

Looking Ahead: October Term 2017

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It's always a fool's errand to venture predictions about the Supreme Court. But it's an especially foolish fool who ventures predictions about the Supreme Court when a new justice arrives on the scene. We sincerely hope that's not why Cato asked us to pen these thoughts on the upcoming term, which will mark the Court's first full year with its newest member, Justice Neil Gorsuch. But in the interest of full disclosure, we offer this disclaimer: "Your *&\$@! guess is as good as ours."^{TM1}

The arrival of a new justice alters the Court not merely by one-ninth, but in its entirety. As in a chess game, such a move rearranges the entire board, as the other justices react and respond to the change. Consider, for example, what happened in October Term (OT) 1991, when the Court's most liberal member, Thurgood Marshall, was replaced by its most conservative member, Clarence Thomas, and the Court moved not to the right but to the left.² The lingering absence of Justice Antonin Scalia, who dominated discourse on the Court for almost three decades, only highlights the potential for surprise. Conventional wisdom simply substitutes Justice Gorsuch as a proxy vote for Justice Scalia while keeping all other inputs the same, and perhaps that theory will be borne out. But conventional wisdom—especially when it comes to the Supreme Court—is often wrong.

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¹ Cf. *Matal v. Tam*, 137 S. Ct. 1744 (2017).

² See, e.g., *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833 (1992); *Lee v. Weisman*, 505 U.S. 577 (1992).

There tends to be a cycle in Supreme Court terms, with blockbuster terms followed by lackluster ones, and vice versa. If that trend continues to hold, we should be in for quite a term, because it's hard to remember a term as anticlimactic as OT 2016. Many of the biggest cases of the upcoming term still remain unknown, as the Court has yet to fill four of its seven months of argument. As of this writing, the Court has 31 cases on its docket (versus 29 at this point last year, and 35, 39, and 47 at this point in the years before that). The granted cases include several that have the potential to be more consequential than any case decided last term. So while it's hard to predict just what kind of a term this will turn out to be, it's a safe bet to assume that it will turn out to be more significant than OT 2016. The following pages discuss some of the key cases, as well as several potentially significant cases in the pipeline.

I. Elections

It's sometimes surprising to discover that, in over 200 years, an important constitutional question has not been definitively answered by the Supreme Court. *Gill v. Whitford* presents such a question: is partisan gerrymandering unconstitutional? The Court has twice before addressed this question, but in neither case provided a clear answer.³ Thus, although partisan gerrymandering is nothing new (Elbridge Gerry died in 1814), the law in this critically important area remains unsettled.

All of that could change as a result of *Gill*. In the wake of the 2010 census, the Wisconsin legislature (then, as now, controlled by Republicans) adopted a redistricting plan (Act 43) for state legislative districts. In 2012, under Act 43, the Republican Party received 48.6 percent of the two-party statewide vote share for Assembly candidates and won 60 of 99 seats in the Wisconsin Assembly. In 2014, under Act 43, the Republican Party received 52 percent of the two-party statewide vote share and won 63 Assembly seats.

A group of Wisconsin Democratic voters sued members of the Wisconsin Elections Commission. According to the complaint, Act 43 diluted Democratic votes statewide by (1) "cracking"—"dividing a party's supporters among multiple districts so that they fall short of a majority in each one," and (2) "packing"—"concentrating a

³ See *Vieth v. Jubilerer*, 541 U.S. 267 (2004); *Davis v. Bandemer*, 478 U.S. 109 (1986).

party's supporters in a few districts where they win by overwhelming margins."⁴ The plaintiffs alleged that these practices resulted in excessive "wasted" votes: votes cast either for a losing candidate (because of "cracking") or for a winning candidate (because of "packing"). They urged the court to adopt a new measure for assessing the discriminatory effect of partisan gerrymanders: the so-called "efficiency gap"—the difference between the parties' respective "wasted" votes in an election, divided by the total number of votes cast. The plaintiffs provided the following example:

Suppose . . . that there are five districts in a plan with 100 voters each. Suppose also that Party A wins three of the districts by a margin of 60 votes to 40, and that Party B wins two of them by a margin of 80 votes to 20. Then Party A wastes 10 votes in each of the three districts it wins and 20 votes in each of the two districts it loses, adding up to 70 wasted votes. Likewise, Party B wastes 30 votes in each of the two districts it wins and 40 votes in each of the three districts it loses, adding up to 180 wasted votes. The difference between the parties' respective wasted votes is 110, which, when divided by 500 total votes, yields an efficiency gap of 22% in favor of Party A.⁵

The plaintiffs alleged that an "efficiency gap" of more than seven percent is presumptively unconstitutional insofar as it "treats voters unequally, diluting their voting power based on their political beliefs, in violation of the Fourteenth Amendment's guarantee of equal protection," and "unreasonably burdens their First Amendment rights of association and free speech."⁶ They requested a declaration that Act 43—which produced an "efficiency gap" of 13 percent in 2012 and 10 percent in 2014—is unconstitutional, an injunction prohibiting further elections under the map, and the drawing of a new redistricting map.

A divided three-judge district court, per Seventh Circuit Judge Kenneth Ripple, ruled in the plaintiffs' favor⁷—and thereby became the first federal court to find an unconstitutional partisan gerrymander since the district court decision reversed by the Supreme Court

⁴ Compl. at ¶ 5, *Whitford v. Gill*, No. 15-421 (W.D. Wisc.).

⁵ *Id.* at ¶ 50.

⁶ *Id.* at ¶ 2.

⁷ *Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016).

in *Davis v. Bandemer* more than 30 years ago. According to the majority, the test for an unconstitutional partisan gerrymander is whether a redistricting plan (1) “intended to place a severe impediment on the effectiveness of the votes of individual citizens on the basis of their political affiliation”; (2) “ha[d] that effect”; and (3) “cannot be justified on other, legitimate legislative grounds.”⁸ Act 43, the majority held, met each of these criteria: (1) partisan advantage was a “motivating factor” behind the plan, (2) the plan made it “more difficult for Democrats, compared to Republicans, to translate their votes into seats,” as “corroborat[ed]” by the “efficiency gap,” and (3) although the plan comports with neutral redistricting criteria (such as contiguity, compactness, and respect for political subdivisions), it is “possible to draw a map with much less of a partisan bent than Act 43.”⁹ In a subsequent remedial order, the court enjoined appellants from using Act 43 in future elections and ordered the state to enact a new plan for the 2018 elections by November 1, 2017.¹⁰

The Supreme Court noted probable jurisdiction over the case (because it involved a direct appeal from a three-judge district court, not a petition for certiorari) and, by a vote of 5-4, granted Wisconsin’s request to stay the judgment pending disposition of the appeal.¹¹

Gill, like previous partisan-gerrymandering cases, presents two major questions: (1) is a partisan gerrymandering claim justiciable at all, and (2) if so, under what standard? Those two questions are, of course, intertwined: a major rationale for deeming such claims non-justiciable is the absence of any obvious objective standard for adjudicating them. In *Bandemer*, a majority of the Court held that such claims are justiciable but failed to produce a majority opinion on the relevant standard.¹² In *Vieth*, a plurality of the Court ruled that such claims are not justiciable,¹³ but Justice Anthony Kennedy concurred in the judgment on the ground that he “would not foreclose all possibility of judicial relief if some limited and precise rationale

⁸ *Id.* at 884.

⁹ *Id.* at 884–927.

¹⁰ 2017 WL 383360 (W.D. Wis. Jan. 27, 2017).

¹¹ 2017 WL 2621675 (June 19, 2017). Several of the authors’ colleagues at Kirkland & Ellis filed amicus briefs supporting the state at the jurisdictional and stay stages.

¹² 478 U.S. at 118–27; *id.* at 127–43 (plurality op.).

¹³ 541 U.S. at 277–306 (plurality op.).

were found to correct an established violation of the Constitution in some redistricting cases.”¹⁴ With the exception of Justice Thomas, all of the members of the *Vieth* plurality are gone. If the stay vote is any indication, *Gill* is likely to be a close case and (like *Bandemer* and *Vieth* before it) could well produce a fractured outcome. It is also one of those cases whose importance depends on its outcome. If the Court reverses, then the status quo continues and the case will be remembered only by election law mavens. But, if the Court affirms, it could fundamentally alter the nation’s political trajectory. Act 43’s challengers appear to believe that, in the “efficiency gap,” they have found the holy grail of election law: a neutral, objective yardstick for courts to use in assessing whether partisan gerrymandering has crossed a constitutional line (and thus to satisfy the concerns that Justice Kennedy expressed in *Vieth*). If so, the 2015 *Chicago Law Review* article in which that concept was proposed will surely go down as among the most consequential of its kind in American history.¹⁵ At a minimum, Supreme Court cognoscenti should expect to hear references to the “efficiency gap,” “packing,” and “cracking” in the months to come, and may wish to work those words into their cocktail-party vocabulary accordingly.

II. Foreign Relations/Immigration

A. Travel Ban

Unless our readers have been hiding under rocks for the last six months, they will be at least generally aware of the litigation over the travel ban that President Donald Trump abruptly announced by executive order during his first week in office. The order stated that “[n]umerous foreign-born individuals have been convicted or implicated in terrorism-related crimes since September 11, 2001, including foreign nationals who entered the United States after receiving visitor, student, or employment visas, or who entered through the United States refugee resettlement program.”¹⁶ To allow the federal government to reassess its visa and refugee programs, the order (1) suspended for 90 days immigrant and nonimmigrant entry into the

¹⁴ *Id.* at 306 (Kennedy, J., concurring in the judgment).

¹⁵ Nicholas Stephanopoulos & Eric McGhee, *Partisan Gerrymandering & the Efficiency Gap*, 82 U. Chi. L. Rev. 831 (2015).

¹⁶ Exec. Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017).

United States of all nationals of seven specified countries (Iran, Iraq, Libya, Sudan, Somalia, Syria, and Yemen), and (2) suspended for 120 days the U.S. Refugee Admissions Program, imposed a ban of indefinite duration on the entry of refugees from Syria, and limited the entry of refugees to 50,000 in fiscal year 2017.¹⁷ The implementation of the order was—to put it mildly—rocky, and within hours batteries of lawyers had shown up at the country’s major international airports and unleashed a torrent of lawsuits.¹⁸

The administration did not fare well in the initial round of litigation. A district court in Washington state granted a temporary restraining order (TRO) prohibiting nationwide enforcement of the executive order, and the Ninth Circuit—treating the TRO as an appealable preliminary injunction—affirmed.¹⁹ The president responded by signing a revised executive order that reinstated the 90-day ban on the entry of nationals of six of the original seven countries (minus Iraq), and otherwise adjusted and provided further justification for the original order.

The revised order, which took effect on March 16, 2017, was again challenged across the country, and district courts in Maryland and Hawaii promptly entered nationwide injunctions against its enforcement. Those orders quickly made their way to the Fourth and Ninth Circuits, respectively, and both circuits mostly affirmed them.²⁰ The Fourth Circuit, sitting en banc in the first instance, affirmed by a vote of 10-3. The majority opinion, authored by Chief Judge Roger Gregory, concluded that the order violated the Establishment Clause because it was motivated by a discriminatory animus toward Muslims (based largely on the president’s statements during the 2016 campaign), and essentially dismissed the order’s national security concerns as pretextual.²¹ Several judges concurred or concurred in the judgment, and three judges dissented. The dissenting judges

¹⁷ *Id.*

¹⁸ Several of the authors’ colleagues at Kirkland & Ellis LLP have been involved in challenges to the travel ban.

¹⁹ *Washington v. Trump*, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017), *aff’d* 847 F.3d 1151 (9th Cir. 2017) (per curiam), reconsideration en banc denied, 853 F.3d 933 (9th Cir. 2017).

²⁰ *Int’l Refugee Assistance Project (IRAP) v. Trump*, 857 F.3d 554 (4th Cir. 2017) (en banc); *Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017) (per curiam).

²¹ *IRAP*, 857 F.3d at 588–604.

accused the majority of failing to follow *Kleindienst v. Mandel*, in which the Supreme Court upheld the exclusion of an alien for “facially legitimate and bona fide” reasons, and took particular aim at the majority’s reliance on the president’s statements during the campaign to impugn the validity of his official action.²²

Meanwhile, across the country, a Ninth Circuit panel reached the same result, albeit for different reasons. Rather than ruling on constitutional grounds, the Ninth Circuit ruled on statutory ones: the court concluded that the president had exceeded his statutory authority. The key statute provides the following:

Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.²³

The Ninth Circuit concluded that the order did not make a sufficient “find[ing]” that the entry of all nationals of the targeted countries, and of refugees, “would be detrimental to the interests of the United States.”²⁴ In addition, the court held that the order violated another statutory provision, which specifies that “[N]o person shall . . . be discriminated against in the issuance of an immigrant visa because of the person’s . . . nationality,”²⁵ as well as a statute requiring the president to engage in “appropriate consultation” with Congress before setting the number of refugees to be admitted in any fiscal year.²⁶

The government asked the Supreme Court not only to review both the Fourth and Ninth Circuit decisions, but in the meanwhile to stay the nationwide injunctions affirmed by those courts. In a *per curiam* order entered on the last day of last term, the Court granted the government’s petitions for certiorari and directed the parties to address,

²² *Id.* at 639–54 (Niemeyer, J., dissenting) (citing *Kleindienst v. Mandel*, 408 U.S. 753 (1972)).

²³ 8 U.S.C. § 1182(f).

²⁴ *Hawaii*, 859 F.3d at 769–74.

²⁵ 8 U.S.C. § 1152(a)(1)(A).

²⁶ 8 U.S.C. § 1157(a)(2).

in addition to the questions presented below, whether the disputed 90-day travel ban on nationals in the six targeted countries became moot on June 14, 2017—90 days after the revised executive order took effect.²⁷ Accordingly, the two travel-ban cases, *Trump v. International Refugee Assistance Project* and *Trump v. Hawaii*, have been scheduled for oral argument in the Court's October sitting.

In addition, the Court granted in part the government's request for a stay of the two nationwide injunctions, and stayed those injunctions insofar as they prevented enforcement of the revised executive order "with respect to foreign nationals who lack any bona fide relationship with a person or entity in the United States."²⁸ The Court took an unusual path to this Solomonian solution. Although the Court itself has previously characterized the first two factors in the multifactor test for granting (or staying) preliminary injunctive relief as "the most critical,"²⁹ the Court purported to bypass those issues (and the many contentious questions they implicated) to focus instead on the equities. As the Court noted, the injunctions at issue here extend well beyond the named plaintiffs, to encompass "foreign nationals abroad who have no connection to the United States at all." According to the Court, "the equities relied on by the lower courts do not balance the same way in that context." Thus, the Court held that either "a close familial relationship" or "a formal, documented" relationship "formed in the ordinary course, rather than for the purpose of evading [the order]" is required.³⁰

Justice Thomas, joined by Justices Samuel Alito and Gorsuch, dissented on the ground that the injunctions should be stayed in full because, first and foremost, the government had shown a strong likelihood of success on the merits, as well as irreparable harm and a favorable balance of the equities. Justice Thomas also chastised the majority for "invit[ing] a flood of litigation . . . , as parties and courts struggle to determine what exactly constitutes a 'bona fide relationship,' who precisely has a 'credible claim' to that relationship, and

²⁷ *Trump v. Int'l Refugee Assistance Project (IRAP)*, 137 S. Ct. 2080 (2017) (per curiam).

²⁸ *Id.* at 2087.

²⁹ *Nken v. Holder*, 556 U.S. 418, 434 (2009).

³⁰ *IRAP*, 137 S. Ct. at 2088.

whether the claimed relationship was formed ‘simply to avoid [the executive order].’³¹

Justice Thomas’s predictions soon proved prescient, as the administration issued guidelines narrowly defining “a close familial relationship,” which were promptly challenged in court. The district court in Hawaii rejected the administration’s exclusion of grandparents, grandchildren, aunts, uncles, nieces, nephews, cousins, brothers-in-law, and sisters-in-law of would-be entrants, and the Supreme Court (again over the dissent of Justices Thomas, Alito, and Gorsuch) declined to intervene.³²

So, after all of the legal drama surrounding the executive orders, where do things now stand? On the merits, it’s hard to say. The Court’s *per curiam* order partially lifting the stay successfully papered over whatever differences among the justices in the majority may have lurked beneath the surface. It also allowed the Court to reach a result that allowed both sides to claim victory—the president could claim that the Court (unanimously, no less) had largely upheld his orders, while the challengers could claim that the stay order left the injunctions intact in many, if not most, of their applications. Sure enough, both sides were promptly spinning the Court’s stay order to their advantage. There remains considerable doubt as to whether the Court will ever reach the merits. As noted above, the ban on entry of nationals of six targeted countries was, by its terms, scheduled to last for only 90 days, and that time elapsed in mid-June, even before the Court granted review. Although other components of the executive order also have been challenged, most of those were scheduled to sunset too, and the Court may simply decide that the core of the cases is moot and dismiss them (presumably, but not necessarily, vacating the lower court opinions in the process). There is certainly risk to the administration in trying to push the issue: while three of the justices have staked out a clear position in the administration’s favor on the merits, the other six have not, and it is by no means obvious that the administration can pick up the requisite two additional votes. Unless the administration decides to press its luck, these cases

³¹ *Id.* at 2090 (Thomas, J., concurring in part and dissenting in part).

³² *Washington v. Trump*, 2017 WL 2989048 (D. Haw. Jul. 13, 2017); 2017 WL 3045234 (Jul. 19, 2017).

may find their place among those that entered the Court to great public fanfare only to exit quietly.

B. Alien Tort Statute

It's not often that the exact same issue is briefed and argued twice on the merits in the Supreme Court. That is because, unless the Court divides evenly or dismisses a writ of certiorari as improvidently granted, it tends to render a merits decision on the issue presented. In *Kiobel v. Royal Dutch Petrol. Co.*, however, the Court departed from that norm.³³ The Court granted certiorari in that case to review the Second Circuit's conclusion that the Alien Tort Statute (ATS)³⁴ is categorically inapplicable to actions against corporations. After briefing and argument, however, the Court directed the parties to brief and argue an entirely different question: "Whether and under what circumstances the [ATS] allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States."³⁵ The Court heard oral argument once again, and affirmed the judgment on the ground that the ATS does not apply extraterritorially, and none of the relevant conduct in that case touched and concerned the United States "with sufficient force to displace the presumption against extraterritorial application."³⁶

That disposition left the Second Circuit in somewhat of an awkward spot. While the Supreme Court did not reject its per se rule against corporate liability under the ATS, neither did the Court provide a ringing endorsement of that rule by reaching out to decide the case on other grounds. One might have expected the Second Circuit to leave the matter at that by following the Supreme Court's lead and deciding subsequent cases on extraterritoriality grounds. But it did not. Instead, the appellate court went out of its way to decide a subsequent case based on its corporate-liability precedent in *Kiobel I*—while casting substantial doubt on that precedent—in an avowed effort to "clarify" the law in this area (that is, to wipe *Kiobel I* off

³³ 133 S. Ct. 1659 (2013).

³⁴ 28 U.S.C. § 1350.

³⁵ 132 S. Ct. 1738 (2012).

³⁶ *Kiobel*, 133 S. Ct. at 1669.

the books).³⁷ The panel all but invited the full Second Circuit or the Supreme Court to review its judgment applying *Kiobel I*, declaring that “we will leave it either to an en banc sitting of this Court or an eventual Supreme Court review to overrule *Kiobel I* if, indeed, it is no longer viable.”³⁸

The Second Circuit denied rehearing en banc by a vote of 10-3, and the three dissenters notably included two of the panel members.³⁹ Judge Dennis Jacobs, concurring in the denial of rehearing en banc, blasted the panel for having “steered deliberately into controversy” by resolving the case on corporate-liability rather than extraterritoriality grounds.⁴⁰ Judge Denny Chin, a member of the panel, wrote an opinion responding to Judge Jacobs, and Judge Rosemary Pooler wrote a separate dissent from the denial of rehearing en banc on the merits—in response to which Judge José Cabranes, author of *Kiobel I*, wrote yet another opinion concurring in denial of rehearing en banc.

If the Second Circuit panel sought to write its opinion in a way that would force the Supreme Court’s hand, it achieved its goal: the Court granted certiorari in *Jesner v. Arab Bank, PLC*.⁴¹ The petition presents the question originally presented, but not decided, in *Kiobel*: “Whether the Alien Tort Statute, 28 U.S.C. § 1350, categorically forecloses corporate liability.” The significance of that question, in light of the Supreme Court’s decision in *Kiobel II*, is open to question: as Judge Jacobs noted: “The principle of *Kiobel I* has been largely overtaken, and its importance for outcomes has been sharply eroded” by the extraterritoriality ruling of *Kiobel II*.⁴² Indeed, extraterritoriality will clearly be “the elephant in the room” in *Jesner*, where the underlying offense against the law of nations is terrorism against Israeli citizens by four Palestinian terrorist groups that allegedly used accounts at branches of respondent Arab Bank in a score of countries (including a single U.S. branch, in Manhattan). If the Court is, once again, disinclined to address the corporate-liability question teed up

³⁷ In re Arab Bank, PLC Alien Tort Statute Litig., 808 F.3d 144 (2d Cir. 2015).

³⁸ *Id.* at 157.

³⁹ In re Arab Bank, PLC Alien Tort Statute Litig., 822 F.3d 34 (2d Cir. 2016) (order).

⁴⁰ *Id.* at 37 (Jacobs, J., concurring in the denial of rehearing en banc).

⁴¹ Several of the authors’ colleagues at Kirkland & Ellis represent the respondent, Arab Bank, PLC, in the Supreme Court.

⁴² 822 F.3d at 35 (Jacobs, J., concurring in the denial of rehearing en banc).

by the Second Circuit, there appear to be ample grounds to rest a ruling on extraterritoriality grounds—or certainly individual justices may be tempted to do so. The merits of the corporate-liability question essentially boil down to the question of the level of generality at which “the law of nations” is incorporated into the ATS: is it incorporated only with respect to the underlying conduct prohibited, or is it incorporated with respect to both the underlying conduct and the status of the alleged perpetrator of that conduct? Although these questions will undoubtedly generate heated commentary in international law reviews, the practical effect of the Court’s decision either way—should the Court even reach the issue—appears to be quite limited. If *Jesner* is “The Return of *Kiobel*,” then *Kiobel* is returning in a far diminished state.

III. Religion

Back in the days when Justice Scalia cajoled the Supreme Court—and accordingly the Court’s bar—to take history seriously as a tool of constitutional interpretation, we doubt he ever imagined that the following line would appear in a Supreme Court brief: “Cake making dates back to at least 1175 B.C.” But there it is, right in the petition for certiorari in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, which the Court granted after distributing it for an eye-popping 19 conferences. While it is certainly possible that the justices were busy researching what qualified as a “cake” in the ancient world, it is more likely that they were divided over whether to grant review in a hot-button case that pits the rights of a gay couple, Charlie Craig and David Mullins, against the rights of a baker (and Masterpiece’s owner), Jack Phillips, who declined to design and create a cake for their same-sex wedding.

After Phillips’s refusal, Craig and Mullins filed charges of discrimination with the Colorado Civil Rights Commission, alleging prohibited discrimination in a place of public accommodation on the basis of sexual orientation. The commission ruled in their favor and issued a cease-and-desist order directing Masterpiece to (1) take remedial measures, including comprehensive staff training and alteration to the company’s policies to ensure compliance with Colorado’s anti-discrimination law, and (2) file quarterly compliance reports for two years that, among other things, document all instances in which patrons were denied service and the reasons therefor. Masterpiece

appealed that order to the Colorado Court of Appeals, which affirmed.⁴³ In so doing, the court rejected Masterpiece's argument that the application of Colorado's anti-discrimination law to require Phillips to design and create cakes for same-sex weddings violated his First Amendment rights to free speech and free exercise of religion. According to the court, "Masterpiece does not convey a message supporting same-sex marriage merely by abiding by the law and serving its customers equally," and "the act of designing and selling a wedding cake to all customers free of discrimination does not convey a celebratory message about same-sex weddings likely to be understood by those who view it."⁴⁴ The court also rejected Masterpiece's argument that the anti-discrimination law was itself being applied in a discriminatory fashion, because the commission refused to penalize secular bakers who refused to design and create cakes with anti-gay messages.⁴⁵ By a divided vote, the Colorado Supreme Court denied discretionary review.

At least on the surface, *Masterpiece Cakeshop* is an irresistibly compelling case because it appears to present a stark conflict between rights: the right to be free from discrimination, on the one hand, and the rights of free speech and the free exercise of religion, on the other. The Colorado Court of Appeals tried to sidestep this conflict by concluding that the acts of designing and creating a cake are not inherently expressive—especially where, as here, the baker declined to create the cake before any discussion of its design. Masterpiece counters that Phillips was exercising his First Amendment rights by refusing to design and create *any* cake to celebrate a same-sex wedding and notes that, in its landmark *Obergefell* decision, the Supreme Court acknowledged that "those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned."⁴⁶

Precisely because it involves a clash of rights, it is very hard to predict how *Masterpiece Cakeshop* will come out. The fact that there apparently were not four votes to grant certiorari until after the confirmation of Justice Gorsuch suggests that the Court is closely divided.

⁴³ Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272 (Colo. App. 2015).

⁴⁴ *Id.* at 286.

⁴⁵ *Id.* at 289–93.

⁴⁶ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015).

As is often the case, it appears that Justice Kennedy's vote may be critical, and he has provided clues pointing in both directions. On the one hand, he has been the foremost champion of gay rights on the Court, authoring the majority opinion in *Obergefell* and other landmark cases that paved the path to that decision. On the other hand, he has arguably been the Court's staunchest defender of free speech, even when offensive or abhorrent. A critical issue may be the extent to which he, and the other justices, view the design and creation of a cake as an expression of the baker's views, as opposed to the client's views. The case may also provide an opportunity for the Court to revisit the elusive speech/conduct distinction and to clarify the level of constitutional protection owed to expressive conduct. Finally, the case may provide an opportunity for the Court to revisit its free-exercise jurisprudence, to address Masterpiece's argument that Colorado's facially neutral anti-discrimination law is being applied in a discriminatory manner because secular bakers have been allowed to decline to design and create cakes with an anti-gay message. For those who had never even contemplated the possibility that cakes could be "pro-gay," "anti-gay," "racist," "atheist," or "fascist," the case promises a delectable confectionary detour from the Court's ordinary fare.

IV. Arbitration

Hardly a term has gone by in recent years when the Supreme Court has not decided a case involving the Federal Arbitration Act (FAA). Such cases have tended to follow a familiar pattern: a lower court refuses to enforce an arbitration agreement on ostensibly neutral state-law grounds, and the Supreme Court reverses on the ground that those ostensibly neutral grounds are not neutral after all, but actually discriminate against or otherwise thwart federally protected arbitration rights. An important subset of these cases involves the enforceability of "class action waivers"—agreements that require bilateral arbitration, and prohibit classwide litigation or arbitration, to resolve disputes. In 2011, a closely divided Court held in *AT&T Mobility LLC v. Concepcion* that the FAA preempts state laws that deem such waivers categorically unconscionable or otherwise unenforceable. The Court reasoned that "[r]equiring the availability

of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.⁴⁷

That observation, however, did not deter the National Labor Relations Board (NLRB) from ruling the following year that agreements between individual employees and their employers that require arbitration of work-related disputes on a bilateral (rather than collective or classwide) basis interfere with the employees' right to engage in "concerted activity" under the federal labor laws. That conclusion, the NLRB declared, did not conflict with the FAA because it did not discriminate against arbitration, but applied equally to agreements in which individual employees waived the right to pursue work-related claims against an employer in *court* on a classwide basis. The Fifth Circuit in 2013 rejected the board's approach because (1) the federal labor laws do not "contain a congressional command overriding application of the FAA," and (2) "use of class action procedures . . . is not a substantive right" under the federal labor laws.⁴⁸ The NLRB, however, continued to apply its approach in other cases (because, in light of the provisions governing judicial review of the board's decisions, it was not obvious that those decisions are subject to Fifth Circuit law).

In a trio of subsequent cases, the federal courts of appeals divided on the question whether the federal labor laws preclude the enforcement of class action waivers in arbitration agreements covering claims regarding wages, hours, and terms and conditions of employment. Both the Seventh and Ninth Circuits concluded that a class action is a form of substantive "concerted activity" within the meaning of the federal labor laws, and that any attempt to restrict that right is thus unlawful.⁴⁹ In light of that conclusion, those courts held that there was no conflict between the federal labor laws and the FAA, which does not require the enforcement of unlawful arbitration agreements. The Fifth Circuit, in contrast, reaffirmed its position that adjudicating work-related claims on a classwide or collective basis is not a substantive right protected by the federal labor

⁴⁷ 563 U.S. at 344.

⁴⁸ See *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 357, 360–62 (5th Cir. 2013).

⁴⁹ *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016); *Morris v. Ernst & Young LLP*, 834 F.3d 975 (9th Cir. 2016).

laws, and that a prohibition on class action waivers thus conflicts with the FAA.⁵⁰

The Supreme Court agreed to review all three cases and consolidated them for oral argument. Thus, in *Epic Systems Corp. v. Lewis*, *Ernst & Young LLP v. Morris*, and *NLRB v. Murphy Oil USA*, the Court will analyze the relationship between the federal labor and arbitration laws. The core question is whether the right to pursue a work-related claim on a collective, as opposed to individual, basis is a substantive right protected by the federal labor laws. There is ample precedent in the context of Federal Rule of Civil Procedure 23 that the right to pursue a class action is purely procedural in nature, and indeed it could hardly be otherwise in light of the Rules Enabling Act.⁵¹ But the asserted right to pursue a class action at issue here arises not from Rule 23, but instead from the federal labor laws. Thus, the Court will have to decide whether the right to engage in concerted activity encompasses a substantive right to adjudicate a claim on a collective or classwide basis, and, if so, how such a right can be reconciled with the FAA, given the Supreme Court's recognition that collective or classwide adjudication is fundamentally inconsistent with arbitration. Like *Masterpiece Cakeshop*, this trio of cases will require the Court to resolve a clash of federal rights, although the rights at issue here are statutory, rather than constitutional. Notably, the solicitor general—who had filed the petition on behalf of the NLRB seeking review of the Fifth Circuit's decision against the board—switched sides in the cases, and now urges the Court to hold that the FAA mandates enforcement of class action waivers, and that nothing in federal labor law is to the contrary.

In recent decades, arbitration has become a standard way for American businesses to try to insulate themselves from the vagaries of class action litigation. It is not surprising that the beneficiaries of class action litigation have pushed back hard. So far, those pushback efforts—which generally have relied on state law—have largely failed. The question now is whether federal law can defeat class action waivers where state law could not. Were the Court to uphold the NLRB's position, this trio of cases would represent the

⁵⁰ *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015).

⁵¹ See, e.g., *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010); 28 U.S.C. § 2072.

first major setback to arbitration rights in the Court in decades. And other disputes lurk in the wings: the Consumer Financial Protection Bureau has recently promulgated a new rule prohibiting class action waivers in consumer financial transactions under the Dodd-Frank Wall Street Reform and Consumer Protection Act. These cases could either mark the end of a golden era for arbitration at the Supreme Court or reaffirm the Court's commitment to bilateral arbitration.

V. Criminal Law and the Fourth Amendment

A. *Qualified Immunity*

It makes perfect sense to throw a wild and crazy house party when your lease is up; the landlord was probably never going to return that deposit anyway. But "Peaches," a.k.a. "Tasty," is that rare, bold tenant who decided to move into a vacant house and throw a party *before* she had even signed a lease. And what a party! Officers responding to neighbors' complaints about "illegal activities" at the house arrived to the sight of "several women who were 'scantly dressed and had currency tucked into their garments.'"⁵² The officers smelled marijuana. "There were candles set out, a few lights on, and normal plumbing."⁵³ (Sometimes extra details can confuse more than clarify.)

Officers eventually rounded up 21 partygoers, "including a man hiding in a closet," none of whom was Tasty/Peaches. When police finally reached her by phone, she confirmed that she had indeed invited the partygoers and that "she was 'possibly' renting" the house from the owner. "Possibly"? It turns out she wasn't; police called the owner, who informed them that Tasty/Peaches "had tried, but failed, to reach a lease agreement," and that "no one, including 'Peaches,' had permission to be there."⁵⁴ The police then arrested all 21 attendees for criminal trespass ("unlawful entry" in D.C. parlance), though prosecutors later decided not to pursue any charges.

Sixteen of the 21 arrestees filed a federal lawsuit under 42 U.S.C. § 1983, alleging that the officers lacked probable cause to arrest them. The district court granted summary judgment to the partygoers, and the D.C. Circuit affirmed. Under D.C. law, "unlawful entry requires

⁵² Brief in Opp'n, D.C. v. Wesby 2–3, No. 15-1485 (O.T. 2017).

⁵³ Brief for Respondents, D.C. v. Wesby 3, No. 15-1485 (O.T. 2017).

⁵⁴ Brief for Petitioner, D.C. v. Wesby 3–5, No. 15-1485 (O.T. 2017).

proof that the accused ‘knew or should have known that s/he was entering against the person’s will,’” and “nothing about what the police learned at the scene suggests that the Plaintiffs” had or should have had such knowledge.⁵⁵ Nor were the officers entitled to qualified immunity. “[I]n the absence of any conflicting information, Peaches’ invitation vitiates the necessary element of Plaintiffs’ intent to enter against the will of the lawful owner. A reasonably prudent officer aware that the Plaintiffs gathered pursuant to an invitation from someone with apparent (if illusory) authority could not conclude that they had entered unlawfully.”⁵⁶

The D.C. Circuit denied rehearing *en banc*, but Judge Brett Kavanaugh dissented on the ground that the officers were entitled to qualified immunity. It’s hard to summarize his position more vividly than he did himself:

When police officers confront a situation in which people appear to be engaged in unlawful activity, the officers often hear a variety of mens rea-related excuses. “The drugs in my locker aren’t mine.” “I don’t know how the loaded gun got under my seat.” “I didn’t realize the under-aged high school kids in my basement had a keg.” “I wasn’t looking at child pornography on my computer, I was hacked.” “I don’t know how the stolen money got in my trunk.” “I didn’t see the red light.” “I punched my girlfriend in self-defense.”

But in the heat of the moment, police officers are entitled to make reasonable credibility judgments and to disbelieve protests of innocence from, for example, those holding a smoking gun, or driving a car with a stash of drugs under the seat, or partying late at night with strippers and drugs in a vacant house without the owner or renter present. . . .

Under the circumstances, it was entirely reasonable for the officers to have doubts about the partiers’ story and to conclude that there was probable cause to arrest the partiers for trespassing. The police officers are entitled to qualified immunity.⁵⁷

⁵⁵ *Wesby v. D.C.*, 841 F. Supp. 2d 20, 32 (D.D.C. 2012) (brackets omitted).

⁵⁶ *Wesby v. D.C.*, 765 F.3d 13, 21 (D.C. Cir. 2014).

⁵⁷ *Wesby v. D.C.*, 816 F.3d 96, 106–07, 109 (D.C. Cir. 2016) (Kavanaugh, J., dissenting from denial of rehearing *en banc*).

Judge Kavanaugh thought the officers were entitled to qualified immunity for the additional reason that no case had clearly established “that officers are required to believe the statements of suspected trespassers who claim that they have permission to be on the property.”⁵⁸

There’s really not much more to say. Although the petitioners in *District of Columbia v. Wesby* gamely attempt to gin up some generalized legal questions (“Are officers entitled to disbelieve suspects?”), at bottom this is a heavily fact-bound case. Indeed, the petitioners spend only eight of the 35 pages of the argument section in their opening brief on qualified immunity; the other 27 are devoted to arguing that under the circumstances they in fact had probable cause to arrest the partygoers. You might as well stamp “fact-bound” on the cover.

It is, therefore, somewhat surprising that the Court granted review in the first place; denials of qualified immunity are generally the province of summary reversals, not plenary review.⁵⁹ And maybe that’s where the case was initially headed; the petition was relisted eight times before finally being granted—no match for *Masterpiece Cakeshop*, perhaps, but impressive nonetheless. The unusually high number suggests that a justice may have been writing an opinion—either a potential summary reversal that ultimately failed to attract sufficient votes, or a dissent from denial of certiorari that eventually convinced a holdout to provide a fourth vote to grant plenary review.

Also worth remembering is Justice Thomas’s separate opinion last term *Ziglar v. Abbasi*, in which he expressed his “growing concern with our qualified immunity jurisprudence.”⁶⁰ “Instead of asking whether the common law in 1871 would have accorded immunity to an officer for a tort analogous to the plaintiff’s claim under §1983, we instead grant immunity to any officer whose conduct ‘does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.’ . . . We have not attempted

⁵⁸ *Id.* at 110.

⁵⁹ See, e.g., *White v. Pauly*, 137 S. Ct. 548 (2017) (per curiam); *Mullenix v. Luna*, 136 S. Ct. 305 (2015) (per curiam); *Taylor v. Barkes*, 135 S. Ct. 2042 (2015) (per curiam); see generally W. Baude, Foreword: The Supreme Court’s Shadow Docket, 9 N.Y.U. J.L. & Liberty 1, 45 (2015) (cataloguing summary reversals by type of case).

⁶⁰ 137 S. Ct. 1843, 1870 (2017) (Thomas, J., concurring in part and concurring in the judgment).

to locate that standard in the common law as it existed in 1871, however, and some evidence supports the conclusion that common-law immunity as it existed in 1871 looked quite different from our current doctrine.⁶¹ Justice Thomas concluded, “In an appropriate case, we should reconsider our qualified immunity jurisprudence.”⁶²

It’s unlikely that *Wesby* will be that case; the parties have not briefed the issue at all. Amicus ACLU *has* briefed it, yet concludes by urging the Court to reconsider the doctrine “[i]n a *future* case.”⁶³ And the Court will not lack for opportunities; there’s at least one pending petition (and probably many more, if not now then soon) squarely asking the Court to abandon qualified immunity altogether.⁶⁴ All that said, qualified immunity is likely to survive for some time yet, and almost certainly to outlive *Wesby*. But it’s something to watch out for—just in case.

B. Cell Phone Searches

Twice in recent years the Court has addressed how the Fourth Amendment’s proscription on “unreasonable searches and seizures” applies to modern technology—specifically, the warrantless collection of data from mobile devices. *United States v. Jones* held that the Fourth Amendment prohibits warrantless GPS tracking of a suspect’s car.⁶⁵ *Riley v. California* held that it also prohibits the warrantless search of an arrestee’s cell phone.⁶⁶ On the surface, *Carpenter v. United States* appears to be a kind of amalgam of *Riley* and *Jones*; it asks whether the Fourth Amendment prohibits the warrantless search of historical cell phone records that could, through the analysis of cell-site (cell tower) data, reveal the movements of the cell phone (and therefore its user) over time. Yet *Riley* and *Jones* are unlikely to drive the decision in *Carpenter*, no matter how it turns out.

The reason is a complicating factor known as the “third-party doctrine”: “[T]he Fourth Amendment does not prohibit the obtaining

⁶¹ *Id.* at 1871.

⁶² *Id.* at 1872.

⁶³ Brief for Am. Civil Liberties Union et al. as Amici Curiae 30, D.C. v. *Wesby*, No. 15-485 (O.T. 2017) (emphasis added); see also *id.* at 15–30.

⁶⁴ See Pet. for Cert., *Surratt v. McClaran*, No. 16-1492.

⁶⁵ 565 U.S. 400 (2012).

⁶⁶ 134 S. Ct. 2473 (2014).

of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.”⁶⁷ Applying the third-party doctrine, *United States v. Miller* held that the Fourth Amendment did not prohibit the police’s warrantless search of the suspect’s bank records.⁶⁸ Similarly, *Smith v. Maryland* held that the Fourth Amendment did not prohibit the warrantless use of a “pen register,” a (now obsolete?) device that recorded every phone number the suspect dialed.⁶⁹ In each case the defendant had “voluntarily” given the information to a third party, and so forfeited any Fourth Amendment protection of that information. Or, put differently, by “voluntarily” providing the information to a third party, the defendant no longer had a reasonable expectation of privacy in that information.

Carpenter, as noted, involves “cell site location information,” generally comprising the identities of each cell tower and directional sector to which the cell phone connected at the start and end of every call made or received. (A single cell site usually has multiple antennae, each pointing in a different direction, to cover “wedge-shaped sectors.”⁷⁰ The directional sector thus provides more granular information about the location of the cell phone relative to the tower.) The information is not a perfect indicator of location, and can sometimes even be misleading, because cell phones do not always connect to the closest tower. Indeed, this was one of the key inconsistencies at the heart of the Adnan Syed case featured on the hit podcast *Serial*.⁷¹ Nevertheless, the increasingly dense placement of cell towers (especially in urban areas) and the increasing frequency with which cell phones connect to towers (not just for phone calls, but for text messages, email, and other instances of internet access) mean that historical cell site location information can provide a fairly detailed picture of the user’s whereabouts.

⁶⁷ *United States v. Miller*, 423 U.S. 435, 443 (1976).

⁶⁸ *Id.* at 443–44.

⁶⁹ 442 U.S. 735, 744–45 (1979).

⁷⁰ Pet., *Carpenter v. United States* 5 n.3, No. 16-402 (O.T. 2017).

⁷¹ See *Syed v. Maryland*, No. 199103042–046, Pet. No. 10432 (Baltimore City Cir. Ct. June 30, 2016) (trial court order granting habeas relief based on unreliable cell tower data).

The prosecutors in *Carpenter* exploited this capability. Following a string of armed robberies in Ohio and Michigan, police sought Carpenter's historical cell phone records from MetroPCS and Sprint for the four- or five-month period over which the robberies occurred. They did so under the auspices of the Stored Communications Act, which instructs magistrate judges to authorize such disclosure without requiring a showing of probable cause.⁷² The cell site location information revealed that Carpenter's phone had connected to cell towers near several of the robbery locations at the times of the respective robberies. In part on that basis, Carpenter was convicted of several counts of Hobbs Act robbery and associated firearms crimes. The district court denied Carpenter's motion to suppress the cell site location information, and a divided Sixth Circuit panel affirmed under the third-party doctrine.

Carpenter argues that the sheer quantity of data, often spanning months, is no different from the data in *Jones*. And an increasing "volume of warrantless requests for [cell site location information] and the ubiquity of cell phones" suggest that this type of warrantless tracking has morphed into precisely the "dragnet-type law enforcement practices" that the Supreme Court has decried and Judge Alex Kozinski feared was imminent.⁷³ The government contends that Carpenter has no ownership interest in the data, used by cellular-service providers "to find weak spots in their cellular networks and to determine whether to charge customers roaming charges for particular calls."⁷⁴ And, echoing the Sixth Circuit, the government also distinguishes "the content of personal communications," in which a suspect maintains a reasonable expectation of privacy, from "the information necessary to get those communications from point A to point B," in which he does not.⁷⁵

But the government, like the Sixth Circuit, relies mostly on the third-party doctrine, which cares for none of this. All that matters is the information's having been voluntarily provided to a third party. There is no doubt that Carpenter's cell tower information was

⁷² 18 U.S.C. § 2703(d).

⁷³ *United States v. Knotts*, 460 U.S. 276, 283–84 (1983); *United States v. Pineda-Moreno*, 617 F.3d 1120, 1126 (9th Cir. 2010) (Kozinski, C.J., dissenting from denial of rehearing en banc).

⁷⁴ Brief in Opp'n for United States, *Carpenter v. United States*, No. 16-402 (O.T. 2017).

⁷⁵ *Id.* at 18 (internal quotation marks omitted).

provided to MetroPCS and Sprint—they are the ones who gathered the information in the first place. (In fact, it's doubtful the information was ever provided to Carpenter himself.) But was the disclosure of this information “voluntary”? The word is in scare quotes for a reason; does anyone really *volunteer* to share such data? The Third Circuit, at least, thinks not: “A cell phone customer has not ‘voluntarily’ shared his location information with a cellular provider in any meaningful way. As the [amicus Electronic Freedom Foundation] notes, it is unlikely that cell phone customers are aware that their cell phone providers *collect* and store historical location information.”⁷⁶

Concurring in *Jones*, Justice Sonia Sotomayor somewhat presciently remarked that the third-party doctrine “is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks.”⁷⁷ She went on:

People disclose the phone numbers that they dial or text to their cellular providers; the URLs that they visit and the e-mail addresses with which they correspond to their Internet service providers; and the books, groceries, and medications they purchase to online retailers. . . . I for one doubt that people would accept without complaint the warrantless disclosure to the Government of a list of every Web site they had visited in the last week, or month, or year.”⁷⁸

As technology becomes ever more pervasive, the third-party doctrine will allow ever more data to be collected without a warrant on the ground that we have “voluntarily” provided the data to our service providers.⁷⁹ No surprise, then, that there are few scholarly defenders of the doctrine. In fact, there may be only one.⁸⁰ Nevertheless, for now, the doctrine lives on. The government asks the Court to leave it untouched; Carpenter, unsurprisingly, asks the Court to revisit it. It's possible, of course, that the Court could decide *Carpenter*

⁷⁶ In re Application of the United States for an Order Directing a Provider of Elec. Comm'n Serv. to Disclose Records to the Gov't, 620 F.3d 304, 317 (3d Cir. 2010).

⁷⁷ 565 U.S. at 417 (Sotomayor, J., concurring).

⁷⁸ *Id.*

⁷⁹ See generally Note, If These Walls Could Talk: The Smart Home and the Fourth Amendment Limits of the Third Party Doctrine, 130 Harv. L. Rev. 1924 (2017).

⁸⁰ Orin S. Kerr, The Case for the Third-Party Doctrine, 107 Mich. L. Rev. 561 (2009).

on the ground that cell site location information does not reveal the same sort of private information as that stored on a cell phone or the same precision of location-tracking as does a GPS device. But then it's hard to see why the Court granted review. "The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear."⁸¹ *Carpenter*, rather, seems destined to reevaluate the third-party doctrine in gross.

C. *Guilty Pleas(e)*

Depending on your viewpoint, *Class v. United States* is either a dry criminal-procedure case or a sexy Second Amendment one (or at least the prelude to one). En route from Virginia to Pennsylvania, Rodney Class—a self-described "Constitutional Bounty Hunter" who roams the nation "to enforce federal criminal law against judges whom he believe[s] ha[ve] acted unlawfully"—stopped at the U.S. Capitol to get his "Commission by Declaration" as a "Private Attorney General" signed.⁸² (The briefs, regrettably, do not explain where one can obtain such documents.) Unfortunately for Rodney, he unwittingly parked his Jeep in an employee parking lot on Capitol grounds, where a federal statute prohibits all weapons.⁸³ In the Jeep were a loaded 9mm Ruger pistol, a loaded .44 Taurus pistol, a loaded .44 Henry rifle, and some 200 rounds of ammunition.

Class, who lawfully possessed (under North Carolina law, at least) all of the weapons and ammunition, moved to dismiss the indictment in part on the ground that the federal statute violates the Second Amendment. After the district judge denied the motion, Class pleaded guilty and renewed his constitutional challenge on appeal. The question presented in *Class* is whether, by pleading guilty, Class waived his right to subsequently challenge the constitutionality of his statute of conviction.

At first blush, the question seems odd because such challenges are a staple of modern criminal law: a defendant will conditionally plead guilty but reserve the right to appeal the conviction on

⁸¹ *Ontario v. Quon*, 560 U.S. 746, 759 (2010).

⁸² Brief for United States, *Class v. United States* 2, No. 16-424 (O.T. 2017); Brief for Petitioner, *Class v. United States* 4–5, No. 16-424 (O.T. 2017).

⁸³ 40 U.S.C. § 5104(e).

grounds specified in writing.⁸⁴ That's exactly what happened in *Bond v. United States*; after losing her motion to dismiss the indictment, the defendant pleaded guilty but reserved the right to appeal her conviction on the ground that the statute of conviction violated the Tenth Amendment.⁸⁵ It's also a common path for Fourth Amendment cases to reach the Supreme Court; after losing a motion to suppress, a defendant will enter a conditional guilty plea to appeal the constitutionality of the search or seizure that yielded the incriminating evidence. But Class didn't enter a *conditional* guilty plea; nor did he waive his right to appeal. Instead, he pleaded guilty without explicitly preserving *or* waiving the right to challenge the constitutionality of his statute of conviction on direct appeal. What then?

The Supreme Court partially answered that question in a pair of cases from the 1970s, *Blackledge v. Perry*⁸⁶ and *Menna v. New York*.⁸⁷ *Blackledge* held that an unconditional guilty plea does not preclude a subsequent constitutional challenge "to the very power of the State to bring the defendant into court to answer the charge brought against him."⁸⁸ *Blackledge* distinguished challenges to garden-variety "antecedent constitutional violations . . . that occurred prior to the entry of the guilty plea"—which *are* waived—from assertions of "the right not to be haled into court at all"—which are not.⁸⁹ The federal habeas petitioner's claim that the state's filing the charge (to which he pleaded guilty) itself violated due process apparently fell in the latter bucket. Two terms later and relying on *Blackledge*, *Menna* held that an appeal challenging a conviction on double-jeopardy grounds likewise is not foreclosed by a guilty plea. "Where the State is precluded by the United States Constitution from haling a defendant into court on a charge, federal law requires that a conviction on that charge be set aside even if the conviction was entered pursuant to a counseled plea of guilty."⁹⁰ A guilty plea establishes only "factual guilt," and thus precludes only challenges to "constitutional violations not

⁸⁴ See, e.g., Fed. R. Crim. P. 11(a) (2).

⁸⁵ 564 U.S. 211 (2011).

⁸⁶ 417 U.S. 21 (1974).

⁸⁷ 423 U.S. 61 (1975) (per curiam).

⁸⁸ 417 U.S. at 30.

⁸⁹ *Id.* (internal quotation marks omitted).

⁹⁰ *Menna*, 423 U.S. at 62 (citing *Blackledge*).

logically inconsistent with the valid establishment of factual guilt. . . . Here, however, the claim is that the State may not convict petitioner no matter how validly his factual guilt is established. The guilty plea, therefore, does not bar the claim.”⁹¹

Which brings us to *Class*. Is the (alleged) unconstitutionality of the no-guns-on-Capitol-grounds statute merely an antecedent “constitutional violation not logically inconsistent with the valid establishment of factual guilt,” or is it an infringement of Class’s “right not be haled into court at all”? The government and Class offer competing accounts of Federal Rule of Criminal Procedure 11(a)(2), which describes the requirements to enter conditional guilty pleas, and the application of *Blackledge*, *Menna*, and other cases; the parties generally treat the case as a dry procedural one. Viewed in this way, Class seems to have a decent shot at victory. More than 100 years ago, the Supreme Court concluded that a lower court lacks the “authority to indict and try” a defendant “if the laws are unconstitutional and void.”⁹² That sounds an awful lot like “can’t be haled into court.”

Yet it’s hard to ignore the Second Amendment subtext. Class was initially charged with violating D.C. Code § 22-4504(a), which prohibited carrying a pistol in public—until, that is, the ordinance was held to be unconstitutional in another case.⁹³ And that *Class* involves guns and gun rights can’t be far from the justices’ minds—not least because this “constitutional bounty hunter,” heavily armed and with a vendetta against judges, parked his car just a few blocks from the Supreme Court building.⁹⁴ With the possible exception of the non-argued *per curiam* opinion in *Caetano v. Massachusetts*,⁹⁵ which simply instructed the Massachusetts high court to come up with a better explanation for upholding a ban on stun guns, the Court has steadfastly refused to hear a bona fide Second Amendment case since *McDonald v. Chicago* in 2010.⁹⁶ Justice Thomas, invariably joined by Justice Scalia (and now Justice Gorsuch), has taken to publicly

⁹¹ *Id.* at 63 n.2.

⁹² *Ex parte Siebold*, 100 U.S. 371, 377 (1880).

⁹³ See *Palmer v. Dist. of Columbia*, 59 F. Supp. 3d 173 (D.D.C. 2014).

⁹⁴ And just steps from the U.S. Capitol—especially salient after the recent shooting at a congressional softball practice in Virginia. See M.D. Shear et al., *G.O.P. Lawmaker Shot Outside Capital*, N.Y. Times, June 15, 2007, at A1.

⁹⁵ 136 S. Ct. 1027 (2016) (*per curiam*).

⁹⁶ 561 U.S. 742 (2010).

dissenting from the denial of cert in some of these cases.⁹⁷ In fact, Justice Thomas used his first (and so far only) remarks at oral argument in more than a decade to question the propriety of a misdemeanor conviction's depriving the defendant of his constitutional right to own a firearm.⁹⁸ Could *Class* eventually be the sleeper Second Amendment case he's been looking for?

Bond offers an intriguing parallel. The first time *Bond* reached the Court, the only question was whether the defendant had standing to challenge the constitutionality of her statute of conviction on federalism grounds. But that was merely a prelude to the *real* question: did the Tenth Amendment prohibit the Chemical Weapons Convention Implementation Act from criminalizing a jilted wife's spreading a chemical irritant on her husband's paramour's mailbox? That was the (far more interesting) question in the second *Bond* case.⁹⁹ Yet it's unclear whether, but for the first cert grant, the Court would have agreed to grant the second *Bond* petition at all. There was no clear split, and the question was not obviously one of recurring national importance. Stewart Baker once mused that "the Supreme Court is probably somewhat more likely to grant certiorari the second time around,"¹⁰⁰ and anecdotal evidence suggests that the Court does indeed have an affinity for hearing the same case multiple times. Examples from just the last few terms include *Horne v. Department of Agriculture*,¹⁰¹ *Fisher v. University of Texas at Austin*,¹⁰² *Kirtsaeng v. John Wiley & Sons, Inc.*,¹⁰³ and *Franchise Tax Board of California v. Hyatt*.¹⁰⁴

⁹⁷ See, e.g., *Peruta v. California*, 137 S. Ct. 1995 (2017) (Thomas, J., joined by Gorsuch, J., dissenting from denial of cert.); *Friedman v. Highland Park*, 136 S. Ct. 447 (2015) (Thomas, J., joined by Scalia, J., dissenting from denial of cert.); *Jackson v. City & Cty. of San Francisco*, 135 S. Ct. 2799 (2015) (Thomas, J., joined by Scalia, J., dissenting from denial of cert.).

⁹⁸ Transcript of Oral Arg. in *Voisine v. United States*, No. 14-10154, at 35–39 (O.T. 2015).

⁹⁹ *Bond v. United States*, 134 S. Ct. 2077 (2014). Some of *Bond*'s counsel in the Supreme Court are now, though were not at the time, the authors' colleagues at Kirkland & Ellis.

¹⁰⁰ Stewart A. Baker, *A Practical Guide to Certiorari*, 33 *Catholic Univ. L. Rev.* 611, 626 (1984).

¹⁰¹ 135 S. Ct. 2419 (2015); 133 S. Ct. 2053 (2013).

¹⁰² 136 S. Ct. 2198 (2016); 133 S. Ct. 2411 (2013).

¹⁰³ 136 S. Ct. 1979 (2016); 568 U.S. 519 (2013).

¹⁰⁴ 136 S. Ct. 1277 (2016); 538 U.S. 488 (2003).

So although *Class* presents a question about criminal procedure, history suggests that it could easily morph into a Second Amendment case—if not on this go-around, then on the next one. And that is reason enough to pay attention.

VI. Federalism

“What happens in Vegas stays in Vegas” isn’t just a tourism motto, it’s federal law—law that the consolidated cases *Christie v. NCAA* and *New Jersey Thoroughbred Horsemen’s Association v. NCAA* hope to upend.¹⁰⁵ The 1992 Professional and Amateur Sports Protection Act (PASPA) makes it “unlawful” for a State to “authorize by law . . . betting, gambling, or wagering” on professional or amateur sports.¹⁰⁶ But PASPA’s proscription “shall not apply” to any “betting, gambling, or wagering scheme in operation in a State” that existed “at any time during the period beginning January 1, 1976, and ending August 31, 1990.”¹⁰⁷ This provision in effect grandfathers sports wagering in just four States—including, most notably, Nevada.¹⁰⁸

New Jersey, however, is not one of those states, thus putting the lie to *Hamilton’s* assertion that “[e]verything is legal in New Jersey.”¹⁰⁹ For decades, sports gambling in New Jersey had been expressly prohibited by statute.¹¹⁰ (New Jersey has long had casinos in Atlantic City, and PASPA does contain an additional exemption for sports-wagering schemes “conducted exclusively in casinos” that were authorized within a year of PASPA’s enactment.¹¹¹ But New Jersey never took advantage of this exemption.) Notwithstanding PASPA, in 2012 the New Jersey legislature authorized racetracks and Atlantic City casinos to enter, with a few exceptions for New Jersey-based teams

¹⁰⁵ Some of the authors’ colleagues at Kirkland & Ellis represent the respondents in both cases.

¹⁰⁶ 28 U.S.C. § 3702.

¹⁰⁷ 28 U.S.C. § 3704(a)(1).

¹⁰⁸ The others are Delaware, Montana, and Oregon. See Brief in Opp’n for United States in Nos. 16-476 & -477, at 3 (O.T. 2017); see also *NCAA v. Governor of the State of N.J.*, 730 F.3d 208, 216 (3d Cir. 2013); *OFC Comm Baseball v. Markell*, 579 F.3d 293, 297 (3d Cir. 2009).

¹⁰⁹ Lin-Manuel Miranda et al., “Blow Us All Away,” *Hamilton: An American Musical* (Original Broadway Cast Recording) (Atlantic Records 2015).

¹¹⁰ N.J. Stat. Ann. § 2A:40-1 (West 2011).

¹¹¹ 28 U.S.C. § 3704(a) (3).

and events, “the business of accepting wagers on any sports event by any system or method of wagering.”¹¹² The NCAA and all four major professional sports leagues (NFL, MLB, NBA, and NHL) promptly sued to enjoin the state statute; among other defenses, the state argued that PASPA unconstitutionally “commandeers” the state.¹¹³

The constitutional “anti-commandeering” principle stems largely from a pair of cases in the 1990s, *New York v. United States* and *Printz v. United States*. *New York* held that, under the Tenth Amendment, “even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts.”¹¹⁴ So Congress may directly regulate the storage and disposal of radioactive nuclear waste, and it may “encourage” states to regulate the disposal of such waste generated within their respective borders, but it may *not* (as it had tried to do) compel state legislatures to enact statutes to regulate such disposal under pain of “taking title” to—being stuck with the very expensive problem of—the waste if they resist. Five years later, *Printz* extended this anti-commandeering principle to state executive officers; so Congress is free to require national background checks before firearms are transferred or sold, but it may not compel state law enforcement officers to conduct those background checks.¹¹⁵

According to New Jersey, *New York* and *Printz* rendered PASPA unconstitutional to the extent it prohibited the state from enacting legislation to authorize sports gambling. The Third Circuit disagreed, in large part because PASPA “does not *require* or coerce the states to lift a finger—they are not required to pass laws, to take title to anything, to conduct background checks, to expend any funds, or to in any way enforce federal law.”¹¹⁶ Instead, PASPA merely “prohibit[s] the states from taking certain actions.”¹¹⁷ Recognizing that “affirmative commands can be easily recast as prohibitions,” the Third Circuit still held that PASPA was a garden-variety prohibition unlike

¹¹² N.J. Stat. Ann. §§ 5:12A-1, -2 (West 2012).

¹¹³ See NCAA, 730 F.3d at 226–37.

¹¹⁴ 505 U.S. 144, 166 (1992).

¹¹⁵ 521 U.S. 898, 935 (1997).

¹¹⁶ NCAA, 730 F.3d at 231.

¹¹⁷ *Id.*

the laws in *New York* or *Printz*, and the court “d[id] not read PASPA to prohibit New Jersey from repealing its ban on sports wagering.”¹¹⁸

In 2014 that’s exactly what New Jersey did: it partially repealed its longstanding statutory ban on sports wagering, though only in casinos and at racetracks and with the same New Jersey-based limitations as in the 2012 law.¹¹⁹ The 2014 statute expressly states that it is “not intended and shall not be construed as causing the State to sponsor, operate, advertise, promote, license, or authorize by law” sports wagering.¹²⁰ The NCAA and the four major professional sports leagues once again sued, and once again the Third Circuit ruled against the state.¹²¹ First, the en banc court disavowed as “too facile” the previous panel’s dictum that PASPA did not “prohibit New Jersey from repealing its ban on sports wagering.”¹²² “While artfully couched in terms of a repealer, the 2014 Law essentially provides that, notwithstanding any other prohibition by law, casinos and racetracks shall hereafter be permitted to have sports gambling. This is an authorization.”¹²³ Having found that PASPA preempted the 2014 statute, the Third Circuit once again rejected the state’s anti-commandeering arguments. “PASPA does not command states to take affirmative actions, and it does not present a coercive binary choice. Our reasoning in *Christie I* that PASPA does not commandeer the states remains unshaken.”¹²⁴ Dissenting, Judge Thomas Vanaskie posited that no matter how the 2014 law is characterized, “PASPA was intended to compel the States to prohibit wagering on sporting events” and thus runs afoul of *New York*’s holding that Congress “lacks the power directly to compel the States . . . to prohibit [certain] acts.”¹²⁵

At the certiorari stage, both the sports leagues and the solicitor general (who filed a brief in opposition in response to the Court’s call for his views) maintained that PASPA does *not* prohibit New Jersey

¹¹⁸ *Id.* at 233, 232.

¹¹⁹ S. Bill No. 2460, 216th Legis., 1st Sess. (N.J. 2014), reprinted at Pet. App. 218–22a.

¹²⁰ *Id.* § 2.

¹²¹ NCAA v. Governor of the State of N.J., 832 F.3d 389 (3d Cir. 2016) (en banc).

¹²² *Id.* at 396–97, 401.

¹²³ *Id.* at 397.

¹²⁴ *Id.* at 401.

¹²⁵ *Id.* at 406–07 (Vanaskie, J., dissenting).

from simply repealing its ban on sports wagering; it simply prohibits affirmatively *authorizing* sports wagering, and the 2014 law is really an authorization masquerading as a partial repeal.¹²⁶ This echoes the Third Circuit's understanding that a simple repeal, without more, would be *insufficient* under New Jersey law (because of a complex interplay with a state constitutional provision) to allow sports wagering in the state.¹²⁷ That the 2014 law purported to allow sports wagering proved it was really an affirmative authorization, not merely a repeal of a ban.

So the ultimate question in the case seems to be: does PASPA prohibit state-sanctioned sports gambling (which is constitutional), or does it compel states to prohibit sports gambling (which is not)? As a practical matter, not much may turn on the answer to that question—either way, you can't walk into an Atlantic City casino and bet the over/under on the length of the National Anthem sung at the Super Bowl. (The over/under was 2:09 last year; singer Luke Bryan finished in 2:04.) But the case may reveal much about the Court's collective views of the anti-commandeering principle, which resists easy characterization or prediction. Thus, although *Printz* had a right-leaning political valence, the doctrine has emerged as one of the primary defenses of "sanctuary cities" who refuse to administer federal immigration law.¹²⁸ Any bet on the outcome in *Christie* would therefore be a risky wager.

¹²⁶ See Brief in Opp'n for the United States, *NCAA v. Christie* 15, Nos. 16-476 & -477 (O.T. 2017) ("If New Jersey wishes to repeal its prohibition on sports gambling altogether and thereby remain silent with respect to such gambling, or to adopt a partial repeal that is not a de facto authorization (by, for instance, lifting state penalties on informal or social wagering), PASPA does not stand in its way. But the 2014 Act's partial repeal—which is specifically tailored to facilitate sports gambling at state-licensed casinos and racetracks—is no different from a positive enactment authorizing such gambling."); Brief in Opp'n for NCAA et al., *NCAA v. Christie* 23, Nos. 16-476 & -477 (O.T. 2017) (similar).

¹²⁷ *NCAA*, 730 F.3d at 232.

¹²⁸ See, e.g., Order Granting [Plaintiffs'] Motions to Enjoin Section 9(a) of Executive Order 13768, at 39–41, *County of Santa Clara v. Trump*, Nos. 17-cv-574, -485 (N.D. Cal. Apr. 25, 2017) (granting a preliminary injunction in part under *New York* and *Printz*), ECF No. 82.

VII. Intellectual Property Law (but Really Constitutional Law)

Most readers' eyes glaze over when they see "patent law" or "Federal Circuit"—and Latin-sounding terms like "*inter partes* review" can't help either. But *Oil States Energy Services LLC v. Greene's Energy Group, LLC*, is actually a constitutional case about property rights and the separation of powers. Specifically, *Oil States* asks whether the patent agency, after granting a patent, can later take it away without providing the patentee a jury or an Article III forum. To fully understand the dispute, however, requires a little background on how patents are issued and canceled.

Let's begin with the Constitution, which grants Congress the "power . . . to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."¹²⁹ Congress wasted little time in enacting "An Act to promote the progress of useful Arts" in 1790, which authorized patents for up to 14-year terms for "any useful art, manufacture, engine, machine, or device, or any improvement therein not before known or used" that was "sufficiently useful and important."¹³⁰

Congress quickly deleted the "sufficiently useful and important" part, which was deemed too high a barrier; only 55 patents had been issued in the three years since the 1790 act. A patentable item now needed only to be a "new and useful art, machine, manufacture or composition of matter, or any new and useful improvement on [the same], not known or used before."¹³¹ This definition endures nearly verbatim today, the only meaningful addition coming in 1952, when Congress required the patented invention to be "non-obvious" "to a person having ordinary skill in the art" as well.¹³²

Over time, some came to believe it was a little *too* easy to get a patent, particularly for software and "business methods."¹³³ Add to that concern "the *in terrorem* power of patent trolls" to extract large

¹²⁹ U.S. Const. art. I, § 8, cl. 8.

¹³⁰ 1 Stat. 109, 110 (1790).

¹³¹ 1 Stat. 318, 319 (1793).

¹³² 35 U.S.C. § 101; as amended by 66 Stat. 798 (1952), codified at 35 U.S.C. § 103.

¹³³ See, e.g., *Bilski v. Kappos*, 561 U.S. 593, 608–09 (2010); Timothy B. Lee, Software Patents Are a Disaster, *Vox*, www.vox.com/2014/12/31/7475317/software-patents-2014-review (Dec. 31, 2014).

settlements for dubious patents,¹³⁴ and it's no surprise that Congress eventually took action—though not, as it did in 1793, by changing the standards for patentability. Instead, Congress created procedures to allow patents to be revoked *after* they were granted.

Even the 1790 act permitted a district-court judge to repeal a patent within one year of its issuance upon a showing that it was “obtained surreptitiously by, or upon false suggestion.”¹³⁵ But Congress eventually authorized more searching post-issuance review within the agency itself, not the courts. For example, the 1980 Bayh-Dole Act created “*ex parte* reexamination,” under which “[a]ny person, at any time” can ask the agency to reexamine and potentially cancel a patent.¹³⁶ The agency itself can reexamine issued patents on its “own initiative” as well.¹³⁷ A patentee whose patent is canceled as a result of an *ex parte* reexamination may seek judicial review of the agency’s decision.¹³⁸

The 2011 Leahy-Smith America Invents Act created a parallel procedure called “*inter partes* review,”¹³⁹ under which any “person who is not the owner of the patent” can seek to invalidate any U.S. patent on the ground that it is either obvious or not novel.¹⁴⁰ Unlike *ex parte* reexamination, *inter partes* review is adversarial, so the petitioning party can participate in a trial-like proceeding. Both the patentee and the petitioner may appeal an adverse decision to the Federal Circuit.

And that brings us, finally, to *Oil States*. The petitioner claims that *inter partes* review is unconstitutional because it deprives a patentee of private property—his patent—without a jury, as required by the Seventh Amendment, and without an Article III tribunal, as required by, well, Article III. As in most such disputes, the parties start from different premises: the petitioner argues that a patent, once issued, is a private property right, whereas the government and the private respondent maintain that a patent is and remains a “public right.”

¹³⁴ *Commil USA, LLC v. Cisco Sys., Inc.*, 135 S. Ct. 1920, 1932 (2015) (Scalia, J., dissenting).

¹³⁵ 1 Stat. 111. The window for such a repeal was later increased to three years. See 1 Stat. 323.

¹³⁶ 35 U.S.C. §§ 301, 302.

¹³⁷ 35 U.S.C. § 303(a).

¹³⁸ 35 U.S.C. § 306.

¹³⁹ Pub. L. 112–29, 125 Stat. 284 (2011), codified at 35 U.S.C. §§ 300 et seq.

¹⁴⁰ 35 U.S.C. § 311.

The distinction is crucial. Since as early as the New Deal-era cases *Crowell v. Benson*¹⁴¹ and *NLRB v. Jones & Laughlin*,¹⁴² the Court has held that “public rights”—rights created by statute—may be adjudicated in a non-Article III forum and without a jury. (The full definition of public rights is a little more nuanced, but “created by statute” will suffice for this discussion.) The further expansion of the administrative state in the 1970s brought more cases reemphasizing this point, most notably *Atlas Roofing Company v. Occupational Health & Safety Review Commission*, which made explicit that “when Congress creates new statutory ‘public rights,’ it may assign their adjudication to an administrative agency with which a jury trial would be incompatible.”¹⁴³ In other words, courts would essentially defer to Congress on the question whether a jury-trial right would impede the effective functioning of a statutory or regulatory scheme.

Moreover, the Seventh Amendment and Article III questions became somewhat intertwined over the years. *Crowell* held that even in disputes over *private* rights, an agency could conduct the initial fact-finding without a jury, subject only to deferential appellate review in an Article III court. (This is essentially how *inter partes* review works.) In other words, agency adjudication means no jury, even for private rights. And the flip side is also true: *Curtis v. Loether* held that a jury is required, even for disputes involving statutorily created rights, if the proceeding is heard in an Article III court. “[W]hen Congress provides for enforcement of statutory rights in an ordinary civil action in the district courts, where there is obviously no functional justification for denying the jury trial right, a jury trial must be available.”¹⁴⁴

So where do patents fit? “[T]he crucial question,” said the Supreme Court in *Granfinanciera, S.A. v. Nordberg*, “is whether ‘Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, has created a seemingly “private” right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the

¹⁴¹ 285 U.S. 22 (1932).

¹⁴² 301 U.S. 1 (1937).

¹⁴³ 430 U.S. 442, 455 (1977).

¹⁴⁴ *Curtis v. Loether*, 415 U.S. 189, 195 (1977).

Article III judiciary.’”¹⁴⁵ The *Oil States* respondents, unsurprisingly, argue that patents and inter partes review fit the bill. Not only are patents created and granted by statute, but inter partes review is just one piece of a massively complex “public regulatory scheme” into which the issuance and cancellation of patents are “closely integrated.” The Federal Circuit agrees.¹⁴⁶

Against this, the *Oil States* petitioner counters with some history. A patent-infringement suit has long been a traditionally “legal” cause of action heard in the English law courts. “[T]here is no dispute that infringement cases today must be tried to a jury, as their predecessors were more than two centuries ago.”¹⁴⁷ And, setting aside invalidation because the patent was “obtained surreptitiously by, or upon false suggestion,” the traditional way to invalidate a patent has always been to raise invalidity as a defense in an infringement suit. It follows that the adversarial inter partes review proceeding must also be conducted before a jury, in an Article III forum. By way of analogy, the petitioner points to copyright, also governed by a “public regulatory scheme”; yet copyright-infringement suits have also been “tried in courts of law, and thus before juries.”¹⁴⁸ And like copyrights, patents are not “modern statutory rights unknown to 18th-century England.”¹⁴⁹ Yet the analogy goes only so far. While “the common law” has long “recognized an author’s right to prevent the unauthorized publication of his manuscript,”¹⁵⁰ patent rights, by contrast, have always “exist[ed] only by virtue of statute.”¹⁵¹ Nevertheless, as in *Curtis*, Congress has “provide[d] for enforcement of statutory [patent] rights in an ordinary civil action in the district courts,” and “there is obviously no functional justification for denying the jury trial right.”¹⁵²

¹⁴⁵ 492 U.S. 33, 54 (1989) (quoting *Thomas v. Union Carbide Agric. Products Co.*, 473 U.S. 568, 593–94 (1985)).

¹⁴⁶ See *MCM Portfolio LLC v. Hewlett-Packard Co.*, 812 F.3d 1284, 1293 (Fed. Cir. 2015).

¹⁴⁷ *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 377 (1996).

¹⁴⁸ *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 348–49 (1998).

¹⁴⁹ *Id.* at 348.

¹⁵⁰ *Id.* at 349.

¹⁵¹ *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 229 n.5 (1964).

¹⁵² *Curtis*, 415 U.S. at 195.

In the face of these competing narratives, the Court may well opt to sidestep the Seventh Amendment question. A further requirement for a jury, even for private rights, is that the sought-for relief be “legal,” not “equitable.” Because *inter partes* review offers no hope for monetary damages, the Seventh Amendment arguably does not apply regardless of whether patents are public rights. The petition gamely attempts to blunt this issue by arguing that the law-equity dividing line “can be difficult to draw” and so the jury “option must be open to patent holders and not foreclosed by *inter partes* review proceedings.”¹⁵³

Even setting aside the Seventh Amendment question, the petitioner urges that *inter partes* review violates Article III because only a court may deprive it of its lawful property (the patent). Long ago, in *McCormick Harvesting Machine Company v. Aultman*, the Court held that once a patent has been issued, “[i]t has become the property of the patentee, and as such is entitled to the same legal protection as other property.”¹⁵⁴ An issued patent “is not subject to be revoked or cancelled by the President, or any other officer of the Government. . . . The only authority competent to set a patent aside, or to annul it, or to correct it for any reason whatever, is vested in the courts of the United States, and not in the department which issued the patent.”¹⁵⁵

That’s a seemingly slam-dunk argument for the petitioner—had *McCormick* not been decided in 1898, long before the advent of the administrative state and the “public rights” doctrine. Subsequent cases, including the New Deal-era and 1970s cases discussed above, have arguably undermined *McCormick*. A line of bankruptcy cases, most recently *Stern v. Marshall*, has acknowledged that any right “integrally related to particular Federal Government action” may be adjudicated outside an Article III forum, especially if “resolution of the claim by an expert Government agency is deemed essential to a limited regulatory objective within the agency’s authority.”¹⁵⁶ And Congress’s longstanding desire to have the agency reexamine

¹⁵³ Petition, *Oil States Energy Services LLC v. Greene’s Energy Group, LLC* 13 n.4, No. 16-712 (O.T. 2017).

¹⁵⁴ 169 U.S. 606, 609 (1898).

¹⁵⁵ *Id.* at 608–09.

¹⁵⁶ 564 U.S. 462, 490–91 (2011).

issued patents, dating back to the creation of *ex parte* reexamination in 1980, places a heavy thumb on the functionalist scale.

Yet several justices have expressed unease with the powers of the modern administrative state and the lack of sufficient judicial oversight.¹⁵⁷ And the protection of property rights has long divided the Court.¹⁵⁸ Add to that the general track record of the Federal Circuit in the Supreme Court (read: not good), and the outcome of this case is anyone's guess.

VIII. Pipeline

If it's hard to predict how the Supreme Court will resolve the cases that it has agreed to review, it's even harder to predict what cases it will agree to review in the first place. Nonetheless, we feel compelled to highlight a few notable cases in the pipeline.

A. *Union Fees*

Last year, at a roundtable discussion on Justice Scalia's impact on the Supreme Court, the panelists were asked to recall their first thought upon hearing of his death. Without hesitation, one panelist responded, "*Abood* lives!" Sure enough, a little over a month after Justice Scalia's death, the Court issued a *per curiam* order in *Friedrichs v. California Teachers Association*, which was expected to be one of the landmark decisions of the term, affirming the judgment by an equally divided Court.¹⁵⁹ The issue in *Friedrichs* was whether the Court should overrule *Abood v. Detroit Board of Education*, where the Court upheld—against a First Amendment challenge—state laws that require public employees to pay "agency fees" to a union even if they want nothing to do with the union and disagree with its advocacy.¹⁶⁰

¹⁵⁷ See, e.g., *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1213–25 (2015) (Thomas, J., concurring in the judgment); *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1877–86 (2013) (Roberts, C.J., dissenting, joined by Kennedy & Alito, JJ.); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).

¹⁵⁸ See, e.g., *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017); *Kelo v. City of New London*, 545 U.S. 469 (2005).

¹⁵⁹ 136 S. Ct. 1083 (2016).

¹⁶⁰ 431 U.S. 209 (1977).

A majority of the Court sharply criticized, but stopped short of overruling, *Abood* in *Harris v. Quinn*.¹⁶¹ Until Justice Scalia's death, the Court appeared poised to take that further step in *Friedrichs*. Like *Friedrichs* before it, *Janus v. American Federation of State, County, and Municipal Employees* presents the question whether *Abood* should "be overruled and public-sector agency fee arrangements declared unconstitutional under the First Amendment."¹⁶² Given the Court's failure to resolve that issue in *Friedrichs*, *Janus* would seem a natural candidate for review. And why, one might ask, do passions run so high on this issue? For one, it involves compelled speech: laws forcing Americans to subsidize private activities with which they disagree. But it also involves money—and political power. If unions are unable to compel the payment of fees, it stands to reason that they will collect less money and hence exercise diminished political power. The stakes on this issue are very high and, if the Court were to grant review, this would unquestionably stand as one of the term's blockbuster cases.

B. Separation of Powers

Few issues excite separation-of-powers mavens more than statutory limits on the president's removal authority. President Andrew Johnson was impeached over a dispute arising from his attempt to remove his own Secretary of War, and an entire generation of lawyers has come of age reading Justice Scalia's dazzling dissent in *Morrison v. Olson* in law school.¹⁶³ Chief Justice William Howard Taft, after having served as president, authored the Court's decision in *Myers v. United States*, which broadly reaffirmed the president's exclusive authority to remove executive branch officials (and thereby repudiated the Tenure of Office Act that had led to President Johnson's impeachment).¹⁶⁴ But, scarcely a decade later, the Court limited *Myers* in *Humphrey's Executor* by upholding limitations on the president's authority to remove a member of the Federal Trade Commission, an "independent" agency that exercises executive power.¹⁶⁵

¹⁶¹ 134 S. Ct. 2618 (2014).

¹⁶² No. 16-1466 (petition filed June 6, 2017).

¹⁶³ 487 U.S. 654, 697–734 (1988) (Scalia, J., dissenting).

¹⁶⁴ 272 U.S. 52 (1926).

¹⁶⁵ *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

In his *Morrison* dissent, Justice Scalia had some choice words for *Humphrey's Executor*, noting that it "was considered by many at the time the product of an activist, anti-New Deal Court bent on reducing the power of President Franklin Roosevelt," and gave "shoddy treatment . . . to Chief Justice Taft's opinion 10 years earlier in *Myers* . . . —gutting, in six quick pages devoid of textual or historical precedent for the novel principle it set forth, a carefully researched and reasoned 70-page opinion."¹⁶⁶

The scope of *Humphrey's Executor* is now the subject of a case pending before the en banc D.C. Circuit, which has the potential to reach the Supreme Court this term (and, if not, almost certainly the following term). The Dodd-Frank Wall Street Reform and Consumer Protection Act created the Consumer Financial Protection Bureau (CFPB), headed by a single director, and specified that the president could remove the director only "for inefficiency, neglect of duty, or malfeasance in office."¹⁶⁷ Parties subject to the CFPB's regulatory authority challenged that provision on separation-of-powers grounds, and a divided panel of the D.C. Circuit in *PHH Corporation v. CFPB* sustained the challenge.¹⁶⁸ The panel distinguished *Humphrey's Executor* on the ground that the case involved an independent agency headed by *multiple* commissioners, whereas the CFPB is headed by only a *single* director.¹⁶⁹ The D.C. Circuit subsequently granted en banc rehearing, thereby vacating the panel decision. The full appellate court heard oral argument in May 2017, and as of this writing, the matter remains under submission. However the D.C. Circuit resolves the case, it will certainly present an attractive candidate for Supreme Court review. And—unlike the D.C. Circuit—the Supreme Court has the luxury of re-examining, as opposed to merely attempting to distinguish, *Humphrey's Executor*.

The flip side of the removal authority, of course, is the appointment authority. And a pending petition for certiorari raises an interesting question under the Constitution's Appointments Clause. *Raymond J. Lucia Companies v. SEC* seeks review of the D.C. Circuit's holding that administrative law judges (ALJs) who preside over enforcement

¹⁶⁶ *Morrison v. Olson*, 487 U.S. at 724, 725–26 (Scalia, J., dissenting).

¹⁶⁷ 12 U.S.C. § 5491(c) (3).

¹⁶⁸ 839 F.3d 1 (D.C. Cir. 2016).

¹⁶⁹ *Id.* at 13–36.

actions brought by the Securities and Exchange Commission (SEC) are not “inferior” officers of the United States, but instead mere employees who do not exercise “significant authority pursuant to the laws of the United States.”¹⁷⁰ The difference is one of constitutional dimension: under the Appointments Clause, “inferior” officers of the United States must be appointed by “the President alone, . . . the Courts of Law, or . . . the Heads of Departments.”¹⁷¹ The Clause promotes the separation of powers by preventing Congress from appointing persons who wield significant executive authority, and promotes accountability by identifying those responsible for appointing such persons. The petition appears likely to be granted: the Tenth Circuit has expressly rejected the D.C. Circuit’s holding,¹⁷² and the D.C. Circuit itself granted hearing en banc (thereby vacating the panel opinion), only to affirm the SEC’s order by an equally divided court.

* * *

These are unconventional times, and the Supreme Court may be headed for an unconventional term. A single party now controls both the federal executive and legislative branches, and the new administration has expressed a willingness, if not an outright desire, to upend the established status quo. After eight years, however, the last administration left a strong imprint on the lower courts, and it is hard to imagine any substantial new initiative that will not face a legal challenge. The most momentous decisions of the upcoming term, thus, may arise in the context of motions for extraordinary relief, such as a motion to stay a lower-court injunction. In this regard, the travel-ban litigation may be most notable as a harbinger of things to come. It will be interesting, in this and coming terms, to see how the recent upheaval in Washington plays out in the polished marble corridors of One First Street Northeast.

¹⁷⁰ 832 F.3d 277, 284 (2016) (quoting *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam)).

¹⁷¹ U.S. Const. art II, § 2, cl. 2.

¹⁷² *Bandimere v. SEC*, 844 F.3d 1168 (10th Cir. 2016).