RECENT DEVELOPMENTS IN APPELLATE ADVOCACY

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I. INTRODUCTION

The United States Supreme Court charted a new course in several areas of appellate law during its past term. The Court began the 2018–2019 term with only eight justices while Brett Kavanaugh's confirmation proceedings continued in the Senate. Justice Kavanaugh joined the Court a few days later and made an immediate impact during the term, authoring decisions in a number of consequential cases. The Court handed down significant new rulings in the areas of business law, civil rights, and election law. Simultaneously, however, the Court refrained from making the far-reaching changes to administrative law that some observers had predicted in cases that presented challenges to agency actions and rules.

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II. BUSINESS LAW

Several significant business law cases were decided in the 2018–2019 term, including class arbitration, antitrust, securities, and trademark law. While some opinions built incrementally on previous decisions from the Court, others broke course in significant ways. The cases show that textualism is as dominant as it has ever been in shaping the Court's decisions. However, the compositions of the majorities were by no means predictable and did not consistently fall along partisan lines.

In *Lamps Plus, Inc. v. Varela*,[1] the question presented to the Court was whether the Federal Arbitration Act ("FAA")[2] prohibits "class arbitration when an [arbitration] agreement is … 'ambiguous about the availability of such arbitration.'"[3] In 2016, a hacker gained access to Lamp Plus's systems and stole the information of about 1,300 employees.[4] A fraudulent federal income tax return was filed in the name of Frank Varela, a Lamps Plus employee.[5] Varela, like the majority of Lamps Plus employees, had signed an arbitration agreement when he joined Lamps Plus.[6] However, after the data breach, Varela joined a class action suit with other employees whose tax information had been compromised against Lamps Plus in federal court in California.[7] Lamps Plus filed a motion to compel individual arbitration and dismiss the lawsuit.[8] The district court granted Lamps Plus' motion but, instead of compelling individual arbitration, the court ordered class-wide arbitration.[9] Lamps Plus appealed and the United States Court of Appeals for the Ninth Circuit affirmed.

First, the Ninth Circuit found the United States Supreme Court's 2010 decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*,[10] in which the Court held that "a court may not compel arbitration on a class wide basis when an agreement is 'silent' on the availability of such arbitration," did not apply. The Ninth Circuit distinguished the case from *Stolt-Nielsen*, where "the parties had *stipulated* that their agreement was silent about class arbitration," and noted here there was no such stipulation between Varela and Lamps Plus.[11] Next, the Ninth Circuit found that the arbitration agreement between Varela and Lamps Plus was ambiguous as to class

1. 139 S. Ct. 1407 (2019).
2. 9 U.S.C.A. §§ 1–16 (2019); *id.* §§ 201–208; *id.* §§ 301–307.
3. 139 S. Ct. at 1412.
4. *Id.*
5. *Id.*
6. *Id.* at 1413.
7. *Id.*
8. *Id.*
9. *Id.*
10. 559 U.S. 662 (2010).
11. Lamps Plus, Inc. v. Varela, 139 S. Ct. at 1412, 1413.

arbitration.[12] Under California law, which the Ninth Circuit applied, a contractual ambiguity should be construed against the drafter—the "*contra proferentem*" doctrine.[13] Thus, because Lamps Plus drafted the arbitration agreement, the Ninth Circuit accepted Varela's interpretation of the agreement authorizing class arbitration.[14]

Chief Justice Roberts, writing for the five-justice majority,[15] first addressed the question of appellate jurisdiction.[16] Varela contended that the Ninth Circuit lacked jurisdiction because section 16 of the FAA only provides for appeal from the denial of a motion to compel, and not from the grant of such a motion.[17] But the Court found that "[t]his argument [to be] beside the point … because Lamps Plus relie[d] . . . on a different provision of section 16, section 16(a)(3) [for jurisdiction]."[18] Section 16(a)(3) permits appeal from a final decision with respect to arbitration under the FAA.[19] And previously, in *Green Tree Financial Corp.-Ala v. Randolph*, the Court found that an order compelling arbitration and dismissing all other claims was final under section 16(a)(3).[20] The Court further found Lamps Plus had standing because Lamps Plus's motion to compel was granted in a modified form as *class* arbitration, not *individual* arbitration as requested by Lamps Plus. The Court stated that this was a "'fundamental' change."[21]

The Court then turned to the question presented: "whether, consistent with the FAA, an ambiguous agreement can provide the necessary 'contractual basis' for compelling class arbitration."[22] The Court looked to its decision in *Stolt-Nielsen* to hold that the FAA "requires more than ambiguity to ensure that the parties actually agreed to arbitrate on a classwide basis."[23] The Court reiterated, "'the first principle that underscores all of [its] arbitration decisions' is that '[a]rbitration is strictly a matter of consent.'"[24] This consent, the Court reasoned, was particularly crucial here given the "'fundamental' differences between classwide arbitration and the individualized form of arbitration envisioned by the FAA."[25] These

12. *Id.* at 1413.
13. *Id.* at 1413, 1417.
14. *Id.* at 1413.
15. The majority included Chief Justice Roberts and Justices Thomas, Alito, Gorsuch, and Kavanaugh.
16. *Id.*
17. *Id.*
18. *Id.* at 1413–14.
19. *Id.* at 1414.
20. 531 U.S. 79, 89 (2000).
21. Lamps Plus, 139 S. Ct. at 1414.
22. *Id.* at 1415 (quoting Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp., 559 U.S. 662, 684 (2010)).
23. *Id.*
24. *Id.* (quoting Granite Rock Co. v. Teamsters, 561 U.S. 287, 299 (2010)).
25. *Id.* at 1416 (quoting Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1622–23 (2018)).

differences include the lower cost and greater efficiency and speed of individual arbitration as opposed to class arbitration, which the Court found was more akin to "the litigation [arbitration] was meant to displace[,]"[26] costly, slower, and "more likely to generate procedural morass than final judgment."[27] These differences motivated the Court's holding in *Stolt-Nielsen*, and, for that reason, the Court found *Stolt-Nielsen* controlled the question presented.[28] Therefore, the Court held "[t]he general *contra proferentem* rule cannot be applied to impose class arbitration in the absence of the parties' consent."[29] In the majority's view, its decision broke no new ground, but merely was "consistent with a long line of cases holding that the FAA provides the default rule for resolving certain ambiguities in arbitration agreements."[30]

In contrast, the Supreme Court made a groundbreaking antitrust ruling in *Apple Inc. v. Pepper*,[31] which presented the question of consumers' standing to sue an alleged antitrust-violating retailer who sold them a product at an inflated price set by third parties.[32] Writing for the Court with the support of the four liberal justices, Justice Kavanaugh held that the third parties' pricing decisions should not prevent consumers in privity with an alleged antitrust violator from filing suit.[33] Justice Gorsuch dissented for the remaining conservative justices, marking antitrust statutes and policies as an area of disagreement for the conservative Court majority—even among the committed textualists.[34]

The case turned on a "pass-through" doctrine developed in 1977 in *Illinois Brick Co. v. Illinois* that prevents plaintiffs from seeking damages against antitrust violators more than one step removed in the stream of commerce.[35] The Court read that doctrine into the Clayton Act of 1914 as a limitation on the overbroad statutory text to "simplif[y] administration" and "improve[] antitrust enforcement."[36] *Illinois Brick* only applies to damages, so "any person" injured still has standing to seek injunctive relief, but

26. *Id.* (quoting *Epic Sys.*, 138 S. Ct. at 1623)).
27. *Id.* (quoting AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 348 (2011)).
28. *Id.*
29. *Id.* at 1418.
30. *Id.*
31. Apple Inc. v. Pepper, 139 S. Ct. 1514 (2019).
32. *Id.* at 1519.
33. *Id.*
34. *Apple* is another in a series of 5-4 majorities in which one textualist justice's interpretation leads to the same judgment as the interpretive approaches of the four liberal justices. These majorities have emerged in cases interpreting criminal statutes, United States v. Davis, 139 S. Ct. 2319 (2019) (Gorsuch, J.), and statutory provisions governing federal jurisdiction to remove class actions from state courts, Home Depot U.S.A., Inc. v. Jackson, 139 S. Ct. 1743 (2019) (Thomas, J.).
35. 431 U.S. 720 (1977).
36. *Apple*, 139 S. Ct. at 1522.

antitrust violators are only liable for damages suffered by "direct purchasers" and not for damages suffered by purchasers further down the stream of commerce.[37]

The Court declined Apple's invitation to apply that doctrine to block consumers from seeking damages over purchases of smartphone software applications ("apps") purchased in Apple's App Store. The majority had good reason to see this as a direct purchase from a potential monopolist. Apple's App Store is the only marketplace for apps compatible with Apple's devices, and App Store customers purchase their apps directly from Apple.[38] Apple remits seventy percent of any purchase price to the developers, retains thirty percent of any purchase, charges developers an annual fee, and requires that the price of all non-free apps ends in ninety-nine cents.[39]

Apple's argument against applying antitrust damages liability to the App Store transactions depended on positioning third-party app developers between Apple's significant control over the market and the prices consumers actually paid.[40] Apple argued that the pass-through doctrine should apply because app developers ultimately set the prices the consumers paid, and any impact of Apple's policies on the developers' pricing decisions was more than one step removed from the consumers' purchases.[41]

Justice Kavanaugh began with "the broad text of § 4" of the Clayton Act and found authority that "'any person' who has been 'injured' by an antitrust violator" may sue for damages.[42] That aligned with precedent "consistently stat[ing] that 'the immediate buyers from the alleged antitrust violators' may maintain suit against the antitrust violators."[43] Consumers were allegedly harmed by anticompetitive practices, and Justice Kavanaugh was unwilling to deprive Apple's customers of statutory standing based on proximate cause arguments not grounded in the statutory text. With support of the four liberal justices, his reading prevailed.

Justice Gorsuch, in dissent, focused on proximate cause and policy rather than text, and found "[n]o antitrust reason" to treat transactions differently based on whether Apple or the developers stand in privity with the purchasers.[44] He and the remaining conservative justices viewed the App Store as a marketplace where "plaintiffs bought apps from third-party developers (or manufacturers) in Apple's retail Internet App Store, at prices set by the

37. *Id.* at 1520.
38. *Id.* at 1519.
39. *Id.*
40. *Id.* at 1521.
41. *Id.*
42. *Id.* at 1520.
43. *Id.*
44. *Id.* at 1530 (Gorsuch, J., dissenting).

developers."[45] The dissent acknowledged that "the plaintiff app purchasers happen to have purchased directly from Apple," but argued that focusing on privity "exalts form over substance."[46] Justice Gorsuch reasoned that *Illinois Brick* would have protected Apple if it had influenced the market without standing between the developers and the consumers and would have extended the doctrine to protect Apple based on the Court's long-standing policy "that antitrust law should look at 'the economic reality of the relevant transactions' rather than 'formal conceptions of contract law.'"[47]

The majority agreed with the dissent that standing should not turn on formalism, but saw that as a reason to limit *Illinois Brick*, not a justification to expand it.[48] Perhaps motivated by fidelity to the famously expansive antitrust statutory text, Justice Kavanaugh seemed prepared to abandon the privity requirement entirely rather than "allow a monopolistic retailer to insulate itself from antitrust suits by consumers" through formalistic restructuring. Absent a textual hook for the limitation on standing, the majority was unwilling to "create an unprincipled and economically senseless distinction among monopolistic retailers and furnish monopolistic retailers with a how-to guide for evasion of the antitrust laws."[49]

The third significant business law ruling in the 2018–2019 term dealt with the question of whether the United States Patent and Trademark Office ("PTO") can refuse to register trademarks that it finds offensive. In *Iancu v. Brunetti*,[50] the Court heard a facial challenge to a portion of the federal Lanham Act governing trademark registration. The resulting majority and partial dissenting opinions highlight the justices' balancing of statutory interpretation principles, and their respective willingness or unwillingness to interpret statutory language in a manner to save it from unconstitutionality. Justice Kagan, writing for the majority including Justices Thomas, Ginsburg, Alito, Gorsuch, and Kavanaugh, concluded that the statutory provision in question was fatally defective and struck it down as a violation of the First Amendment. The justices who dissented in part agreed that the statute in question was problematic, but would have adopted a narrow interpretation of the language to partially preserve the challenged term.

Iancu involved trademark registration and the benefits that registration confers. Although registration of a mark with the Patent and Trademark

45. *Id.* at 1537.
46. *Id.* at 1529.
47. *Id.* at 1529 (quoting United States v. Concentrated Phosphate Export Ass'n, Inc., 393 U.S. 199, 208 (1968)).
48. *Id.* at 1523.
49. *Id.* at 1524.
50. 139 S. Ct. 2294 (2019).

Office is not necessary in order to protect and enforce it,[51] registration constitutes prima facie evidence of the mark's validity and also serves as "constructive notice of the registrant's claim of ownership," which can make it easier for the registrant to succeed in infringement claims.[52] In a 2017 decision, *Matal v. Tam*, the Supreme Court had concluded that the Lanham Act is subject to review under the First Amendment as a restriction on free speech.[53] The eight-justice Court in *Matal* could not agree upon whether the Lanham Act "is a condition on a government benefit or a simple restriction on speech" but nonetheless held that "if a trademark registration bar is viewpoint-based, it is unconstitutional."[54] The *Matal* Court concluded that a portion of the Lanham Act, 15 U.S.C. § 1052(a), which had barred registration of marks that "disparage[d]" a "person[], living or dead" was an unconstitutional viewpoint-based speech restriction.[55]

In *Iancu*, the Court considered the constitutionality of another portion of 15 U.S.C. § 1052(a), which prohibited the registration of a mark that "[c]onsists of or comprises immoral … or scandalous matter."[56] The plaintiff, Erik Brunetti, sought to register his clothing brand "FUCT" (pronounced phonetically) as a trademark.[57] The PTO denied registration on the basis that the mark is an obvious homonym for a profane expression.[58] Brunetti then brought a facial challenge to the "immoral or scandalous" registration bar in the Court of Appeals for the Federal Circuit arguing that, like the "disparagement" prohibition found unconstitutional in *Matal*, the Lanham's Act bar on the registration of "immoral" or "scandalous" marks was a similar form of unconstitutional viewpoint-based speech discrimination.[59] The Federal Circuit agreed with Brunetti and struck the provision, and the Supreme Court affirmed.

Justice Kagan's majority opinion looked at the dictionary definitions of "immoral" and "scandalous," and concluded that both terms necessarily connoted a viewpoint-based normative judgment of the message conveyed by the proposed mark. "Immoral," the majority explained, meant that the proposed mark was "inconsistent with rectitude, purity, or good morals."[60] "Scandalous" meant "giv[ing] offense to the conscience or moral feelings";

51. *Id.* at 2297–98 (citing Matal v. Tam, 137 S. Ct. 1744, 1752 (2017)).
52. *Id.* (quoting 15 U.S.C. § 1115(a); 15 U.S.C. § 1072).
53. *Id.* at 2298–99.
54. *Id.* (citing *Matal*, 137 S. Ct. at 1751, 1762–63 (opinion of Alito, J.); 137 S. Ct. at 1751, 1753 (opinion of Kennedy, J.)).
55. *Id.* (citing *Matal*, 137 S. Ct. at 1751); 15 U.S.C. § 1052(a).
56. *Iancu*, 139 S. Ct. at 2298 (quoting 15 U.S.C. § 1052(a)).
57. *Id.* at 2297.
58. *Id.* at 2297–98.
59. *Id.* at 2298.
60. *Id.* at 2299 (quoting Webster's New International Dictionary 1246 (2d ed. 1949)). The majority relied upon dictionaries published at approximately the same time that 15 U.S.C. § 1052(a) was enacted.

"excit[ing] reprobation"; or "call[ing] out condemnation."[61] Therefore, in the Court's view, "the Lanham Act permits registration of marks that champion society's sense of rectitude and morality, but not marks that denigrate those concepts."[62] Similarly, "the Lanham Act allows registration of marks when their messages accord with, but not when their messages defy, society's sense of decency or propriety."[63] The majority concluded that on its face, § 1052(a) required the Patent and Trademark Office to engage in viewpoint-based discrimination by approving marks that complied with society's collective sense of morality and propriety, but rejecting proposed marks that did not.[64]

The majority noted that during oral argument, the Government conceded the apparent viewpoint-based nature of the restriction. The Government had urged the Court to uphold the statute by adopt a "limiting construction" of the statutory language to "narrow the statutory bar to [only include] 'marks that are offensive or shocking to a substantial segment of the public because of their *mode* of expression, independent of any views that they may express.'"[65]

The majority declined to adopt a "narrow" construction of the statutory language in a nod to principles of strict textualism, explaining, "we cannot accept the Government's proposal, because the statute says something markedly different."[66] "This Court, of course, may interpret 'ambiguous statutory language' to 'avoid serious constitutional doubts.'"[67] "But that canon of construction applies only when ambiguity exists."[68] "We will not rewrite a law to conform it to constitutional requirements."[69] Concluding that the statutory language was drafted in such a broad manner as to necessitate viewpoint-based discrimination by the Patent and Trademark Office, the majority struck it down.[70] Justice Alito wrote a short concurrence emphasizing that the Lanham Act could be revised so as to block registration of marks "containing vulgar terms that play no real part in the expression of ideas" such as the "FUCT" mark at issue.[71]

Justices Roberts, Breyer, and Sotomayor each wrote a separate opinion concurring in part and dissenting in part. The three justices agreed with

61. *Iancu*, 139 S. Ct. at 2299–300 (quoting Webster's New International Dictionary, *supra* note 60, at 2229).
62. *Id.* at 2299.
63. *Id.* at 2300.
64. *Id.* at 2300–01.
65. *Id.* at 2301 (quoting Tr. of Oral Arg. at 11).
66. *Id.*
67. *Id.* (quoting FCC v. Fox Television Stations, Inc., 556 U.S. 502, 516 (2009)).
68. *Id.*
69. *Id.* (quoting United States v. Stevens, 559 U.S. 460, 481 (2010)).
70. *Id.* at 2302.
71. *Id.* at 2303.

the majority that the statutory term "immoral" required viewpoint-based discrimination, and was therefore unconstitutional. The dissenters, however, would have accepted the Government's request to impose a narrow interpretation on the statutory phrase "scandalous" to save it from unconstitutionality. Justice Breyer's opinion, in particular, rejected the formalistic and textualist approach taken by the majority. Instead, Justice Breyer would "focus on the interests that the First Amendment protects and ask a more basic proportionality question: Does 'the regulation at issue work harm to First Amendment interests that is disproportionate in light of the relevant regulatory objectives'?"[72]

Justice Breyer and Justice Sotomayor would have read the term "scandalous" to "cover only offensive modes of expression."[73] The dissenters focused on the significant overlap between the majority's broad definition of "scandalous" and the definitions of the clearly unconstitutional terms: "immoral" and "disparage."[74] "With marks that are offensive because they are disparaging and marks that are offensive because they are immoral already covered, what work did Congress intend for 'scandalous' to do?"[75] "A logical answer is that Congress meant for 'scandalous' to target a third and distinct type of offensiveness: offensiveness in the mode of communication rather than the idea."[76] "The other two words cover marks that are offensive because of the ideas they express; the 'scandalous' clause covers marks that are offensive because of the mode of expression, apart from any particular message or idea."[77]

Concluding that "scandalous" could be reasonably interpreted in a manner to prevent it from requiring viewpoint-based speech restrictions, the dissenters noted that "the Court has in the past accepted or applied similarly narrow constructions to avoid constitutional infirmities."[78] In the instant case, the dissenters would have held that "[p]roperly narrowed, 'scandalous' is a viewpoint-neutral form of content discrimination that is permissible in the kind of discretionary governmental program or limited forum typified by the trademark-registration system."[79]

Apart from invalidating a portion of the Lanham Act, *Iancu* serves as a window into the justices' analytical frameworks and priorities regarding one of the Supreme Court's paramount functions: assessing the constitutionality of statutes and other laws. Those justices in the majority adopted

72. *Id.* at 2306 (quoting Reed v. Town of Gilbert, Ariz., 135 S. Ct. 2218, 2235–36 (2015)).
73. *Id.* at 2309.
74. *Id.* at 2310.
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.* at 2312 (citing Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)); Boos v. Barry, 485 U.S. 312, 329–30 (1988); Frisby v. Schultz, 487 U.S. 474 (1988)).
79. *Id.* at 2313.

a strict textualist approach, broadly defining the pertinent statutory terms and refusing to place any judicial 'gloss' on the language. The dissenters, however, were more interested in the practical effects of the plaintiff's requested relief, and exhibited a stronger reluctance to upend legislation.

In the 2018–2019 term, the Court also addressed the scope of primary liability in fraudulent-misstatement cases under Securities and Exchange Commission Rule 10b-5. Specifically, the Court focused on whether primary liability can attach to a "non-maker" of false and misleading statements under Rules 10b–5(a) and (c), despite the fact that primary liability for "making" false statements is expressly addressed in Rule 10b-5(b).

In *Lorenzo v. Securities and Exchange Commission*,[80] the Court held that the dissemination of false or misleading statements with intent to defraud can fall within the scope of Rules 10b–5(a) and (c), as well as the relevant statutory provisions, even if the disseminator did not "make" the statements and consequently falls outside Rule 10b–5(b).[81] The Court ruled that by sending e-mails he understood to contain materially false statements, petitioner Francis Lorenzo, a director of a registered broker-dealer based in Staten Island, New York, had "employ[ed]" a "device," "scheme," and "artifice to defraud" within the meaning of Rule 10b–5(a), § 10(b) of the Exchange Act, and § 17(a)(1) of the Securities Act.[82] And by virtue of the same conduct, Mr. Lorenzo also "engage[d] in a[n] act, practice, or course of business" that "operate[d] . . . as a fraud or deceit" under Rule 10b–5(c).[83] Noting that the Court and the SEC "have long recognized considerable overlap among the subsections of [Rule 10b-5] and related provisions of the securities laws,"[84] the Court rejected Mr. Lorenzo's argument that Rule 10b-5(b) is the only provision of Rule 10b-5 that imposes liability for misstatements.[85]

In his dissenting opinion, Justice Thomas (joined by Justice Gorsuch) took issue with the Court "eviscerating" the distinction between primary and secondary liability in fraudulent-misstatement cases, as established by the Court in *Janus Capital Group, Inc. v. First Derivative Traders*, 564 U. S. 135 (2011).[86] In *Janus*, the Court held, *inter alia*, that a person does not "make" a fraudulent misstatement within the meaning of Rule 10b–5(b) and thus is not primarily liable for the statement, if the person lacks "ultimate authority over the statement."[87] Because Mr. Lorenzo was not the "maker" of any

80. 139 S. Ct. 1094.
81. *Id.* at 1102.
82. *Id.* at 1101.
83. *Id.* at 1102 (citing Herman & MacLean v. Huddleston, 459 U.S. 375, 383 (1983)).
84. *Id.*
85. *Id.* at 1102–03.
86. *Id.* at 1106 (Thomas, J., dissenting).
87. Janus Capital Grp., Inc. v. First Derivative Traders, 564 U.S. 135, 142 (2011).

false statement—and did nothing beyond knowingly disseminating e-mails containing false statements at the behest of his boss—the dissent believed that he could only be liable as an aider and abettor under principles of secondary liability.[88] The SEC, however, did not charge Mr. Lorenzo with aiding and abetting fraud.[89] Applying the "old and familiar" rule that "the specific governs the general,"[90] Justice Thomas would have held that "the provisions [of Rule 10b-5] specifically addressing false statements 'must be operative' as to false-statement cases, and that the more general provisions [of Rule 10b-5] should be read to apply 'only [to] such cases within [their] general language as are not within the' purview of the specific provisions on false statements."[91]

III. CIVIL AND CONSTITUTIONAL RIGHTS

The Supreme Court took up several notable cases implicating civil and constitutional rights during the last term. In *Flowers v. Mississippi*,[92] the Court, in its own words, "simply enforce[d] and reinforce[d] *Batson*[*v. Kentucky*][93] by applying it to the extraordinary facts of this case."[94] Petitioner Curtis Flowers had been tried six separate times by the State of Mississippi for capital murder in connection with the deaths of four people.[95] Flowers was convicted in the first three trials, but his convictions were reversed by the Mississippi Supreme Court for prosecutorial misconduct in the first and second[96] trials and discrimination against prospective black jurors in the third.[97] The fourth and fifth trials were declared mistrials after the juries were unable to reach a verdict.[98] In the sixth trial, now being considered by the Court, Flowers was convicted.[99]

Justice Kavanaugh, writing for the seven-justice majority[100] held that a combination of four facts compelled a finding of "clear error" by "the trial court in concluding that the State's peremptory strike of black prospective juror Carolyn Wright was not 'motivated in substantial part by discrimina-

88. *Lorenzo*, 139 S. Ct. at 1107.
89. *Id.* at 1106.
90. *Id.* at 1108 (quoting RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639, 645–46 (2012).
91. *Id.* at 1109 (quoting *RadLAX Gateway Hotel, LLC*, 566 U.S. at 646).
92. 139 S. Ct. 2228 (2019).
93. 476 U.S. 79 (1986).
94. 139 S. Ct. at 2235.
95. *Id.*
96. In the second trial, the trial court seated a black juror after finding the prosecutor utilized a peremptory strike against the juror on the basis of race. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. Justices Thomas and Gorsuch dissented.

tory intent.'"[101] The first fact was "the history from Flowers' six trials."[102] In its review of this history, the majority found that over the course of Flowers' first four trials, in a "relentless, determined effort," the State attempted to strike all of the thirty-six black prospective jurors that could be removed by peremptory strike.[103] This history, Justice Kavanaugh concluded, indicated the State's desire to try Flowers before an all-white jury.[104] The second fact was the State's striking five of the six black prospective jurors in Flowers' sixth trial,[105] which the Court found to be a continuation of the State's pattern during Flowers' first four trials of trying to remove all black people from the jury.[106] The third fact was the "prosecutor's dramatically disparate questioning of black and white prospective jurors at the sixth trial."[107] The State asked the five struck black prospective jurors a total of 145 questions, an average of twenty-nine questions each.[108] The State asked the white seated jurors a total of twelve questions, an average of one each.[109] While the Court affirmed that disparate questioning, or investigation, by itself is not a *Batson* violation, when combined with other evidence, the disparate questioning by the State during Flowers' sixth trial suggested the State was motivated in substantial part by a discriminatory intent.[110]

The fourth and final fact was "the prosecutor's proffered reasons for striking one black juror (Carolyn Wright) while allowing other similarly situated white jurors to serve on the jury at the sixth trial."[111] Prior to its four-fact analysis, the Court, citing *Foster v. Chatman*,[112] reaffirmed that, "[t]he Constitution forbids striking even a single prospective juror for a discriminatory purpose."[113] The State said it exercised a peremptory strike against Carolyn Wright because (1) "she knew several defense witnesses and had worked at the Wal-Mart where Flowers' father also worked"; (2) thirteen years prior to the trial, Wright had been sued for collection of a debt by the furniture store where the victims were killed; and (3) Wright had worked with one of Flowers' sisters.[114] But the court found the state did not ask follow-up questions to several white jurors who also knew many individuals involved in the case. Neither did the State ask Wright ques-

101. *Id.*
102. *Id.* at 2244.
103. *Id.* at 2245.
104. *Id.*
105. *Id.* at 2244.
106. *Id.* at 2246.
107. *Id.* at 2244.
108. *Id.* at 2246–47.
109. *Id.* at 2247.
110. *Id.* at 2248.
111. *Id.* at 2244.
112. 136 S. Ct. 1737 (2016).
113. 139 S. Ct. at 2244.
114. *Id.* at 2249, 2250.

tions about the nature of her relationship with Flowers' father. As to the debt collection action, the Court found the State failed to explain how a "13-year-old, paid-off debt" to the furniture store could affect Wright's ability to serve as a juror in the case.[115]

Finally, the Court found that Wright did not in fact work with one of Flowers' sisters and that "[w]hen a prosecutor misstates the record in explaining a strike, the misstatement can be another clue showing discriminatory intent."[116] The Court stressed that the Wright strike had to be examined in light of the first three facts and not in isolation and concluded that the combination of these four facts—and the combination of these four facts only—"establish[ed] that the trial court at Flowers' sixth trial committed clear error in concluding that the State's peremptory strike of black prospective juror Carolyn Wright was not motivated in substantial part by discriminatory intent."[117] Accordingly, in what the Court stressed was a simple application of its *Batson* jurisprudence, the Court reversed Flowers' conviction.

In *Gamble v. United States*, Justice Alito delivered the opinion for a seven-two majority, confirming that the well-settled dual-sovereignty doctrine permits successive prosecutions by separate sovereigns under the Double Jeopardy Clause.[118] Petitioner Terance Gamble pleaded guilty in Alabama state court to violating Alabama Code § 13A-11-72(a), which prohibits the possession of firearms by any person convicted of a "crime of violence."[119] After pleading guilty to the state offense, Gamble was indicted by federal prosecutors for violating 18 U.S.C. § 922(g)(1), which generally prohibits the same conduct.[120] Gamble moved to dismiss the indictment on double-jeopardy grounds, arguing that "[t]he federal indictment was for 'the same offence' as the one at issue in his state conviction."[121] The district court denied Gamble's motion to dismiss, and the United States Court of Appeals for the Eleventh Circuit affirmed.[122] The Supreme Court granted certiorari and affirmed the judgment of the Eleventh Circuit.[123]

As usual, the Court began with the text of the Fifth Amendment, which "protects individuals from being twice put in jeopardy 'for the same *offence*,' [but] not for the same *conduct* or *actions*."[124] An "offence" is defined by law, and laws are defined by sovereigns; "where there are two sovereigns, there

115. *Id.* at 2249–50.
116. *Id.* at 2251.
117. *Id.*
118. 139 S. Ct. 1960 (2019).
119. *Id.* at 1964.
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.* at 1965–67.
124. *Id.* at 1965 (quoting Grady v. Corbin, 495 U.S. 508, 529 (1990)).

are two laws, and two 'offences.'"[125] In addition to honoring "the formal difference between two distinct criminal codes," the dual-sovereignty doctrine "honors the substantive differences between the interests that two sovereigns can have in punishing the same act." Consider, for example, the crime of assaulting a United States Marshal, which would offend both the federal and state systems by "hindering the execution of legal process" and by "breaching the peace of the State."[126] "That duality of harm explains how 'one act' could constitute 'two offences, for each of which the offender is justly punishable.'"[127] More than 170 years of precedent confirms this understanding "without qualm or quibble."[128]

Of special import, Justice Alito dedicated a paragraph to the role of *stare decisis* in supporting the Court's decision.[129] "*Stare decisis* 'promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'"[130] Although it is important for the Court to be right, "a departure from precedent 'demands special justification.'"[131] As a result, anyone challenging a settled principle must present more than "ambiguous historical evidence."[132]

Justice Alito dismantled Gamble's arguments (which were based primarily on "shaky" historical evidence and "spotty" treatises) as contrary to almost two centuries of settled precedent.[133] Gamble claimed that early English cases prohibited "domestic prosecution following a prosecution for the same act under a different sovereign's laws."[134] But Gamble did not cite—and the Court could not find—"a single pre-Fifth Amendment case in which a foreign acquittal or conviction barred a second trial in a British or American court."[135] Gamble's cited treatises, many of which were published before the Fifth Amendment was ratified, did "not come close to settling the historical question with enough force to meet [his] particular burden under *stare decisis*."[136] And nineteenth-century state cases were "inconclusive" because they are evenly split and manifest conflicts of conscience rather than "confident conclusions about the common law."[137]

125. *Id*.
126. *Id*. at 1966–67 (alterations omitted).
127. *Id*. at 1967 (quoting Moore v. Illinois, 55 U.S. 13, 20 (1852)) (alterations omitted).
128. *Id*. at 1966–67 (collecting cases).
129. *Id*. at 1969.
130. *Id*. (quoting Payne v. Tennessee, 501 U.S. 808, 827 (1991)).
131. *Id*. (quoting Arizona v. Rumsey, 467 U.S. 203, 212 (1984)).
132. *Id*. (quoting Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468, 479 (1987)).
133. *Id*. at 1969–80.
134. *Id*. at 1970.
135. *Id*.
136. *Id*. at 1974.
137. *Id*. at 1976.

Finally, Gamble argued that the Fifth Amendment's incorporation to the States through the Fourteenth Amendment Due Process clause somehow changed the calculus.[138] But the dual-sovereignty doctrine "survived incorporation intact" because incorporation simply requires States to abide by the Court's interpretation of the Double Jeopardy Clause, which has long included the dual-sovereignty doctrine.[139]

Justice Alito also tackled two principal objections in his colleagues' dissenting opinions. Justices Ginsburg and Gorsuch contended that the Court's "dual-sovereignty rule errs in treating the Federal and State *Governments* as two separate sovereigns when in fact sovereignty belongs to the people."[140] But, by adopting the Constitution, the people "split the atom of sovereignty."[141] Put differently, although the United States is one republic, it is not "a unitary state like the United Kingdom."[142] The dissenting Justices also contended "that because the division of federal and state power was meant to promote liberty, it cannot support a rule that exposes Gamble to a second sentence."[143] But the powers of the Federal and State Governments often overlap, allowing a measure of dual regulation.[144] As a result, neither of these objections were sufficient to overcome the well-settled dual-sovereignty doctrine, which remains fully intact and commanded affirmance of the lower court's decision.

In *Nielsen v. Preap*,[145] Justice Alito held for the Court that 8 U.S.C. § 1226(c) prevents the Secretary of Homeland Security from granting bond hearings to certain potentially deportable noncitizens until government authorities decide whether to deport them.[146] Paragraph (1) of the contested subsection directs the Secretary to "take into custody any alien who" satisfies certain requirements "when the alien is released without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offence."[147] The Secretary may detain noncitizens not "described in paragraph (1)" or release them on bond or on conditional parole,[148] but paragraph (2) only permits the Secretary to

138. *Id*. at 1978–79.
139. *Id*. at 1979.
140. *Id*. at 1968; *see also id.* at 1990 (Ginsburg, J., dissenting); *id.* at 1999 (Gorsuch, J., dissenting).
141. *Id*. (quoting Alden v. Maine, 527 U.S. 706, 751 (1999)).
142. *Id*.
143. *Id*.; *see also id*. at 1990–91 (Ginsburg, J., dissenting); *id.* at 1999–2000 (Gorsuch, J., dissenting).
144. *Id*. at 1968–69 ("Taxation is an example that comes immediately to mind.").
145. Nielsen v. Preap, 139 S. Ct. 954 (2019).
146. *Id.* at 965.
147. 8 U.S.C. § 1226(c)(1).
148. *Id.* § 1226(a).

release a person "described in paragraph (1)" if necessary for certain major criminal investigations.[149]

Two groups of noncitizens who were taken into immigration custody years after being released from criminal custody and denied bond hearings under the mandatory detention provision filed habeas petitions and class action complaints challenging the denial of bond hearings.[150] The government appealed, and the Ninth Circuit affirmed the certifications, creating a split with four other circuits. The Court granted certiorari to decide whether a noncitizen who is not taken into immigration custody "immediately upon release" from criminal custody is exempt from the mandatory detention provisions of paragraph (2),[151] in other words, to determine what "when . . . released" means in this statute.

Justice Alito's majority opinion held that a person described by any of the sub-categories of paragraph (1) is "described" by paragraph (1)—and therefore, ineligible for a bond hearing—regardless of "when" the Secretary takes the person into custody. The majority read "when . . . released" as "curbing" the Secretary's "discretion to arrest" a person described in the subclauses of paragraph (1), not as a limit on Congress's direction to the Secretary to hold those individuals without bond hearings.[152] The majority opinion interpreted the statutory text without lingering on the constitutional implications of a statute that requires mandatory detention without the possibility of individualized bond hearings, explaining that the constitutional question was not before the Court and that an as-applied challenge to the constitutionality of the statute would not be foreclosed by the Court's decision.[153]

Justice Alito's majority decision on the merits depended on the concurrence of Justice Kavanaugh who wrote separately to "emphasize the narrowness of the issue before [the Court]"[154] and Justice Thomas (joined by Justice Gorsuch) who doubted the Court's jurisdiction to hear the case at all. Justice Thomas would have held that various other statutory bars deprive all courts of jurisdiction to review the Secretary's decisions about detention of these noncitizens and that changes in the named plaintiffs' circumstances rendered the cases moot prior to certification.[155] Justice Thomas identified—and Justice Alito rejected—three statutory bars. One

149. *Id.* § 1226(c)(2).
150. *Nielsen*, 139 S. Ct. at 961.
151. *Id.*
152. *Id.* at 966.
153. *Id.* at 972.
154. *Id.* (Kavanaugh, J., concurring). Justice Kavanaugh, in his concurrence, emphasized that only the "narrow" statutory question of whether the "mandatory duty to detain a particular noncitizen" without bond "remains mandatory if the Executive Branch fails to *immediately* detain the noncitizen" and asserted that "[n]o constitutional issue is presented."
155. *Id.* at 973 (Thomas, J., concurring in part).

appears in a later subsection of the same statute, which provides that the Secretary's "discretionary judgment regarding the application of [§ 1226] shall not be subject to review" and that "[n]o court may set aside any action or decision by the [Secretary] under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole."[156] Two others bar judicial review of "all questions of law and fact, including interpretation of constitutional and statutory provisions, arising from any action . . . to remove an alien from the United States" with limited exceptions[157] and injunctions to "enjoin or restrain the operation of [the statute]" except as applied to "an individual alien against whom proceedings … have been initiated."[158]

Justice Breyer authored the sole dissent, which was joined by Justices Ginsberg, Sotomayor, and Kagan.[159] The dissent offered a different reading of the statute in which the fact of immediate detention by immigration officials following release from criminal custody was an important part of the description of the noncitizens subject to the "'no-bail-hearing' requirement."[160] The dissent bolstered its analysis of the text and structure of the statute using the canon of constitutional avoidance. Rejecting Justice Kavanaugh's characterization of the question as a "narrow" question of statutory interpretation, Justice Breyer emphasized the "not simply theoretical" constitutional concern that the majority's reading of the statute "would give the Secretary authority to arrest and detain aliens years after they have committed a minor crime and then hold them without a bail hearing for months or years."[161] Notwithstanding the dissent's constitutional concerns and the partial-concurrence's jurisdictional concerns, the Court held that the Secretary correctly interpreted the statute to prohibit bond hearings regardless of how long the Secretary delayed in taking a noncitizen into custody.

In *Timbs v. Indiana*, a 9-0 decision, the Court held that the Excessive Fines Clause of the Eighth Amendment is incorporated by the Due Process Clause of the Fourteenth Amendment and thus applies against states.[162] Petitioner Tyson Timbs pleaded guilty to dealing in a controlled substance and conspiracy to commit theft in Indiana state court.[163] In addition to his sentence of home detention for one year, probation for five years, participation in a court-supervised addiction treatment program, and over $1,200

156. 8 U.S.C. § 1226(e).
157. *Id.* § 1252(b)(9).
158. *Id.* § 1252(f)(1).
159. *Nielsen*, 139 S. Ct. at 977 (Breyer, J., dissenting).
160. *Id.* at 977–78.
161. *Id.* at 982.
162. 139 S. Ct. 682, 687 (2019).
163. *Id.* at 686.

in fees and costs, the state initiated civil forfeiture proceedings against Timbs to obtain his $42,000 Land Rover SUV because it had been used to transport heroin.[164] Although the trial court found the vehicle had been used to facilitate violation of a criminal statute, the trial court declined to approve the forfeiture, finding it "grossly disproportionate" to the severity of Timb's crime and "unconstitutional under the Eighth Amendment's Excessive Fines Clause."[165] The Indiana Court of Appeals affirmed the forfeiture denial, but the Indiana Supreme Court, without deciding whether the forfeiture was excessive, reversed, holding that the Excessive Fines Clause did not apply to the States.[166]

To determine whether the Eighth Amendment's Excessive Fines Clause was incorporated and applicable to the States under the Fourteenth Amendment's Due Process Clause, Justice Ginsburg, writing for the majority, first traced the Excessive Fines Clause all the way back to 1215 and the Magna Carta.[167] The Magna Carta provided that economic sanctions "'be proportioned to the wrong' and 'not so large as to deprive [an offender] of his livelihood.'"[168] Next, the Court reviewed American history, and found that "[i]n 1787, the constitutions of eight states—accounting for 70% of the U.S. population—forbade excessive fines," and that by the time the Fourteenth Amendment was ratified, all but two State constitutions included an excessive fines clause.[169] But, excessive fines were still imposed. As an example, the Court pointed to Black Codes enacted after the Civil War, which were designed to "subjugate newly freed slaves and maintain the prewar racial hierarchy."[170] Among these enactments were "draconian" fines that if left unpaid had to be satisfied through involuntary labor.[171]

The Court then turned to the present, noting that Respondent Indiana itself "report[ed] all 50 States have a constitutional provision prohibiting the imposition of excessive fines either directly or by requiring proportionality."[172] The Court reasoned that the universal state constitutionalization of the protection against excessive fines recognizes that "[e]xorbitant tolls undermine other constitutional liberties," like free speech.[173] Additionally, the Court found that the imposition of excessive

164. *Id.*
165. *Id.*
166. *Id.* (citing Indiana v. Timbs, 84 N.E.3d 1179 (Ind. 2017)).
167. *Id.* at 687.
168. *Id.* at 688.
169. *Id.* (citing Steven G. Calabresi, Sarah E. Agudo & Kathryn L. Dore, *State Bill of Rights in 1787 and 1791: What Individual Rights Are Really Deeply Rooted in American History and Tradition?*, 85 S. Cal. L. Rev. 1451, 1517 (2012)).
170. *Id.*
171. *Id.* at 688–89.
172. *Id.* at 689.
173. *Id.*

fines is a real and present danger because fines are a large source of State revenue.[174] Thus, given the "overwhelming" nature of "the historical and logical case for concluding that the Fourteenth Amendment incorporates the Excessive Fines Clause[,]" the Court concluded that "[p]rotection against excessive punitive economic sanctions secured by the Clause is . . . both 'fundamental to our scheme of ordered liberty' and 'deeply rooted in this Nation's history and tradition.'"[175]

After determining the Excessive Fines Clause was incorporated, the Court, stating Indiana did not "meaningfully challenge the case for incorprat[ion] . . . as a general matter," addressed Indiana's ancillary argument that "the Clause does not apply to Indiana's use of civil *in rem* forfeitures because . . . the Clause's specific application to such forfeitures is neither fundamental or deeply rooted."[176] The Court made quick work of this argument. First, the Court pointed out that it had already held in *Austin v. United States*,[177] that "civil *in rem* forfeitures fall within the Clause's protection when they are at least partially punitive."[178] Second, because the Court found Indiana "never argued" that "civil *in rem* forfeitures were categorically beyond the reach of the Excessive Fines Clause," the Court "decline[d] the State's invitation to reconsider [its] unanimous decision in *Austin*."[179] Finally, the Court also rejected Indiana's challenge to the application of the Excessive Fines Clause to civil *in rem* forfeitures because "[i]n considering whether the Fourteenth Amendment incorporates a protection contained in the Bill of Rights, [the Court] ask[s] whether *the right guaranteed*—not each and every particular application of that right—is fundamental or deeply rooted."[180]

IV. ELECTION LAW

The Supreme Court issued two decisions involving challenges to so-called "gerrymandering" during the term, one involving partisan gerrymandering and the other racial gerrymandering. In both cases, a bare majority of the Supreme Court ruled against the challengers based on an application of the Case or Controversy Clause of Article III of the Constitution, highlighting the continuing difficulty of a successful gerrymandering challenge.

174. *Id.*
175. *Id.* (quoting McDonald v. Chicago, 561 U.S. 742, 767 (2010)).
176. *Id.*
177. 509 U.S. 602 (1993).
178. 139 S. Ct. at 689.
179. *Id.* at 690.
180. *Id.*

In the companion cases of *Rucho v. Common Cause*,[181] the Supreme Court invoked the "political question" doctrine to rule that federal courts lack jurisdiction to hear challenges to congressional districting maps based solely upon alleged partisan gerrymandering. The two cases concerned constitutional challenges to states' congressional districting maps. The plaintiffs alleged that the states had drawn their congressional maps in such a manner as to disadvantage the opposing political party, thereby diluting or nullifying the votes of the opposing party's supporters. In an opinion written by Chief Justice John Roberts, and joined by Justices Thomas, Alito, Gorsuch, and Kavanaugh, the Court found that it lacked jurisdiction to decide the cases because the plaintiffs' claims were purely political. The Court recognized that an individual voter may challenge a congressional districting map if it causes his or her vote to carry less weight than other voters within the same state. Political parties, however, have no right to demand that districts are drawn to give a party a number of elected representatives proportionate to its relative support within the state. The Court concluded that the plaintiffs were not alleging that their individual votes had been diluted, but rather that their chosen political party had been disadvantaged by the manner in which the maps were drawn.

The two cases represented challenges to maps drawn by both major parties. In *Rucho v. Common Cause*, voters and a nonprofit organization challenged North Carolina's redistricting plan enacted by the Republican-controlled legislature. The plaintiffs argued that the plan violated the Equal Protection Clause, the First Amendment, and the requirement of Article 1, § 2 of the U.S. Constitution that Members of the House of Representatives be chosen "by the People of the several States."[182] A three-member panel of the Middle District of North Carolina ruled in favor of the plaintiffs on all three counts.[183] In *Lamore v. Benisek*, Maryland voters challenged the congressional redistricting plan enacted by the Democrat-controlled legislature under the same three constitutional provisions.[184] A three-member panel of the District Court of Maryland similarly ruled the map unconstitutional. Both rulings were appealed directly to the Supreme Court pursuant to 28 U.S.C. § 1253, which authorizes direct appeals from three-judge district court panels.

The majority opinion in *Rucho* began with a recitation of the federal court's constitutional limitation to only decide "Cases" and "Controversies." The Court noted that in rare circumstances, "the law is that the judicial department has no business entertaining the claim of unlawfulness—because the

181. 139 S. Ct. 2484 (2019).
182. *Id.* at 2491–92.
183. *Id.* at 2492–93.
184. *Id.* at 2493.

question is entrusted to one of the political branches or involves no judicially enforceable rights."[185] The question presented in the consolidated cases, as framed by the majority, was "whether there is an 'appropriate role for the federal judiciary' in remedying the problem of partisan gerrymandering—whether such claims are claims of legal right, resolvable according to legal principles, or political questions that must find their resolution elsewhere."[186]

The Court noted that the issue of partisan gerrymandering pre-exists the Constitution itself, and that Congress has exercised its authority under the Elections Clause to address the problem.[187] Further, prior cases decided by the Supreme Court have upheld a variety of challenges to redistricting maps, demonstrating that such claims may be justiciable.[188] Two lines of jurisprudence have developed that the Court found relevant to the instant inquiry: challenges to gerrymandering based upon population inequality, and challenges based upon racial disparities.

Regarding the former, the Supreme Court has held that claims of population inequality among districts was justiciable "because such a claim could be decided under basic equal protection principles."[189] Such a claim was also justiciable under the Elections Clause with regard to congressional district maps because the Constitution "required that 'one man's vote in a congressional election is to be worth as much as another's.'"[190] Regarding the latter, "Laws that explicitly discriminate on the basis of race, as well as those that are race neutral on their face but are unexplainable on grounds other than race, are of course presumptively invalid."[191]

Although the Supreme Court had heard several cases specifically involving challenges to *partisan* gerrymandering dating back to 1973, the Court had never issued a majority opinion deciding whether a challenge to partisan gerrymandering was justiciable.[192] The Court noted its historical struggles with articulating a standard for evaluating such claims. "The basic reason [for the difficulty] is that, while it is illegal for a jurisdiction to depart from the one-person, one-vote rule, or to engage in discrimination, 'a jurisdiction may engage in constitutional political gerrymandering.'"[193]

185. *Id.* at 2494 (quoting Vieth v. Juelirer, 541 U.S. 267, 277 (2004) (plurality opinion)).
186. *Id.* (quoting Gill v. Whitford, 138 S. Ct. 1916, 1926–37 (2018)).
187. *Id.* at 2495–96 (citing Act of June 25, 1842, ch. 47, 5 Stat. 491; Act of Jan. 16, 1901, ch. 93, § 3, 31 Stat. 733; Act of Feb. 2, 1872, ch. 11, § 2, 17 Stat. 28).
188. *Id.* at 2496.
189. *Id.* (citing Baker v. Carr, 369 U.S. 186, 226 (1962)).
190. *Id.* (quoting Wesberry v Sanders, 376 U.S. 1, 8 (1964)).
191. *Id.* (citing Gomillion v. Lightfoot, 364 U.S. 339, 340 (1960); Wright v. Rockefeller, 376 U.S. 52 (1964)).
192. *Id.* at 2497–98 (citing Gaffney v. Cummings, 412 U.S. 735 (1973); Davis v. Bandemer, 478 U.S. 109 (1986); Vieth v. Jubelirer, 541 U.S. 267 (2004); League of United Latin Am. Citizens v. Perry, 548 U.S. 399 (2006)).
193. *Id.* at 2497 (quoting Hunt v. Cromartie, 526 U.S. 541, 551 (1999)).

It has long been recognized that partisan, political considerations are necessary components of any redistricting map, and therefore some level of partisan gerrymandering is presumptively valid. "The 'central problem' is not determining whether a jurisdiction has engaged in partisan gerrymandering. It is 'determining when political gerrymandering has gone too far.'"[194]

If the Supreme Court were to create such a standard, the majority reasoned, that standard would need to be "grounded in a 'limited and precise rationale' and be 'clear, manageable, and politically neutral.'"[195] Challenges to partisan redistricting maps necessarily arise from the complainants' desire for "proportional" representation. However, the Court concluded that no right to proportional representation exists in the Constitution, and noted that in the early days of the country, states typically sent single-party delegations of representatives—the antithesis of "proportional" representation.[196]

Absent a right to proportional representation, the Court concluded that the plaintiffs were truly asking for a requirement that district maps be drawn "fairly," and "'Fairness' does not seem to us a judicially manageable standard."[197] "Deciding among . . . different visions of fairness . . . poses basic questions that are political, not legal. There are no legal standards discernible in the Constitution for making such judgments."[198] Further, the majority reasoned, even if a "fairness" standard could be crafted, they saw no clear manner in which to apply that standard to determine if a districting map is "too" partisan.[199]

The dissenting opinion, authored by Justice Kagan and joined by Justices Ginsburg, Breyer, and Sotomayor, complained that partisan gerrymandering can render elections "meaningless" and "subverts democracy."[200] The dissent also concluded that partisan gerrymandering impairs voters' individual constitutional rights by "dilut[ing]" the votes of some citizens.[201] "In short, the mapmaker has made some votes count for less, because they are likely to go for the other party."[202] The dissenters would have upheld the lower court decisions striking the redistricting maps.

194. *Id.* (quoting *Vieth*, 541 U.S. at 296 (plurality opinion)).
195. *Id.* at 2498 (quoting *Vieth*, 541 U.S. at 306–08 (Kennedy, J., concurring)).
196. *Id.* at 2499 (citing *Davis*, 478 U.S. at 130 (plurality opinion); *Mobile v. Bolden*, 446 U.S. 55, 75–76 (1980) (plurality opinion) ("The Equal Protection Clause of the Fourteenth Amendment does not require proportional representation as an imperative of political organization.")).
197. *Id.* (quoting *Vieth*, 541 U.S. at 291 (plurality opinion)).
198. *Id.* at 2500–01.
199. *Id.* at 2501.
200. *Id.* at 2512, 2515 (Kagan, J., dissenting).
201. *Id.* at 2513–14.
202. *Id.* at 2514.

The majority viewed the dissenting justices' preferred outcome as "an unprecedented expansion of judicial power."[203] The majority responded to the dissenters' concerns about vote "dilution" with the argument that "'vote dilution' in the one-person, one-vote cases refers to the idea that each vote must carry equal weight. In other words, each representative must be accountable to (approximately) the same number of constituents."[204] The majority was unwilling to expand the concept of "vote dilution" to include practical limitations on a voter's influence toward electing that voter's preferred candidate. Therefore, the Court held that challenges to partisan gerrymandering present non-justiciable political questions, and remanded the companion cases with instructions that they be dismissed.[205]

In *Virginia House of Delegates v. Bethune-Hill*, Justice Ginsburg delivered the opinion of the Court for a five-four majority, holding that the Virginia House of Delegates ("House") did not have standing to challenge the decision of a three-judge district court panel concerning Virginia's redistricting of twelve legislative districts.[206] After the 2010 census, Virginia redrew legislative districts for the State's Senate and House.[207] Voters in twelve House districts sued two Virginia state agencies and four election officials, arguing that the redrawn districts were racially gerrymandered in violation of the Fourteenth Amendment Equal Protection Clause.[208] The Virginia House and its Speaker intervened, urging the constitutionality of the challenged districts.[209] A three-judge district court panel held that, in eleven of the districts, "the State had unconstitutionally sorted voters based on the color of their skin."[210] Virginia's Attorney General announced publicly that the State would not seek certiorari review, but the House petitioned the Court to hear the case.

The Court did not consider the merits of the racial-gerrymandering challenge because it determined that jurisdiction was lacking.[211] "As a jurisdictional requirement, standing to litigate cannot be waived or forfeited."[212] The three familiar elements of standing are "(1) a concrete and particularized injury, that (2) is fairly traceable to the challenged conduct, and (3) is likely to be redressed by a favorable decision."[213] The House urged that it

203. *Id.* at 2507 (majority opinion).
204. *Id.* at 2501.
205. *Id.* at 2508.
206. 139 S. Ct. 1945 (2019).
207. *Id.* at 1949.
208. *Id.*
209. *Id.* at 1950.
210. *Id.* (internal quotation marks, citation, and alterations omitted).
211. *Id.* at 1950–56.
212. *Id.* at 1951.
213. *Id.* at 1950 (citing Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992)).

had standing to represent the State's interest and to sue in its own right, but neither argument held water.

It is well-settled that a State has standing to defend the constitutionality of its own statutes and that a State may designate agents to represent it in federal court.[214] As a result, the State could have designated the House to represent its interests, but did not.[215] Virginia law vests exclusive authority and responsibility for representing the State's interests in civil litigation in the State's Attorney General.[216] "Virginia has thus chosen to speak as a sovereign entity with a single voice," and the House failed to identify "any legal basis for its claimed authority to litigate on the State's behalf."[217] This conclusion is not altered by the fact that the House has intervened to defend legislation in prior cases.[218] Nor does it matter that the House participated in proceedings before the district court, as it only "purported to represent its own interests," rather than the interests of the State.[219]

Even lacking standing to sue on behalf of the State, the House also maintained that it had standing to sue in its own right.[220] But the "Court has never held that a judicial decision invalidating a state law as unconstitutional inflicts a discrete, cognizable injury on each organ of government that participated in the law's passage."[221] Because the House is only half of Virginia's "General Assembly," this case is distinguishable from *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652 (2015), where the Court recognized the standing of the Arizona House and Senate acting together.[222] And, although the altered district boundaries may affect its composition, "intervenor status alone is insufficient to establish standing to appeal."[223] In sum, "Virginia would rather stop than fight on. One House of its bicameral legislature cannot alone continue the litigation against the will of its partners in the legislative process."[224]

Justice Alito dissented, joined by Chief Justice Roberts and Justices Breyer and Kavanaugh, believing that the imposition of the district court's redistricting plan will "cause the House the kind of harm required by Article III of the Constitution" to demonstrate standing.[225] As to injury in fact, Justice Alito believes that "[a] legislative districting plan powerfully affects

214. *Id.* at 1951.
215. *Id.*
216. *Id.* (citing Va. Code Ann. § 2.2-507(A)).
217. *Id.* at 1951–52.
218. *Id.* at 1952.
219. *Id.*
220. *Id.* at 1953.
221. *Id.*
222. *Id.* at 1953–54.
223. *Id.* at 1954–55.
224. *Id.* at 1956.
225. *Id.* (Alito, J., dissenting).

a legislative body's output of work."[226] "[T]he invalidation of the House's redistricting plan and its replacement with a court-ordered map would cause the House to suffer a 'concrete' injury. And as Article III demands, . . . that injury would also be 'particularized' (because it would target the House); 'imminent' (because it would certainly occur if this appeal is dismissed); 'traceable' to the imposition of the new, court-ordered plan; and 'redressable' by the relief the House seeks here."[227]

V. ADMINISTRATIVE LAW

The Supreme Court took up two notable questions of administrative law and agency actions in the past term. In cases, Chief Justice Roberts cast the decisive vote and joined the four liberal justices, giving credence to the prediction of some Court observers that he would become the new "swing justice" following Justice Kennedy's requirement.

Perhaps the highest profile decision of the term came in *Department of Commerce v. New York*,[228] where the Court, *inter alia*, applied the review provisions of the Administrative Procedures Act ("APA") to the decision of the Secretary of Commerce to reinstate a question about citizenship on the 2020 decennial census questionnaire.[229] The Court held, *inter alia*, that although the decision was adequately supported by the evidence,[230] the decision nevertheless appeared to be "pretextual,"[231] thus warranting a remand to the agency.

In March 2018, Secretary of Commerce Wilbur Ross announced in a memo that he had decided to reinstate a question about citizenship on the 2020 decennial census questionnaire.[232] The Secretary stated that he was acting at the request of the Department of Justice, which sought improved data about citizen voting-age population for purposes of enforcing the Voting Rights Act.[233] Shortly after the Secretary announced his decision, two groups of plaintiffs filed suit in a New York federal court, challenging the decision on several grounds, including on the basis that it violates the Enumeration Clause of the Constitution and the requirements of the APA.[234]

226. *Id.*
227. *Id.* at 1958 (internal quotation marks, citations, and alterations omitted).
228. 139 S. Ct. 2551 (2019).
229. *Id.* at 2569 ("The Secretary's decision to reinstate a citizenship question is amenable to review for compliance with those and other provisions of the Census Act, according to the general requirements of reasoned agency decisionmaking.").
230. *Id.*
231. *Id.* at 2576.
232. *Id.* at 2562.
233. *Id.*
234. *Id.* at 2563.

Writing for the majority, Chief Justice Roberts held that the Enumeration Clause "permits Congress, and by extension the Secretary, to inquire about citizenship on the census questionnaire."[235] With respect to whether the Secretary abused his discretion in reinstating the citizenship question, the Court concluded that the evidence before the Secretary supported his decision.[236] The Court held that "the choice between reasonable policy alternatives in the face of uncertainty was the Secretary's to make"[237] and that "[i]t is not for [the Court] to ask whether his decision was 'the best one possible' or even whether it was 'better than the alternatives.'"[238]

The Court, however, determined that the district court was nevertheless justified in remanding to the agency because the Secretary's decision appeared to be based on a "pretextual" rationale.[239] The Court held that in "viewing the evidence as a whole, we share the District Court's conviction that the decision to reinstate a citizenship question cannot be adequately explained in terms of DOJ's request for improved citizenship data to better enforce the VRA."[240] Although the Court noted that such a result is "rare"[241] and "unusual"[242]—in light of the deference applied when evaluating informal agency action—the "reasoned explanation requirement of administrative law … [requires] that agencies offer genuine justifications for important decisions . . . that can be scrutinized by courts and the interested public."[243]

Justice Thomas (joined by Justices Gorsuch and Kavanaugh) dissented from that portion of the Court's opinion that found the Secretary's rationale a "pretext." According to Justice Thomas, the Court's "only role in this case [was] to decide whether the Secretary complied with the law and gave a reasoned explanation for his decision."[244] Because the Court answered those questions in the affirmative, Justice Thomas would have ended the inquiry.[245] The dissent also opined that the Court's decision was unprecedented and transformative for administrative law, because "[f]or the first time ever, the Court invalidates an agency action solely because it questions the sincerity of the agency's otherwise adequate rationale."[246] The dissenting justices wrote that "[i]t is not difficult for political opponents

235. *Id.* at 2567.
236. *Id.* at 2569.
237. *Id.* at 2570.
238. *Id.* at 2571 (quoting FERC v. Elec. Power Supply Ass'n, 136 S. Ct. 760, 782 (2016)).
239. *Id.* at 2576.
240. *Id.* at 2575.
241. *Id.*
242. *Id.* at 2576 (citing Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985)).
243. *Id.*
244. *Id.* (Thomas, J., dissenting).
245. *Id.*
246. *Id.*

of executive actions to generate controversy with accusations of pretext, deceit, and illicit motives"[247] and that crediting such accusations "could lead judicial review of administrative proceedings to devolve into an endless morass of discovery and policy disputes not contemplated"[248] by the Administrative Procedure Act.

In *Kisor v. Wilkie*,[249] a narrow majority of the Court clarified, but declined to overrule, the principle known as *Auer*[250] or *Seminole Rock*[251] deference, which directs courts to defer to an administrative agency's reading of ambiguous language in its own regulation, so long as the interpretation is reasonable. James Kisor, a veteran of the Vietnam War, sought disability benefits from the Department of Veteran Affairs (the "VA").[252] He first applied in 1982, claiming to have developed post-traumatic stress disorder as a result of his involvement in a military operation.[253] The VA denied benefits to Mr. Kisor after the evaluating psychiatrist determined that Mr. Kisor did not suffer from PTSD.[254] Twenty-four years later, the VA determined that Mr. Kisor did, in fact, suffer from PTSD.[255] However, the VA only granted Mr. Kisor benefits starting from the time of his motion to reopen, filed in 2006, not retroactive to his initial application filed in 1982.[256]

Under the applicable VA regulation, retroactive benefits were available to Mr. Kisor if he presented "relevant official service department records" that the agency had not considered in its prior denial.[257] Although Mr. Kisor had produced two new service records, both confirming his involvement in the military operation that caused his condition, the Board of Veterans' Appeals (the "Board") determined that these records were not "relevant" under the regulation, because they did not establish that Mr. Kisor actually suffered from PTSD—the basis of the denial of benefits in 1982.[258] The Court of Appeals for the Federal Circuit affirmed based on deference to the Board's interpretation of the VA rule.[259] The Federal Circuit concluded that the regulation was ambiguous based on two competing interpretations of the term "relevant," *to wit*: (i) records casting doubt

247. *Id.*
248. *Id.*
249. 139 S. Ct. 2400 (2019).
250. Auer v. Robbins, 519 U.S. 452 (1997).
251. Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945).
252. *Kisor*, 139 S. Ct. at 2409.
253. *Id.*
254. *Id.*
255. *Id.*
256. *Id.*
257. *Id.*
258. *Id.*
259. *Id.*

on the agency's prior rationale (as advanced by the Board); or (ii) records relating to the veteran's claim more broadly (as urged by Mr. Kisor).[260] The Federal Circuit determined that *Auer* deference was appropriate, and that the agency's interpretation of its own regulation should govern.[261]

Writing for five justices (including the Chief Justice), Justice Kagan began by stating several limitations to *Auer* deference: (i) it does not apply unless the regulation is truly ambiguous, after the court exhausts all of the traditional tools of interpretation; (ii) even if genuine ambiguity exists, the agency's interpretation must be reasonable; (iii) the interpretation must be the agency's "authoritative" or "official" position; (iv) the agency's interpretation must in some way implicate its substantive expertise; and (v) the agency's reading of the rule must reflect "fair and considered judgment" to be entitled to deference.[262] However, the Court declined the petitioner's request to overrule *Auer* deference, noting that the "long line of precedents" upon which it is based go back "75 years or more,"[263] and that Congress could have acted at any time to require a *de novo* review of regulatory interpretations, but chose not to.[264] However, the Court vacated the judgment and remanded the case for further proceedings, noting that the Federal Circuit was too quick to find "ambiguity" in the regulatory language at issue,[265] and that it should not have simply "assumed" that *Auer* deference should apply in these circumstances.[266]

In a provocative concurring opinion spanning over forty pages, Justice Gorsuch—joined by Justice Thomas and, in part, by Justices Alito and Kavanaugh—lamented that the Court failed to "say 'goodbye'" to *Auer* deference.[267] According to the concurrence, *Auer* deference improperly "requires judges to accept an executive agency's interpretation of its own regulations even when that interpretation doesn't represent the best and fairest reading."[268] Further, *Auer* deference unnecessarily favors the federal government's position, thus "deny[ing] the people who come before [the courts] the neutral forum for [the resolution of] their disputes that they rightly expect and deserve."[269] In addition, Justice Gorsuch asserted that (i) the Court had to rely on *stare decisis* to uphold *Auer* deference, because five votes did not exist to defend its legitimacy and prudence;

260. *Id.*
261. *Id.*
262. *Id.* at 2415–17.
263. *Id.* at 2422.
264. *Id.* at 2422–23.
265. *Id.* at 2424.
266. *Id.*
267. *Id.* at 2425 (Gorsuch, J., concurring).
268. *Id.*
269. *Id.* at 2428.

(ii) the Court's need to clarify the purpose and applicability of the principle only demonstrates that it is unworkable; and (iii) a "legion" of academics and jurists have called for the demise of *Auer* deference.[270] Justice Gorsuch warned that *Auer* deference is on "life support" due to the Court's several "new and nebulous" limitations on its applicability.[271]

270. *Id.* at 2425.
271. *Id.*