

Looking Ahead: October Term 2018

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Ordinarily after a term of the magnitude of October Term (OT) 2017, there isn't all that much of consequence to say about the term ahead, as blockbuster terms tend to be followed by quiet ones. And in one sense, that certainly looks to be true this year. Although the Supreme Court has 38 cases on its docket before the new term starts (as compared to 29 at this point last year), you have to squint pretty hard to come up with even one as headline-grabbing as the more than half dozen genuine blockbusters the Court decided last year. But, of course, last term also ended with one of the most potentially significant developments in recent years for the future of the Court: the retirement of Justice Anthony Kennedy. While any change in its makeup inevitably has a profound impact on the Court, this one will be no butterfly effect. Justice Kennedy has been the crucial swing vote on some of the biggest issues of the day for (at least) the past decade, including a few that the Court declined to resolve last term.

If you're looking for predictions about how Justice Kennedy's replacement will affect the Court, or an evaluation of Judge Brett Kavanaugh's qualifications or jurisprudential philosophy, this is not the place to find them. Instead, I will offer only this humble observation: It's going to take a heck of a lot more than one term to answer that question. That said, although the cases the Court has granted so far for OT 2018 may not reach the epic levels of the cases it confronted in OT 2017, there are at least a few that have the potential to offer us invaluable insight into how the Court's newest member will approach cross-cutting issues such as *stare decisis*, agency deference, separation of powers, and federalism. While the

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rest of the world fixated on the future of *Roe v. Wade*, the Court quietly granted certiorari to decide whether to overrule three of its lesser-known—at least beyond nerdy Court-watcher circles—precedents. And while doomsayers prognosticate (or enthusiasts anticipate) the imminent resurrection of *Lochner*, the Court has its eyes set on a very different early 20th century doctrine that has fallen into desuetude.

Notably, many of the bigger cases the Court is set to consider this coming term do not necessarily divide neatly along ideological lines. One of the precedents the Court will consider whether to overrule was recently called into question by the strange bedfellows of Justices Clarence Thomas and Ruth Bader Ginsburg. Another has produced the interesting dynamic over the years where the Court's more conservative members push to open federal courts to constitutional claims that some of its more liberal members have been content to leave to the state courts. And the Court will consider whether to revive the long-dormant nondelegation doctrine, typically championed by more conservative circles, in the context of a challenge to federal sex offender registration rules, hardly a conservative cause du jour.

As of this writing, we know only about half of the cases the Court will consider next term. By term's end, the Court could once again be facing partisan gerrymandering, the intersection between LGBT rights and religious liberty, the Second Amendment, and any number of the various challenges to the Trump administration that are working their way through the lower courts. And much may be gleaned simply from watching what the Court does and does not agree to take, as that itself may suggest how strong the forces of instrumentalism remain. In short, we may not be in for another blockbuster term at this point, but if we watch carefully, we may learn quite a bit in the year to come about what the Court's latest changes in membership portend.

Chevron

The Court will kick things off on its First Monday with *Weyerhaeuser Company v. U.S. Fish and Wildlife Service*, otherwise known as the “dusky gopher frog” case. The dusky gopher frog is an endangered species that used to inhabit Mississippi, Alabama, and Louisiana, but is now found only in Mississippi. Its claim to fame appears to be that, “[i]f you pick up a gopher frog and hold it, the frog will play dead and

even cover its eyes; if you hold the frog long enough, it will pe[e]k at you and then pretend to be dead again.”¹ Charming or creepy? You decide. In 2012, the Fish and Wildlife Service (FWS) decided to designate 1,544 acres of privately owned property in Louisiana “critical habitat” for the frog—even though no dusky gopher frog has been spotted there for more than half a century. In fact, the property concededly lacks two of the three features that, by FWS’s own telling, are essential to the frog’s survival, which presumably explains why there are no dusky gopher frogs to be found there these days. Nonetheless, FWS forged ahead with the designation, even though it acknowledged that it would cost the landowners up to \$34 million in lost development value.

According to the landowners, the absence of any dusky gopher frogs on their property poses a considerable problem for the agency under the text of the Endangered Species Act. The act defines “critical habitat” as areas “occupied by the species,” or areas that are unoccupied but “essential for the conservation of the species.”² In the landowners’ view (embraced by Judge Priscilla Owen in her dissent from the panel decision below), “an area cannot be ‘essential for the conservation of the species’ if it is uninhabitable by the species and there is no reasonable probability that it will become habitable by the species.”³ The panel majority disagreed, concluding that the agency’s conclusion that the property is “essential” to the conservation of the dusky gopher frog is entitled to *Chevron* deference. The panel also concluded that the agency’s decision not to exclude the property from its designation on economic impact grounds—that is, under its power to “tak[e] into consideration the economic impact” of a critical habitat designation and exclude an area if “the benefits of such exclusion outweigh the benefits of” designation⁴—was not reviewable at all. After the full court denied rehearing en banc by a narrow 8-6 margin, with Judge Edith Jones writing for all six dissenters, the Supreme Court agreed to take up the case.

While *Weyerhaeuser* is at one level a run-of-the-mill statutory interpretation case, these days there is always more at stake when agency

¹ Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv., 827 F.3d 452, 458 n.2 (5th Cir. 2016).

² 16 U.S.C. § 1532(5)(A)(i)–(ii).

³ Markle, 827 F.3d at 486 (Owen, J., dissenting).

⁴ 16 U.S.C. § 1533(b)(2).

deference is involved given the ever-increasing criticism some of the justices have heaped upon *Chevron*. The chief justice warned in *City of Arlington v. FCC* that “the danger posed by the growing power of the administrative state cannot be dismissed.”⁵ Justice Thomas lamented in *Michigan v. EPA* that “*Chevron* deference precludes judges from exercising [independent] judgment, forcing them to abandon what they believe is the best reading of an ambiguous statute in favor of an agency’s construction.”⁶ And then-Judge Neil Gorsuch openly suggested in his now-famous concurrence in *Gutierrez-Brizuela v. Lynch* that *Chevron* should be reconsidered, characterizing the doctrine as “permit[ting] executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers’ design.”⁷ Suffice it to say, if the justices see an opportunity to curtail agency deference, at least some of them are likely to take it.

This case has opportunities galore. The first question in the case squarely implicates the dividing line between *Chevron* step one and step two, which is an appealing avenue by which those justices who are not ready to throw *Chevron* out entirely can chip away at it. After all, the easiest way to cut back on *Chevron* deference is to make it harder to demonstrate that a statute is ambiguous, and thus trigger deference. Here, the landowners and their *amici* have offered the Court any number of ways to do so, invoking statutory context, legislative history, constitutional avoidance, the so-called “major questions” canon, and more. The second question, whether the agency’s economic impact determination is subject to judicial review, turns on whether it qualifies under the Administrative Procedure Act as “agency action . . . committed to agency discretion by law.”⁸ Unsurprisingly, here too the landowners and their *amici* have encouraged the Court to embrace a narrow reading that would make this provision universally harder for agencies to invoke. For those with a keen interest in the future of the administrative state—or the future of the dusky gopher frog—this is definitely a case worth watching.

⁵ 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting).

⁶ 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring).

⁷ 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).

⁸ 5 U.S.C. § 701(a)(2).

The Nondelegation Doctrine

As Cass Sunstein famously quipped, the nondelegation doctrine “has had one good year, and 211 bad ones (and counting).”⁹ That good year was 1935—the year of *A.L.A. Schechter Poultry Corporation v. United States*¹⁰ and *Panama Refining Company v. Ryan*.¹¹ Since then, the Supreme Court has largely declined to enforce, and indeed steadily undermined, the notion that the Constitution imposes meaningful limits on what Congress may delegate to the executive branch. Even the rise of modern originalist jurisprudence has not reversed this trend. It was Justice Antonin Scalia, after all, who wrote the majority opinion in *Whitman v. American Trucking Associations*,¹² which gave us the “intelligible principle” rule, under which a principle has to be about as intelligible as Dadaist art to pass constitutional muster. But the Court surprised many this spring by agreeing to take up a splitless nondelegation question on which it had denied certiorari more than a dozen times over the past decade. The Court probably didn’t take that step just to put the final nail in the nondelegation doctrine’s coffin.

Gundy v. United States is certainly not the most obvious candidate for the revitalization of this long-dormant doctrine. The nondelegation doctrine is often championed by conservatives as a potential mechanism for placing meaningful constraints on the administrative state. The two cases in which it was successfully invoked challenged New Deal-era economic regulations—and nondelegation claims are often pressed (albeit often unsuccessfully) in cases challenging exceedingly broad delegations of law-making power to the legion of federal agencies tasked with regulating everything that can even conceivably be said to implicate commerce. *Gundy* arises in a very different context, and one perhaps a bit less appealing to the doctrine’s champions: the Sex Offender Registration and Notification Act, better known as SORNA.

If ever there were an unconstitutional delegation of law-making power to the executive branch, SORNA would seem to be it. Through SORNA, Congress created a new federal registration requirement

⁹ Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 322 (2000).

¹⁰ 295 U.S. 495 (1935).

¹¹ 293 U.S. 388 (1935).

¹² 531 U.S. 457 (2001).

for sex offenders, but then declined to resolve the seemingly critical question of whether this new requirement should apply to individuals who were convicted of a sex offense before SORNA was enacted. Instead, Congress left it to the attorney general “to specify the applicability of [its] requirements . . . to sex offenders convicted before the enactment of this chapter”—and provided exactly zero guidance as to how he should go about doing so.¹³ To be sure, an argument could be made that the statute was not intended to give the attorney general discretion to decide *whether* to apply its requirements retroactively, but instead was intended to give discretion only to determine *how* to do so (for example, how quickly and how far back). But the government made exactly that argument six years ago in *Reynolds v. United States*, the statutory interpretation precursor to *Gundy*, only to have it rejected by a lopsided majority of the Court as inconsistent with the text of the statute.¹⁴ In a dissent joined by Justice Ginsburg, the ever-prescient Justice Scalia observed, “it is not entirely clear to me that Congress can constitutionally leave it to the Attorney General to decide—with no statutory standard whatever governing his discretion—whether a criminal statute will or will not apply to certain individuals.”¹⁵ Apparently, it is not entirely clear to at least four of the Court’s current members either.

Gundy will be a very interesting case to watch. It certainly has the potential to be resolved on narrow grounds, as the power to extend criminal prohibitions is so significant, and the absence of any principle to guide the exercise of that power so stark, that the Court arguably need do nothing more than confirm the nondelegation doctrine’s existence to conclude that SORNA violates it. Of course, even that would be consequential when dealing with a doctrine that has not been enforced by the Court since before most of the current justices were born. But there are undoubtedly at least a few justices who may be interested in doing something more.

Most notably, then—Judge Gorsuch made a powerful argument—in a case involving another provision of SORNA, proving that he has no qualms about context—that the nondelegation doctrine is an essential

¹³ 34 U.S.C. § 20913(d).

¹⁴ 565 U.S. 432 (2012).

¹⁵ *Id.* at 450 (Scalia, J., dissenting).

structural safeguard of individual liberty.¹⁶ As he put it, “[i]f the separation of powers means anything, it must mean that the prosecutor isn’t allowed to define the crimes he gets to enforce.”¹⁷ Gorsuch also invoked the nondelegation doctrine in *Gutierrez-Brizuela* in support of his argument that *Chevron* and *Brand X* “seem[] more than a little difficult to square with the Constitution of the framers’ design.”¹⁸ Suffice it to say, there is far more at stake in *Gundy* than SORNA. Of course, the justices understand that as well as the rest of us, which is precisely why the case has the potential to produce a classic Roberts Court narrow decision garnering broad consensus. That said, the opportunity to not only revive, but add real teeth to the nondelegation doctrine may prove more than some members of the Court can pass up.

The Takings Clause

At long last, the Supreme Court has granted certiorari to decide whether to overrule “the portion of *Williamson County Regional Planning Commission v. Hamilton Bank* that requires property owners to exhaust state court remedies to ripen federal takings claims.”¹⁹ Okay, maybe that’s not quite as exciting to those of you who don’t spend a lot of time working on takings cases, but Chief Justice William Rehnquist might have been pretty jazzed. In one of his very last opinions, he offered the characteristically humble admission that, while he had joined *Williamson County*, “further reflection and experience [led him] to think that [its] justifications . . . are suspect, while its impact on takings plaintiffs is dramatic.”²⁰ Indeed. *Williamson County*’s fox-guarding-the-henhouse exhaustion requirement has proven among the more maddening of obstacles to vindicating a core constitutional right.

¹⁶ *United States v. Nichols*, 784 F.3d 666, 675 (10th Cir. 2014) (Gorsuch, J., dissenting from denial of reh’g en banc).

¹⁷ *Id.*

¹⁸ *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (2016) (Gorsuch, J., concurring). In *Brand X*, the Supreme Court ruled that *Chevron* deference trumps lower-court precedents unless that court had held that the statute in question was “unambiguous” for *Chevron* purposes. *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Svcs.*, 545 U.S. 967 (2005).

¹⁹ Petition for Writ of Certiorari at i, *Knick v. Township of Scott*, No. 17-647 (U.S. filed Oct. 31, 2017).

²⁰ *San Remo Hotel, LP v. City and County of San Francisco*, 545 U.S. 323, 352 (2005) (Rehnquist, C.J., concurring).

Knick v. Township of Scott is not exactly your ordinary takings fare. You may be surprised to learn that it remains legal in most states to bury deceased loved ones in your backyard. Pennsylvania is one of them, and the practice of “backyard burials” apparently goes back several centuries in rural western-Pennsylvania Scott Township. About 10 year ago, the township claims to have discovered an ancient burial ground on Rose Mary Knick’s 90-acre farmland. The township then enacted an ordinance declaring that all cemeteries must be kept open to the public during daylight hours, and declared Knick in violation when she declined to open her heretofore-private property to the public. Knick sued the township in state court, arguing that this state-mandated public easement over her private property was an unconstitutional taking. But after the township withdrew the notice of violation and stayed enforcement of the ordinance as to Knick, the state court refused to resolve her claim unless and until the township initiated a civil enforcement action against her.

Knick then turned to the federal courts, only to be rebuffed by the *Williamson County* rule. Under that 1985 decision, before bringing a federal takings claim in federal court, a property owner not only must demonstrate that the state has made a final decision to take her property, but also must seek (and be denied) just compensation in state court. Because the state court wouldn’t allow Knick to litigate her takings claim until the township brings an enforcement action, the federal courts dismissed her effort to vindicate her property rights as unripe, concluding that she must first go seek just compensation for any taking in state court.

Knick is a classic illustration of how the *Williamson County* rule “all but guarantees that claimants will be unable to utilize the federal courts to enforce the Fifth Amendment’s just compensation guarantee.”²¹ On the one hand, a federal court typically won’t hear a takings claim if it has not been exhausted in state court. On the other hand, once a state court has considered and rejected the takings claim, the property owner is precluded from relitigating the claim in federal court. Indeed, that is exactly what the Court held in *San Remo Hotel, LP v. City and County of San Francisco*, prompting Chief Justice Rehnquist (joined by Justices Sandra Day O’Connor, Anthony Kennedy, and Thomas) to suggest that maybe it was time to give *Williamson County* another look.²² Making matters worse, some state governments and

²¹ *Id.* at 351.

²² *Id.* at 348–52 (2005) (Rehnquist, C.J., concurring).

officials have even managed to remove state court takings claims to federal court, only to then get them dismissed by the federal court for failure to exhaust in state court. All of this led Justice Thomas (joined by Justice Kennedy) to opine a couple of terms ago that the *Williamson County* rule has “downgraded the protection afforded by the Takings Clause to second-class status.”²³ (More on second-class rights to come.)

Odds are, the *Williamson County* rule’s days are numbered. While the Court has occasionally granted certiorari in recent years to decide whether to overrule one of its precedents, only to befuddle Court-watchers with an apparent change of heart,²⁴ this rule has built up enough animosity over the years that it seems an unlikely candidate for begrudging reaffirmation. Indeed, perhaps because state courts have unsurprisingly proven less than entirely receptive to takings claims against the state, the Court has already taken to “attempt[ing] to ameliorate the effects of” the *Williamson County* rule by “recast[ing]” it “as a ‘prudential’ rather than jurisdictional requirement,” which itself is a telling sign that several justices probably would not lament its demise.²⁵ The Court also declined to take up a second question presented in *Knick* that involved whether to narrow the rule, which does not bode well for its survival. So for those of us who often find ourselves frustrated by the dearth of federal court cases on key takings issues, there may finally be some light at the end of the tunnel.

State Sovereign Immunity

When the Supreme Court grants a case only to resolve it on narrow grounds that necessitate a remand, it’s not uncommon for the case to find its way back a second time. Last year we saw the return of *Encino Motorcars, LLC v. Navarro*, and this year we will see the return of *Sturgeon v. Frost* (otherwise known as the Alaska hovercraft case). But *Franchise Tax Board of California v. Hyatt* will receive the rare distinction this term of making its third appearance before the Supreme Court.

This case arises out of a long-running tax dispute between Gilbert Hyatt and California’s Franchise Tax Board. Hyatt lived in California

²³ *Arrigoni Enterprises, LLC v. Town of Durham*, 136 S. Ct. 1409, 1411 (2016) (Thomas, J., dissenting from denial of cert.).

²⁴ See, e.g., *Kimble v. Marvel Enterprises, Inc.*, 135 S. Ct. 2501 (2015).

²⁵ *Arrigoni Enterprises*, 136 U.S. at 1411.

for 23 years, but after earning hundreds of millions of taxable dollars there, he filed a state tax return in 1992 claiming that he had moved to Nevada—a state that conveniently has no income tax. The Tax Board got wind that Hyatt may not actually have moved when he said he did, and it proceeded to undertake a rather comprehensive audit that (allegedly) involved, among other things, “peer[ing] through Hyatt’s windows” and “rummag[ing] around in his garbage.”²⁶ After the audit confirmed its suspicions, the Tax Board informed Hyatt that he owed the state \$10 million in taxes, interest, and penalties. Hyatt responded not only by protesting the audit through administrative channels, but by suing the Tax Board, claiming that it committed various torts, including invasion of privacy, intentional infliction of emotional distress, and fraud, during the course of its audit. And he decided to bring his lawsuit in Nevada state court. The Tax Board tried to invoke sovereign immunity but was precluded from doing so by *Nevada v. Hall*, a 1979 case in which the Supreme Court held that states do not have sovereign immunity in the courts of other states.²⁷

Hyatt made its first trip to the Supreme Court back in 2003, when a unanimous Court held that the Full Faith and Credit Clause did not require the Nevada courts to abide by a California statute that gives the Tax Board immunity from suit in the California courts.²⁸ The case then went back down to the state court, where, given the rare opportunity to stick it to tax collectors (and out-of-state tax collectors, no less), a Nevada jury awarded Hyatt a staggering \$388 million in compensatory and punitive damages, to which the trial court judge tacked on \$102 million in interest. The Nevada Supreme Court ultimately reversed the \$52 million judgment on the invasion of privacy claim, but affirmed the \$1 million judgment on the fraud claim, and remanded for a new trial on the emotional distress claim (on which the jury had awarded \$85 million) after finding various evidentiary errors. The court also threw out the \$250 million punitive damages award and took punitives off the table on remand.

At that point, the U.S. Supreme Court intervened again, this time granting certiorari to decide whether to overrule *Nevada v. Hall*, or, short of that, to decide whether California was at least entitled to

²⁶ *Franchise Tax Bd. of Cal. v. Hyatt* (“Hyatt II”), 136 S. Ct. 1277, 1284 (2016) (Roberts, C.J., dissenting).

²⁷ 440 U.S. 410 (1979).

²⁸ *Hyatt v. Franchise Tax Bd.*, 538 U.S. 488 (2003).

the same immunities and protections in Nevada court that Nevada has extended to its *own* state entities.²⁹ After Justice Scalia's death left the Court with only eight members, it divided equally on the *Nevada v. Hall* question. But in a decision that smacked of compromise, a six-justice majority held that the Tax Board was at least entitled to invoke the \$50,000 damages cap that would apply in a tort claim against a Nevada state entity.³⁰ On remand, the Nevada Supreme Court reduced the fraud judgment to \$50,000. But it reversed course on the emotional distress claim, now claiming that the same evidentiary errors that previously led it to grant a new trial were actually harmless, and so awarded Hyatt \$50,000 on that claim as well.

That brings us to *Hyatt III*, in which the Court has agreed once again to consider whether to overrule *Nevada v. Hall*, this time hopefully with a majority to resolve that question. Part of what makes that question such an interesting one is that both parties claim to be trying to vindicate state sovereignty. According to the Tax Board, allowing a state to be haled in to the courts of another state without its permission is an affront to the sovereignty to which states are entitled. Hyatt, on the other hand, maintains that it would be an affront to state sovereignty to demand that states grant immunity to their sister states, as sovereigns traditionally have the right to decide for themselves whether to grant immunity to other sovereigns in their courts. *Hyatt* also has the wonderful irony, pointed out by Justice Ginsburg in the last go-around,³¹ of being the mirror image of *Hall*, as California itself was the state that helped convince the *Hall* Court that *Nevada* should be subject to suit in *California* state court. As of this writing, the Court is down a member once again, and given the outcome in *Hyatt II*, odds are it is a member whose vote will be necessary to reach a majority. But hopefully we will have a ninth justice soon enough to avoid the need for a *Hyatt IV*.

The Double Jeopardy Clause

Hyatt isn't the only case on the Court's docket this term involving state sovereignty—or the only such case in which *stare decisis* will feature. After 11 relists, the Court finally decided on its last

²⁹ The firm at which the author was employed at the time, Bancroft PLLC, represented the Tax Board in *Hyatt II*.

³⁰ *Hyatt II*, 136 S. Ct. at 1281–83.

³¹ Transcript of Oral Arg. at 15, *Hyatt II*, 136 S. Ct. 1277 (No. 14-1175).

June orders list to grant certiorari in *Gamble v. United States* to decide whether to overrule the “separate sovereigns” (a.k.a. “dual sovereigns”) exception to the Double Jeopardy Clause.

The Double Jeopardy Clause provides that “No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb.”³² While it’s hard to see why the identity of the prosecutor makes a difference under that language, the Supreme Court has long held that the Double Jeopardy Clause does not prohibit the federal government and a state from prosecuting someone for the same crime. This so-called “separate sovereigns” exception is (at least according to *Gamble*) a bit of an anachronism. It originated at a time when the Court had held that the Double Jeopardy Clause did not apply to the states, and one of the Court’s reasons for crafting the exception was its view that “[t]he Fifth Amendment . . . applies only to proceedings by the Federal Government.”³³ Of course, that is no longer the case; the Court concluded decades ago that the Fourteenth Amendment incorporates the Double Jeopardy Clause against the states.³⁴ While that considerably undermined at least one of the justifications on which the Court had relied in crafting the separate-sovereigns exception, the Court has continued to adhere to its pre-incorporation precedents holding that successive state and federal prosecutions for the same crime do not offend the Double Jeopardy Clause, even as it cabined the scope of the separate-sovereigns doctrine in other contexts.³⁵ And the Court has denied review in numerous cases over the years that asked whether the separate-sovereigns exception should be overruled.

The separate-sovereigns doctrine found its way back to the Court’s collective attention a few terms ago, when the Court was asked to decide whether Puerto Rico qualifies as a separate sovereign for purpose of the exception.³⁶ Puerto Rico couldn’t convince

³² U.S. Const., amend. V.

³³ *Abbate v. United States*, 359 U.S. 187, 194 (1959); see also *Bartkus v. Illinois*, 359 U.S. 121 (1959).

³⁴ See *Benton v. Maryland*, 395 U.S. 784, 787 (1969).

³⁵ See, e.g., *Elkins v. United States*, 364 U.S. 206 (1960) (overruling pre-incorporation precedent allowing federal officers to use evidence unlawfully obtained by state officers); *Murphy v. Waterfront Comm’n*, 378 U.S. 52 (1964) (overruling pre-incorporation precedent holding that one sovereign could use testimony unlawfully compelled by another).

³⁶ See *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863 (2016).

the Court that it was entitled to this dignity, but the case did lead a few justices to question whether the exception even makes sense: The case prompted a concurrence from the strange bedfellows of Justices Ginsburg and Thomas, suggesting that the separate-sovereigns doctrine is inconsistent with the Double Jeopardy Clause and “bears fresh examination in an appropriate case.”³⁷

Terrance Gamble decided to take them up on the invitation. About a decade ago, Gamble was convicted of second-degree robbery, leaving him barred under both federal and state law from possessing a firearm. About three years ago, Gamble was pulled over for a faulty taillight, and, lo and behold, the officer found marijuana and a handgun in his car. Alabama proceeded to prosecute Gamble for drug possession and for being a felon in possession of a firearm. In the meantime, the federal government decided to prosecute him too, for the same incident and the same crime of being a felon in possession in a firearm. And while the state court sentenced Gamble to only one year in prison for the firearm offense, the federal court issued a sentence nearly four times as long. Fortunately for Gamble, he was savvy enough to preserve a double jeopardy challenge to the successive federal prosecution in his conditional guilty plea. And after spending several months on the Relist Watch alongside a few other petitions raising the same issue, he surprised everyone by garnering a grant rather than a dissent from denial. So it seems that Justices Ginsburg and Thomas aren't the only ones interested in revisiting a precedent that Justice Hugo Black described as “an affront to human dignity and . . . dangerous to human freedom.”³⁸

The Excessive Fines Clause

Speaking of incorporation, the Supreme Court doesn't see a lot of incorporation questions these days. With the exception of the Second Amendment, which wasn't incorporated until 2010—because most courts refused to acknowledge the right's existence for the better part of a century—most of the protections found in the Bill of Rights were incorporated against the states 50 years ago. There are still a handful of stragglers, however, and the Court will soon confront one of them: the Eighth Amendment's Excessive Fines Clause.

³⁷ *Id.* at 1877 (Ginsburg, J., concurring).

³⁸ *Abbate*, 359 U.S. at 203 (Black, J., dissenting).

Enter Tyson Timbs. In 2012, Timbs received about \$73,000 in life insurance after his father died. Timbs decided to splurge on a \$42,000 Land Rover, which he then used to drive around Indiana and Ohio spending the rest of the money on drugs. As he candidly put it, “[u]nfortunately, I had a whole bunch of money, which isn’t a good idea for a drug addict to have.”³⁹ When the money ran out, Timbs took to small-time dealing to supply his habit—including, unbeknownst to him, to several undercover officers. After a series of controlled buys, Timbs was arrested. He pled guilty and was sentenced to a year of house arrest, five years of probation, and \$1,200 in fines and costs. But that wasn’t enough for the state of Indiana. Invoking its civil asset forfeiture law, the state came for his Land Rover too.

Although the state trial court found that Timbs had used the Land Rover to transport drugs, it concluded that forcing him to forfeit a \$42,000 Land Rover would violate the Excessive Fines Clause, as the value of the vehicle (even taking into account a bit of depreciation for the 15,000 miles Timbs put on it) was grossly disproportionate to a drug offense that carried a maximum fine of \$10,000. The state appellate court agreed, but the Indiana Supreme Court reversed, concluding that since the U.S. Supreme Court has never clearly held that the Excessive Fines Clause is incorporated against the states, the Indiana courts need not do so of their own accord. In reaching that conclusion, the court added to a “surprising amount of confusion as to whether the Excessive Fines Clause has been incorporated against the states.”⁴⁰ Timbs sought certiorari, and Indiana tried to convince the Court that the case is a poor vehicle, as it were, but the Court took the case anyway, vehicle and all. (Literally: The case is captioned *Tyson Timbs and a 2012 Land Rover LR2 v. State of Indiana*.)

While the Court’s last foray into incorporation proved quite contentious, this case seems unlikely to do the same. For one thing, it doesn’t involve that most divisive of enumerated rights, the Second Amendment. And at least so far, it doesn’t look like Timbs is hoping to use his case to revitalize the Privileges or Immunities Clause. That said, the case does implicate the growing concerns that have been expressed about whether modern civil forfeiture law is truly consistent

³⁹ Adam Liptak, *He Sold Drugs for \$225. Indiana Took His \$42,000 Land Rover*, N.Y. Times, June 25, 2018, <https://www.nytimes.com/2018/06/25/us/politics/supreme-court-civil-asset-forfeiture.html>.

⁴⁰ *Reyes v. N. Tex. Tollway Auth.*, 830 F. Supp. 2d 194, 206 (N.D. Tex. 2011).

with the Constitution. Just last year, Justice Thomas penned a statement respecting the denial of certiorari in which he called for the Court to take a harder look at civil forfeiture law, highlighting its self-dealing nature, its potential for corruption, and the “egregious and well-chronicled abuses” it has produced.⁴¹ This case doesn’t present the Due Process Clause challenge Justice Thomas invited, but it does present an opportunity for the Court to impose at least one meaningful constraint on what “has in recent decades become [a] widespread and highly profitable” tool for cash-strapped states.⁴²

Retaliatory Arrest Redux

If you can’t manage to squeeze a second (or, better yet, third) petition out of the same case, presenting a question the Court recently declined to resolve can often be the next best thing. This term, the Court will have its third chance in the past six years to decide whether the existence of probable cause defeats a First Amendment retaliatory arrest claim.

The Court first granted certiorari to consider that question in *Reichle v. Howard*, but it ended up reserving the question and resolving the case on qualified immunity grounds.⁴³ Last year, the Court took the issue up again in *Lozman v. City of Riviera Beach*, the second of its cases involving famed floating house owner Fane Lozman, who successfully persuaded the Court in his first trip up that his abode did not qualify as a “vessel” for purposes of federal admiralty jurisdiction.⁴⁴ Apparently the City of Riviera Beach isn’t wild about this self-proclaimed “persistent and tenacious underdog”;⁴⁵ it arrested him roughly 15 seconds after he stood up to talk about government corruption at a city council meeting, thus prompting his First Amendment retaliatory arrest claim. But the Court ultimately decided *Lozman II* on exceedingly narrow grounds, concluding that the absence of probable cause need not be proven to pursue a First

⁴¹ *Leonard v. Texas*, 137 S. Ct. 847, 848 (2017) (Thomas, J., statement respecting denial of cert.).

⁴² *Id.*

⁴³ 566 U.S. 658 (2012).

⁴⁴ *Lozman v. City of Riviera Beach* (“Lozman I”), 568 U.S. 115 (2013).

⁴⁵ Adam Liptak, A Persistent Gadfly Wins Again in the Supreme Court, N.Y. Times, June 18, 2018, <https://www.nytimes.com/2018/06/18/us/politics/a-persistent-gadfly-wins-again-in-the-supreme-court.html>.

Amendment retaliatory arrest claim “[o]n facts like these,” and leaving for another day what rule applies “in other contexts.”⁴⁶ In other words, the Court decided that Lozman could pursue his claim—and didn’t decide much else.

Fortunately, the Court had a third case waiting in the wings: *Nieves v. Bartlett*. *Nieves* is one of two cases on the Court’s docket this term arising out of Alaska. The first involves hovercrafts; this one, extreme snowmobiling. Every spring, thousands of extreme skiers, snowmobilers, and spectators gather in the Hoodoo Mountains of Alaska for Arctic Man, a multiday festival featuring a high-speed ski and snowmobile race. Shockingly, this annual ritual also features a fair amount of alcohol consumption. Four years ago, two Alaska state troopers patrolling Arctic Man became suspicious that there might be some underage drinking going on at a campsite party Russell Bartlett was attending. Bartlett, who had admittedly had at least a few beers at that point, declined their invitation to talk. And when one of the troopers tried to question a few of the underage attendees, he loudly informed the minors that the troopers had no right to question them without a parent or guardian present.

At that point, Bartlett and one of the troopers got into a physical struggle; who started it appears to be a matter of some dispute, but it ultimately ended with Bartlett being arrested for disorderly conduct and resisting arrest. He was released the next morning, and the state dropped the charges about a year later, at which point Bartlett decided to bring (among other things) a First Amendment retaliatory arrest claim. The district court rejected his claim after concluding that there was probable cause for the arrest, but the U.S. Court of Appeals for the Ninth Circuit reversed, holding that probable cause doesn’t bar a First Amendment retaliatory arrest claim. So this case squarely presents the question *Lozman* reserved: whether the existence of probable cause bars a First Amendment retaliatory arrest claim “in other contexts.”

While there’s nothing unusual about a near-unanimous Roberts Court resolving a case on narrow, fact-specific grounds, it’s at least a little bit unusual for the Court to duck a question in one case, only to agree to take it up again just a few weeks later. After all, the Court certainly didn’t jump at the chance to take up *Arlene’s Flowers*—the case

⁴⁶ *Lozman v. City of Riviera Beach (Lozman II)*, 138 S. Ct. 1945, 1955 (2018).

of the Washington florist who didn't want to create floral arrangements for a same-sex wedding—after narrowly resolving *Masterpiece Cakeshop*—the case of the Colorado baker—or to revisit partisan gerrymandering in North Carolina after kicking last term's Wisconsin challenge on standing grounds. Here, the Court's actions may reflect some tension between the justices' views about the probable cause issue and their views about the particular facts of Lozman's case, which suggested that the city really had formulated a plan to arrest Lozman in retaliation for being a vocal critic of and frequent litigator against the city. Indeed, perhaps what the justices were really uncomfortable with in *Lozman II* was Lozman's concession that the city had probable cause to arrest him. If so, that would not bode well for Bartlett, as his case comes to the Court on a pretty solid factual finding that, whatever exactly may have happened at Arctic Man 2014, the troopers had probable cause to arrest him. That leaves his case looking a lot more like the concern Justice Thomas voiced in his dissent in *Lozman II* arguing that probable cause should indeed categorically bar a First Amendment retaliatory-arrest claim—namely, an effort “to harass officers with the kind of suits that common-law courts deemed intolerable.”⁴⁷ That may not be an option a majority of the Court is anxious to preserve.

Waiting in the Wings

The Court has all manner of petitions awaiting its return from summer recess, and it undoubtedly will have the opportunity to consider several hot-button issues before term's end. Here are a few of the highlights on the horizon.

Title VII

The Court will soon consider a pair of petitions presenting a question that has generated considerable heated debate in the lower courts over the past two years—namely, whether Title VII's prohibition on employment discrimination “because of . . . sex” includes discrimination on the basis of sexual orientation. A divided en banc Seventh Circuit said yes last year in *Hively v. Ivy Tech Community College of Indiana*—a case in which Judge Richard Posner garnered some decidedly unhelpful-to-his-side-of-the-cause attention for his

⁴⁷ *Id.* at 1958 (Thomas, J., dissenting).

concurrency opining that he “would prefer to see us acknowledge openly that today we, who are judges rather than members of Congress, are imposing on a half-century-old statute a meaning of ‘sex discrimination’ that the Congress that enacted it would not have accepted.”⁴⁸ This year, a divided en banc Second Circuit reached the same result in *Zarda v. Altitude Express, Inc.*,⁴⁹ while a panel of the Eleventh Circuit found itself bound by 1979 circuit precedent to reach the opposite conclusion in *Bostock v. Clayton County Board of Commissioners*.⁵⁰ Petitions have been filed in both *Zarda* and *Bostock*, so the Court will soon have the opportunity to decide whether to wade into this thicket now, or to allow the issue to continue to percolate in the lower courts. Most likely, whether the Court takes one of these cases will depend largely on whether it is convinced that the Second and Seventh Circuit decisions are wrong. If so, then the Court may be more willing to take up the issue now; if not, the Court may be more inclined to wait this hot-button issue out a bit longer and see whether en banc proceedings resolve any conflict between the most recent decisions in this area and decades-old precedent like the one relied upon in *Bostock*.

Partisan Gerrymandering

Although the Court certainly didn’t leave anyone with the impression this past term that it was itching to get its hands on another partisan gerrymandering case, this is one area in which the choice will not be entirely up to the Court. While *Gill v. Whitford* (the Wisconsin case) was pending, a two-judge majority of a three-judge district court in the Middle District of North Carolina issued a sweeping decision invalidating North Carolina’s congressional map on partisan gerrymandering grounds, holding that the map violated not only the Equal Protection Clause and the First Amendment, but two provisions of the Elections Clause to boot.⁵¹ The Supreme Court promptly issued an emergency stay (over the dissent of Justices Ginsburg and Sonia Sotomayor), and the Court ultimately vacated the decision and

⁴⁸ 853 F.3d 339, 357 (7th Cir. 2017) (en banc) (Posner, J., concurring).

⁴⁹ 883 F.3d 100 (2d Cir. 2018).

⁵⁰ 723 F. App’x 964 (11th Cir. 2018) (per curiam).

⁵¹ *Common Cause v. Rucho*, 279 F. Supp. 3d 587 (M.D.N.C. 2018). Full disclosure: In addition to representing the Wisconsin state legislature in *Gill*, the author’s firm also represents the North Carolina legislative defendants in this litigation.

remanded the case for reconsideration in light of *Gill*. As of this writing, remand proceedings remained ongoing in the district court, but odds of the court reversing course and siding with the legislature are not high. And if the court does invalidate North Carolina's map once again, the Supreme Court will be all but guaranteed to hear the case, as it has mandatory jurisdiction over redistricting cases and is exceedingly unlikely to summarily affirm a decision invalidating the state's map given the open question of whether partisan gerrymandering claims are even justiciable. So when all is said and done, the Court may not have kicked this can very far down the road. But the Court did manage to kick it just far enough that the next case will be decided by a Court that doesn't include Justice Kennedy, who authorized the controlling decision declining to resolve the justiciability question in *Vieth v. Jubelirer*.⁵² Perhaps next time around we will finally get the long-awaited resolution of whether—and if so under what circumstances and what standard—partisan gerrymandering claims are justiciable.

The Establishment Clause

The Court's Establishment Clause jurisprudence has been fractured for some time, in ways that go far beyond the role of any one justice. This term, the Court may have an opportunity to bring some clarity to this murky area in *American Humanist Association v. Maryland-National Capital Park and Planning Commission*.⁵³ *American Humanist* is the latest in a series of cases about cross-shaped memorials. In 1925, the American Legion erected a Latin-cross shaped memorial to the 49 residents of Prince George's County, Maryland, who died fighting in World War I. Their names were inscribed upon a 9' × 2' plaque along the bottom, with the American Legion crest prominently in the middle of the cross and martial virtues inscribed in bronze along the base. Like so many of the World War I memorials that can be found throughout the country, the memorial's design was chosen to evoke the cross-shaped gravemarkers that carpeted the battlefields of World War I and were later erected in American cemeteries throughout Europe. The state took possession of the Bladensburg

⁵² 541 U.S. 267, 306–17 (2004) (Kennedy, J., concurring).

⁵³ Another disclosure: The author's firm submitted an amicus brief on behalf of the Veterans of Foreign Wars of the United States and the National WWI Museum and Memorial in support of the petitioners in this case.

Peace Cross in 1961 for traffic control reasons, and the memorial now sits in the middle of a park filled with other such memorials. But not for long if the Fourth Circuit has its way, as a two-judge majority held that the memorial violates the Establishment Clause because the Latin cross “only holds value as a symbol of death and resurrection *because* of its affiliation with the crucifixion of Jesus Christ.”⁵⁴ As the majority acknowledged, its decision calls into question the constitutionality of every government-owned cross-shaped memorial in the country—including two memorials that have long stood at Arlington National Cemetery. Combined with the six-judge dissent from rehearing en banc, that is certainly likely to attract the attention of at least a few justices when the companion petitions in this case come before the Court this fall.

The Second Amendment

Last, but (at least for this author) certainly not least, the Court will undoubtedly have at least one opportunity this term to consider whether the time has finally come to jump back into the Second Amendment fray. The Court hasn’t taken a Second Amendment case since it decided *McDonald v. City of Chicago* back in 2010—or really *District of Columbia v. Heller* itself in 2008, because *McDonald* was a Fourteenth Amendment case—much to the dismay of some of the justices⁵⁵ (as well as to your author, who worked on several of the petitions the Court denied, and to the Cato Institute, which has filed amicus briefs supporting several Second Amendment petitions). The conventional wisdom is that there is a chink in the *Heller* and *McDonald* armor, a hypothesis that may soon be put to the test with the addition of a new justice. The Fifth Circuit recently denied en banc by the narrowest of margins in *Mance v. Sessions*, a case involving a challenge to federal restrictions on interstate handgun transfers, with seven judges dissenting and three—Judges

⁵⁴ *Am. Humanist Ass’n v. Md.-Nat’l Capital Park & Planning Comm’n*, 874 F.3d 195, 207 (4th Cir. 2018).

⁵⁵ See, e.g., *Silvester v. Becerra*, 138 S. Ct. 945 (2018) (Thomas, J., dissenting from denial of certiorari); *Peruta v. California*, 137 S. Ct. 1995 (2017) (Thomas, J., joined by Gorsuch, J., dissenting from denial of certiorari); *Friedman v. Highland Park*, 136 S. Ct. 447 (2015) (Thomas, J., joined by Scalia, J., dissenting from denial of certiorari); *Jackson v. City and County of San Francisco*, 135 S. Ct. 2799 (2015) (Thomas, J., joined by Scalia, J., dissenting from denial of cert.).

Jennifer Elrod, Don Willett, and James Ho—each authoring a dissent joined by all of their dissenting colleagues.⁵⁶ Four days later, Judge Diarmuid O’Scannlain authored his second 2-1 opinion holding that the Second Amendment protects a right to carry a handgun outside the home, this time invalidating Hawaii’s open carry ban (the state also prohibits concealed carry, which *Peruta v. San Diego* allows it to do).⁵⁷ *Young v. Hawaii* will undoubtedly have a stop in the en banc court—*Peruta* was taken en banc by the Ninth Circuit on its own initiative after San Diego declined to file a petition—but both cases (along with a few others) will likely find their way to the Court in the not-too-distant future. Time will tell whether Justice Kennedy’s replacement makes any difference in the long-running efforts to resuscitate *McDonald’s* admonition that the Second Amendment is not “a second-class right.”⁵⁸

* * *

In sum, at the moment OT 2018 may appear a bit lackluster in comparison to the blockbuster OT 2017. But even setting aside the many grants undoubtedly yet to come, there is much worth watching closely this coming year. At best, we will get invaluable insight into how the Court’s newest members approach *stare decisis* and core structural constitutional constraints. At worst, we will still learn whether you can use your hovercraft in Alaska, what constrains the state from trying to seize your Land Rover, and where to turn if the state mandates public access to your private cemetery.

⁵⁶ *Mance v. Sessions*, No. 15-10311, 2018 WL 3544988 (5th Cir. July 20, 2018).

⁵⁷ *Young v. Hawaii*, No. 12-17808, 2018 WL 3542985 (9th Cir. July 24, 2018).

⁵⁸ *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010) (plurality).

