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Supreme Court Review: Legalistic Argle-Bargle

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THE UNIVERSITY OF AKRON SCHOOL OF LAW
presents

Supreme Court Review: Legalistic Argle-Bargle

Constitution Week
Friday, September 13, 2013
9am to 2:30pm
5 hrs CLE/CE

Summary of Cases

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I. CONSTITUTIONAL LAW

[Arizona v. Inter Tribal Council of Arizona, Inc., 133 S. Ct. 2247 \(2013\)](#) (Scalia, J., majority opinion; 7-2)

Summary: The National Voting Registration Act of 1993 (NVRA) authorizes the federal Election Assistance Commission (EAC) to design a form that the states must use to register persons to vote in federal elections. At present, that form simply requires that a person aver, under penalty of perjury, that the person is an American citizen. In 2004, the people of Arizona adopted Proposition 200, which requires county recorders to reject any application for voter registration that is not accompanied by documentary evidence of American citizenship. The issue before the Court was whether the NVRA pre-empts Proposition 200. The Elections Clause of the Constitution grants Congress the power to regulate how federal elections are held and grants the states the power to determine who votes in those elections. The EAC properly acted pursuant to the power granted by the NVRA. However, the states are free to request the federal government to amend the federal registration form to include any information necessary to enable state election officials to assess the eligibility of the applicant.

Holding: Yes, the NVRA pre-empts Proposition 200.

Significance: From a constitutional standpoint, the decision is not surprising. The Arizona statute was in direct conflict with the federal regulation, and under standard preemption doctrine the state law must yield. From the perspective of voting rights, the Court's dicta regarding the right of the state to request changes to the federal form may make it possible for the states to place yet another procedural roadblock in the path of eligible voters.

[Fisher v. University of Texas, 133 S. Ct. 2411 \(2013\)](#) (Kennedy, J., majority opinion; 7-1)

Summary: Abigail Fisher applied for admission to the University of Texas at Austin and was rejected. She challenged the constitutionality of the admissions system used by the University. Specifically, she contended that the affirmative action program used by the University violated the Equal Protection Clause of the Constitution because it favored African-Americans over White applicants. The Court of Appeals upheld the affirmative action program. The Court of Appeals acknowledged that "strict scrutiny" applies because the government was taking the race of student applicants into account. However, the Court of Appeals deferred to the judgment of the University as to the extent of diversity necessary to enhance the educational experience of the student body. The Court ruled that, while it was appropriate to defer to the judgment of the University as to the value and necessity for diversity, it was not appropriate to defer to the judgment of the University as to the extent of affirmative action necessary to achieve that goal. How far affirmative action may go – the "critical mass" of minority students necessary to create a vibrant and diverse experience for everybody – is to be determined by the courts as a matter of law under the Constitution, not by educational officials.

Holding: The lower court failed to apply strict scrutiny in evaluating whether the University of Texas at Austin’s admissions procedures violated the Equal Protection Clause of the Fourteenth Amendment. In a 7-1 decision, the Court vacated and remanded the case to the Fifth Circuit to determine whether the race-conscious element of the University’s admissions program satisfies strict scrutiny.

Significance: For higher education, this holding impacts the extent to which schools will be able to rely upon affirmative action policies as part of their admissions procedures. Four justices on the Court believe that affirmative action admissions programs are unconstitutional; four justices believe that they are constitutional; and Justice Kennedy is conflicted.

[Hollingsworth v. Perry, 133 S. Ct. 2652 \(2013\)](#) (Roberts, C.J., majority opinion; 5-4)

Summary: Although this case presented the question whether California’s Proposition 8 (denying same-sex couples the right to marry) was constitutional, the Supreme Court did not reach that issue on the merits. Instead, the Court dismissed the case for lack of subject matter jurisdiction. Public officials of the State of California were parties to the action in the trial court and defended the constitutionality of Proposition 8 at the trial level. They declined to appeal the trial court’s decision striking down Proposition 8, so supporters of Proposition 8 filed an appeal. Unlike the public officials, the supporters of Proposition 8 sustained no injury to their legal rights when the law was struck down: the trial court neither ordered them to do anything nor enjoined them from doing anything. Accordingly they had no standing to appeal from the decision of the trial court.

Holding: The Court dismissed the appeal, holding that the supporters of Proposition 8 lacked standing to appeal the District Court’s decision.

Significance: In *Windsor* the United States remained as a party to the action and filed appeals at every step of the litigation process. In *Hollingsworth* the State of California decided not to appeal the decision of the trial court. In both cases there were competent attorneys who were well-prepared to defend the law in question – the Bipartisan Legal Advisory Group attorneys for the House of Representatives in *Windsor* and the attorneys for the Proposition 8 supporters in *Hollingsworth* – but the difference between the cases was that the government was a party to the appeal in *Windsor* and was not a party to the appeal in *Hollingsworth*. Another significant aspect of the decision, though unmentioned in the opinion, is that this ruling implicitly confirms the crucial fact that the opponents of same-sex marriage **are not harmed** by the marriages of gay and lesbian couples. They do not suffer even the threshold legal injury needed to create a “case or controversy” that will confer jurisdiction. This makes it more difficult to argue that the government has a legitimate interest in prohibiting same-sex marriage.

[McBurney v. Young, 133 S. Ct. 1709 \(2013\)](#) (Alito, J., for a unanimous Court)

Summary: Mark McBurney, a resident of Rhode Island, and Roger Hurlbut, a resident of California, requested records from state agencies in the State of Virginia under Virginia’s

Freedom of Information Act. However, that law only applies to citizens of the State of Virginia and does not offer relief to citizens of other states. The plaintiffs challenged this law as violating both the Privileges and Immunities Clause of Article IV and the dormant Commerce Clause. The Court ruled that Virginia's FOIA was not adopted for a "protectionist" purpose; that is, that it was not adopted to give Virginia citizens a competitive advantage in the economic marketplace dealing with public records. Instead, the law was adopted to ensure that Virginia's citizens had ready access to public records so that they could hold their own public officials accountable for public conduct. Accordingly, the law did not infringe upon any "privileges" or "immunities" of American citizens of other states. Furthermore, the Court ruled that even if it were found that the dissemination of public records constituted an economic market and the dormant Commerce Clause applied to this type of law, under the Market Participant Doctrine, the states have the power to treat their own citizens more favorably than out-of-state citizens.

Holding: The Virginia statute granting ready access to public records only to citizens of the state did not violate the Privileges and Immunities Clause or the dormant Commerce Clause.

Significance: There was no denial of due process in either of these cases; there were other procedures (albeit more expensive, more cumbersome, and more time-consuming) by which the Plaintiffs could have obtained the records in question. Despite the Equal Protection Clause, the Due Process Clause, the Privileges and Immunities Clause, and the dormant Commerce Clause doctrines, there are a number of ways in which the States are permitted to discriminate against citizens of other states, including a longer waiting period to obtain a divorce, higher fees for hunting licenses, and higher tuition at state schools. Ready access to public records under state FOIAs may now be added to that list.

[*Millbrook v. United States*, 133 S. Ct. 1441 \(2013\)](#) (Thomas, J., for a unanimous Court)

Summary: A federal prisoner alleged that correctional officers sexually assaulted and threatened him. He sued the United States under the Federal Tort Claims Act (FTCA). The Court of Appeals dismissed the suit on the ground that, while the federal government has waived sovereign immunity for intentional torts committed by law enforcement officers, the waiver applied only to tortious conduct that occurs in the course of executing a search, seizing evidence, or making an arrest. The Court disagreed, utilizing a strictly literal reading of the FTCA to find that the government had waived sovereign immunity for intentional torts by correctional officers.

Holding: The Supreme Court reversed the holding of the Court of Appeals and reinstated the prisoner's suit.

Significance: The ruling significantly broadens the rights of prisoners and the liability of the government towards prisoners.

[*Shelby County v. Holder*, 133 S. Ct. 2612 \(2013\)](#) (Roberts, C.J., majority opinion; 5-4)

Summary: The Voting Rights Act of 1965 (VRA) is one of the most important pieces of civil rights legislation ever adopted by Congress. It was intended to undo a century of state law attacks on the right of African-Americans to vote. The core provision of the Act was contained in Sections 4 and 5, which required certain states and portions of states to obtain the permission of the Department of Justice before adopting changes to their election laws: the “preclearance” provisions. In 2006 Congress overwhelmingly re-enacted the Voting Rights Act; however, it did not adjust the boundaries of the jurisdictions subject to the preclearance provisions. Instead jurisdictions subject to the preclearance provisions were left subject to existing requirements based upon 1970 data. The Court ruled that in failing to adjust the preclearance boundaries to current conditions, Congress exceeded its power under Section 2 of the Fifteenth Amendment. Specifically, the Court found that the preclearance provisions were irrational because they violate the implicit rights of the states to “equal sovereignty.”

Holding: The Court struck down the preclearance requirements of the VRA.

Significance: The VRA has been one of the most successful pieces of civil rights legislation, and this decision erodes the most important protections in the VRA. The decision may open the door for states to begin enacting voting laws and procedures that create obstacles for minority voters who wish to participate in the political process.

[*United States v. Bormes*, 133 S. Ct. 12 \(2012\)](#) (Scalia, J., for a unanimous Court)

Summary: James Bormes paid a filing fee to a federal district court. The receipt that was returned to him contained the last four digits of his credit card and its expiration date, in violation of the privacy provisions of the federal Fair Credit Reporting Act, which provides for a remedy against “any person” who violates the Act, and which defines a person as including “a government.” Accordingly, Bormes sued the United States for violation of the FCRA. The United States defended on the ground that Bormes’ FCRA claim was barred by the doctrine of sovereign immunity. The usual test for determining whether sovereign immunity has been waived is whether the law “unambiguously” waives that immunity. Bormes responded by asserting that since the Little Tucker Act, 28 U.S.C. § 1346(a)(2), confers jurisdiction on the federal courts to hear damages actions against the United States, sovereign immunity had been waived. The Court of Appeals agreed with Bormes and ruled that in light of the Little Tucker Act, sovereign immunity would be waived if a federal statute “can fairly be interpreted as mandating compensation.” The Supreme Court ruled that the Little Tucker Act is jurisdictional only and does not affect the standard for determining waiver of sovereign immunity. The “fair interpretation” test does not apply in this situation.

Holding: The Supreme Court remanded because the Court of Appeals used the wrong standard in determining whether the FCRA waives sovereign immunity. It should have determined whether the FCRA “unambiguously” waives the sovereign immunity of the federal government.

Significance: The Court made it a little harder to sue the federal government for damages.

[United States v. Kebodeaux, 133 S. Ct. 2496 \(2013\)](#) (Breyer, J., majority opinion; 7-2)

Summary: In 1999 when the defendant was a 20-year-old member of the Air Force, he had sex with a 15-year-old girl. He was convicted of statutory rape, received a dishonorable discharge, and served three months in prison. Upon release he was required to comply with state-law sex offender registration requirements. In 2006 Congress enacted the Sex Offender Registration and Notification Act (SORNA), a federal law that requires persons convicted of federal sex offenses to register in the United States where they live, study, and work. The law was applied retroactively to persons who had already been convicted and released from prison. Kebodeaux violated SORNA when he moved within the State of Texas and failed to re-register with the United States. Kebodeaux challenged the constitutionality of SORNA on the ground that Congress lacked the power to adopt SORNA. The Court ruled that Congress had the power to enact SORNA, at least as applied to this case, under its enumerated power to “make rules for the Government and Regulation of the land and naval forces.” Furthermore, the Necessary and Proper Clause gives Congress “large discretion” to “adopt any means, appearing to it most eligible and appropriate” to carry out its enumerated power to regulate the military.

Holding: SORNA was upheld, at least as applied to Kebodeaux.

Significance: This case was decided on narrow grounds because the offender was a member of the military when he committed the act in question.

[United States v. Windsor, 133 S. Ct. 2675 \(2013\)](#) (Kennedy, J., majority opinion; 5-4)

Summary: The State of New York recognized the marriage of Edith Schlain Windsor to Thea Spyer. However, Section 3 of the Defense of Marriage Act prohibits the federal government from recognizing same-sex marriages as valid. The principal issue on the merits in this case was whether the Defense of Marriage Act is constitutional. As a threshold issue, the Court found that it had subject matter jurisdiction to decide this case despite the fact that the United States took the same position as Edie Windsor, arguing that the law was unconstitutional. The United States government, having declined to defend Section 3 of the Defense of Marriage Act while continuing to enforce it, had standing to appeal a U. S. District Court’s invalidation of that provision. The District Court’s order directing the Treasury to pay money to the Plaintiff, even if welcomed by the government, constituted injury to it. The intervention of the Bipartisan Legal Advisory Group of the U.S. House of Representatives satisfied the prudential rule against adjudicating the constitutionality of statutes in friendly, non-adversarial proceedings.

On the merits, the Court considered whether the federal government was infringing on the power of the States by defining who was married and who was not, but found it “unnecessary” to decide the case on the grounds of Federalism. Instead, the Court found that Section 3 of DOMA violates the individual rights of gay and lesbian couples. Specifically, the Court ruled that Section 3 of DOMA violates the Equal Protection

component of, as well as the liberty interests protected by, the Due Process Clause of the Fifth Amendment. The Court found that the law was adopted for the sole purpose of injuring the rights of gay and lesbian couples – that the law was intended to denigrate them and their relationships. Accordingly, the law was not justified by any legitimate governmental interest

Holding: The United States has standing to appeal and Section 3 of the Defense of Marriage Act violates the Due Process Clause of the Fifth Amendment.

Significance: This is the most significant gay rights case to date. The reasoning of the Court was quite sweeping. The Court did not principally base its decision on federalism grounds, as many had predicted, but instead found that DOMA violates the constitutional rights of gay and lesbian couples. The Court found that Congress did not have even a legitimate reason to deny recognition to the lawful unions of same-sex couples. In future cases defending their own “defense of marriage” acts, the states will have to assert rationales different from or in addition to those asserted in support of the federal act – and that might be difficult. On the jurisdictional issue of standing to litigate, this decision makes it clear that the federal government may appeal a decision invalidating a federal law despite the fact that it agrees with the decision as long as (1) the government is prepared to enforce the law unless it is invalidated by the courts, and (2) a party intervenes to defend the law, thereby maintaining an adversarial proceeding.

[*Clapper v. Amnesty International USA*, 133 S. Ct. 1138 \(2013\)](#) (Alito, J., majority opinion; 5-4)

Summary: Respondent Amnesty International USA, a group of activists, lawyers, and journalists, sought prospective relief from the federal government’s exercise of its foreign wiretapping authority under the Foreign Intelligence Surveillance Act (FISA), 20 U.S.C. § 1881(a), which allows the surveillance of individuals who are not “United States Persons” and who are reasonably believed to be outside the United States. Petitioners argued that Respondent proffered no evidence that the United States would imminently acquire its international communications using § 1881(a)-authorized surveillance and did not show that an injunction prohibiting § 1881(a)-authorized surveillance would likely redress its purported injuries. The Court concluded that Respondent failed to demonstrate that the future injury was certain and that the future injury was fairly traceable to the FISA provision at issue. Further, its costs incurred to avoid surveillance were not fairly traceable to the FISA provision at issue.

Holding: Respondents lack Article III standing to seek prospective relief from the federal government’s exercise of its foreign wiretapping authority under FISA because the threatened injury is not certainly impending.

Significance: This decision makes it more difficult to challenge the federal government’s exercise of its foreign wiretapping authority under FISA, and somewhat more difficult in general to challenge governmental acts that threaten future harm.

[Agency for International Development v. Alliance for Open Society International, Inc., 133 S. Ct. 2321 \(2013\)](#) (Roberts, C.J., majority opinion; 6-2)

Summary: The United States Leadership Against HIV/AIDS Act (Leadership Act) requires that organizations receiving federal funds to combat HIV/AIDS abroad have a policy opposing prostitution and sex trafficking. The Respondents, recipients of funds under the Leadership Act, wish to remain neutral on prostitution and sought a declaratory judgment that the requirement violates their First Amendment rights.

Holding: The requirement in the Leadership Act is an unconstitutional condition that compels speech in violation of the First Amendment.

Significance: This decision reinforces and arguably strengthens the doctrine of unconstitutional conditions. It may offer additional protection to organizations such as Planned Parenthood that legislatures try to deny public funding to because of disagreements with their ideological positions.

II. CRIMINAL LAW

A. Fourth Amendment

[Bailey v. United States, 133 S. Ct. 1031 \(2013\)](#) (Kennedy, J., majority opinion; 6-3)

Summary: The Court interpreted the *Michigan v. Summers* rule, 452 U.S. 692 (1981), which allowed police to detain an individual pursuant to the execution of a search warrant. The Court stated that the rule of *Summers* is spatially constrained because detention was designed to be a means of ensuring officer safety, preventing flight, and promoting an orderly search. The rule does not apply when the individual who was detained elsewhere had left the immediate vicinity of the premises before the warrant was executed.

Holding: The detention of persons not in the immediate vicinity of the search warrant location violates the Fourth Amendment.

[Missouri v. McNeely, 133 S. Ct. 1552 \(2013\)](#) (Sotomayor, J., majority opinion; 5-4)

Summary: Missouri argued for a rule that would allow officers to obtain a blood test whenever an allegedly drunk driver was seized, claiming that the natural dissipation of alcohol in the bloodstream creates an exigent circumstance. Exigencies must be viewed on case-by-case basis under the totality of the circumstances. The Court stated that technological advances that allow search warrants to be obtained more quickly are relevant in assessing whether exigencies are present to justify warrantless search. If officers can reasonably obtain a search warrant without significantly undermining the efficacy of the search, they need to do so.

Holding: Though exigent circumstances may give police authority to take a blood sample from a driver without a search warrant, the natural dissipation of alcohol in the bloodstream does not in every case constitute an exigency justifying a non-consensual blood test without a search warrant.

[Florida v. Jardines, 133 S. Ct. 1409 \(2013\)](#) (Scalia, J., majority opinion; 5-4)

Summary: Police had a trained narcotics detection dog sniff at the front door of a house following an unverified tip that marijuana was growing inside. The Court stated that this was a trespassory invasion of the curtilage of the home and intruded on reasonable expectations of privacy. Having a door knocker on the house did not constitute an implied license to enter the curtilage to conduct a search. Officers can approach a house and knock on the door as other members of the public can do – this would be permissible pursuant to the implied license; but having the dog sniff was a search under the Fourth Amendment.

Holding: Having a trained narcotics detection dog sniff at the front door of a house following an unverified tip that marijuana was growing inside is a warrantless search under the Fourth Amendment.

[Florida v. Harris, 133 S. Ct. 1050 \(2013\)](#) (Kagan, J., for a unanimous Court)

Summary: The Florida Supreme Court contravened Supreme Court’s Fourth Amendment precedent by holding that the alert by a narcotics detection dog was insufficient to establish probable cause to search a vehicle. A flexible, common-sense, totality of circumstances test applies.

Holding: An alert by a certified drug-detection dog is presumptively sufficient to establish probable cause, and the absence of records of a dog’s past performance in the field is not enough to rebut the presumption of reliability.

[Maryland v. King, 133 S. Ct. 1958 \(2013\)](#) (Kennedy, J., majority opinion; 5-4)

Summary: When officers would arrest someone for a serious offense and take him into custody, they would take a cheek swab for purposes of analyzing the arrestee’s DNA and entering the DNA profile in a national database. They would conduct this search even though it was not supported by individualized suspicion of any other wrongdoing. The Court stated that like fingerprinting, the swab is a minimally invasive police booking procedure necessary for identification of the arrestee and an accurate assessment of his dangerousness and criminal history. The dissent noted that this is the first time the Court has ever upheld a search for which there was no “individualized suspicion” and “whose primary purpose was to detect evidence of ordinary criminal wrongdoing.”

Holding: When, with probable cause, officers arrest someone for a serious offense and take him into custody, taking a cheek swab for purposes of analyzing the arrestee’s DNA and entering the DNA profile into a national database is a reasonable search under the Fourth Amendment.

B. Fifth Amendment

[Evans v. Michigan, 133 S. Ct. 1069 \(2013\)](#) (Sotomayor, J., majority opinion; 8-1)

Summary: The trial judge directed a verdict of acquittal on the grounds that the prosecution had failed to prove an element of the crime that, as the Defendant conceded on appeal and the appellate court held, did not actually exist. The Court stated that to permit a second trial after a directed verdict of acquittal, however mistaken the acquittal may have been, would present an unacceptably high risk that the Government, with its vastly superior resources, might wear down the defendant so that, even though innocent, he may be found guilty. The Court noted that procedural dismissals do not raise similar concerns because no expectation of finality attaches to them. This was not a dismissal on a procedural ground, but rather a determination, albeit mistaken, that the state had failed to prove its case. “Evans’s acquittal was the product of an ‘erroneous interpretatio[n] of governing legal principles,’ but . . . that error affects only ‘the accuracy of [the] determination’ to acquit, not ‘its essential character.’”

Holding: Retrial is barred under the Double Jeopardy clause of the Constitution when the trial judge directs a verdict of acquittal based on the prosecutor’s failure to prove an element of the crime charged that does not actually exist.

Significance: This decision resolves in favor of defendants a split of opinion on the question whether a defendant may be retried after a trial judge has directed a verdict of not guilty based on the prosecution’s failure to prove an element of the crime that does not actually exist.

[Salinas v. Texas, 133 S. Ct. 2174 \(2013\)](#) (5-4; agreement on judgment only) (Alito, J., joined by Roberts, C.J., and Kennedy, J.; Thomas, J., joined by Scalia, J., concurring in the judgment; Breyer, J., joined by Ginsburg, Sotomayor, and Kagan, J.J., dissenting)

Summary: The Defendant submitted voluntarily to police questioning. He was not in custody, so *Miranda* warnings were neither required nor given. When asked an incriminating question, the Defendant was silent. At trial, the prosecutor cited that silence as evidence of guilt.

Plurality: The prosecutor’s action did not violate the Fifth Amendment because, when asked the incriminating question, the Defendant did not invoke his Fifth Amendment privilege. Although “‘no ritualistic formula is necessary in order to invoke the privilege,’ [] a witness does not do so by simply standing mute.”

Concurrence: The Defendant’s “claim would fail even if he had invoked the privilege because the prosecutor’s comments regarding his pre-custodial silence did not compel him to give self-incriminating testimony.”

Dissent: Under the circumstances, one may “fairly infer” that Defendant’s silence was “an exercise of the Fifth Amendment’s privilege.” The prosecutor was prohibited “from commenting on [that] silence.”

C. Sixth Amendment

[Boyer v. Louisiana, 133 S. Ct. 1702 \(2013\)](#)

Summary: In this order the Court dismissed the writ of certiorari as improvidently granted. The question presented was whether a state's failure to fund counsel for an indigent Defendant for five years, particularly where the failure was the direct result of the prosecutor's choice to seek the death penalty, must be weighed against the state for speedy trial purposes. The dismissal order after full briefing and oral argument is unexplained, but seven justices expressed their views. Four dissenting justices would have the delay in this situation weighed against the state. Three concurring justices believe that the factual premise of the question was not established, since much of the delay resulted from defense-requested continuances of hearings on funding issues, and the Defendant ultimately benefitted from the delay.

Significance: The dismissal leaves Boyer's conviction in place, makes no law, and has no precedential value.

[Chaidez v. United States, 133 S. Ct. 1103 \(2013\)](#) (Kagan, J., majority opinion; 7-2)

Summary: When Petitioner, a lawful permanent resident of the United States since 1977, pled guilty to mail fraud in 2004, she was unaware of the immigration consequences of her plea, and her attorney did not advise her of them. Immigration officials initiated removal proceedings against her in 2009 based on the mail fraud conviction. While Petitioner was attempting to overturn that conviction based on ineffective assistance of counsel, the Court decided *Padilla v. Kentucky*, 559 U.S. 356 (2010), holding that the Sixth Amendment requires defense attorneys to inform non-citizen clients of the deportation risks of guilty pleas. Under *Teague v. Lane*, a new procedural rule does not apply retroactively to disturb a final conviction. The issue was whether the *Padilla* holding constituted a new rule rather than merely the application of the existing rule on ineffective assistance to a new situation.

Holding: Because the question of whether the Sixth Amendment requires attorneys to inform clients of collateral consequences of convictions such as deportation was still an open question before *Padilla*, the Court's rule in that case was a new rule. Therefore, it does not apply retroactively to the Petitioner's earlier conviction.

Significance: As the majority treated this case as an ordinary application of the retroactivity rule, there is little reason to think this decision will have great impact on either the Court's retroactivity jurisprudence or on immigration law. It does add certainty to many plea deals entered into prior to *Padilla*.

[Hodge v. Kentucky, 133 S. Ct. 506 \(2012\)](#)

Summary: Justice Sotomayor dissented from the denial of certiorari, urging that the Kentucky Supreme Court erred in concluding that Hodge would have been sentenced to death anyway because even if the mitigating evidence at issue had been presented, it would

not have “explained” his action. Mitigation evidence need not, and rarely could, “explain” a heinous crime, rather mitigation evidence allows a jury to make a reasoned moral decision on whether the individual defendant deserves to be executed or to be shown mercy. Requiring that there be a nexus between evidence in mitigation and the crime’s commission is contrary to prior precedents in *Smith v. Texas* (2004) and other cases where troubled and abused backgrounds were relevant mitigating evidence in violent offense prosecutions.

[Alleyne v. United States, 133 S. Ct. 2151 \(2013\)](#) (Thomas, J., majority opinion; 5-4)

Summary: In *Harris v. United States*, 536 U.S. 545 (2002), the Court upheld a federal statute that increased the minimum sentence if a firearm was brandished during a violent or drug-trafficking crime. The statute also made the issue of brandishing a determination to be made by the sentencing judge based on a preponderance of the evidence, including facts not subject to the Constitution’s indictment, jury, and proof requirements. In readdressing that issue here, the Court overruled *Harris* and stated that any fact that increases the mandatory minimum sentence is an element of the offense that must be submitted to the jury, charged in the indictment, and proven beyond a reasonable doubt.

Holding: The decision in *Harris* is overruled.

D. Jury Instructions

[Smith v. United States, 133 S. Ct. 714 \(2013\)](#) (Scalia, J., for a unanimous Court)

Summary: Defendant relied on the defense to a charge of conspiracy that he had withdrawn from the conspiracy more than five years before the indictment, which was the period of limitations for such a conspiracy. The trial court instructed the jury that the Defendant needed to prove that he withdrew from the conspiracy outside the statute of limitations by a preponderance of the evidence. The Court ruled that placing the burden of proof on the Defendant did not offend due process because the defense does not negate an element of the crime, but only excuses conduct that would otherwise be punishable. Congress could have placed the burden on the government but did not, and thus, the common law approach of placing the burden of affirmative defenses on the defendant applies.

Holding: Withdrawal from a conspiracy outside the statute of limitations period is an affirmative defense that the defendant must prove by a preponderance of the evidence.

Significance: When charged with a conspiracy that began before the period of limitations but continued beyond it, a defendant asserting a withdrawal defense has the burden of proving by a preponderance of the evidence that he withdrew from the conspiracy before the period of limitations.

[*Sekhar v. United States*, 133 S. Ct. 2720 \(2013\)](#) (Scalia, J., for a unanimous Court)

Summary: Petitioner Sekhar was convicted of extortion under the Hobbs Act for threatening to expose an alleged affair by the general counsel of the State Comptroller of New York. The general counsel had recommended that the Comptroller not invest in a fund managed by Sekhar's firm, and Sekhar sought to force the general counsel to reverse that recommendation. The Act defines extortion to mean "the obtaining of property from another, with his consent" induced by particular kinds of wrongful threats. The property alleged to have been sought by Sekhar was the general counsel's recommendation to approve the investment.

Holding: Attempting to compel an investment recommendation does not constitute "the obtaining of property from another" under the Hobbs Act.

Significance: There is now one fewer way to be convicted of a certain kind of blackmail.

E. Due Process

[*Peugh v. United States*, 133 S. Ct. 2072 \(2013\)](#) (Sotomayor, J., majority opinion; 5-4)

Summary: The Court stated that using the U.S. Sentencing Guidelines that are in effect at the time of sentencing, rather than those in effect at the time of the offense, creates a significant risk that the defendant will receive a longer sentence when the newer guidelines provide for a higher sentencing range than those in place at the time of the offense. Finding an ex post facto violation does not undo the Booker advisory sentence scheme.

Holding: A sentencing court violates the ex post facto clause by using the U.S. Sentencing Guidelines in effect at the time of sentencing, rather than those in effect at the time of the offense, when the newer guidelines provide for a higher sentencing range than the version in place at the time of the offense

[*Metrish v. Lancaster*, 133 S. Ct. 1781 \(2013\)](#) (Ginsburg, J., for a unanimous Court)

Summary: In a case of first impression in 2001, the Michigan Supreme Court recognized that a 1975 state statute had abolished the diminished-capacity defense, overruling 26 years of lower court precedent. The Defendant, who had relied on this defense in his original trial prior to this decision, was barred from using the defense in his retrial after this decision. In denying habeas relief, the Court stated that this recognition was not an "unreasonable application of" U.S. Supreme Court's retroactivity jurisprudence under the federal habeas statute, 28 U.S.C. § 2254(d). That jurisprudence forecloses "unexpected and indefensible" changes in common-law doctrines; it was not unreasonable for the Michigan Court to find this was not so unforeseeable.

[United States v. Davila, 133 S. Ct. 2139 \(2013\)](#) (Ginsburg, J., for a unanimous Court)

Summary: A magistrate judge advised Defendant, in a tax case, to plead guilty to avoid a longer sentence. The court below ruled that the magistrate judge improperly participated in plea negotiations in violation of Fed. R. Crim. P. 11(c)(1), rendering the Defendant's guilty plea invalid. The Court concluded that the judicial participation did not in itself demand automatic vacatur of the plea. The reviewing court must consider all the facts and assess the impact of this error on a defendant's decision to plead guilty.

Holding: Judicial participation in plea negotiations does not automatically require vacatur of a defendant's guilty plea unless the error prejudiced the defendant.

F. Federal Appellate Practice

[Henderson v. United States, 133 S. Ct. 1121 \(2013\)](#) (Breyer, J., majority opinion; 6-3)

Summary: When the governing law is unsettled at the time of trial, but settled in the defendant's favor by the time of appeal, an appellate court reviewing for "plain error" under Fed. R. Crim. P. 52 (b) should use the time-of-appeal standard when assessing whether the lower court's ruling was plainly wrong.

Holding: Plain error relief is available if the error was plain at the time of trial or at the time of appeal.

[Ryan v. Schad, 133 S. Ct. 2548 \(2013\)](#) (per curiam)

Summary: The Ninth Circuit Court of Appeals stayed a mandate denying relief in a capital case after granting an en banc rehearing in another case that raised the same legal issue. Under Fed. R. App. Proc. 41(d)(2)(D), a court should only stay a mandate under extraordinary circumstances. This was not an extraordinary circumstance, so the appellate court abused its discretion in staying the mandate.

Holding: The grant of en banc rehearing in another case raising the same issue is not an "extraordinary circumstance" allowing a federal circuit court to stay issuance of a mandate denying relief in a capital case.

G. Deportation and Convictions

[Moncrieffe v. Holder, 133 S. Ct. 1678 \(2013\)](#) (Sotomayor, J., majority opinion; 7-2)

Summary: Part of the Immigration and Nationality Act (INA), 8 U.S.C. § 1101 et seq., provides that a noncitizen who has been convicted of an "aggravated felony" may be removed from the United States, and the Act bars the Attorney General from granting discretionary relief from removal to an aggravated felon. The Court says here, "[i]f a noncitizen's conviction for a marijuana distribution offense fails to establish that the

offense involved either remuneration or more than a small amount of marijuana, the conviction is not for an aggravated felony under the INA."

Holding: A person convicted of a state illicit drug trafficking offense that involved the "social sharing of a small amount of marijuana" is not necessarily barred from obtaining discretionary relief from removal under the INA.

H. Criminal Legislation

[*Descamps v. United States*, 133 S. Ct. 2276 \(2013\)](#) (Kagan, J., majority opinion; 8-1)

Summary: Under the Armed Career Criminal Act, the modified categorical approach allows a judge to consult certain extra-statutory documents, such as the indictment, jury instructions, or the record of a plea colloquy, to determine whether the nature of a prior conviction qualifies it as a predicate for a recidivist sentence enhancement.

Holding: When a statute of conviction contains a single, indivisible set of offense elements and covers both qualifying and non-qualifying offenses, a conviction under that statute cannot be subjected to the modified categorical approach.

I. Federal Habeas Corpus Cases

[*Ryan v. Gonzales*, 133 S. Ct. 696 \(2013\)](#) (Thomas, J., for a unanimous Court)

Summary: Inmates appealing state death sentences to federal court have a right to a lawyer, but the courts have never said whether the inmates have to be mentally competent enough to help their lawyers with their federal appeals. Gonzales and Carter argued that federal judges have discretion to hold up proceedings indefinitely until the inmates are ready. The Court said that "at some point, the state must be allowed to defend its judgment of conviction." It further stated that "[f]or purposes of resolving these cases, it is unnecessary to determine the precise contours of the district court's discretion to issue stays. We address only its outer limits." In Gonzales's case, the District Court did not abuse its discretion in denying a stay after finding that Gonzales's claims were all record-based or resolvable as a matter of law, regardless of his competence. Review of a petitioner's record-based claims subject to § 2254(d) is limited to the record before the state court that heard the case on the merits; thus, any additional evidence that Gonzales might have would be inadmissible. In Carter's case, three of his claims did not warrant a stay because they were adjudicated on the merits in state post-conviction proceedings and subject to review under § 2254(d). Thus, extra-record evidence that he might have concerning these claims would be inadmissible. It is unclear from the record whether he exhausted his fourth claim. If it was exhausted, it too would be record-based. But even if it was both unexhausted and not procedurally defaulted, an indefinite stay would be inappropriate because such a stay would permit petitioners to "frustrate [the Antiterrorism and Effective Death Penalty Act of 1996's] goal of finality by dragging out indefinitely their federal habeas review."

Holding: A federal judge cannot indefinitely delay a death row inmate's federal appeals to see if the convict can become mentally competent enough to help his lawyer.

[Johnson v. Williams, 133 S. Ct. 1088 \(2013\)](#) (Alito, J., for a unanimous Court)

Summary: When a state appellate court's opinion addresses some issues but omits mention of a federal constitutional claim raised before it, a rebuttable presumption arises that the constitutional claim was decided on its merits. Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the federal courts may not grant habeas relief to prisoners whose claims have already been adjudicated on the merits unless the state court decision is contrary to clearly established U.S. Supreme Court law or is an unreasonable interpretation of the facts. Thus, under AEDPA, a federal habeas court must treat an unaddressed constitutional claim as if the state court had ruled on the claim for purposes of this deference.

Holding: Unless the presumption that a constitutional claim was decided on the merits is rebutted, the federal courts must apply deference under AEDPA.

[Nevada v. Jackson, 133 S. Ct. 1990 \(2013\)](#) (per curiam)

Summary: The Nevada trial court excluded extrinsic evidence that the sexual-assault complainant had previously made false accusations against the Defendant. The Nevada Supreme Court's affirmance was not an unreasonable application of any United States Supreme Court decision. "[S]tate and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials." "Only rarely have we held that the right to present a complete defense was violated by the exclusion of defense evidence under a state rule of evidence." Supreme Court cases do not "clearly establish that the Constitution requires a case-by-case balancing of" the defendant's right to present a defense and the "interests" served by a state rule requiring the defendant to file written notice of his intent to introduce extrinsic evidence for impeachment. The Supreme Court "has never held that the Confrontation Clause entitles a criminal defendant to introduce *extrinsic evidence* for impeachment purposes." The Court stated that by characterizing Supreme Court "cases as recognizing a broad right to present 'evidence bearing on [a witness's] credibility,'" the Ninth Circuit erroneously framed "our precedents at a [too] high level of generality."

Holding: The grant of habeas relief was reversed because there is no clearly established constitutional right to use extrinsic evidence for impeachment purposes.

[Marshall v. Rodgers, 133 S. Ct. 1990 \(2013\)](#) (per curiam)

Summary: California has a rule allowing trial judges discretion to deny mid-trial requests to begin or to terminate self-representation. The Court stated that this rule is not contrary to or an unreasonable application of clearly established United States Supreme Court law. The Ninth Circuit relied excessively on its own decisions and the decisions of other circuits in identifying the "clearly established" legal principles.

Holding: The Court summarily reversed the Ninth Circuit’s grant of relief in a non-capital habeas case because the California rule did not violate any laws clearly established by United States Supreme Court case law.

[McQuiggin v. Perkins, 133 S. Ct. 1924 \(2013\)](#) (Ginsburg, J., majority opinion; 5-4)

Summary: A “convincing showing of actual innocence” under the standard of *Schlup v. Delo*, 513 U.S. 298 (1995), entitles a petitioner to an equitable exception to the statute of limitations for a federal habeas petition. There is no separate diligence requirement, but unexplained delay may reduce the convincing power of the evidence of innocence. The Court believes it unlikely that Perkins’s showing of innocence is sufficient to meet the “demanding” *Schlup* standard.

Holding: Actual innocence can overcome the statute of limitations for habeas petitions, but the court can consider unexplained delay as a factor in determining whether the petitioner has shown actual innocence.

[Trevino v. Thaler, 133 S. Ct. 1911 \(2013\)](#) (Breyer, J., majority opinion; 5-4)

Background: In *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), the Court held that the defendant in a state criminal case who is prohibited by state law from raising a claim of ineffective assistance of trial counsel on direct appeal, but who has a state-law right to raise such a claim in the first post-conviction proceeding, can argue that the denial of post-conviction assistance of counsel, or the ineffective assistance of first post-conviction counsel, constitutes “cause” to excuse a default with respect to his ineffective-assistance-of-trial-counsel claim raised in post-conviction. The state can then argue that the ineffective assistance of trial counsel claim is insubstantial and that there is no “prejudice” as required to excuse the default. This is a narrow exception to the earlier rule from *Coleman v. Thompson* that an attorney’s ignorance of inadvertence in a post-conviction proceeding does not constitute cause, and the Court held that inadequate assistance at initial-review collateral proceedings may indeed establish cause. The Court declined to resolve the question of whether a prisoner has a constitutional right to effective assistance of counsel in initial-review collateral proceedings.

Summary: The *Martinez* rule applies where state law says that ineffective assistance of counsel (IAC) claims *must* be raised in an initial-review collateral proceeding. The holding also applies where state law does not *require* IAC to be raised first in collateral review, but where “[t]he structure and design of the [state] system in actual operation, however, make it ‘virtually impossible’ for an ineffective assistance claim to be presented on direct review.” Here, while Texas permits IAC claims before the trial court in a motion for a new trial, this vehicle is often inadequate because of time constraints and because the trial record has generally not been transcribed at this point. The rule from *Martinez* that the ineffective assistance of first post-conviction counsel can constitute cause for procedural default of a claim of ineffective assistance of trial counsel also applies in Texas and other states where the “state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a

claim of ineffective assistance of trial counsel on direct appeal,” even if (unlike in Arizona) it is theoretically possible to raise an IAC claim on direct appeal.

Holding: In cases where the state procedural framework makes it virtually impossible to bring an IAC claim on initial direct review, the Martinez rule applies. Ineffective assistance of first post-conviction counsel can constitute cause to excuse a default on the ineffective assistance of trial counsel claim.

III. REGULATION

A. Administrative Law

[*City of Arlington v. FCC*, 133 S. Ct. 1863 \(2013\)](#) (Scalia, J., majority opinion; 6-3)

Summary: The Telecommunications Act of 1996 requires states and localities to act “within a reasonable period of time” after the filing of an application to build a wireless tower. It also authorizes the FCC to “prescribe such rules and regulations as may be necessary in the public interest to carry out” the Act. Pursuant to those provisions, the FCC promulgated a regulation requiring states and localities to rule on wireless tower siting applications within no more than 150 days. The goal of the authorizing statute and the FCC regulation is to prevent the NIMBY syndrome from obstructing development of the national wireless network. Affected localities disputed the FCC’s position that the Act authorized the agency to adopt the regulation.

Holding: The Court upheld the FCC rule. More important, the Court held that under the *Chevron* doctrine, courts must defer to agencies’ constructions of ambiguous provisions of their statutes even where the agencies interpret the scope of their own authority.

Significance: The majority opinion resolves the deference issue as most observers probably expected. The real significance may be the dissent, in which Chief Justice Roberts insisted that a court may not defer to an agency interpretation until the court independently decides whether Congress has delegated the agency authority to make law with respect to the specific statutory provision at issue. This could portend a major shift of policymaking (political) authority from agencies, which are accountable to an elected President, to courts, which are accountable to no one.

B. Environmental Law

[*Decker v. Northwest Environmental Defense Center*, 133 S. Ct. 1326 \(2013\)](#) (Kennedy, J., majority opinion; 7-1)

Summary: The logging company was channeling polluted stormwater into waterways via channels, culverts, and ditches alongside its logging roads. The environmental organization, NEDC, challenged its ability to do so without a National Pollutant Discharge Elimination System (NPDES) permit under the Clean Water Act, which is required for any point source

that discharges a pollutant into the waters of the United States. There is an exception to permitting requirements applicable to discharge made up entirely of stormwater, but that exception does not apply if the discharge is associated with industrial activity. NEDC argued that the logging company was not entitled to the stormwater exception because it was channeled as a result of industrial activity (logging). The EPA regulations defined industrial activity as “manufacturing, processing, or raw materials storage areas at an industrial plant.” In this case, the EPA had interpreted this definition not to include logging, which it deemed merely the harvesting of raw materials. The Court found this to be a reasonable interpretation, especially in light of the deference to be accorded to agencies in interpreting their own regulations and the fact that the interpretation did not depart from prior interpretations.

Holding: The Clean Water Act and the EPA’s implementing regulations do not require NPDES permits before channeled stormwater runoff from logging roads can be discharged into the navigable waters of the United States.

Significance: This allows logging companies to continue permit-free alteration of the landscape in a manner that directs polluted stormwater into streams and rivers when it might otherwise have been absorbed into the ground and filtered. The primary ecological issue is the high sediment content, which is harmful to fish and other aquatic species. In reality, though, this is nothing new.

[Koontz v. St. Johns River Water Management District, 133 S. Ct. 2586 \(2013\)](#) (Alito, J., majority opinion; 5-4)

Summary: This is perhaps the most controversial of the Court’s recent “takings trilogy.” It expands substantially the reach of two prior developer-friendly cases, *Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Those cases held that for a land-use permit to be conditioned on the owner’s relinquishment of a portion of his property, there must be a nexus and rough proportionality between that demand and the impact of the proposed land use. The facts in *Koontz* were a bit different, in that he was denied a permit (as opposed to granted one after being forced to hand over part of his property), and the condition he failed to meet was entirely monetary (contributing to an offset). As a result, the lower courts did not agree on how to apply the existing doctrine, and the Court took up the issue.

Holding: Denying a permit for failure to meet an unconstitutional condition is just as invalid as granting one under force of such a condition, although no property has been taken. Conditioning permits on payment into an offsite mitigation project is subject to the *Nollan/Dolan* standard, just as requiring real property would be. Denial of the *Koontz* permit application is invalid.

Significance: This case may have a major impact on mitigation requirements for environmentally harmful development. It has been celebrated by landowners/developers and criticized by environmentalists. Extending constitutional takings doctrine to requirements of offsite mitigation could be a real game-changer in the protection of

vulnerable wetlands and other ecosystems. That said, it is important to note that it does not hold offsite mitigation requirements (which are quite common) unconstitutional, but merely requires the *Nollan/Dolan* nexus be applied, which keeps it from being a total wipe-out.

[*Los Angeles County Flood Control District v. Natural Resources Defense Council, Inc.*, 133 S. Ct. 710 \(2013\)](#) (Ginsburg, J., for a unanimous Court)

Summary: The District operates a “municipal separate storm sewer system” (MS4), which is a drainage system that collects, transports, and discharges storm water. The Clean Water Act (CWA) and its implementing regulations require certain MS4 operators to obtain a National Pollutant Discharge Elimination System (NPDES) permit before discharging storm water into navigable waters. The District has the necessary permit for its MS4. Environmental organizations brought suit alleging that water-quality monitoring in the area demonstrated violations of this permit. The Ninth Circuit held the District liable for polluted water that flowed out of the concrete-lined portions of the rivers, where the monitoring stations are located, into lower, unlined portions of the same rivers. This sort of spillage fell at the borderline of what the CWA defines as discharge of a pollutant, resulting in a need for clarification of the issue.

Holding: The flow of water from an improved portion of a navigable waterway into an unimproved portion of the same waterway does not qualify as a “discharge of a pollutant” under the CWA.

Significance: While hardly a surprising outcome, it does expand the variety of ways in which water can be polluted with no responsible entity.

[*Tarrant Regional Water District v. Herrmann*, 133 S. Ct. 2120 \(2013\)](#) (Sotomayor, J., for a unanimous Court)

Summary: This case deals with water rights among several states party to a congressionally-approved interstate compact. Among other things, the compact set forth limits on upstream water use for a particular waterway in order to ensure adequate water for the downstream state of Louisiana. A Texas district wished to withdraw water it deemed to be beyond Oklahoma’s allocated share (and thus “unallocated”) from within Oklahoma’s borders, in violation of Oklahoma state law. The District filed suit in federal court at the same time as it requested the permit (knowing it would be denied as impermissible under state law), alleging that the state law was preempted by the compact and was also a violation of the dormant commerce clause, in that it discriminated against interstate commerce in water. Unfortunately for the Texas district, the compact provides that it should not “be deemed to ... [i]nterfere with or impair the right or power of any Signatory State to regulate within its boundaries the appropriation, use, and control of water, or quality of water, not inconsistent with its obligations under this Compact.” Although the compact also contains language providing “equal rights” among the signatory states to a certain portion of the water flow, which provides the main basis of the District’s

argument, both Oklahoma and the federal courts interpret this only as a right to withdraw water within a state's own boundaries.

Holding: The District failed on both counts. The compact did not create any cross-border rights to water. It was at best ambiguous regarding whether the percentage of water one state was permitted to withdraw could be drawn outside its borders, and more likely had envisioned no such permission, due to traditional principles of state sovereignty. Nor was there a violation of the dormant commerce clause, as none of the water accessible in Oklahoma could accurately be described as unallocated water available to other states – it was allocated to Oklahoma subject to the restrictions on the quantity the state could withdraw.

Significance: While this case is tailored to the circumstances (most of it is basic contract interpretation of the compact), and thus primarily impacts the parties to the compact at issue (and especially Oklahoma, whose state statute's constitutionality was at issue), it does provide some clarity for future issues arising under interstate compacts. In order for a state law to be preempted by a congressionally-approved interstate compact, the conflict will need to be clear. If the state law fits within an ambiguity in the compact, it will likely receive deference under this case. The Court also rejects the dormant commerce clause argument by focusing entirely on the District's erroneous interpretation of the compact; thus the case has little precedential value as there is no discussion of broader issues regarding water rights and interstate commerce.

C. Health Law

[Levin v. United States, 133 S. Ct. 1224 \(2013\)](#) (Ginsburg, J., for a unanimous Court)

Summary: The Plaintiff was a veteran who sought treatment for cataracts at a Navy hospital. After suffering injury, he sued the United States for battery under the Federal Tort Claims Act (FTCA), alleging that he withdrew his consent just before surgery. Although the FTCA excepts battery from its waiver of sovereign immunity, 28 U.S.C. § 2680(h), the Gonzalez Act, which establishes that in suits against armed forces medical personnel, a plaintiff's exclusive remedy is against the United States, 10 U.S.C. § 1089(a), carves out an exception to that general rule under the FTCA and allows plaintiffs to recover from the United States for a "negligent or wrongful act or omission in the performance of medical . . . functions," 10 U.S.C. § 1089(e). The United States argued that this provision was intended simply to reinforce the government's immunity, but the Court held that the government's interpretation of the statute required "a reading most unnatural." *Levin*, 133 S. Ct. at 1232. The Court also stated that had Congress meant what the government claimed it meant, Congress would have used different language, as it did in other parts of the Gonzalez Act and in other parts of the Code. *Id.* at 1232-33.

Holding: The Gonzalez Act removes actions against armed forces medical personnel from the protection of the intentional tort exception in the FTCA; thus, the Plaintiff can bring suit against the United States for the alleged medical battery by a Navy doctor.

Significance: This decision corrects a serious unintended consequence brought about by the lower court decisions. Specifically, the Court's interpretation of 28 U.S.C. § 2680(h) corrects the prior unequal treatment of individuals who sue over the violation of informed-consent under FTCA. The FTCA's purpose is to remove the Government's sovereign immunity against tort suits: this Act does not actually establish and define the causes of tort actions against the Government. These causes of action are determined by state law. Conditions under which patients can successfully sue doctors for informed-consent violations differ from one state to another. Some states allow patients to proceed on a regular negligence theory. On the other hand, some states allow patients to sue doctors for informed-consent violations only on battery or assault theories. Adoption of the government's interpretation of 28 U.S.C. § 2680(h) would therefore have created an intolerable "venue discrimination" between patients receiving medical treatment in different military facilities. Under the lower court decisions, patients who received care in those states that only allow assault/battery theories for pursuing a cause of action for breach of informed consent had their causes of action barred. In contrast, those who received care in states that allowed a negligence theory could proceed with their causes of action.

[*Sebelius v. Auburn Regional Medical Center*, 133 S. Ct. 817 \(2013\)](#) (Ginsburg, J., for a unanimous Court)

Summary: Plaintiffs are medical care providers who are appealing reimbursement awards that were determined more than 10 years earlier. Plaintiffs provide inpatient medical care to Medicare beneficiaries. They are reimbursed at a fixed rate per patient, with this amount adjusted upward for providers that serve a disproportionate number of low-income patients. Their reimbursements for those services are calculated annually by a fiscal intermediary. For several years, Plaintiffs' reimbursements were calculated incorrectly, to their detriment, because the fiscal intermediary was provided with inaccurate data by the Centers for Medicaid and Medicare Services (CMS) on the rates of low-income patients the Plaintiffs treated. In the normal course, a provider who is dissatisfied with the intermediary's reimbursement award can appeal that award to the Provider Reimbursement Review Board (PRRB) within 180 days of the receipt of the reimbursement letter. In 1974, the Secretary of Health and Human Services promulgated a regulation, through notice and comment rulemaking, allowing the PRRB to extend the time for appeal up to three years upon a showing of good cause. Because Plaintiffs were not made aware of the errors in their reimbursements for more than a decade, Plaintiffs requested that the doctrine of equitable tolling be applied. Under the doctrine of equitable tolling, the period for filing an action may be extended when a party "despite all due diligence . . . is unable to obtain vital information bearing on the existence of his claim." In this case, the data upon which the amount of this reimbursement is based was exclusively within the possession of the government. Plaintiffs alleged that they only became aware of these deficiencies as a result of publication of a separate decision in *Baystate Medical Center v. Mutual of Omaha Insurance Company*. In *Baystate*, it was revealed that CMS systemically understated for all providers the numbers of SSI-entitled patients in its calculations, which resulted in an underpayment to the hospitals. CMS was aware of these deficiencies and did not correct them.

The Court ruled that because Congress did not intend the 180-day time limit for appeal to be jurisdictional, the Secretary did have the authority to promulgate the regulation allowing the PRRB to extend the time for appeal. However, the doctrine of equitable tolling does not apply because the presumption of equitable tolling has never before applied to internal agency appeal deadlines and to do so in this instance would "essentially gut" the Secretary's regulation. Further, allowing for equitable tolling here would undermine the Secretary's determination that the three-year outer limit on appeals is necessary to allow the PRRB to work through its caseload and keep the reimbursement process running smoothly. Finally, Congress amended this statute six times since the three-year outer limit on appeals was promulgated and left that regulation untouched all six times.

Holding: Equitable tolling does not apply to the statute at issue, so the Plaintiffs' appeals of reimbursement determinations more than 10 years after they were issued were not timely filed.

Significance: Of immediate significance, this decision effectively ends dozens of pending lawsuits with billions of dollars in potential liability for miscalculated Medicare reimbursements. In the long run, while it appears that the precise issue addressed in this case was narrow, it has potentially far reaching implications due to the Supreme Court's suggestion that equitable tolling will not normally be permitted in administrative actions. This ruling also raises basic issues of fairness. The hospitals were deprived of the chance to exercise their appellate rights due to the government's alleged concealment of the errors in computing the payments owed to the hospital. This case leaves many with the question of whether the government should be permitted to profit from what were allegedly deliberate acts of concealment.

[Mutual Pharmaceutical Co. v. Bartlett, 133 S. Ct. 2466 \(2013\)](#) (Alito, J., majority opinion; 5-4)

Summary: Plaintiff was severely injured from a negative reaction to the generic drug sulindac manufactured by Defendant. She sued for design defect and argued that, under New Hampshire law, Defendant should have provided stronger warnings. Once a brand-name drug has filed a full New Drug Application which has been approved by the FDA, a lengthy and expensive process, a generic manufacturer can file an Abbreviated New Drug Application (ANDA) in which it asserts that the proposed drug: 1) has the same active ingredient(s), dosage, strength, and delivery method as the brand-name drug; 2) is bioequivalent to the brand-name drug; and 3) has the same labeling as that approved for the brand-name drug. Once a generic drug is approved, the manufacturer is prohibited from making any major changes to, *inter alia*, the drug's label. Defendant received authorization from the FDA to manufacture the generic sulindac after filing an ANDA. Because Defendant was prohibited under federal law from making any changes to sulindac's label, it would have been impossible for Defendant to also comply with the stronger labeling requirement that arose under New Hampshire's design defect law. Although Defendant could have avoided this conflict by opting not to sell sulindac in New Hampshire, this stop-selling option is insufficient to defeat a claim for preemption.

Holding: To the extent that it would have required Defendant to alter its drug label in violation of federal law, the New Hampshire warning-based design defect law is preempted by federal law, and Defendant cannot be held liable for design defect under New Hampshire law.

Significance: Under the FDA's premarket testing regime, to date, serious adverse effects were not detected for approximately one-half of the drugs on the market until after the drugs received regulatory approval and were made available to the general population. Under current rules, brand-name drug makers can change their labels to warn about these serious new risks without FDA approval, while generic drug makers cannot. This problem is critically important as generic drugs have become immensely popular over the past few decades. Last year 80% of prescriptions filled in the U.S. were for generic drugs. A generic manufacturer can only change product labeling if ordered by the FDA to do so or if the generic drug's brand-name equivalent has already made a similar change. Of note is that there are 434 generic drugs for which no comparable brand-name product exists. The result of the Supreme Court's decision in *Bartlett* is that the manufactures of 80% of the drugs on the market are insulated against liability for inadequate labeling. Branded drugs, in contrast, are liable if a product's safety label is inadequate. This causes a "regulatory gap" between generic and brand-name product safety. To deal with this serious problem, the FDA has issued proposed new rules that will allow generic manufacturers to change their labels. The proposed new rule will make generic and brand-name producers equal with respect to their obligation to update safety labeling as new information is discovered about serious health risks. Many hope that, when finalized, this new rule will provide much needed protection to the tens of millions of people who regularly use generic drugs.

[Wos v. E.M.A., 133 S. Ct. 1391 \(2013\)](#) (Kennedy, J., majority opinion; 6-3)

Summary: Plaintiff, a Medicaid beneficiary, suffered numerous birth defects. With her parents, she settled with the delivering doctor and hospital; the value of the settlement was not apportioned between medical expenses and other damages. Federal law requires states to recover monies received by Medicaid beneficiaries when those monies are designated as payments for medical expenses that were paid by Medicaid; however, federal law also bars states from placing liens on the property of Medicaid beneficiaries to recover Medicaid payments. When a beneficiary obtains a settlement or jury verdict, the beneficiary is viewed as having a property interest in the value of that settlement or verdict that is not apportioned specifically to medical expenses. North Carolina established a statutory presumption that one-third of any settlement or jury verdict award was attributable to medical expenses, up to the value actually paid by Medicaid. This one-third allocation is arbitrary and will often have the effect of allowing the state to recover monies that were not designated as medical payments. This is in direct conflict with the federal law prohibiting states from placing Medicaid liens on beneficiaries' property. In instances of lump-sum settlement awards or jury verdicts, the state must develop some process for accurately allocating the amount recovered.

Holding: North Carolina’s statute presuming that one-third of any settlement or jury verdict is allocable to medical expenses is in direct conflict with, and therefore preempted by, the federal Medicaid anti-lien provision.

Significance: Of immediate significance, the holding of this case prohibits states from allocating an arbitrarily high percentage of a Medicaid beneficiary’s settlement or jury verdict and using these awards as a source of revenue for closing budget deficits. The larger question many are asking is whether this decision will have a broader impact on the long-running debate over the ability of beneficiaries of “Spending Clause” statutes, like Medicaid, to obtain a remedy in court for state violations of their statutory rights. For a long period of time, it appeared that avenues were steadily being foreclosed for private enforcement of such federal statutory mandates against the states. In other words, if states ignored federal law requirements, the federal government could withhold monies, but whether individuals who received Medicaid benefits, or doctors treating these patients, could sue states for noncompliance has been the subject of great debate. By upholding the Constitution’s directive that conflicting state laws are displaced by federal law, will this case provide the support for private causes of action to force state compliance with federal requirements, such as those set forth in Affordable Care Act, known as Obama Care?

[Sebelius v. Cloer, 133 S. Ct. 1886 \(2013\)](#) (Sotomayor, J., for a unanimous Court)

Summary: Plaintiff began suffering initial symptoms of Multiple Sclerosis (MS) not long after receiving the final dose of the Hepatitis B vaccine, but was not immediately diagnosed with MS and did not learn of the connection between the Hepatitis B vaccine and MS until later still. Upon learning of the connection, she filed a petition for compensation under the National Childhood Vaccine Injury Act (NCVIA). Although the NCVIA requires that all petitions be filed within 36 months of the initial onset of the symptoms, Plaintiff argued that the filing time should have been equitably tolled, but ultimately lost on that issue. The NCVIA prohibits attorneys from charging fees to clients for bringing petitions under it, but it provides for attorney fees to be awarded on successful petitions automatically and on unsuccessful petitions when those petitions were brought in good faith and with a reasonable basis. Here the petition was “filed” under the NCVIA because the petition was delivered to the Court of Federal Claims, which accordingly forwarded the claim for assignment to a Special Master. This action meets the ordinary definition of filed, and no other portion of the NCVIA relies on a special definition of filed. Further, the NCVIA does not cross-reference the limitations provision in the attorney fees provision, but it does expressly cross-reference other provisions with the limitations provision.

Holding: The NCVIA unambiguously allows the award of attorney fees for an unsuccessful petition that was untimely filed so long as the petition was filed in good faith and with a reasonable basis.

Significance: As is often the case in vaccine injury compensation cases, determining when the limitations period begins to run is fact-based and often unclear. Although symptomatic petitioners often do not know that their illness or injury could be associated with a vaccine they received until they receive a definitive diagnosis. Petitioners also may not know or

realize at the time that initial symptoms are related to their ultimate diagnosis. Therefore, a petitioner may file a petition in good faith believing he is within the limitations period but later have the court find that he had symptoms that fall outside the limitations period resulting in the claim being dismissed. Because of the holding in *Sebelius v. Cloer*, petitioners in that situation will still be able to petition for attorney's fees and costs. This means that petitioners with good faith claims but potential timeliness issues will still be able to find an attorney willing to take their cases.

[*FTC v. Phoebe Putney Health System, Inc.*, 133 S. Ct. 1003 \(2013\)](#) (Sotomayor, J., for a unanimous Court)

Summary: Georgia state law allows political subdivisions to establish hospital authorities to operate and maintain healthcare facilities throughout the state. The goal is to aid the state in its duty to provide healthcare services to the indigent. These bodies are authorized to exercise any powers necessary to achieve the law's goals, including, *inter alia*, purchasing, leasing, building, and repairing facilities. The hospital authorities are not authorized to operate for profit. The hospital authority in this case operated one of two hospitals in a county, and, combined, those hospitals accounted for the vast majority of acute medical services provided in the several surrounding counties. The hospital authority planned to acquire the second hospital, and the FTC filed an administrative complaint alleging that this plan would substantially reduce competition in the market for acute medical services and create a virtual monopoly in violation of antitrust laws.

The hospital authority argued that it was immune from antitrust liability under the state-action doctrine, which immunizes local governments and non-governmental entities carrying out state regulatory functions from antitrust liability for actions that are the foreseeable result of state legislation. A result is foreseeable if the legislature is authorizing the entity to act in a way that is inherently anticompetitive. This immunity is disfavored and is thus applied narrowly. The Georgia statute neither expressly states that it intends the act to have anticompetitive effects, nor demonstrates that the legislature affirmatively contemplated it having an anticompetitive effect. The statute generally grants hospital authorities the same powers as private corporations, and, because those powers are not usually used anticompetitively, the grant of those powers alone does not demonstrate that the legislature contemplated that they would be used anticompetitively. Further, none of the other specific goals of hospital authorities or restrictions placed on hospital authorities show that the legislature intended for the hospital authorities to act anticompetitively. Thus, anticompetitive actions were not a foreseeable result of the legislation.

Holding: The Georgia legislature did not clearly articulate an intention to allow hospital authorities to act anticompetitively, so they are not immune from antitrust liability under the state-action doctrine.

Significance: The Court clarified that the state-action doctrine should apply narrowly when sub-state and non-state actors claim immunity from antitrust liability. Citing the amici brief filed by 20 states in support of the FTC's position, the Court reasoned that loose application of the clear-articulation test would "attach significant unintended

consequences to local bodies, effectively requiring states to disclaim any intent to displace competition to avoid inadvertently authorizing anticompetitive conduct." Of interest to the debate over the merits of the special treatment that hospitals in many states receive as a result of claiming non-profit status, the hospital authority, which was the respondent in the case, argued, *inter alia*, that it should get lighter antitrust treatment because, since it is a nonprofit, it is unlikely that it will use the merger to engage in antitrust activity. This case adds to the discussion over whether a more lax antitrust regime is justified for nonprofits; certainly, this case raises questions over whether nonprofits will systematically act in ways that are more pro-consumer than their for-profit counterparts.

[FTC v. Actavis, Inc., 133 S. Ct. 2223 \(2013\)](#) (Breyer, J., majority opinion; 5-3)

Summary: In bringing a new drug to market, the brand-name manufacturer must submit a New Drug Application (NDA) to the FDA for review and approval, which involves a long, costly testing process. Once a brand-name drug has been approved, the Hatch-Waxman Act, 21 U.S.C. § 355, allows a would-be generic manufacturer of the same drug to rely on the approval already given to the brand-name drug by submitting an Abbreviated New Drug Application (ANDA) that requires the generic to certify, *inter alia*, that its drug has the same active ingredient(s), dose, strength, and delivery method as, and is the bioequivalent of the brand-name drug. The generic manufacturer must also certify that any patents claimed in the brand-name's NDA either have expired or will expire, will not be infringed, or are invalid. Claiming that a patent is invalid or will not be infringed automatically counts as patent infringement. If the patent-holder brings an infringement suit within 45 days, the FDA must withhold approval of the generic for 30 months before approving the generic, unless the dispute is resolved in favor of the generic manufacturer before then. The first generic manufacturer to file an ANDA and certify that a patent is invalid or will not be infringed enjoys a 180-day exclusivity period which begins to run on the day when that manufacturer begins to market the generic drug. This exclusivity period can prove extremely valuable (possibly as much as several hundred million dollars) to the generic manufacturer who, during that period, has the exclusive right to market a generic version of that drug.

This has led to the development of reverse payment settlements within the pharmaceutical industry to resolve these patent disputes. In a reverse payment settlement, in order to end the patent litigation, the generic manufacturer, the alleged infringer, agrees not to bring the generic drug to market for a certain period of time—generally less than the time remaining on the patent. In exchange, the patent-holder agrees to pay the generic manufacturer a sum of money for each year that the generic is withheld from the market. Because the first-to-file generic manufacturer has the 180-day exclusivity period, which does not begin to run until that generic manufacturer actually markets the generic product, if the brand-name manufacturer enters into such a settlement with that generic manufacturer, the brand-name manufacturer can keep all competition from generic manufacturers out of the marketplace. The FTC has filed numerous complaints against companies entering into these settlements alleging that by agreeing to keep competition out of the market and share in monopoly profits, these companies are violating multiple antitrust laws. Disparate outcomes in these cases have led to a circuit split on the validity of these settlements.

Holding: Reverse settlement payments may be challenged but are not presumptively illegal. In determining the validity of a reverse payment settlement, a court should take a “rule of reason” approach and look at the size of the payment, the scale of the payment in relation to the payor’s anticipated litigation costs, other services which it might represent payment for, and the lack of any other convincing justification to determine whether it carries a risk of significant anticompetitive effects. This analysis appropriately balances the competing concerns at the heart of patent and antitrust laws.

Significance: This decision resolves a circuit split on the correct test to apply to claims that reverse payment settlements violate antitrust laws. It will likely limit the frequency of these settlements in the future and, according to the dissent, could decrease the frequency of settlements generally, particularly in patent cases.

IV. CIVIL PROCEDURE

A. Class Actions

[*Comcast Corp. v. Behrend*, 133 S. Ct. 1426 \(2013\)](#) (Scalia, J., majority opinion; 5-4)

Summary: In a 5-4 decision, the Supreme Court reversed the certification of a Rule 23(b)(3) damages class that included more than one million current and former subscribers to cable-television services. The class alleged that Defendant Comcast Corporation (Comcast) had engaged in a series of transactions that permitted Comcast to “cluster” or concentrate its operations in what was referred to as the Philadelphia Designated Market Area. The class alleged that the clustering violated Sections 1 and 2 of the Sherman Antitrust Act. The class also provided expert testimony that Comcast’s actions created four different types of antitrust impact and resultant cable subscription price increases. The District Court certified a Rule 23(b)(3) damages class but only as to one of the four theories of antitrust impact – the so-called “overbuilder” theory. The District Court also determined that damages from the overbuilder theory could be calculated on a classwide basis. The Third Circuit affirmed class certification over Comcast’s objection that the damages model included all four theories of antitrust impact and not just damages from the sole theory on which the class was certified. The Supreme Court granted certiorari.

Holding: Certification of the Rule 23(b)(3) class was improper because the lower court refused to entertain arguments against certification that would also be pertinent to the merits inquiry. This, the majority concluded, ran afoul of previous Supreme Court precedent. The majority took on the task of applying the appropriate certification standard (a decision with which the dissenting justices took issue) and concluded that the Plaintiff class fell “far short” of establishing that damages were capable of measurement on a classwide basis. Instead, according to the majority, “[q]uestions of individual damage calculations [would] inevitably overwhelm questions common to the class.”

Significance: This case may have limited significance, or it may, ultimately, be used to limit significantly the Rule 23(b)(3) damages class action. The majority opinion emphasized,

relying *inter alia*, on *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541(2011), that its rejection of class certification turned on the following established class certification principles: (1) a party “must affirmatively demonstrate . . . compliance” with Rule 23 requirements, *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013) (quoting *Dukes*, 131 S. Ct. at 2551-52); (2) Rule 23 “does not set forth a mere pleading standard”; instead, parties must be prepared to provide evidentiary proof of Rule 23(a) requirements, *id.* (quoting *Dukes*, 13 S. Ct. at 2551-52); and (3) the proof required to certify a class will often overlap with proof on the merits, *id.* (citing *Dukes*, 131 S. Ct. at 2551). These same principles, the majority concluded, apply not just to the Rule 23(a) class action prerequisites, but also to the Rule 23(b) requirements. The *Comcast* majority perhaps provided a new twist, stating that, “[if] anything, Rule 23(b)(3)’s predominance criterion is even more demanding than Rule 23(a).” *Id.* The majority’s application of the class certification standard, moreover, seemed to imply that, to certify a Rule 23(b)(3) damages class, the plaintiff must establish that damages are capable of measurement across the entire class. If so, this could be the death knell of the Rule 23(b)(3) class.

Perhaps the Court majority did not provide a new twist, though. Justices Ginsburg and Breyer wrote the dissenting opinion, in which, Justices Sotomayor and Kagan joined. The dissenting opinion highlights that the majority’s opinion “breaks no new ground” regarding class action certification. In particular, the dissent emphasizes, the majority decision should not be construed to require, as a Rule 23(b)(3) prerequisite, that classwide injury must be “measurable ‘on a class-wide basis.’” While it is true that “questions of law or fact common to class members” must “predominate” over questions affecting only individual class members, this does not mean that, in a Rule 23(b)(3) class, individual damage calculations preclude Rule 23(b)(3) certification. Instead, the dissent concluded that the *Comcast* ruling is “good for this day and case only. In the mine run of cases, it remains the ‘black letter rule’ that a class may obtain certification under Rule 23(b)(3) when liability questions common to the class members predominate over damages questions unique to class members.” Early returns show that the *Comcast* ruling may, indeed, be “good for [that] day and case only,” as both the Sixth and Seventh Circuits, in cases remanded to them by the Supreme Court for reconsideration in light of *Comcast*, have reaffirmed the “black letter rule.” See *Butler v. Sears, Roebuck & Co.*, Nos. 11-8029, 12-8030 (7th Cir. Aug. 22, 2013)(Posner, J.) (where, unlike *Comcast*, a liability-only class action is certified, separate hearings to determine damages of individual class members or sub-classing to determine damages of various groups of class members is permissible); *Glazer v. Whirlpool Corp.*, No. 10-4188 (6th Cir. July 18, 2013) (class certified for liability purposes only and leaving damages for later proceedings is within strictures of Supreme Court’s decisions in *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, 133 S. Ct. 1184 (2013) and *Comcast Corp. v. Behrend*, 113 S. Ct. 1426 (2013)).

[*Genesis HealthCare Corp. v. Symczyk*, 133 S. Ct. 1523 \(2013\)](#) (Thomas, J., majority opinion; 5-4)

Summary: Section 16(b) of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 216(b), permits employees to file a “collective” action, on behalf of themselves and others “similarly situated,” for certain violations of the FLSA. In *Genesis*, Plaintiff Laura Symczyk, a

registered nurse, filed a collective action in which she alleged that her prior employer, Genesis HealthCare Corp. (Genesis), violated her rights under the FLSA and those of similarly situated employees, by uniformly deducting 30 minutes for breaks and mealtimes, although employees sometimes performed compensable work during those time periods. Genesis served a Rule 68 offer of judgment on Symczyk that included unpaid wages, and “such reasonable attorneys’ fees, costs, and expenses . . . as the Court may determine,” and stated that the offer would expire within ten days. When Plaintiff Symczyk allowed the offer to expire, Genesis argued that the case should be dismissed on subject matter jurisdiction grounds because it had provided an offer of complete relief, and, thus, Symczyk’s claim was mooted because she retained no personal stake in the litigation. Symczyk objected that the Rule 68 offer of judgment should not be used to “pick off” named plaintiffs and prevent a valid collective action for enforcement of FLSA requirements. She did not argue in the District Court or the Third Circuit what both she and the United States, as amicus curiae, would argue before the Supreme Court – that her claim had not been rendered moot because the Rule 68 offer had lapsed without entry of judgment. The District Court dismissed the action because (1) no other persons had joined the lawsuit; and (2) the Rule 68 offer of judgment had mooted Symczyk’s suit by providing complete relief for her claim. The Third Circuit reversed, concluding that the Rule 68 offer had mooted Symczyk’s claim, but determining, nevertheless, that the case should be sent back to the District Court for “conditional certification,” and if such certification were permitted, for the District Court to relate the certification back to the date of the filing of the Complaint. Such a “certification” on remand would have had the effect of supplying additional plaintiffs whose cases were not moot and, thus, of permitting the case to proceed.

Holding: The Court noted, but failed to resolve, the split in circuits on whether an unaccepted Rule 68 offer of judgment that fully satisfies a plaintiff’s claim is sufficient to moot the plaintiff’s claim. Concluding that Plaintiff Symczyk had waived the Rule 68 offer-of-judgment issue, the Court assumed that Symczyk’s claim had been rendered moot. Assuming that the lone plaintiff’s claim had been rendered moot and noting that no other plaintiff had opted into the action, the Supreme Court held that the purported FLSA collective action did not remain justiciable because the Plaintiff had “no personal interest in representing putative, unnamed claimants, nor any other continuing interest that would preserve her suit from mootness.” *Genesis*, 133 S. Ct. at 1532.

Significance: The case, at a minimum, signals that five members of the Court view the statutory collective action – a statutory cousin to the class action -- with disfavor. If it is ultimately determined that a Rule 68 offer of judgment renders a collective action plaintiff’s claim moot, the *Genesis* majority has indicated that it will not preserve the action, through analogy to class action mootness principles, until other employees have an opportunity to decide whether to join the collective action. The ultimate significance of the case will depend, thus, on how the Court answers the question it assumed in *Genesis* – does an unaccepted, Rule 68 offer of judgment that fully satisfies the collective action plaintiff’s claim render that claim moot? If the Court ultimately answers that question in the affirmative, the *Genesis* decision paves the way for defendants to “pick off” collective action plaintiffs and prevent FLSA collective actions from proceeding. The circuit courts have split

on the Rule 68 issue. The dissenting justices would answer that question with a resounding “No.” They emphasized that, like any other unaccepted settlement offer, an unaccepted Rule 68 offer becomes “a legal nullity, with no operative effect.” *Genesis*, 133 S. Ct. at 1533 (Kagan, J., dissenting). Indeed, Rule 68 specifically provides that “[a]n unaccepted offer is considered withdrawn.” The dissent, thus, exhorts the circuit courts to reexamine their Rule 68 analysis: “[F]riendly suggestion to the Third Circuit: Rethink your mootness-by-unaccepted-offer theory. And a note to all other courts of appeal: Don’t try this at home.” *Id.* at 1543 (Kagan, J., dissenting). The majority did not reach the issue but did drop a footnote stating that circuit courts on both sides of the divide have “recognized that a plaintiff’s claim may be satisfied even without the plaintiff’s consent.” *Genesis*, 133 S. Ct. at 1529 n.4 (majority opinion). So, *Genesis* has drawn the battle lines on the Rule 68 question, which, in turn, will impact whether defendants may “pick off” collective action plaintiffs through Rule 68 offers of complete relief. Stay tuned.

[*Standard Fire Insurance Co. v. Knowles*, 133 S. Ct. 1345 \(2013\)](#) (Breyer, J., for a unanimous Court)

Summary: Plaintiff Greg Knowles filed a proposed class action against Defendant Standard Fire Insurance Company (Standard Fire) in state court in Arkansas, alleging that Standard Fire had wrongfully failed to include certain general contractor fees in loss payments made to insureds. Knowles attempted to prevent removal of the action to federal court under removal provisions of the Class Action Fairness Act (CAFA), which permit removal of class actions when the proposed class includes more than 100 members; there is minimal diversity; and the amount in controversy exceeds \$5 million. Knowles sought to preclude removal by stipulating that the plaintiff class would not seek damages in excess of \$5 million. He, thus, alleged in the Complaint that “Plaintiff and the Class stipulate they will seek to recover total aggregate damages of less than five million dollars.” Knowles likewise attached an affidavit to the Complaint that stipulated that Knowles and the class would not “at any time during this case . . . seek damages for the class . . . in excess of \$5 million.” When Defendant Standard Fire removed the case to federal court, Knowles timely moved to remand, arguing that the stipulation to less than CAFA’s \$5 million amount-in-controversy minimum precluded federal court jurisdiction. The District Court found that the class’s damages would have exceeded \$5 million by a small amount, but for the stipulation. Concluding that the stipulation was effective to limit the proposed class’s damages to less than CAFA’s amount in controversy, the District Court remanded the case to state court. The Eighth Circuit exercised its discretion under CAFA to decline review of the remand order, but the Supreme Court granted Standard Fire’s petition for writ of certiorari.

Holding: Before class certification, a proposed named plaintiff’s stipulation cannot bind proposed class members, but is binding only on his own behalf. Thus, a named plaintiff’s pre-certification stipulation that damages are less than CAFA’s \$5 million amount-in-controversy requirement is ineffective to avoid removal.

Significance: The decision resolves a split in circuits and clarifies that named plaintiffs in proposed class action law suits may not avoid removal to federal court by stipulating, pre-certification, to less than the amount in controversy.

B. Arbitration

[*American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 \(2013\)](#) (Scalia, J., majority opinion; 5-3)

Summary: Plaintiffs, Italian Colors Restaurant (Italian Colors) and other merchants who accept American Express cards, signed a standard-form agreement with American Express Company and a wholly owned subsidiary (collectively, Amex) that required all disputes to be resolved by arbitration. The agreement further provided that there would be “no right or authority for any Claims to be arbitrated on a class basis.” The Plaintiff-merchants subsequently filed a class action against Amex, alleging that Amex had, in violation of the antitrust laws, used its monopoly power regarding *charge cards* to require Plaintiffs to accede to *credit card* rates approximately 30 percent higher than competitors’ credit card rates. Plaintiffs alleged an illegal tying agreement under the Sherman Antitrust Act and sought treble damages. Amex countered by moving to compel individual arbitration regarding the alleged tying arrangement. Plaintiffs opposed the motion and submitted a declaration of an economist that concluded that the required expert analysis to pursue the suit would cost at least several hundred thousand dollars and might exceed \$1 million. The economist also opined that the maximum plaintiff’s award in the case would be \$12,850, and, even when trebled to \$38,549, the cost of pursuing the action, on an individual basis, would be prohibitively expensive. Plaintiffs noted that the agreement with Amex also foreclosed all other options for bringing the suit in an economically feasible manner. The agreement forbade any kind of joinder or consolidation of claims or parties; it included a confidentially provision that precluded Plaintiffs from arranging to produce a common expert report with other merchants; and it precluded any shifting of costs to Defendants, even if Plaintiffs prevailed. Further, Amex refused to enter stipulations that might prevent the need for an expert report or reduce the issues on which expert information would be necessary. The dissenting opinion characterized the agreement as one that “cuts off not just class arbitration, but any avenue for sharing, shifting, or shrinking necessary costs.” It concluded that the agreement, in essence, provided Italian Colors with two unappealing options: “Spend way, way, way more money than your claim is worth, or relinquish your Sherman Act rights.” On these facts, the District Court granted the motion to compel individual arbitration, but the Second Circuit reversed.

Holding: The Federal Arbitration Act (FAA) requires that courts “rigorously enforce” a waiver of class arbitration – even one in a standard form contract – because it constitutes the party’s agreement. This rule governs, absent a contrary congressional command, even if the claim at issue is created by a federal statute and even if plaintiff’s cost of individually pursuing the claim would far exceed the potential recovery. The majority further (1) found no congressional command that would preserve the antitrust claim at issue, though the Court recognized that Congress sought to facilitate antitrust claims by, for instance, providing for treble damages; and (2) held inapplicable, over a vigorous dissent, the common law exception that would invalidate agreements that prevent “effective vindication” of federal statutory rights.

Significance: The case emphasizes that a majority of the Supreme Court believes arbitration agreements – even those in standard form contracts and on which one party had no real opportunity for input – must be enforced, even to the extent of extinguishing any opportunity for plaintiffs to pursue a congressionally created claim. The Court indicated, as it often does, that “[n]o legislation [including the Sherman Act, which was at issue] pursues its purposes at all costs[.]” see *Italian Colors*, 133 S. Ct. 2304, 2309 (2013) (citing *Rodriguez v. United States*, 480 U.S. 522, 535-26 (1987) (per curiam)), but one wonders, in light of the Court’s FAA jurisprudence, whether the Court has not, in fact, amended that proposition to be, “[n]o legislation – except the Federal Arbitration Act – pursues its purposes at all costs.” The five-justice majority also appears willing to reduce to a virtual nullity the common-law “effective vindication” exception to enforcement of arbitration agreements, which would render unenforceable arbitration agreements that prevent effective vindication of congressionally-created, statutory causes of action.

Indeed, the effective denial of other federal, statutory claims in light of mandatory arbitration agreements that preclude class arbitration has already begun. In *Southerland v. Ernst & Young, LLP*, Plaintiff Southerland filed a class action on behalf of herself and other similarly situated employees of Ernst & Young, LLP (Ernst & Young) to recover unpaid overtime wages. Southerland’s individual unpaid wages amounted to only \$1,867.02. When Ernst & Young moved to compel individual arbitration of the claims, pursuant to employment agreements that included a provision that all disputes be arbitrated and that “disputes pertaining to different employees will be heard in separate proceedings,” the District Court denied the motion, noting that enforcing the ban on class arbitration would effectively immunize Ernst & Young from all claims by Plaintiff. The Second Circuit, whose opinion was overturned in *Italian Colors*, reversed. Applying *Italian Colors*, the Second Circuit concluded that (1) no contrary congressional command in the FLSA precluded class action waivers in arbitration agreements; and (2) the effective vindication exception does not apply where a class waiver provision in an arbitration agreement renders a FLSA claim economically infeasible. See *Southerland v. Ernst & Young*, No. 12-304cv (2d Cir. August 9, 2013). Thus, it appears that, absent action by Congress, arbitration agreements may be crafted to preclude class arbitration, to render all other dispute resolution options economically infeasible, and, hence, to immunize defendants from liability under congressionally created, federal-law claims.

[*Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 \(2013\)](#) (Kagan, J., for a unanimous Court)

Summary: Pediatrician, John Sutter, entered into a contract with Oxford Health Plans (Oxford), under which Sutter agreed to provide medical care to those in Oxford’s network, and Oxford, a health insurance company, agreed to pay for services provided. Alleging that Oxford failed to pay amounts owing under the contract fully and promptly, Sutter filed a class action alleging breach of contract and other state-law claims on behalf of himself and other New Jersey physicians who had contracted with Oxford. Oxford moved to compel arbitration based on a provision of the contract between Sutter and Oxford that provided, in part, as follows: “No civil action concerning any dispute arising under this Agreement shall be instituted before any court and all such disputes shall be submitted to final and binding arbitration in New Jersey. . . .” The trial court granted the motion compelling

arbitration, and the parties agreed that the arbitrator would decide whether the contract permitted class arbitration. Focusing on the text of the agreement and the intent of the parties, the arbitrator concluded that the agreement permitted class arbitration. Oxford, thereafter, filed in federal district court to vacate the decision, arguing that the arbitrator had “exceeded [his] powers” under § 10(a)(4) of the Federal Arbitration Act (FAA). The District Court denied the motion, and the case proceeded to arbitration. Mid-arbitration, the Supreme Court decided *Stolt Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 664 (2010), which provided that class arbitration may be required only if the parties agreed by contract to class arbitration. Upon Oxford’s prompt motion for reconsideration in light of *Stolt Nielsen*, the arbitrator again concluded that the arbitration agreement authorized class arbitration. Oxford returned to federal court with a motion to vacate the arbitrator’s second decision. The District Court again denied the motion, and the Third Circuit affirmed.

Holding: The extremely limited review of arbitration permitted under § 10(a)(4) of the Federal Arbitration Act means that a court must uphold an arbitrator’s decision that a contract authorizes class arbitration, even if the court is convinced that the arbitrator erred in its contractual interpretation. “Because the parties ‘bargained for the arbitrator’s construction of their agreement,’ an arbitral decision ‘even arguably construing or applying the contract’ must stand, regardless of a court’s view of its (de)merits.” *Oxford*, 133 S. Ct. at 2068 (citations omitted). The question on review is not whether the arbitrator is right, but whether she interpreted the contract.

Significance: The *Oxford* decision may ultimately be of limited significance in terms of whether the arbitrator or a court will decide if an ambiguous arbitration agreement authorizes class arbitration. The *Oxford* Court noted in footnote 2 of the decision that the availability of class arbitration may be a “question of arbitrability.” Questions of “arbitrability” are “gateway matters” that are presumptively for courts – rather than arbitrators – to decide. *Oxford*, 133 S. Ct. at 2068 n.2. Because the parties in *Oxford* had agreed that the arbitrator would determine the issue, the Court had no opportunity to consider the “arbitrability” issue, but look for the Court to resolve this in the near future, as its flagging of the underlying issue is unmistakable. Further, the *Oxford* decision, reaffirming the extreme deference accorded an arbitrator’s “arguable” construction of a contract, should encourage those who draft arbitration agreements and who often disfavor class arbitration, to include explicit exclusions of class arbitration in future agreements.

[*Nitro-Lift Technologies, L.L.C. v. Howard*, 133 S. Ct. 500 \(2012\)](#) (per curiam)

Summary: Plaintiffs Eddie Lee Howard and Shane D. Schneider entered confidentiality and noncompetition agreements with their employer, Nitro-Lift Technologies, L.L.C. (Nitro-Lift). The agreements also contained an arbitration clause that provided that “[a]ny dispute, difference, or unresolved question . . . shall be settled by arbitration . . .” When Howard and Schneider, thereafter, left Nitro-Lift and began working for one of its competitors, Nitro-Lift served them with a demand for arbitration. Howard and Schneider responded by filing suit in the District Court of Johnston County, Oklahoma, seeking a declaration that the noncompetition agreements were null and void. The state court

dismissed the Complaint, concluding that the issues were for an arbitrator, rather than the court, to resolve. Before the Oklahoma Supreme Court, Nitro-Lift also argued that decisions of the United States Supreme Court construing the Federal Arbitration Act required that arbitrators, rather than courts, resolve the contract construction issues. Despite these cases, the Oklahoma Supreme Court held that a court may review the validity of an underlying contract, and it concluded that the noncompetition agreements in the contracts at issue were “void and unenforceable” under Okla. Stat., Tit. 15, § 219A.

Holding: It is a “mainstay” of the substantive law of the Federal Arbitration Act (FAA) that attacks on the validity of a contractual agreement, as opposed to attacks on the validity of an arbitration clause, are to be determined initially by the arbitrator and not by a state or federal court. In response to the Oklahoma Supreme Court’s reasoning that a more “specific” Oklahoma state statute should govern over the more general Federal Arbitration Act, the Supreme Court rejoined that the ancient interpretive principle that the specific controls the general “applies only to conflict between laws of equivalent dignity. . . . There is no general-specific exception to the Supremacy Clause.” *Nitro-Lift Technologies*, 133 S. Ct. at 504.

Significance: The Court used the vehicle of a unanimous, per curiam opinion to reprimand the Oklahoma Supreme Court for assuming that state law could control an issue governed by federal law – the FAA and Supreme Court interpretation of the FAA. The Court emphasized that “[i]t is the responsibility of this Court to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law.” *Nitro-Lift*, 133 S. Ct. at 503 (quoting *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312 (1994)). Interestingly, this is the second year in a row that the Supreme Court has resorted to the use of a unanimous, per curiam opinion to chastise a state supreme court for failing to follow the FAA and Supreme Court decisions construing the FAA. See *Marmet Health Care Center v. Brown*, 132 S. Ct. 1201 (2012) (concluding that Supreme Court of West Virginia “misread[] and disregard[ed] the precedents of th[e] [Supreme] Court interpreting the FAA[] [and] did not follow controlling federal law implementing that basic principle” when the state supreme court held unenforceable “all predispute arbitration agreements that apply to claims alleging personal injury or wrongful death against nursing homes”).

C. Attorney’s Fees & Costs

[*Lefemine v. Wideman*, 133 S. Ct. 9 \(2012\)](#) (per curiam)

Summary: Plaintiff Steven Lefemine and other members of Columbia Christians for Life (CCL) demonstrate and carry graphic pictures of aborted fetuses during their demonstrations. In November 2005, Lefemine and other CCL members demonstrated in Greenwood County, South Carolina. Because of complaints about the graphic signs, a county police officer warned Lefemine that he would be cited for breach of the peace if he continued to carry the sign. Lefemine stated that he had a First Amendment right to carry the sign, but he, ultimately, discontinued the demonstration because he feared being ticketed. The following year, Lefemine’s attorney sent a letter to the Greenwood County

Sheriff stating that Lefemine and CCL would return, would carry graphic signs, and would pursue legal remedies to protect their First Amendment rights, if necessary. When the sheriff's department responded that it had violated no rights, would insist that demonstrators relinquish graphic signs, and would, moreover, ticket those who refused, CCL elected not to protest in the county for the next two years.

In October 2008, Lefemine filed a Complaint under 42 U.S.C. § 1983 against the Greenwood County police officers alleging First Amendment violations and seeking nominal damages, a declaratory judgment, a permanent injunction, and attorney's fees. Finding that Defendants had violated Lefemine's First Amendment rights, the District Court entered a permanent injunction, enjoining Defendants "from engaging in content-based restrictions on display of graphic signs" during demonstrations. The District Court also (1) denied nominal damages, concluding that the illegality of Defendants' conduct had not been clearly established at the time of Defendants' actions; and (2) denied attorney's fees, concluding that fees were not warranted "[u]nder the totality of the facts" of the case. *Lefemine v. Davis*, 732 F. Supp. 2d 614, 627 (D.S.C. 2010). The Fourth Circuit affirmed the denial of attorney's fees, holding that Lefemine was not a "prevailing party" for purposes of § 1988, the Civil Rights Attorney's Fees Act of 1976. The Fourth Circuit concluded that the District Court's order did not "alte[r] the relative positions of the parties" because it only prohibited "unlawful" conduct by Defendants and only ordered the Defendants to "comply with the law and safeguard constitutional rights in the future." *Lefemine v. Davis*, 672 F.3d 292, 302-03 (4th Cir. 2012)

Holding: A plaintiff who secures a permanent injunction is a "prevailing party," for purposes of the § 1988 attorney's fee statute, even if he receives no award of damages, whenever the permanent injunction constitutes "actual relief on the merits of [the] claim that materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Lefemine*, 133 S. Ct. at 11 (citing *Farrar v. Hobby*, 506 U.S. 103, 1110-12 (1992)).

Significance: The Court emphasized that it has "repeatedly" held that injunctive and declaratory relief will ordinarily meet the "prevailing party" standard § 1988. Because Plaintiff desired and obtained the right to carry graphic signs during demonstrations, in the face of police threat of criminal sanctions, the permanent injunction created the required material alteration in the parties' relationship, even though the District Court's order was a general instruction to the Defendants to "comply with the law."

[*Marx v. General Revenue Corp.*, 133 S. Ct. 1166 \(2013\)](#) (Thomas, J., majority opinion; 7-2)

Summary: When Plaintiff Olivia Marx defaulted on student loans guaranteed by Edfund, a division of the California Student Aid Commission, Edfund hired General Revenue Corporation (GRC) to provide collection services. Marx thereafter sued GRC, alleging unfair collection practices under the Fair Debt Collection Practices Act (FDCPA). After a one-day bench trial, the District Court determined that Marx had not established any violations of the FDCPA. GRC, as the "prevailing" party in the litigation, sought "costs" (but not attorney's fees) in the amount of \$7,779.16, for witness fees, witness travel expenses, and

deposition transcript fees. Plaintiff Marx opposed the request for costs, arguing, first, that Rule 54(d)(1) gives courts discretion to award costs to a “prevailing” party, “[u]nless a federal statute . . . provides otherwise;” and, second, that a provision of the FDCPA “provide[d] otherwise.” See 15 U.S.C. § 1692k(a)(3). Marx argued that the language of § 1692k(a)(3) explicitly prohibited prevailing defendants in a FDCPA case from obtaining costs unless the District Court also found that the plaintiff had brought the action “in bad faith and for the purpose of harassment.” Section 1692k(a)(3) of the FDCPA provides as follows: “On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney’s fees reasonable in relation to the work expended and costs.” Because the District Court had made no finding that she had brought the action in bad faith and for the purpose of harassment, Marx argued that GRC was not entitled to costs. The District Court rejected the argument that § 1692k(a)(3) displaced the court’s general discretion to award costs. It, thereafter, disallowed some of the costs requested by GRC and awarded GRC \$4,543.03 in costs. A divided panel of the Tenth Circuit affirmed that § 1692k(a)(3) did not displace a court’s discretion under Rule 54(d)(1) to award costs to prevailing defendants.

Holding: Section 1692k(a)(3) of the FDCPA does not restrict a prevailing defendant’s right to receive costs of litigation to instances in which a District Court finds that the plaintiff brought the action “in bad faith and for the purpose of harassment.” Because § 1692k(a)(3) addresses only situations in which a plaintiff files a claim in bad faith and for the purpose of harassment, but it is silent regarding cases in which a district court does not make a finding of bad faith and purpose to harass, § 1692k(a)(3) does not displace the background principle of Rule 54(d)(1) that a court has discretion to award costs to prevailing parties, including prevailing defendants.

Significance: The case settles a conflict in circuits, concluding that a prevailing defendant in an FDCPA case may recover costs, pursuant to Rule 54(d)(1), even in the absence of a finding that the plaintiff filed the suit in bad faith and for the purpose of harassment. Additionally, for those interested in arguments in statutory construction, including the context of a statute, that may overcome what appears to be the plain language of a statute, the typical dictionary definition of terms, the *expression unius, exclusio alterius* canon, and the canon against surplusage, the *Marx* case is a must read.

V. BUSINESS

A. Business Law

[*American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 \(2013\)](#) (Scalia, J., majority opinion; 5-3)

Summary: American Express places a clause in all of its contracts requiring customers to submit disputes to arbitration and to waive any right to bring a class action arbitration proceeding. Plaintiff restaurant nevertheless tried to bring a class action arbitration claiming violations of the federal antitrust laws.

Holding: The contractual waiver will be enforced. Nothing in the federal antitrust laws COMPELS an entitlement to bring a claim in a class action format. The fact that it will never be cost effective to bring such suits on an individual basis (i.e., damages for particular individual's harm would never come close to the cost to litigate the issue) is irrelevant since this is not a technical prohibition on bringing such a suit to enforce the relevant law.

Significance: After this case it is absolutely clear that a waiver of class arbitration contained in a contract is enforceable due to the primacy of the Federal Arbitration Act. If a person signs a contract with a waiver of class action arbitration clause, the only way to escape it is (1) to show a specific statutory directive that gives an actual entitlement to a class action proceeding, or (2) to establish contract defenses such as fraud, duress, or unconscionability that would invalidate the contract. Thus, many meritorious claims will now never be litigated due to such clauses, and businesses are likely to insert such clauses in their form contracts to insulate themselves from such claims.

[*Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, 133 S. Ct. 1184 \(2013\)](#) (Ginsburg, J., majority opinion; 6-3)

Summary: Connecticut Retirement brought a class action federal securities fraud suit against Amgen based on allegations that Amgen publicly made material misrepresentations regarding some of its key products. To prove the underlying case, specific reliance on the false statements is required unless the “fraud on the market” theory applies. Here, the district court found it did and certified the class action. Amgen contended that the plaintiff must also prove another element, the “materiality” of the false statements, prior to certification of the class action.

Holding: Materiality is an issue common to all members of the class and thus does not need to be resolved prior to the certification of the class action.

Significance: Requiring proof of materiality at the class certification stage would have been a significant impediment to securities fraud class actions. The Court’s decision, unsurprisingly, retains current law and refuses to increase the plaintiff’s burden in pursuing such class actions. More significant is the dicta in the dissents and in Justice Alito’s concurrence which hint that the Court may soon be willing to reconsider the appropriateness of the “fraud on the market” theory itself in a future case.

[*Bullock v. BankChampaign, N.A.*, 133 S. Ct. 1754 \(2013\)](#) (Breyer, J., for a unanimous Court)

Summary: Mr. Bullock borrowed funds from a trust, for which he was the trustee, and invested the funds for his own benefit. While he ultimately repaid the loans with interest, a court ordered him to disgorge his profits from the investments made with the loans (more than \$250,000) since the loans were prohibited by basic tenets of trust law. The parties conceded that Bullock did not in fact know that he violated trust law when he borrowed from the trust for his personal use. Bullock then filed for bankruptcy seeking to have the judgment discharged due to his inability to pay. The lower courts found that his debt was not dischargeable in bankruptcy since it involved “defalcation.”

Holding: The court defined “defalcation” as requiring an element of intent, which on remand should enable Mr. Bullock to qualify for a discharge on the agreed facts. Essentially, defalcation under the bankruptcy law was given its penal code meaning so that a discharge is allowed unless he actually knew, or recklessly disregarded the risk, that his conduct was wrongful.

Significance: Normally the Court broadly construes the discharge exceptions, but not so here.

[*PPL Corp. v. Commissioner*, 133 S. Ct. 1897 \(2013\)](#) (Thomas, J., for a unanimous Court)

Summary: PPL Corp., a U.S. company, owned a large interest in a U.K. energy company. The U.K. imposed a one-time “windfall tax” on this U.K. subsidiary. The tax was applied only to certain companies that had been recently privatized by the U.K. government, and the rate was applied to the difference between their initial privatization price and an evaluation of their current value (which was derived based on an earnings approach). The intent of the U.K. tax was to claw-back some of the benefit that had been lost to the fisc when these companies were privatized at too low a price. Generally U.S. companies are allowed to credit foreign income taxes they pay against their U.S. income tax liability, but only if the foreign tax has the “predominant character” of an “income tax” in the U.S. sense. The question was whether this one-time U.K. tax was in fact a creditable “income” tax.

Holding: In substance the U.K. tax was a tax on the income the U.K. subsidiary earned even though the U.K. law did not itself characterize or directly calculate the tax as one based on income.

Significance: This opinion reaffirms substance over form in tax cases and should make it easier to claim a credit for foreign taxes that are described for foreign law purposes as not income-based, but which can be economically recast by the payor as in fact taxes on its foreign income.

[*US Airways, Inc. v. McCutchen*, 133 S. Ct. 1537 \(2013\)](#) (Kagan, J., majority opinion; 5-4)

Summary: McCutchen was injured in a car accident and received medical treatment paid for under his employer’s (US Airways) health plan. That health plan contained a provision requiring an employee to reimburse the plan if the employee later recovered monetary damages from a third party. McCutchen ultimately filed suit due to the accident and recovered approximately \$100,000, of which \$40,000 was paid to his attorney as a contingent fee payment. US Airways sued to recover the net \$60,000 received by McCutchen, and he attempted to void the contractual reimbursement obligation using various equitable defenses.

Holding: Under the Employee Retirement Income Security Act (ERISA), an employer is permitted to enforce the contractual terms of its plans, and equitable defenses are not permitted to disturb the contractually agreed to results. Hence, McCutchen must reimburse the health plan. However, since the contract did not specify how litigation costs

were to be treated, the Court will apply equitable principles to fill in this contractual gap and allow McCutchen to recover part of his attorney fees from the plan.

Significance: Going forward there is no doubt that the contractual terms of ERISA-covered plans will be enforced, as long as they are not ambiguous, without resort to equitable doctrines. While this may be a hardship to particular claimants, it does create certainty regarding the primacy of these contracts, which arguably benefits all ERISA-covered benefit plans in the long run.

B. Intellectual Property Law

[*Already, LLC v. Nike, Inc.*, 133 S. Ct. 721 \(2013\)](#) (Roberts, C.J., for a unanimous Court)

Summary: Nike brought a trademark infringement suit against Already, and Already filed a counterclaim for declaration that Nike's registered mark is invalid. Nike, thereafter, issued an unconditional and irrevocable covenant not to sue and moved to dismiss both its claim and Already's counterclaim on the grounds that the covenant extinguished the case or controversy. The Court stated that given the breadth of the covenant not to sue, "it could not reasonably be expected" that Nike would resume its enforcement efforts against Already. Justice Kennedy's concurrence (joined by three other Justices) warned that covenants not to sue ought not to be taken as an automatic means for a trademark owner to abandon an action without incurring the risk of ensuing adverse adjudication.

Holding: The case is moot because Nike's covenant not to sue prohibited it from bringing any further trademark infringement suits against Already and, thus, there is no longer a case or controversy.

Significance: Unconditional and irrevocable covenants not to sue will divest the federal courts of jurisdiction.

[*Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351 \(2013\)](#) (Breyer, J., for a unanimous Court)

Summary: This case presented the issue of whether the Copyright Act's "first sale" doctrine, which permits the owner of a lawfully purchased copy to resell it without permission of the copyright owner, applies to copies of copyrighted works made outside the U.S. and later imported and sold in the U.S. The Court rejected the argument that the phrase "lawfully made under this title," found in Copyright Act's "first sale" provision, 17 U.S.C. § 109, applies only to copies made in the U.S. The Court rather, adopted the position that the phrase imposes a non-geographical limitation and that the doctrine applies where, as here, copies are manufactured abroad with permission of the copyright owner.

Holding: The "first sale" doctrine applies to copies lawfully manufactured abroad and sold in the U.S.

Significance: U.S. copyright owners cannot prevent the importation into the U.S. of gray market works intended for sale overseas.

[*Gunn v. Minton*, 133 S. Ct. 1059 \(2013\)](#) (Roberts, C.J., for a unanimous Court)

Summary: The issue was whether the federal courts have exclusive subject matter jurisdiction over state-based legal malpractice claims that arise out of patent infringement litigation. The Court concluded that the malpractice claim at issue may be heard in state court because the federal issue presented, i.e., whether the patentee could have successfully asserted “experimental use” negation to the “on sale” or “public use” bar, does not raise a substantial federal issue. The Court noted that, no matter how the state courts resolve federal issue, the outcome of prior federal patent litigation will not change and that federal courts are not bound by state court precedents.

Holding: The federal courts’ exclusive jurisdiction over patent cases does not apply to state-law legal malpractice claims in patent cases.

Significance: State courts have jurisdiction over malpractice suits even in cases where the underlying action is subject to exclusive federal jurisdiction.

[*Bowman v. Monsanto Co.*, 133 S. Ct. 1761 \(2013\)](#) (Kagan, J., for a unanimous Court)

Summary: Monsanto, the holder of a patent on genetically modified soybean seeds, sued a farmer who, contrary to the terms of the licensing agreement, purchased commodity seed from a local grain elevator for late season planting and saved seed harvested from that planting for replanting in following seasons. Monsanto sued for patent infringement; the farmer raised the patent exhaustion doctrine as a defense. Under this doctrine, the authorized sale of a patented article gives the purchaser, or any subsequent owner, the right to use or resell the article. The Court concluded that the exhaustion doctrine does not apply in this case. While the farmer could resell patented soybeans he purchased, he could not make additional patented soybeans without Monsanto’s permission.

Holding: Growing new plants that contain the patented genetic material constitutes copying patented material and is, therefore, not protected by the doctrine of patent exhaustion.

Significance: This was a major victory for the biotech industry, insofar as the Court rejected a broad interpretation of the patent exhaustion doctrine.

[*Association for Molecular Pathology v. Myriad Genetics, Inc.*, 133 S. Ct. 2107 \(2013\)](#) (Thomas, J., for a unanimous Court)

Summary: This case raised the issue of whether isolated naturally occurring DNA is patentable subject matter under 35 U.S.C. § 101. The patented invention (the DNA) is used to help detect increased risk of breast and ovarian cancer. Products of nature are not eligible for patent protection. “Myriad did not create anything,” Justice Thomas asserted.

“To be sure, it found an important and useful gene, but separating that gene from its surrounding genetic material is not an act of invention.” The Court clarified that claims directed to non-naturally occurring complementary DNA (cDNA) are eligible for patent protection.

Holding: Because naturally occurring DNA is a product of nature, it is not eligible for patent protection.

Significance: This was a major loss for the biotech industry. This is the latest case from the Court in which the Court has cut back on what qualifies as patentable subject matter. See *Bilski v. Kappos*, 130 S. Ct. 3218 (2010)(machine or transformation test is not sole test for determining whether claimed process recited patentable subject matter); *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, 132 S. Ct. 1289 (2012) (“administering and determining “ process that helps doctors treat patients with autoimmune diseases is not eligible for patent protection)

[*FTC v. Actavis, Inc.*, 133 S. Ct. 2223 \(2013\)](#) (Breyer, J., majority opinion; 5-3)

Summary: In bringing a new drug to market, the brand-name manufacturer must submit a New Drug Application (NDA) to the FDA for review and approval, which involves a long, costly testing process. Once a brand-name drug has been approved, the Hatch-Waxman Act, 21 U.S.C. § 355, allows a would-be generic manufacturer of the same drug to rely on the approval already given to the brand-name drug by submitting an Abbreviated New Drug Application (ANDA) that requires the generic to certify, *inter alia*, that its drug has the same active ingredient(s), dose, strength, and delivery method as, and is the bioequivalent of the brand-name drug. The generic manufacturer must also certify that any patents claimed in the brand-name’s NDA either have expired or will expire, will not be infringed, or are invalid. Claiming that a patent is invalid or will not be infringed automatically counts as patent infringement. If the patent-holder brings an infringement suit within 45 days, the FDA must withhold approval of the generic for 30 months before approving the generic, unless the dispute is resolved in favor of the generic manufacturer before then. The first generic manufacturer to file an ANDA and certify that a patent is invalid or will not be infringed enjoys a 180-day exclusivity period which begins to run on the day when that manufacturer begins to market the generic drug. This exclusivity period can prove extremely valuable (possibly as much as several hundred million dollars) to the generic manufacturer who, during that period, has the exclusive right to market a generic version of that drug.

This has led to the development of reverse payment settlements within the pharmaceutical industry to resolve these patent disputes. In a reverse payment settlement, in order to end the patent litigation, the generic manufacturer, the alleged infringer, agrees not to bring the generic drug to market for a certain period of time-generally less than the time remaining on the patent. In exchange, the patent-holder agrees to pay the generic manufacturer a sum of money for each year that the generic is withheld from the market. Because the first-to-file generic manufacturer has the 180-day exclusivity period, which does not begin to run until that generic manufacturer actually markets the generic product, if the brand-

name manufacturer enters into such a settlement with that generic manufacturer, the brand-name manufacturer can keep all competition from generic manufacturers out of the marketplace. The FTC has filed numerous complaints against companies entering into these settlements alleging that by agreeing to keep competition out of the market and share in monopoly profits, these companies are violating multiple antitrust laws. Disparate outcomes in these cases have led to a circuit split on the validity of these settlements.

Holding: Reverse settlement payments may be challenged but are not presumptively illegal. In determining the validity of a reverse payment settlement, a court should take a “rule of reason” approach and look at the size of the payment, the scale of the payment in relation to the payor’s anticipated litigation costs, other services which it might represent payment for, and the lack of any other convincing justification to determine whether it carries a risk of significant anticompetitive effects. This analysis appropriately balances the competing concerns at the heart of patent and antitrust laws.

Significance: This decision resolves a circuit split on the correct test to apply to claims that reverse payment settlements violate antitrust laws. It will likely limit the frequency of these settlements in the future and, according to the dissent, could decrease the frequency of settlements generally, particularly in patent cases.

VI. THE HODGE-PODGE OF ARGLE-BARGLE

A. Family Law

[*Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 \(2013\)](#) (Alito, J., majority opinion; 5-4)
The “Baby Veronica” Case

Summary: Father, who is Cherokee Indian, learned that his fiancé, who is Hispanic, was pregnant. The estranged couple ended their long-distance relationship several months later. Father replied to a text message from Mother indicating he would rather relinquish his parental rights than pay child support. Mother arranged for the adoption of the child, and the white couple she selected supported her emotionally and financially during the pregnancy and birth. Father was first notified of the pending adoption four months after the child’s birth. He was served with legal papers for the adoption which he hastily signed just before deployment for military duty in Iraq. The next day he realized the papers were for a third-party adoption rather than sole rights to Mother and immediately contacted a lawyer. The case was stayed for fifteen months while Father was stationed in Iraq, with temporary custody awarded to the adoptive parents. After trial, the state court awarded custody to Father under the authority of the federal Indian Child Welfare Act of 1978 (ICWA) which protects parents of Indian children against involuntary termination of parental rights and creates a placement preference for Indian parents. The Act was passed to remediate a racialized history of removing Indian children from tribal communities for assimilation.

Holding: The ICWA does not apply to protect the custodial rights of a Native American biological father who never had custody of his child. Justice Thomas concurred on the grounds that there was no constitutional basis of power for the ICWA and federal regulation of Indian child custody proceedings.

Significance: The decision to extend legal protections to only those biological fathers who have preexisting physical or legal custody of their children is consistent with the Court's decisions holding that the Constitution does not compel the protection of a unwed father's parental interest unless he has established biology plus a social, family-like relationship. *See Stanley v. Illinois*, 405 U.S. 645 (1972); *Michael H. v. Gerald D.*, 491 U.S. 110 (1989). Other Court precedents hold that an unwed, biological father's consent to adoption is not required unless he has provided financial support during the pregnancy or initiated other social connection with the child. *See Quilloin v. Walcott*, 434 U.S. 246 (1978); *Lehr v. Robertson*, 463 U.S.248 (1983). *Adoptive Couple* potentially narrows the reach of the ICWA and raises questions about the continued viability of the federal law that creates different child custody standards based on the race of the child. The result directed no specific action as to the custody of Veronica, now 4, who has lived for the last eighteen months with her father and his extended family. On remand, the state court ordered the immediate return of the child to the white adoptive parents, ignoring the usual residential parent presumption in change of custody cases. Father refuses to relinquish custody of his daughter and court challenges continue.

[Chafin v. Chafin, 133 S. Ct. 1017 \(2013\)](#) (Roberts, C.J., for a unanimous Court)

Summary: Father, a U.S. citizen, and Mother, a U.K. citizen, married in Germany where their daughter was born. Father was deployed to Afghanistan, and child lived with Mother in Scotland for three years. Parents reunited in Alabama, but Father then filed for divorce and Mother was deported for overstaying her tourist visa and because of father's allegations of domestic violence. Mother brought suit in U.S. district court directing the child's return to Scotland as the location of her "habitual residence" and the proper place for child custody proceedings pursuant to the Hague Convention on the Civil Aspects of International Child Abduction, ratified and implemented by the United States in 1988. *See* 42 U.S.C. § 11601. Father's appeal was dismissed as moot because child had already been returned.

Holding: A district court's order as to international child custody jurisdiction is appealable like any other order. The fact that the child has already left the country does not moot the case.

Significance: Child custody proceedings on the merits of the Chafins' case will continue in Scotland where the U.K. courts have rejected automatic re-return orders shuffling the child. The decision has the potential to increase rival custody proceedings by its encouragement of appeals, notwithstanding the Court's appreciation for the potential for delay and uncertainty and the associated risk to the well-being of the child.

[Hillman v. Maretta, 133 S. Ct. 1943 \(2013\)](#) (Sotomayor, J., for a unanimous Court)

Summary: A federal employee designated his wife as the beneficiary of his group life insurance policy. They subsequently divorced. He remarried in 2002 and died in 2008 without changing his beneficiary to his second wife. The second wife sued under a Virginia statute providing that the first wife was liable to the widow for insurance proceeds paid based on a failure to change the beneficiary designation following a divorce.

Holding: The federal employee group insurance law preempts state law providing for automatic change in beneficiary following a divorce.

Significance: The case resolves a circuit and state split, applying the same rule of preemption of federal insurance law for veterans and servicemen.

B. Miscellaneous

[Gabelli v. SEC, 133 S. Ct. 1216 \(2013\)](#) (Roberts, C.J., for a unanimous Court)

Summary: In 2008, the Securities and Exchange Commission (SEC) filed a civil enforcement action under the Investment Advisors Act (IAA) against Bruce Alpert and Marc Gabelli for conduct that spanned a period from 1999 through 2002. Alpert and Gabelli moved to dismiss the action as untimely, citing the five-year limitations period in 28 U.S.C. § 2462, a general limitations statute that governs many penalty provisions in the U.S. Code, and arguing that the SEC filed the action outside the requisite five-year period. The District Court dismissed the action, but the Second Circuit reversed. The Second Circuit held that a “discovery rule” should be read into the five-year limitations period in § 2462 for “claims that sound in fraud.” *SEC v. Gabelli*, 653 F.3d 49, 60 (2nd Cir. 2011). Under the discovery rule, the Second Circuit concluded that “the statute of limitations for a particular claim does not accrue until that claim is discovered, or could have been discovered with reasonable diligence, by the plaintiff.” *Id.* at 59.

Holding: A civil enforcement action alleging fraudulent conduct and governed by the five-year limitations period in 28 U.S.C. § 2462, accrues when the defendant’s allegedly fraudulent conduct occurs, not when, pursuant to a “discovery rule,” the government discovered or reasonably could have discovered the fraudulent conduct.

Significance: The case clarifies that a discovery rule will not extend the government’s time to file enforcement actions based on fraudulent conduct in actions in which the statute of limitations is set by 28 U.S.C. § 2462. A unanimous Court relied on the plain language of the statutory provision and on a number of policy arguments to determine that government enforcers have only five years from the date of the allegedly unlawful conduct in which to file suit. Among the policy bases for the decision are the following: (1) government enforcement agencies differ from private plaintiffs – agencies, such as the SEC, are specifically charged with ferreting out fraud and are provided many tools for doing so, while private parties are not held to “live in a constant state of investigation” or to “spend [their] days looking for evidence that [they] were lied to or defrauded,” *Gabelli*, 133 S. Ct. at

1222; (2) government enforcers seek different relief – government enforcement actions seek to punish and to label wrongdoers, while private parties generally seek compensation for injury; (3) statutes of limitations promote security and justice and provide that “even wrongdoers are entitled to assume that their sins may be forgotten,” *id.* at 1221 (citations omitted); and (4) litigation and administrative efficiency concerns counsel in favor of denying a discovery rule absent express statutory provision, since it is difficult to determine when “the government,” as opposed to a private party, has or reasonably should have had knowledge of fraud, and § 2462 provides no information on which government actor’s knowledge is relevant. *Id.* at 1223-24.

[*Dan’s City Used Cars, Inc. v. Pelkey*, 133 S. Ct. 1769 \(2013\)](#) (Ginsburg, J., for a unanimous Court)

Summary: Dan’s City Used Cars, Inc. (Dan’s City), a towing company, towed and, ultimately, disposed of Robert Pelkey’s car, despite notice that Pelkey intended to pay accumulated storage fees and reclaim the car. Pelkey sued Dan’s City in state court, alleging state law claims under both the New Hampshire Consumer Protection Act and New Hampshire’s statutory and common-law regarding a bailee’s duty to use reasonable care in dealing with a bailor’s property. The state-law claims were premised on Dan’s City’s failure to comply with New Hampshire statutory requirements for disposing of abandoned vehicles. Dan’s City countered that all state-law claims were expressly preempted by § 14501(c)(1) of the Federal Aviation Administration Authorization Act (FAAAA), which provides as follows: “[A] State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property.” The New Hampshire trial court determined that all state claims were preempted by § 14501(c)(1), but the New Hampshire Supreme Court reversed, holding that the state-law claims at issue were not preempted because the disposal of the car months after it was towed did not constitute a service “with respect to the transportation of property” and because the disposal of the vehicle was too remote to constitute a part of the towing “service.”

Holding: Section 14501(c)(1) of the FAAAA does not preempt state-law claims arising from the storage and later disposal of a car *after* the towing of the car has ended because (1) claims related to the post-towing disposal of a vehicle relate to conduct in disposing of a vehicle, not conduct regarding the “transportation of property;” and (2) claims regarding later disposal of a towed vehicle are not sufficiently related to the towing “service” provided by the motor carrier to be preempted.

Significance: The case resolves a split in state supreme court decisions regarding whether state-law claims arising from a towing company’s post-towing disposal of a vehicle are preempted by § 14501(c)(1). Further, the Court emphasized that the phrase “with respect to the transportation of property” in § 14501(c)(1) “massively limits” the state-law claims that come within the preemptive reach of § 14501(c)(1). The Court’s previous similar statement was in a dissenting opinion only. In *Dan’s City*, the Supreme Court emphasizes in a unanimous opinion that state claims relating to the “price, route, or service” of a motor

carrier will not be preempted unless the state law claims also concern the motor carrier's "transportation" or "movement" of property.

[*American Trucking Assns., Inc. v. City of Los Angeles*, 133 S. Ct. 2096 \(2013\)](#) (Kagan, J., for a unanimous Court)

Summary: To respond to community concerns regarding pollution, congestion, and safety that might accompany the proposed expansion of the Port of Los Angeles (Port), the City of Los Angeles's Board of Harbor Commissioners amended the tariff (a municipal ordinance) governing the Port. The amendments required the Port's terminal operators to enter into "concession agreements" with "drayage" companies, i.e., trucking companies that load and unload cargo from ships docking at the Port. The tariff required, *inter alia*, that the concession agreements between terminal operators and drayage companies include agreements by the drayage companies (1) to display on trucks a number for reporting safety and environmental breaches; and (2) to provide a plan for off-street parking. The tariff also established criminal penalties, including fines, to be imposed on terminal operators for "each and every day" that a terminal operator permitted access to the Port by a drayage truck that had not registered by entering into a concession agreement with the terminal operator. The concession agreement included penalties for drayage companies that signed and then violated the requirements of the concession agreement. The American Trucking Associations (ATA), which represents trucking companies, including drayage companies, brought suit against the City of Los Angeles and the Port, arguing that the placard and off-street parking provisions of the concession agreement were preempted by § 14501(c)(1) of the Federal Aviation Administration Authorization Act (FAAAA). Section 14501(c)(1) provides that "a State [or local government] may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." The City of Los Angeles and the Port argued that the concession agreements were not "other provision[s] having the force and effect of law," but merely a way of advancing their commercial interests in expanding the Port. The District Court held that § 14501(c)(1) did not preempt the placard and off-street parking provisions of the concession agreements and also disagreed with other arguments of the ATA. The Ninth Circuit affirmed the District Court's ruling regarding the preemptive scope of § 14501(c)(1) and affirmed most other aspects of the District Court decision.

Holding: The placard and off-street parking provisions of the concessions agreements "hav[e] the force and effect of law" and, hence, are preempted – even though the Port included the provisions in the concession agreements to further the Port's business and commercial interests. This is because the Port used classic regulatory authority, including criminal penalties for noncompliance, rather than voluntary bargaining, to induce companies to sign the agreements. Because the contract provisions have "the force and effect of law," and because there was no dispute that the contract provisions "related to a price, route, or service of any motor carrier . . . with respect to the transportation of property," the provisions are expressly preempted by § 14501(c)(1) of the FAAAA.

Significance: Contract provisions required by state or local governments for the purpose of furthering the government's proprietary interests may have "the force or effect of law" and may, thus, be expressly preempted by § 14501(c)(1) of the FAAAA, if the parties to the contracts are coerced to agree to the contract terms by the government's use of regulatory tools available to the government only, such as criminal sanctions for failing to enter the agreements.

[*Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 \(2013\)](#) (Roberts, C.J., for a unanimous Court)

Summary: The Supreme Court reached a 9-0 decision that generated a total of 4 opinions, with seven justices signing on to different concurring opinions. The case involved interpreting the jurisdictional scope of the Alien Tort Statute (ATS), passed as part of the Judiciary Act of 1789, which authorizes tort claims to be brought in federal court for torts "committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. The Petitioners were Nigerian nationals now residing in the U.S. who sued Dutch, British, and Nigerian oil companies alleging serious human rights violations committed in Nigeria. The Second Circuit dismissed all claims on the basis that the law of nations does not recognize corporate liability. The Court requested briefing on the broader issue of whether and under what circumstances the statute recognizes a cause of action for extraterritorial activities occurring within the territory of another sovereign. The Court held that the actions of these corporations, all performed on Nigerian soil, did not provide a basis for jurisdiction in U.S. courts. Concerned about courts intruding on sovereigns and disrupting foreign policy and relations, Chief Justice Roberts for the Court applied the presumption of extraterritoriality to the statute. Finding no explicit exceptions for this cause of action, the Court dismissed the suit. The concurring opinions variously sought to explain different modes of analyzing other potential causes of action under the ATS in which there might be an opportunity for finding jurisdiction despite the conduct which constituted the alleged violation having occurred within the sovereignty of another state.

Holding: The presumption against extraterritoriality applies to the ATS; because the actions of these corporations were all performed on Nigerian soil, they did not provide a basis for jurisdiction in U.S. courts.

Significance: Even a unanimous decision does not yield clarity for lower courts in the future to know just what ties to the United States will suffice to allow a tort claim for wrongs committed outside of the United States that are egregious violations of international law norms.

[*Maracich v. Spears*, 133 S. Ct. 2191 \(2013\)](#) (Kennedy, J., majority opinion; 5-4)

Summary: An exception in the Driver's Privacy Protection Act (DPPA), 18 U.S.C. § 2721(b)(4), provides for releasing information for "use in connection with" or "investigation in anticipation of" litigation. The Respondent plaintiffs' attorneys obtained, through a FOIA request, contact information of drivers who had bought cars in South Carolina in order to both seek information about alleged dealer violations of state law and

offer to represent those who provided it. They sent letters to determine if car dealers other than those they already knew about from their current clients were charging unlawful fees, and if so, offered to represent those buyers in their pending "private attorney general" litigation against the offending car dealers. The attorneys needed to match buyers with dealerships in order to have standing to pursue the claims against those dealerships. The plaintiffs won the underlying suit (*Herron*) against the car dealers, but some of the solicited car buyers filed this suit claiming violation of the DPPA. The Court narrowly construed the exception, held that attorney solicitation of clients is not a permissible purpose under the (b)(4) litigation exception, found that the letters could be solicitations, and remanded the case for a determination of whether the predominant purpose of the letters was solicitation. This potentially exposes the respondents to millions – what the dissent characterized as "astronomical" – in liquidated damages. The dissent noted that in the *Herron* lawsuit, the Respondent attorneys had been under a duty to protect the interests of the very buyers from whom they sought information to determine if the dealers had been acting illegally, and that offering to represent buyers in accord with the ethical rules of the state and pursuant to their duty should be recognized as in connection with that pending litigation.

Holding: An attorney's letter, if "predominantly" solicitation of clients for a lawsuit, does not fall within an exception of the DPPA that permits the disclosure of personal information for use "in connection with" judicial and administrative proceedings, including "investigation in anticipation of litigation."

Significance: This interpretation could make the Respondent plaintiff's attorneys liable for extensive damages because they used contact information of drivers who had bought cars in South Carolina to both seek information about alleged dealer violations of state law and offer to represent those who provided it, even though the attorneys brought a successful lawsuit on behalf of those buyers. A "minimalist" interpretation of a statute can override state interpretations and have massive unexpected consequences.

[*Arkansas Game & Fish Commission v. United States*, 133 S. Ct. 511 \(2012\)](#) (Ginsburg, J., for a unanimous Court; 8-0)

Summary: From 1993 to 2000, the U.S. Army Corps of Engineers occasionally deviated from its schedule of water releases from the Clearwater Dam at the request of farmers. These releases temporarily extended flooding into timber-growing areas owned and managed by the Arkansas Game and Fish Commission. Although the Corps agreed to stop the deviations, the Commission sued, claiming that the temporary flooding during tree-growing season caused the destruction of timber and damage to the terrain. It argued that these effects constituted a taking of property that entitled the Commission to compensation. Although the Court had already established both that government-induced flooding can be a taking and that temporary takings can be compensable, the Government argued that temporary, government-induced flooding cannot be considered a compensable taking.

Holding: There is no categorical exemption from Takings Clause liability for temporary, government-induced flooding.

Significance: The Court rejected a proposed new categorical rule on Takings Clause liability in specific factual circumstances.

[*Chaidez v. United States*, 133 S. Ct. 1103 \(2013\)](#) (Kagan, J., majority opinion; 7-2)

Summary: When Petitioner, a lawful permanent resident of the United States since 1977, pled guilty to mail fraud in 2004, she was unaware of the immigration consequences of her plea, and her attorney did not advise her of them. Immigration officials initiated removal proceedings against her in 2009 based on the mail fraud conviction. While Petitioner was attempting to overturn that conviction based on ineffective assistance of counsel, the Court decided *Padilla v. Kentucky*, 559 U.S. 356 (2010), holding that the Sixth Amendment requires defense attorneys to inform non-citizen clients of the deportation risks of guilty pleas. Under *Teague v. Lane*, a new procedural rule does not apply retroactively to disturb a final conviction. The issue was whether the *Padilla* holding constituted a new rule rather than merely the application of the existing rule on ineffective assistance to a new situation.

Holding: Because the question of whether the Sixth Amendment requires attorneys to inform clients of collateral consequences of convictions such as deportation was still an open question before *Padilla*, the Court's rule in that case was a new rule. Therefore, it does not apply retroactively to the Petitioner's earlier conviction.

Significance: As the majority treated this case as an ordinary application of the retroactivity rule, there is little reason to think this decision will have great impact on either the Court's retroactivity jurisprudence or on immigration law. It does add certainty to many plea deals entered into prior to *Padilla*.

[*Horne v. Department of Agriculture*, 133 S. Ct. 2053 \(2013\)](#) (Thomas, J., for a unanimous Court)

Summary: California raisin growers refused to comply with the Secretary of Agriculture's Order requiring them to contribute to a reserve pool of raisins and were subject to civil damages imposed by the USDA. The Order was issued under the authority of the Agricultural Marketing Agreement Act of 1937 (AMAA), which regulates "handlers" of certain agricultural commodities. The growers argued that as producers, they were not handlers and therefore not subject to the Order. They also argued that the Order violated the Fifth Amendment prohibition against taking property without just compensation. The Ninth Circuit concluded that the growers were handlers subject to the Order under the AMAA, but it also concluded that it lacked jurisdiction over the takings claim, finding that because Petitioners raised their takings claim as producers rather than as handlers, they were required to raise the claim in the Court of Federal Claims.

Holding: Because the Order only imposed duties on the Petitioners in their capacity as handlers, their takings claim is necessarily raised in the same capacity, so the Ninth Circuit has jurisdiction to decide the takings claim.

Significance: Although the case seems to open the door to constitutional challenges to government fines, it was decided unanimously on jurisdictional grounds, so that door is not yet opened.

[*Kloeckner v. Solis*, 133 S. Ct. 596 \(2012\)](#) (Kagan, J., for a unanimous Court)

Summary: Plaintiff was a federal government employee who complained of sex and age discrimination in the form of a hostile work environment and was then fired. Based on this serious employment action, she filed a claim with the Merit Systems Protection Board, an independent agency within the civil service system. When that claim was dismissed on procedural grounds, she appealed in federal district court. Because her claim was an employment discrimination case implicating Title VII, the civil service statute provides special, complicated procedures. The government argued that because her claim had been dismissed on procedural rather than substantive grounds, her appeal should have been to the Federal Circuit rather than to federal district court.

Holding: Judicial review in this circumstance is appropriately sought in federal district court.

Significance: Not much; a unanimous Court had little sympathy for the circuitous and strained jurisdictional argument presented by the government.

[*Lozman v. City of Riviera Beach*, 133 S. Ct. 735 \(2013\)](#) (Breyer, J., majority opinion; 7-2)

Summary: Petitioner Lozman owned a house that floated. He had it towed to various locations before settling at the marina owned by the City of Riviera Beach. After several disputes and an attempt to evict Lozman, the City brought a federal admiralty suit *in rem* against the floating home. Lozman argued lack of admiralty jurisdiction because his home was not a “vessel,” which is defined as “every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.”

Holding: A thing is a vessel for purposes of admiralty jurisdiction if a reasonable observer would consider it to be designed to any practical degree for carrying people or things on water. Although capable of being towed on water with people and things transported in it, this house—with no steering mechanism, no means of propulsion, and no design elements particularly conducive to travel—was not a vessel any more than a washtub or a door taken off its hinges.

Significance: These cases could be important in borderline maritime cases involving such structures as offshore oil platforms and floating casinos. Workers assigned to vessels are seamen, with certain legal protections. The scale in such cases has shifted slightly against a “vessel” finding.

[University of Texas Southwestern Medical Center v. Nassar, 133 S. Ct. 2517 \(2013\)](#) (Kennedy, J., majority opinion; 5-4)

Summary: Respondent Nassar was a physician of Middle Eastern descent who was both a University of Texas faculty member and a staff physician at the University-affiliated Parkland Memorial Hospital. Respondent felt that one of his supervisors, Dr. Levine, was biased against him because of his religious and ethnic background and complained to Dr. Levine's supervisor, Dr. Fitz. After arranging to continue working for the Hospital, Respondent resigned his teaching post and sent a letter to Dr. Fitz and others stating that he was leaving because of Dr. Levine's harassment. Dr. Fitz, upset at Dr. Levine's public humiliation and wanting public exoneration for her, persuaded the Hospital to withdraw its job offer to Respondent. Respondent filed an employment discrimination suit under Title VII, alleging (1) racial and religious harassment by Dr. Levine resulting in Respondent's constructive discharge, and (2) retaliation by Dr. Fitz for Respondent's complaining about Dr. Levine's behavior. The jury found for Respondent on both claims. The Fifth Circuit vacated the constructive discharge claim but upheld the retaliation claim, reasoning that retaliation claims, like claims of status-based discrimination, require only a showing that retaliation was a motivating factor for the adverse employment action, rather than the but-for cause of that action.

Holding: Under Title VII, a plaintiff alleging retaliation must prove that, but for the retaliatory motive, the employer would not have taken the adverse action. Although Congress in 1991 established that Title VII liability holds when an employer has a discriminatory motive, even if the employer also had other, legitimate motives, the Court held that this express rule regarding status-based discrimination did not extend to retaliation claims.

Significance: Retaliation claims under Title VII are now significantly more difficult to prove, and other civil rights statutes regarding the burden of proof for retaliation claims contain similar language that could result in the same conclusion.

[Vance v. Ball State University, 133 S. Ct. 2434 \(2013\)](#) (Alito, J., majority opinion; 5-4)

Summary: Petitioner Vance sued her employer, Ball State University, alleging a racially hostile work environment in violation of Title VII. Her claim was based on alleged racial harassment by Davis, another employee of the University. Under Title VII, an employer is vicariously liable for the actions of a co-worker only if the employer was negligent in controlling the work environment. In contrast, an employer is strictly liable for the harassing conduct of a supervisor that results in a tangible employment action such as firing or failing to promote an employee. The Equal Employment Opportunity Commission's enforcement guidance on this issue states that an individual is a supervisor if the individual is authorized "to undertake or recommend tangible employment decisions affecting the employee" or if the individual is authorized "to direct the employee's daily work activities." In this case, the courts below entered and upheld summary judgment against Petitioner based on the conclusion that Davis was not Petitioner's supervisor

because Davis did not have the power to hire, fire, demote, promote, transfer, or discipline Petitioner.

Holding: An employee is a “supervisor” for purposes of vicarious liability under Title VII only if empowered to take tangible employment action against the victim.

Significance: This decision makes it significantly more difficult to hold employers liable for the actions of individuals who have the power to direct the work activities of other employees.

[*Sekhar v. United States*, 133 S. Ct. 2720 \(2013\)](#) (Scalia, J., for a unanimous Court)

Summary: Petitioner Sekhar was convicted of extortion under the Hobbs Act for threatening to expose an alleged affair by the general counsel of the State Comptroller of New York. The general counsel had recommended that the Comptroller not invest in a fund managed by Sekhar’s firm, and Sekhar sought to force the general counsel to reverse that recommendation. The Act defines extortion to mean “the obtaining of property from another, with his consent” induced by particular kinds of wrongful threats. The property alleged to have been sought by Sekhar was the general counsel’s recommendation to approve the investment.

Holding: Attempting to compel an investment recommendation does not constitute “the obtaining of property from another” under the Hobbs Act.

Significance: There is now one fewer way to be convicted of a certain kind of blackmail.

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