.

Plumhoff v. Rickard

This excessive force Section 1983 matter began when police officers stopped Rickard who was driving a vehicle with only one operating headlight. Rickard could not produce a driver’s license and appeared nervous. The officer asked him to step out of the car. Instead, Richard sped away reaching speeds of over 100 miles per

⁴⁹ Section 1983 applies to persons acting under color of state law. This action was brought under the authority of *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), which created a federal common law claim of damages for an alleged violation of the plaintiffs’ Fourth Amendment rights. The Court assumed, without deciding, that *Bivens* extended to a claimed deprivation of First Amendment Rights, and then grounded its decision on the qualified immunity defense.

hour as six officers chased him. Rickard eventually hit one of the officer's cruisers and spun into a parking lot colliding with Plumhoff's vehicle. Rickard put his car into reverse and attempted to escape. Another officer, Evans, pounded on the passenger-side window. At that point, Rickard's vehicle hit another police vehicle. Rickard kept his foot on the accelerator but his car's tires spun because the bumper of Rickard's car was "flush against a police cruiser." Plumhoff then fired three shots into Rickard's car. Rickard was able to reverse his vehicle in a "180 degree arc" and fled down another street. Twelve more shots were fired at the vehicle before Rickard lost control of the car, crashed into a building, and died from a combination of gunshot wounds and injuries suffered in the crash. Rickard's daughter then brought the Section 1983 claim.

Writing for the Court in reversing the Sixth Circuit, Justice Alito held that, "Rickard's flight posed a grave public safety risk" and therefore the police "acted reasonably in using deadly force to end that risk." He also held that under the circumstances firing 15 shots did not represent excessive force.

It stands to reason that, if police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended. As petitioners noted below, "if lethal force is justified, officers are taught to keep shooting until the threat is over." 509 Fed. Appx., at 392.

Here, during the 10-second span when all the shots were fired, Rickard never abandoned his attempt to flee. Indeed, even after all the shots had been fired, he managed to drive away and to continue driving until he crashed. This would be a different case if petitioners had initiated a second round of shots after an initial round had clearly incapacitated Rickard and had ended any threat of continued flight, or if Rickard had clearly given himself up. But that is not what happened.

Securities Class Action

Halliburton Co v. Erica P. John Fund, Inc.

In *Basic Inc. v. Levinson*, 485 U. S. 224 (1988), the Court held that investors seeking damages for securities fraud could prove reliance on a misrepresentation in deciding to buy or sell a security "by invoking a presumption that the price of stock traded in an efficient market reflects all public, material information—including material misstatements." The Court also held that this presumption could be rebutted. One way to do so is for a defendant to show that the alleged misrepresentation "did not actually affect the stock's price—that is, that the misrepresentation had no 'price impact.'"

In a securities class action, may a defendant rebut the presumption before class certification or must it wait until the class certification issue is decided before trying to show that there was no price impact? In the second visit of this matter to the Court, the Chief Justice held that a defendant should have the opportunity to rebut the presumption at the class certification stage.

Halliburton was sued for alleged violations of Section 10(b) of the Securities Exchange Act of 1934 by Erica P. John Fund, Inc. (EPJ Fund). The complaint alleged that Halliburton misrepresented its potential liability in asbestos litigation; its expected revenue from construction contracts; and the anticipated benefits of a merger, all in an attempt to inflate its stock price. Halliburton made a number of corrective disclosures which the plaintiff contended "caused the company's stock price to drop and investors to lose money." EPJ Fund moved

to certify a class of investors who purchased Halliburton stock during the relevant time period. The district court rejected class action status because EPJ Fund had not demonstrated a causal connection between the alleged misrepresentations and plaintiffs' economic losses. The Supreme Court vacated that decision in 2011,⁵⁰ and remanded the matter for review of any additional arguments against class certification that Halliburton had preserved.

On remand, Halliburton argued that the same evidence it had presented to disprove loss causation also demonstrated that its alleged misrepresentations had no effect on its stock price.

By demonstrating the absence of any "price impact," Halliburton contended, it had rebutted Basic's presumption that the members of the proposed class had relied on its alleged misrepresentations simply by buying or selling its stock at the market price. And without the benefit of the Basic presumption, investors would have to prove reliance on an individual basis, meaning that individual issues would predominate over common ones. The District Court declined to consider Halliburton's argument, holding that the Basic presumption applied and certifying the class under Rule 23(b)(3).

The Fifth Circuit affirmed and the Court again granted certiorari, "this time to resolve a conflict among the Circuits over whether securities fraud defendants may attempt to rebut the *Basic* presumption at the class certification stage with evidence of a lack of price impact. We also accepted Halliburton's invitation to reconsider the presumption of reliance for securities fraud claims that we adopted in *Basic*."

The Chief Justice first held that Halliburton did not establish the "special justification" required to overturn long-settled precedent:

Halliburton contends that securities fraud plaintiffs should always have to prove direct reliance and that the Basic Court erred in allowing them to invoke a presumption of reliance instead. According to Halliburton, the Basic presumption contravenes congressional intent and has been undermined by subsequent developments in economic theory. Neither argument, however, so discredits Basic as to constitute "special justification" for overruling the decision.

The Chief Justice dismantled each argument in a lengthy portion of the opinion ultimately concluding that if *Basic* is to be overruled at this juncture, Halliburton had to look to Congress to do so.

Halliburton then offered an alternative to overruling *Basic*: requiring "plaintiffs to prove that a defendant's misrepresentation actually affected the stock price—so-called 'price impact'—in order to invoke the *Basic* presumption. It should not be enough, Halliburton contends, for plaintiffs to demonstrate the general efficiency of the market in which the stock traded." The Chief Justice rejected this proposal:

⁵⁰ The Court had found "nothing in '*Basic* or its logic' to justify the Fifth Circuit's requirement that securities fraud plaintiffs prove loss causation at the class certification stage in order to invoke *Basic*'s presumption of reliance. *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U. S. ___, ___ [131 S. Ct. 2179, 2185] (2011) (*Halliburton I*) (slip op., at 6). 'Loss causation,' we explained, 'addresses a matter different from whether an investor relied on a misrepresentation, presumptively or otherwise, when buying or selling a stock.' *Ibid* [131 S. Ct. at 2186]."

Far from a modest refinement of the Basic presumption, this proposal would radically alter the required showing for the reliance element of the Rule 10b-5 cause of action. What is called the Basic presumption actually incorporates two constituent presumptions: First, if a plaintiff shows that the defendant's misrepresentation was public and material and that the stock traded in a generally efficient market, he is entitled to a presumption that the misrepresentation affected the stock price. Second, if the plaintiff also shows that he purchased the stock at the market price during the relevant period, he is entitled to a further presumption that he purchased the stock in reliance on the defendant's misrepresentation.

By requiring plaintiffs to prove price impact directly, Halliburton's proposal would take away the first constituent presumption. Halliburton's argument for doing so is the same as its primary argument for overruling the Basic presumption altogether: Because market efficiency is not a yes-or-no proposition, a public, material misrepresentation might not affect a stock's price even in a generally efficient market. But as explained, Basic never suggested otherwise; that is why it affords defendants an opportunity to rebut the presumption by showing, among other things, that the particular misrepresentation at issue did not affect the stock's market price. For the same reasons we declined to completely jettison the Basic presumption, we decline to effectively jettison half of it by revising the prerequisites for invoking it.

The Chief Justice, however, did agree with Halliburton that it should be allowed to defeat the presumption at the class certification stage “through evidence that the misrepresentation did not affect the stock price,” an argument that EPJ Fund itself acknowledged could be made. There is no dispute, the Chief Justice wrote,

that defendants may introduce price impact evidence at the class certification stage, so long as it is for the purpose of countering a plaintiff's showing of market efficiency, rather than directly rebutting the presumption. As EPJ Fund acknowledges, “[o]f course ... defendants can introduce evidence at class certification of lack of price impact as some evidence that the market is not efficient.” Brief for Respondent 53. See also Brief for United States as Amicus Curiae 26.

EPJ Fund, however, argued, and the Fifth Circuit held, that Halliburton could not rely on this same evidence prior to class certification “for the particular purpose of rebutting the presumption altogether.” The Chief Justice rejected this position.

This restriction makes no sense, and can readily lead to bizarre results. Suppose a defendant at the certification stage submits an event study looking at the impact on the price of its stock from six discrete events, in an effort to refute the plaintiffs' claim of general market efficiency. All agree the defendant may do this. Suppose one of the six events is the specific misrepresentation asserted by the plaintiffs. All agree that this too is perfectly acceptable. Now suppose the district court determines that, despite the defendant's study, the plaintiff has carried its burden to prove market efficiency, but that the evidence shows no price impact with respect to the specific misrepresentation challenged in the suit. The evidence at the certification stage thus shows an efficient market, on which the alleged misrepresentation had no price impact. And yet under EPJ Fund's view, the plaintiffs' action should be certified and proceed as a class action (with all that entails), even though the fraud-on-the-market theory does not apply and common reliance thus cannot be presumed.

The Chief Justice then had to deal with one other issue: whether proof of price impact is similar to proof of materiality, which the Court held in *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, 568 U. S. ___, [133 S. Ct. 1184] (2013), was a merits question, not a class certification question. He held that it was not:

[P]rice impact differs from materiality in a crucial respect. Given that the other Basic prerequisites must still be proved at the class certification stage, the common issue of materiality can be left to the merits stage without risking the certification of classes in which individual issues will end up overwhelming common ones. And because materiality is a discrete issue that can be resolved in isolation from the other prerequisites, it can be wholly confined to the merits stage.

Price impact is different. The fact that a misrepresentation “was reflected in the market price at the time of [the] transaction”—that it had price impact—is “Basic’s fundamental premise.” *Halliburton I*, 563 U. S., at ___ [131 S. Ct. at 2186]. *It thus has everything to do with the issue of predominance at the class certification stage. That is why, if reliance is to be shown through the Basic presumption, the publicity and market efficiency prerequisites must be proved before class certification. Without proof of those prerequisites, the fraud-on-the-market theory underlying the presumption completely collapses, rendering class certification inappropriate.*

But as explained, publicity and market efficiency are nothing more than prerequisites for an indirect showing of price impact. There is no dispute that at least such indirect proof of price impact “is needed to ensure that the questions of law or fact common to the class will ‘predominate.’” *Amgen*, 568 U.S., at ___ [133 S. Ct. at 1195] (*emphasis deleted*); see *id.*, at ___ [133 S. Ct. at 1199]. *That is so even though such proof is also highly relevant at the merits stage.*⁵¹

CONCLUSION

Whether by design or happenstance, the 2013-14 term represents the greatest amount of unanimity in judgment shown by the Justices sitting with Chief Justice Roberts since the 2006-07 term. But more unanimity does not mean less disagreement as cases like *Canning*, *McCullen*, and *Bond* among others reflect.

While some call this term’s outcomes the “quiet docket,” there still were some headline decisions. *Hobby Lobby* received enormous attention on the last day of the term. But more broadly, the Court’s First Amendment holdings in *Town of Greece*, *McCutcheon*, and *McCullen* continued the Roberts’ Court’s staunch defense of First Amendment rights and the view of at least five of the Justices that corporations, at least for First Amendment purposes, are entitled to protections of freedom of speech in the same manner that the persons who form them are.

⁵¹ It remains to be seen whether this logic will affect class certification arguments in other contexts where analogies might be drawn to the elements of proof under a *Basic* analysis.

The Court's endorsement of voters' decision on university admissions policies in *Schuette* continues the support of state legislative experiments around the United States trying to achieve the benefits of a diverse student body in state universities without explicit racial preferences in admissions.

Presidential leeway in making recess appointments received an endorsement but not during what the Court calculated was only a 3-day recess, as *Canning* reflects.

Privacy received a big boost in *Riley* when cell phone searches incident to arrest were disallowed without a warrant.

Section 1983 cases are not easily won as shown by the Court's decisions in *Tolan*, *Lane*, *Stanton*, *Wood*, and *Plumhoff*.

The Federal Circuit's views on the patent law have not prevailed for the most part before the Court, and copyright protection received the endorsement of the Court in both *Aereo* and *Petrella*.

The Court is not necessarily unfriendly to fraud claims whether brought under state law (*Chadbourne & Parke*) by a state attorney general (*Hood*) or brought against a large corporation (*Halliburton*), although in the last case, the impact, if any, of the Court's holding on class certification case law is something practitioners should follow.

In practical terms, the Court also contoured the scope of minimum contacts in *Walden* and *Bauman* and provided a framework for dealing with forum-selection clauses (*Atlantic Marine*).

And Justice Kennedy held the key vote in key cases—but that is nothing new.

/jmb

ABOUT THE AUTHOR

John M. Barkett

Mr. Barkett is a partner at the law firm of Shook, Hardy & Bacon L.L.P. in its Miami office. He is a graduate of the University of Notre Dame (B.A. Government, 1972, *summa cum laude*) and the Yale Law School (J.D. 1975) and served as a law clerk to the Honorable David W. Dyer on the old Fifth Circuit Court of Appeals. Mr. Barkett is an adjunct professor of law at the University of Miami School of Law. He is also the recipient of one of the 2011 Burton Awards for Legal Achievement that honors lawyers for distinguished legal writing. Since March 2012, Mr. Barkett has served on the Advisory Committee for Civil Rules of the Federal Judicial Conference. In 2014, Mr. Barkett was appointed to serve on the American Bar Association's Standing Committee on Ethics and Professional Responsibility.

Mr. Barkett has, over the years, been a commercial litigator (contract and corporate disputes, employment, trademark, and antitrust), environmental litigator (CERCLA, RCRA, and toxic tort), and, for the past several years, a peacemaker and problem solver, serving as an arbitrator, mediator, facilitator, or allocator in a variety of environmental, commercial, or reinsurance contexts. He is a certified mediator under the rules of the Supreme Court of Florida and the Southern and Middle Districts of Florida, a Fellow of the American College of Civil Trial Mediators, and a member of the London Court of International Arbitration and the International Council for Commercial Arbitration, and serves on the AAA and ICDR roster of neutrals, and the CPR Institute for Dispute Resolution's "Panel of Distinguished Neutrals." He has served or is serving as a neutral in scores of matters involving in the aggregate more than \$4 billion. He has conducted or is conducting commercial domestic and international arbitrations under AAA, LCIA, ICDR, UNCITRAL, and CPR rules and has conducted *ad hoc* arbitrations. In November 2003, he was appointed by the presiding judge to serve as the Special Master to oversee the implementation and enforcement of the 1992 Consent Decree between the United States and the State of Florida relating to the multi-billion dollar restoration of the Florida Everglades. He consults with major corporations on the evaluation of legal strategy and risk in commercial disputes, and conducts independent investigations where such services are needed. He also consults with other lawyers on questions of legal ethics.

Mr. Barkett has published two books, *E-Discovery: Twenty Questions and Answers*, (Chicago: First Chair Press, 2008) and *The Ethics of E-Discovery* (Chicago: First Chair Press, 2009). Mr. Barkett has also prepared analyses of the Roberts Court the past seven years, in addition to a number of other articles on a variety of topics:

- *Arbitration: Hot Questions, Cool Answers* (Shook, Hardy & Bacon Annual Update on the Law, June 25, 2014, Kansas City)
- *Chess Anyone? Selection of International Commercial Arbitration Tribunals*, (Miami-Dade County Bench and Bar Conference, February 8, 2013 updated for Shook, Hardy & Bacon Annual Update on the Law, June 25, 2014, Kansas City)
- *Perspectives on the New York Convention Under the Laws of the United States* (co-authored with F. Cruz-Alvarez; M. Paulsson, and S. Pagliery) (International Council For Commercial Arbitration 22nd Biennial Congress, April 8, 2014, Miami, Florida)
- *New Rule 45*, 28 N.R.E. 50 (Spring 2014)

- *Refresher Ethics: Steering Clear of Witness Minefields* (with Green, Bruce; Sandler, Paul Mark) (Professional Education Broadcast Network Webinar, May 16, 2014)
- *Ethics in ADR -- A Sampling of Issues* (Professional Education Broadcast Network Webinar, October 31, 2013)
- *The Roberts Court 2012-13, DOMA, Voting Rights, Affirmative Action, More Consensus, More Dissent*, (ABA Annual Meeting, San Francisco, August 10, 2013)
- *Ethical Challenges on the Horizon: Confidentiality, Competence and Cloud Computing* (ABA-CLE, July 24, 2012; updated, ABA Section of Litigation Annual Conference, Chicago, April 25, 2013)
- *Work Product Protection for Draft Expert Reports and Attorney-Expert Communications* (forthcoming) (ABA Section of Litigation Annual Conference, Chicago, April 26, 2013)
- *Lawyer-Client Fallout: Using Privileged Information To Establish A Claim Against a Client/Employer* (forthcoming) (ABA Section of Litigation Annual Conference, Chicago, April 25, 2013)
- *More on the Ethics of E-Discovery: Predictive Coding and Other Forms of Computer-Assisted Review* (Duke Law School, Washington D.C., April 19, 2013)
- *Neighborly RCRA Claims*, 27 N.R.E. 48 (Spring 2013)
- *The Roberts Court 2011-12: The Affordable Care Act and More* (ABA Annual Meeting, Chicago, August 3, 2012)
- *Un-taxing E-Discovery Costs: Section 1920(4) After Race Tire Amer. Inc. and Taniguchi* (June 29, 2012) (<http://www.shb.com/attorneys/BarkettJohn/UntaxingEdiscoveryCosts.pdf>)
- Barkett, *ABA to Tackle Technology Issues in Model Rules at August Meeting*, (<http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202560335059&thepage=3&slreturn=1>). Law Technology News (June 25, 2012)
- *E-Communications: Problems Posed by Privilege, Privacy, and Production* (ABA National Institute on E-Discovery, New York, NY, May 18, 2012)
- *The 7th Circuit Pilot Project: What We Might Learn And Why It Matters to Every Litigant in America* (ABA Section of Litigation News Online, December 11, 2011) (http://apps.americanbar.org/litigation/litigationnews/civil_procedure/docs/barkett.december11.pdf)
- *Skinner, Matrixx, Souter, and Posner: Iqbal and Twombly Revisited*, 12 The Sedona Conference Journal 69 (2011) (Mr. Barkett received the Burton Award for Legal Achievement for this paper).
- *The Challenge of Electronic Communication, Privilege, Privacy, and Other Myths*, 38 Litigation Journal 17 (ABA Section of Litigation, Fall 2011)
- *Avoiding the Cost of International Commercial Arbitration: Is Mediation the Solution?* in Contemporary Issues in International Arbitration and Mediation – The Fordham Papers (Martinus Nijhoff, New York, 2011)
- *The Roberts Court 2010-11: Three Women Justices!* (ABA Annual Meeting, Toronto, August 2011)
- *The Ethics of Web 2.0*, (ACEDS Conference, Hollywood, FL March 2011)
- *The Roberts Court: Year Four, Welcome Justice Sotomayor* (ABA Annual Meeting, San Francisco, August 2010)
- *The Myth of Culture Clash in International Commercial Arbitration* (co-authored with Jan Paulsson), 5 Florida International University Law Review 1 (June 2010)
- *Walking the Plank, Looking Over Your Shoulder, Fearing Sharks Are in the Water: E-Discovery in Federal Litigation?* (Duke 2010 Conference, Civil Rules Advisory Committee, May 11, 2010) (<http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/John%20Barkett.%20Walking%20the%20Plank.pdf>)

- *Zubulake Revisited: Pension Committee and the Duty to Preserve*, (Feb. 26, 2010) (http://www.abanet.org/litigation/litigationnews/trial_skills/pension-committee-zubulake-ediscovery.html)
- *Draft Reports and Attorney-Expert Communications*, 24 N.R.E. (Winter 2010)
- *From Canons to Cannon in A Century of Legal Ethics: Trial Lawyers and the ABA Canons of Professional Ethics* (American Bar Association, Chicago, 2009)
- *The Robert's Court: Three's a Charm* (ABA Annual Meeting, Chicago, August 2009)
- *Cheap Talk? Witness Payments and Conferring with Testify Witnesses*, (ABA Annual Meeting, Chicago, 2009)
- *Burlington Northern: The Super Quake and Its Aftershocks*, 58 Chemical Waste Lit. Rprt. 5 (June 2009)
- *Fool's Gold: The Mining of Metadata* (ABA's Third Annual National Institute on E-Discovery, Chicago, May 22, 2009)
- *More on the Ethics of E-Discovery* (ABA's Third Annual National Institute on E-Discovery, Chicago, May 22, 2009)
- *Production of Electronically Stored Information in Arbitration: Sufficiency of the IBA Rules in Electronic Disclosure in International Arbitration* (JurisNet LLC, New York, September 2008)
- *The Robert's Court: The Terrible Two's or Childhood Bliss?* (ABA Annual Meeting, New York, August 2008)
- *Orphan Shares*, 23 NRE 46 (Summer 2008)
- *Tipping The Scales of Justice: The Rise of ADR*, 22 NRE 40 (Spring 2008)
- *Tattletales or Crimestoppers: Disclosure Ethics Under Model Rules 1.6 and 1.13*, (ABA Annual Meeting, Atlanta, August 7, 2004 and, in an updated version, ABA Tort and Insurance Practice Section Spring CLE Meeting, Phoenix, April 11, 2008)
- *E-Discovery For Arbitrators*, 1 Dispute Resolution International Journal 129, International Bar Association (Dec. 2007)
- *The Roberts Court: Where It's Been and Where It's Going* (ABA Annual Meeting, San Francisco, August, 2007)
- *Help Has Arrived...Sort Of: The New E-Discovery Rules*, ABA Section of Litigation Annual Meeting, San Antonio (2007)
- *Refresher Ethics: Conflicts of Interest*, (January 2007 ABA Section of Litigation Joint Environmental, Products Liability, and Mass Torts CLE program)
- *Help Is On The Way...Sort Of: How the Civil Rules Advisory Committee Hopes to Fill the E-Discovery Void*, ABA Section of Litigation Annual Meeting, Los Angeles (2006)
- *The Battle For Bytes: New Rule 26, e-Discovery*, Section of Litigation (February 2006)
- *Forward to the Past: The Aftermath of Aviall*, 20 N.R.E. 27 (Winter 2006)
- *The Prelitigation Duty to Preserve: Lookout!* ABA Annual Meeting, Chicago, (2005)
- *The MJP Maze: Avoiding the Unauthorized Practice of Law* (2005 ABA Section of Litigation Annual Conference)
- *Bytes, Bits and Bucks: Cost-Shifting and Sanctions in E-Discovery*, ABA Section of Litigation Annual Meeting (2004) and 71 Def. Couns. J. 334 (2004)
- *The CERCLA Limitations Puzzle*, 19 N.R.E. 70 (Fall, 2004)
- *If Terror Reigns, Will Torts Follow?* 9 Widener Law Symposium 485 (2003)

Mr. Barkett is also the author of *Ethical Issues in Environmental Dispute Resolution*, a chapter in the ABA publication, *Environmental Dispute Resolution, An Anthology of Practical Experience* (July 2002) and the

editor and one of the authors of the ABA Section of Litigation's Monograph, *Ex Parte Contacts with Former Employees* (Environmental Litigation Committee, October 2002).

Mr. Barkett is a Fellow of the American College of Environmental Lawyers and also a former member of the Council of the ABA Section of Litigation. At the University of Miami Law School, Mr. Barkett teaches two courses, "Environmental Litigation" and "E-Discovery."

Mr. Barkett has been recognized in the areas of alternative dispute resolution or environmental law in a number of lawyer-recognition publications, including Who's Who Legal (International Bar Association) (since 2005); Best Lawyers in America (National Law Journal) (since 2005); Legal Elite (since 2004), (Florida Trend), Florida Super Lawyers (since 2008), and Chambers USA America's Leading Lawyers (since 2004). Mr. Barkett can be reached at jbarkett@shb.com.

APPENDIX (VOTE COUNT)

Vote Count	13-14 No.	13-14%	12-13 No.	12-13%	11-12 No.	11-12%	10-11 No.	10-11%	09-10 No.	09-10 %	08-09 No.	08-09 %	07-08 No.	07-08 %	06-07 No.	06-07 %
4-4	0	0%	0	0	0	0%	2 ⁵²	2.4%	0	0%	0	0%	2	2.8%	0	0%
5-2	0	0%	0	0	0	0%	0	0%	0	0%	0	0%	1	1.4%	0	0%
5-3	0	0%	2	2.5%	2	2.7%	3 ⁵³	3.6%	3	3.3%	0	0%	2	2.8%	1	1.3%
5-4	11⁵⁴	14.9%	21⁵⁵	26.6%	14⁵⁶	19.2%	14	16.7%	16⁵⁷	17.4%	22	27.2%	10⁵⁸	13.9%	24⁵⁹	32.0%
6-2	2	2.7%	1	1.3%	1	1.4%	7	8.3%	0	0	0	0%	1	1.4%	1	1.3%
6-3	8 ⁶⁰	10.8%	6	7.6%	14 ⁶¹	19.2%	4	4.8%	10	10.9%	10	12.3%	8 ⁶²	11.1%	2	2.7%
7-0	0	0%	0	0	0	0%	0	0%	0	0%	0	0%	0	0.0%	1	1.3%

⁵² Both decisions were *per curiam*. Justice Kagan did not participate in either case.

⁵³ One of these decisions was *per curiam*.

⁵⁴ This count includes *Utility Air Regulatory Group v. EPA* that was a 7-2 decision on one issue in the case but the vote was 5-4 on a second issue in the case.

⁵⁵ This count includes *US Airways, Inc. v. McCutchen* which was a 9-0 decision in rejecting equitable defenses to an ERISA claim, but 5-4 on applying the common-fund doctrine.

⁵⁶ Includes one *per curiam* decision.

⁵⁷ Includes two *per curiam* decisions and one writ improvidently granted. *Perdue v. Winn* was a 9-0 vote on whether a fee award could be enhanced, but a 5-4 vote on the decision to remand the award for review in light of the standards set by the Court.

⁵⁸ One 5-4 decision, *Davis v. Federal Election Commission*, had a 9-0 vote on a standing issue but is treated here as a 5-4 vote on the merits.

⁵⁹ Includes the school cases (Seattle and Jefferson County) as one opinion.

⁶⁰ Includes one *per curiam* decision.

⁶¹ Includes two *per curiam* decisions.

⁶² *Crawford v. Marion County Election Board* was a 6-3 vote, but there was not a majority opinion.

Vote Count	13-14 No.	13-14%	12-13 No.	12-13%	11-12 No.	11-12%	10-11 No.	10-11%	09-10 No.	09-10 %	08-09 No.	08-09 %	07-08 No.	07-08 %	06-07 No.	06-07 %
7-1	1	1.4%	2	2.5%	0	0%	3	3.6%	3	3.3%	0	0%	1	1.4%	2	2.7%
7-2	4	5.4%	6	7.6%	4	5.5%	5	5.9%	14 ⁶³	15.2%	14 ⁶⁴	17.3%	18	25.0%	8	10.7%
8-0 ⁶⁵	2	2.7%	1	1.3%	4	5.5%	18	21.4%	4	4.3%	0	0%	0	0.0%	3	4.0%
8-1	1	1.4%	2	2.5%	8	10.9%	5	5.9%	4	4.3%	6 ⁶⁶	7.4%	5	6.9%	6	8.0%
9-0⁶⁷	45	60.8%	38	48.1%	26	35.6%	23	27.4%	38	41.3%	29	35.8%	24	33.3%	27	36.0%
Total	74	100%	79	100%	73	100%	84	100%	92	100%	81	100%	72	100%	75	100%

⁶³ Includes four *per curiam* decisions. *Florida v. Powell* (holding that advising a suspect that the suspect has the right to talk to a lawyer before answering any of the law enforcement officers' questions and that the suspect can invoke this right at any time during the interview satisfies *Miranda v. Arizona*, 384 U.S. 436, 471 (1966)) was an 8-1 decision on jurisdiction but a 7-2 decision on compliance with *Miranda* (Justice Stevens dissented and was joined by Justice Breyer on Part II of the dissent).

⁶⁴ Includes one *per curiam* decision.

⁶⁵ The *per curiam* count for 8-0 decisions is 1 for 2010-11 and 2 in 2006-07.

⁶⁶ Includes one *per curiam* decision.

⁶⁷ The *per curiam* count for 9-0 decisions is 6 (2012-13) (including *Boyer v. Louisiana* where the writ was dismissed as improvidently granted), 14 (2011-12) 5 (2010-11) (including *Tolentino v. New York* where the writ was dismissed as improvidently granted); 12 (2009-10); 4 (2008-09); 2 (2007-08); and 6 (2006-07).