The U.S. Supreme Court’s 2017–18 Term
A Taste of the New Normal

BY JANE PERKINS, GARY SMITH, AND MONA TAWATAO

The U.S. Supreme Court charted a confident and decidedly conservative path during the 2017–18 Term. In some cases the Court overturned long-standing precedent, for example, ruling 5-to-4 that public employees cannot be required to pay union dues that support collective bargaining on their behalf.1 In other cases the majority obtained the desired result by turning statutory construction on its head. For example, in 5-to-4 rulings, the Court used earlier-enacted laws over later ones to uphold President Trump’s travel ban on immigration from certain predominantly Muslim countries and to allow employers to require employees to arbitrate overtime wage disputes individually rather than seek classwide relief in court.2

Such 5-to-4 rulings were common during the Term. Out of 63 decisions, 19 were decided by a 5-to-4 margin. In his final year on the Court, Justice Kennedy never voted with the four progressive justices; the year before, he had voted with them 57 percent of the time.3 The Court’s newest addition, Justice Gorsuch, was a reliable conservative vote.

As we discuss here, the conservative justices controlled the outcome of most access-to-court cases. We highlight opinions that deal with Article III standing and separation of powers, mootness, statutory construction and deference, injunctions, standard of review, stare decisis, timeliness of appeals and tolling, and administrative procedure.

Article III Standing and Separation of Powers

In Trump v. Hawaii the plaintiffs challenged Proclamation No. 9645, the third in a series of executive actions barring nationals from selected predominantly Muslim countries from entering the United States.4 The plaintiffs claimed that the proclamation established Islam as a disfavored religion, thereby violating their First Amendment right to be free from governmental establishment of religion.5 The issue was whether the plaintiffs had standing to sue since the proclamation did not apply to them but to family members with whom they sought to be united.6

Chief Justice Roberts’s opinion set forth the test for Article III standing: allegations and eventual proof “that the plaintiff ‘personally’ suffered a concrete and particularized injury in connection with the conduct about which he complains.”7 Relying on factually similar precedent, the Court held that the plaintiffs had alleged the requisite concrete injury: “the ... real-world effect that the Proclamation has had in keeping them separated from certain relatives who seek to enter the country.”8 On the merits, however, a five-member majority gave the president great deference on immigration matters and held the proclamation constitutional, despite candidate Trump’s animus, including his well-publicized call for a “total and complete shutdown of Muslims entering the United States.”9

In Patchak v. Zinke the Court examined the interplay between Congress’s power to make laws and the powers that Article III confers on the Judicial Branch.10 Patchak sued the secretary of the Interior for taking land adjacent to his land into

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4 Trump, 138 S. Ct. at 2404.
5 Id. at 2416.
6 Id.
7 Id. (citing Spokeo Incorporated v. Robins, 136 S. Ct. 1540, 1547–48 (2016)).
8 Id.
9 Id. at 2417.
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trust on behalf of a Native American tribe, which then built a casino on the entrusted land. While Patchak’s suit was pending, Congress passed a law that barred any suits relating to the subject land, called the “Bradley Property,” and required prompt dismissal of any pending suits.11 Patchak claimed that this violated separation of powers. The Court disagreed.

Justice Thomas’s plurality opinion explains that Congress violates separation of powers by “usurping a court’s power to interpret and apply the law to the circumstances before it[,] … [t]he simplest example [being] a statute that says, ‘In Smith v. Jones, Smith wins.’”12 But “Congress can make laws[,] including those that apply retroactively to pending lawsuits, even when it effectively ensures that one side wins.”13 This is the rule: “Congress violates Article III when it compels … findings or results under old law[,] … but Congress does not violate Article III when it changes the law.”14 The Court rejected Patchak’s argument that the contested law “the highwater mark of legislative encroachment on Article III.”15

**Mootness**

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**United States v. Sanchez-Gomez** concerned a Southern District of California policy that permitted the use of full restraints on most in-custody defendants produced for nonjury proceedings.10 Sanchez-Gomez and three others challenged the policy as violating the Fifth Amendment. Before the court could rule, their underlying criminal cases ended. Nevertheless, the Ninth Circuit held the case was not moot and acted as a direct response to his case, and “[b]y all accounts, the [tribe] exercised its political influence to persuade Congress to enact a narrow jurisdiction-stripping provision that effectively ends all lawsuits threatening its casino, including Patchak’s.”16 But, according to Justice Thomas, “the question in this case is [n]ot favoritism, nor even corruption, but power.”17 In a vehement dissent, Chief Justice Roberts, joined by Justices Kennedy and Gorsuch, called the contested law “the highwater mark of legislative encroachment on Article III.”18


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2 Id. at 903–4.

12 Id. at 905 (internal quotation omitted).

13 Id.

14 Id. (internal quotations omitted).

15 Id.

11 Id. at 910.

16 Id. (internal quotation omitted).

17 Id. (internal quotation omitted).

18 Id. at 921 (Roberts, C.J., dissenting).


20 *United States v. Sanchez-Gomez*, 859 F.3d 649 (9th Cir. 2017).

21 Id. at 655, 658.

22 Id. at 657–59 (citing *Gerstein v. Pugh*, 420 U.S. 103 (1975)).

23 Id. at 658 (internal quotation omitted).

24 Sanchez-Gomez, 138 S. Ct. at 1538.

25 Id.
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class action case to continue when the claim of the named plaintiff becomes moot, because the certified class has acquired an independent legal status with ongoing interests. He notes that Gerstein provides a “limited exception” to Sosna’s requirement that a named plaintiff with a live claim exist at the time of class certification. However, the Court found that the exceptions stop here, as illustrated by Genesis Healthcare Corporation v. Symczyk, which refused to export Rule 23 class-action exceptions to collective actions brought under the Fair Labor Standards Act. Concluding, the Court rejected the notion of a “functional class action,” finding that the “mere presence of . . . allegations that might, if resolved in respondents’ favor, benefit other similarly situated individuals cannot save [respondents’] suit from mootness once the[ir] individual claim[s] have dissipated.”

In a per curiam opinion, Azar v. Garza, the Court ruled on appropriate relief when a civil case “has become moot while on its way here.” Jane Doe, a minor, was detained and placed in the custody of the Office of Refugee Resettlement after she unlawfully crossed into the United States. Eight weeks pregnant, she requested an abortion, but the Office of Refugee Resettlement refused to allow it based on a policy prohibiting the office from facilitating abortions. The lawsuit ensued. After the court of appeals affirmed the district court’s emergency injunction, the government noted it was going to petition the Supreme Court for emergency review. However, in a surprise to the government, Doe had the abortion. At the government’s request, the Court granted certiorari, vacated the judgment below, and remanded with instructions to dismiss the claim as moot. The Court said equity called for vacatur because a “doctrine that would permit a plaintiff to obtain a favorable judgment, take voluntary action that moots the dispute, and then retain the benefit of the judgment” would be “a strange doctrine.”

Statutory Construction and Deference to Agency Interpretation

As always, most of the Court’s decisions this Term turned upon interpretations of federal statutes, requiring it to engage in the uniquely judicial task of “statutory construction.” Here we highlight such decisions not so much to discern their substantive merits as to seek insights into how the Court and individual justices approach this interpretive task.

The justices took decidedly different positions on the role of using legislative history to discern the meaning of a statute. In Digital Realty Trust Incorporated v. Somers the Court considered the interplay between two “whistleblower” protection provisions designed to encourage the reporting of corporate fraud, one established in the Sarbanes-Oxley law of 2002, the other in the Dodd-Frank Act of 2010. The protections in the Dodd-Frank Act are limited to persons who report allegations of fraud to the Securities and Exchange Commission, as opposed to persons who, like the plaintiff, report suspected fraud only to company management, the Court unanimously concluded after an unremarkable statutory analysis. The case is noteworthy because of the concurring opinion by Justice Thomas, joined by Justices Alito and Gorsuch, endorsing the view that the legislative history of a statute—in this case a Senate Report relied upon by the majority—is of no value in discerning a statute’s meaning. According to the concurring justices, the Court’s analysis should not “venture beyond the statutory text.” This admonition prompted a separate response from Justices Sotomayor and Breyer who chided, “[W]e do not think it wise for judges to close their eyes to reliable legislative history—and the realities of how Members of Congress create and enact laws—when it is available.

The same dispute arose in Marinello v. United States, where a criminal defendant was convicted under a statute that forbids “obstruct[ing] or imped[ing] . . . the due administration of [the Internal Revenue Code].” The defendant argued, based upon the text and the narrow interpretation that courts have given to similar “obstructive conduct” criminal statutes, that the government needed to prove that the obstructive conduct was related to some specific “pending [Internal Revenue Service (IRS)] action or proceeding, such as an investigation or an audit.”

Writing for a seven-member majority, Justice Breyer agreed with the defendant and reversed the conviction, concluding .
Justices Thomas, Alito, and Gorsuch simply declined to join the part of the opinion that cited portions of the congressional record to support interpretation of the statute.

that the “statutory context confirms that the text refers to specific, targeted acts of administration.”38 Justices Thomas and Alito, this time not joined by Justice Gorsuch, wrote a dissent arguing that the statute must be read to criminalize any conduct that might impede the IRS from performing any of its activities, such as (in this case) the defendant’s destruction of business records relevant to his tax returns in a not-so-subtle jibe at this case) the defendant’s destruction of performing any of its activities, such as (in this case) the defendant’s destruction of

Contrary to public perception, most of the Court’s cases involving disputes over legislation do not provoke passionate disagreement and are resolved by routine application of statutory construction analysis.43 However, every year the substantive disputes in a few cases implicate critical issues of political, economic, or social policy, and in those decisions the fault lines between the ideological wings of the Court reemerge.

In Jennings v. Rodriguez immigration policy again sharply divided the Court. Plaintiff Alejandro Rodriguez is a Mexican citizen and U.S. lawful permanent resident who brought a class action challenging the government’s policy of detention for two different groups of immigrants.44 The first group includes persons detained or apprehended while attempting to enter the United States and who are determined to be ineligible for admission.45 Although federal law calls for the immediate “removal” of such persons, they may request asylum, and if an immigration officer determines their claim is credible, they may remain in the country (in detention) pending the outcome of their asylum application.46

The second group consists of persons who entered the United States, either lawfully or unlawfully, but were later arrested and designated for removal because they were determined to be either inadmissible at the time of entry or because, subsequent to their admission, they were convicted of crimes (and completed sentences for those convictions).47 Those who challenge their removal are detained pending the outcome of those proceedings.48

Rodriguez, who fell within the second group, challenged the procedures through which the government detains, without opportunity for a bail hearing, these two groups of immigrants while it processes (or opposes) their claims, confining them for months and sometimes years, even though many persons ultimately prevail on those claims and are released and permitted to stay in the United States.49 Plaintiffs contended that the denial of any opportunity to challenge their detention violated the due process clause of the Fifth Amendment.50 The district court issued an injunction in favor of the plaintiffs; the Ninth Circuit affirmed, construing the statutes at issue as imposing an “implicit” six-month limit on a person’s detention, after which the person must be given a bond hearing, and the government must prove by clear and convincing evidence that further detention is justified.51

The Ninth Circuit relied heavily upon a 2001 Supreme Court decision, Zadvydas v. Davis, where the Court applied the doctrine

38 Id. at 1106.
39 Id. at 1112 (Thomas, J., dissenting).
40 Id. at 1107.

42 Id. See also Encino Motorsports Limited Liability Company v. Navarro, 138 S. Ct. 1134, 1143 (2018) (majority opinion by Justice Thomas, interpreting provision of Fair Labor Standards Act, noting that legislative history of statute at issue was unhelpful “[e]ven for those Members of this Court who consider legislative history”).
43 See, e.g., Lagos v. United States, 138 S. Ct. 1684, 1689–90 (2018) (unanimous opinion by Justice Breyer resolving dispute under Mandatory Victims Restitution Act by invoking doctrine of noscitur a sociis, “the well-worn Latin phrase that tells us that statutory words are often known by the company they keep”).
45 Id. at 837.
of “constitutional avoidance” to imply a six-month limit upon the period for which immigrants could be detained pending removal (pursuant to a different provision of the Immigration and Nationality Act) without receiving a bail hearing.\(^5^2\) Despite be read” to imply a six-month limit.\(^5^6\) The Court dismissed the lower court’s reliance upon the nearly identical result, under similar immigrant detention provisions, that the Court reached in Zadvydas; the majority distinguished the detention provisions in Zadvydas as at least arguably “ambiguous,” and in any event, at least in Justice Alito’s view, “Zadvydas represents a notably generous application of the constitutional-avoidance canon.”\(^5^7\)

After a refutation of the statutory arguments offered by the plaintiffs, and a rebuttal to “[t]he dissent’s utterly implausible interpretation of the statutory text”\(^5^4\) to avoid a finding that the statute is unconstitutional,\(^5^4\) Here, to avoid ruling upon the “serious constitutional concerns” that would arise if the statutory detentions at issue were “prolonged” or indefinite, the Ninth Circuit implied a six-month limitation on the time period for which a person could be detained without bond hearings under the provisions at issue.\(^5^5\) This was error, according to Justice Alito, because the detention provisions at issue clearly did not include any limitations on the length of detention (except until the conclusion of the removal proceedings), and therefore none of the “detention provisions may plausibly

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In **Husted v. A. Philip Randolph Institute** a dispute implicating a national political issue—the proliferation of legislation in conservative states, in this case Ohio, to remove voters from the rolls for various reasons and under various circumstances—resulted in the same alignment in the Court as in **Rodríguez**.\(^6^2\) Although the statutory disagreement in **Husted**—whether the Ohio “voter purge” law violated certain provisions of the National Voter Registration Act—produced unremarkable interpretive analyses from both factions of the Court, the result was the same: a five-justice majority opinion, again written by Justice Alito, upholding the validity of the Ohio law.\(^6^3\) That decision, in turn, prompted another dissent, again from Justice Breyer, on behalf of the liberal wing, this time reinforced by Justice Kagan.\(^5^4\) Justice Sotomayor filed a separate dissent to emphasize her frustration with the Court’s decision, which in her view failed to recognize the long history of the “substantial efforts by States to disenfranchise low-income and minority voters.”\(^6^5\)

The Court also returned to the Fair Labor Standards Act. Two years ago a divided Court declined to defer to the Barack Obama administration’s Department of Labor regulation reversing a long-standing agency policy that auto dealerships “service advisors” should be exempt from the wage, hour, and overtime provisions of the Fair Labor Standards Act (and thus should be

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52 Rodríguez, 804 F.3d at 1082 (citing Zadvydas v. Davis, 533 U.S. 678, 682 (2001)). The Ninth Circuit thus did not reach the merits of the plaintiff’s due process claims (id. at 1087).

53 Jennings, 138 S. Ct. 830.

54 Id. at 843 (quoting Clark v. Martinez, 543 U.S. 371, 381 (2005)).

55 Rodríguez, 804 F.3d at 1077.

56 Jennings, 138 S. Ct. at 843.

57 Id.

58 Id. at 851.

59 Id.

60 Id. at 859 (Breyer, J., dissenting).

61 Id. at 876 (Breyer, J., dissenting).


63 Id. (examining 52 U.S.C. § 20507(b)(2), (c), (d) (2016)).

64 Id. at 1850 (Breyer, J., dissenting).

65 Id. at 1863 (Sotomayor, J., dissenting).
Paid for overtime work). The majority concluded that the agency’s interpretation was not entitled to deference because it had not sufficiently explained why it had reversed its prior long-standing policy on the issue. The Court remanded the case to consider, without deference to the agency’s interpretation, whether the statutory exemption in the Act applies to service advisors. On remand, the Ninth Circuit reaffirmed its conclusion that the Act’s wage and hour provisions apply. The Supreme Court again granted certiorari and, in a 5-to-4 opinion by Justice Thomas, again reversed the Ninth Circuit and concluded that “service advisors are exempt from the overtime-pay requirement of the [Fair Labor Standards Act] because they are ‘salesmen[en] … primarily engaged in … servicing automobiles.’”

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Chevron Deference

In 1984 the Court issued Chevron v. Natural Resources Defense Council, which instructed lower courts to defer to an administrative agency’s duly promulgated interpretation of an ambiguous statute. Several decisions from the 2017–18 Term, after cursory analyses, declined (without objection) to accord agency deference to disputes over statutory meaning. In each case the Court concluded that the statutory text was unambiguous, and thus under Chevron’s familiar framework no administrative deference was due.

However, these cases did not reflect what is going on at the Court. Led by Justice Gorsuch, the Court repeatedly questioned the 34-year-old Chevron precedent. SAS Institute Incorporated v. Iancu involved the process for reviewing a competitor’s challenge to a previously issued patent. A significant part of the opinion turned on statutory construction that only a patent lawyer could love, but when the Court questioned the viability of Chevron deference, things got interesting. Justice Gorsuch began his discussion for a five-member conservative majority by noting that SAS had suggested that the Court “use this case as an opportunity to abandon Chevron” and, quoting Judge Henry Friendly, embrace the “impressive body” of pre-Chevron law recognizing that “the meaning of a statutory term is properly a matter for judicial [rather than] administrative judgment.” But while posing the question, Justice Gorsuch left the answer for another day, finding that, even under Chevron, no deference was due because the statute’s terms were unmistakably clear.

In Epic Systems Corporation v. Lewis the same five-member majority again refused to accord deference to the agency position. Epic Systems arose when employees filed a class action suit against their employer for overtime wages. The employer moved to dismiss, citing a provision of the employment contract requiring employees to use individualized arbitration proceedings to resolve disputes and arguing that the Federal Arbitration Act required courts to enforce the arbitration agreements as written. In response, the employees cited a “saving clause” in the Act that removes the arbitration requirement if the agreement violates another federal law. The employees said the individualized arbitration requirement violated a National Labor Relations Act provision that guarantees workers the right to engage in concerted activities, such as litigation, for the purpose of collective bargaining “or other mutual aid or protection.”

Siding with the employer and consistent with other recent decisions, the Court protected the arbitration agreements. The Federal Arbitration Act, Justice Gorsuch, writing for the majority, said, trumps the National Labor Relations Act, and so courts must enforce the arbitration provision—a holding that the dissent labeled “egregiously wrong” because employers typically dictate the terms of employment contracts; employees will be forced to resolve problems through individual arbitration, and that will rarely occur. Justice Gorsuch, however, did not acknowledge employees’ unequal bargaining position, instead stating...
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the question before the Court as whether “employees and employers [should] be allowed to agree that any disputes between them will be resolved through one-on-one arbitration.”81 From there the majority took a result-oriented path to justify allowing such an “agreement.” For example, while hotly discounting reliance on legislative history in other cases (see discussion supra), the majority found that Congress enacted the Federal Arbitration Act “in response to a perception that courts were unduly hostile to arbitration.”82

After concluding the statutory analysis, Justice Gorsuch picked up where he left off in SAS Institute, expressly noting that, in contrast to SAS Institute, no party asked the Court to reconsider Chevron deference.83 Again, the Court did not reconsider Chevron but rather found that, even under the Act “in a way that limits the work of a second statute,” the Federal Arbitration Act, “[a]nd on no account might we agree that Congress implicitly delegated to an agency authority to address the meaning of a second statute it does not administer.”84 This analysis has a few problems. It appears to read the “saving clause” out of the Federal Arbitration Act; it fails to ensure that both the Federal Arbitration Act and the National Labor Relations Act have meaning; it does not acknowledge that the National Labor Relations Act was the later-enacted statute, which, under the rules of construction, would mean that it would control over the earlier-passed law. In the end the Court distinguished Chevron’s justification for deference based on the need to leave “policy choices” to the executive branch—noting that Immigration Reform and Immigrant Responsibility Act of 1996 requires the Department of Homeland Security to give the noncitizen a written notice to appear specifying, among other items, “[t]he time and place at which the [removal] proceedings will be held.”85 Relying on a 1997 regulation, Homeland Security served noncitizens with notices that did not state the time, place, or date of the initial removal hearing but rather informed them that these specifics were “to be determined.”86 Upon receiving such a document, Pereira argued that it was not a “notice to appear” under the Act. The argument was critical to Pereira and other noncitizens who had received similar documents because, under the Act, the notice to appear stops the time for counting a noncitizen’s period of continuous presence in the United States. Significantly, noncitizens who are subject to removal proceedings and who have accrued 10 years of continuous presence in the United States may be eligible for a form of discretionary relief known as cancellation of removal.87

In this 8-to-1 decision, Justice Sotomayor did not question Chevron’s viability but, as with the previous decisions, did find that the Court need not resort to Chevron because Congress had answered the question at hand. Assessing statutory text and neighboring statutory provisions, and applying “common sense,” the Court easily concluded that a notice that leaves out the time and place to appear is not a “notice to appear” under the Illegal Immigration Reform and Immigrant Responsibility Act.88

Notably, as one of his last pronouncements while on the Court, Justice Kennedy’s

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Chevron, no deference was due. Referring to its analysis construing the statutes, the majority said it was “more than up to the job” of solving the interpretive puzzle.84 The Court nevertheless rejected the National Labor Relations Board’s interpretation of the National Labor Relations Act as guaranteeing workers the right to engage in concerted litigation on the grounds that the board was seeking to interpret competing briefs from the National Labor Relations Board and the solicitor general left the executive’s position “a garbage.”86

The Court also refused to apply Chevron deference in Pereira v. Sessions, which concerned the notice used by the U.S. Department of Homeland Security to inform noncitizens of removal proceedings.87 When initiating removal proceedings, the Illegal

81 Id. at 1619.
82 Id. at 1621.
83 Id. at 1629.
84 Id. at 1630.
85 Id. at 1629.
86 Id. at 1630 (quoting Chevron, 467 U.S. at 865).
89 Pereira, 138 S. Ct. at 2111 (citing Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10312, 10332 (March 6, 1997)).
90 Id. at 2110 (citing 8 U.S.C. § 1229b(b)(1)(A)).
91 Id. at 2114–16.
concurring opinion chided lower courts for engaging in “curtisory analysis ... [that] suggests an abdication of the Judiciary’s proper role in interpreting federal statutes.”92 He cautioned against such “reflexive deference” to agency interpretation, particularly where that interpretation concerns the agency’s own authority.93 Justice Kennedy concluded, “[i]t seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie Chevron and how courts have implemented that decision.”94 And while Justice Alito, the lone dissenter, saw the case as a straightforward application of Chevron, he, too, acknowledged that Chevron is in trouble, describing it as an “important, frequently invoked, once celebrated, and now increasingly maligned precedent.”95

**Injunctions**

*Benisek v. Lamone* offers a primer on the preliminary injunction standard.96 Republican voters sued Maryland elections officials and alleged that the officials gerrymandered a congressional district in 2011. The voters sought a preliminary injunction in May 2017 to try to stop the officials by August 18, 2017, from proceeding with the election for the congressional seat based on the 2011 map; the voters believed August 18 to be the latest date by which a map could be redrawn before the election. The district court denied the plaintiffs’ motion and stayed the proceedings pending the Supreme Court’s highly anticipated decision in *Gill v. Whitford*, another gerrymandering case from this Term.97 After *Gill* was decided, the plaintiffs requested that the Court vacate the district court’s order and remand for a decision on their pending preliminary injunction motion.

The Court applied the four-part Winter test, which requires the moving party to show (1) that there is a likelihood of success on the merits, (2) “that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.”98 The Court held, even assuming the plaintiff could show a likelihood of success on the merits, that “the balance of equities and the public interest tilted against their request for a preliminary injunction.”99 First, the Court noted the plaintiffs’ lack of diligence in waiting six years after the alleged gerrymandering to seek relief.100 Second, the Court found that the plaintiffs’ timetable for relief went against the public’s interest in orderly elections and had long since passed in any case.101 Third, the Court determined that the district court acted within its discretion in denying the preliminary injunction given that *Gill* was pending at the time and that a district court ruling might have ended up contradicting *Gill* and resulting in election chaos.102 This would have been inconsistent with the “purpose of a preliminary injunction [which] is merely to preserve the relative positions of the parties until a trial on the merits can be held[,]”103

Five years ago *Shelby County v. Holder* struck down the Voting Rights Act’s “preclearance” provision, which required states with a history of discrimination to obtain federal approval before making changes in their voting rules.104 This Term in *Abbott v. Perez* the conservative majority took an aggressive stance both procedurally and substantively that dealt another significant blow to the Act.105

*Abbott* has a long history. Before a three-judge panel in federal district court in Texas, several groups originally challenged Texas’s 2011 districting plans for congressional and state legislative seats; they alleged racial gerrymandering and other voting rights violations.106 The Texas district court drew up interim districting plans, but the state challenged those plans as usurping the state legislature’s powers. The Supreme Court agreed and remanded.107 Meanwhile, another federal district court, this one in Washington, D.C., denied Texas’s declaratory relief claim for preclearance of the original 2011 plan; this denial was vacated after the Court decided *Shelby*.108 In 2013 Texas drew new districting plans, which were challenged. In 2017 the Texas federal district court found those plans still had the “taint” of the discriminatory 2011 plans.109 A three-judge panel asked the state to revise its districting plans to

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92 Id. at 2120 (Kennedy, J., concurring).
93 Id.
94 Id. at 2121.
95 Id. (Alito, J., dissenting).
99 Id. at 1944.
100 Id.
101 Id. at 1944–45.
102 Id. at 1945.
103 Id. (internal quotation omitted).
106 Id. at 2315.
107 Id. at 2316.
108 Id. at 2316–17. Texas initiated the D.C. district court case seeking preclearance of its 2011 plans by way of declaratory relief.
109 Id. at 2318.
comply with the Voting Rights Act in time for the impending voter registration process.110

Remarkably, before the district court had rendered a final decision on the districting plans, the Supreme Court held that it had jurisdiction under 28 U.S.C. § 1253 to hear the state’s appeal because the lower courts’ orders were, in effect, injunctions. (Section 1253 governs direct appeals to the Supreme Court from decisions in certain cases that, by statute, must be made by three-judge panels.)111 The majority eschewed rigid adherence to the general principle that only final district court decisions are reviewable on appeal when such adherence would create undue hardship.112 The Court also made clear that “the label attached to an order is not dispositive[,]” and “where an order has the ‘practical effect’ of granting or denying an injunction, the effect’ of granting or denying an injunction, and “where an order has the ‘practical effect’ of granting or denying an injunction, it should be treated as such for purposes of appellate jurisdiction.”113 Having boldly established its jurisdiction to hear the state’s appeal because the lower court that one district drawn Voting Rights Act, but the majority agreed with the lower court that one district drawn to increase the Latino population was impermissible racial gerrymandering.114

Standard of Review
When an appellate court is presented with a mixed question of law and fact, what standard of review applies? The Court answered this question in U.S. Bank National Association v. Village at Lakeridge Limited Liability Company.115 Debtor company Lakeridge filed for Chapter 11 bankruptcy. Lakeridge’s efforts to reach agreement with its creditors on a debt reorganization plan stalled when a creditor, U.S. Bank, refused to consent because of another creditor’s romantic relationship with an officer of Lakeridge. The bankruptcy court rejected U.S. Bank’s argument that the romantic relationship meant that Lakeridge did not have the requisite arm’s-length relationship with its creditors. The Ninth Circuit affirmed, applying a deferential clear-error standard of review of the bankruptcy court’s finding.

In her plurality opinion, Justice Kagan explains that “the standard of review for a mixed question all depends—on whether answering it entails primarily legal or factual work.”116 When answering a mixed question “require[s] courts to expound on the law, particularly by amplifying or elaborating on a broad legal standard” or “developing auxiliary legal principles of use in other cases—appellate courts should typically review a decision de novo.”117 But the Court noted that “other mixed questions immerse courts in case-specific factual issues—compelling them to marshal and weigh evidence, make credibility judgments, and otherwise address what we have (emphatically if a tad redundantly) called ‘multifarious, fleeting, special, narrow facts that utterly resist generalization.’”118 In such cases “appellate courts should usually review a decision with deference.”119 Describing the bankruptcy court’s examination of the mixed question in Lakeridge as “about as factual sounding as any mixed question gets,” Justice Kagan concluded that the Ninth Circuit properly applied the deferential clear-error standard of review.120

Stare Decisis
In South Dakota v. Wayfair Incorporated the Court considered whether South Dakota’s law imposing sales tax on Internet sellers with no physical presence in the state was unconstitutional under the commerce clause.121 The Court said “no,” but to reach that holding, it had to buck precedent.

Writing for the five-justice majority, Justice Kennedy first explained that Congress and the states, within limits, have concurrent power to regulate commerce.122 The two primary limits on this power are that states may not discriminate against interstate commerce or impose undue burdens on interstate commerce.123 The Court applied those principles in 1967 in National Bellas Hess and held that an out-of-state mail-order company’s obligation to collect and remit sales tax to the customer’s state depended on whether the seller had a physical presence in that state.124 The Court held that simply shipping mail-ordered goods to the customer’s state was not physical presence, and the tax therefore violated the commerce clause.125 In 1992, in the factually similar Quill Corporation v. North Dakota, the Court, citing stare decisis, upheld the

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110 id. at 2315, 2318.
111 id. at 2319.
112 id.
113 id.
114 id. at 2324–35.
116 id. at 967.
117 id.
118 id.
119 id.
120 id. at 968–69.
122 id. at 2090.
123 id. at 2090–91.
125 id. at 759–60.
A jurisdictional defect may not be waived or forfeited and can be raised at any time, including on appeal.

physical-presence rule of Bellas Hess in reviewing a North Dakota sales tax.126

Fast forward to the present day when 89 percent of Americans have Internet access (compared to 2 percent when Quill was decided); the world’s largest seller is Amazon; and respondent Wayfair netted $4.7 billion in revenue in 2017 alone.127

The Court simply could not square the physical-presence rule with reality. While recognizing its obligation to “approach the reconsideration of our decisions with the utmost caution, stare decisis is not an inexorable command.”128 Thus the Court let go of its adherence to the physical-presence rule and overruled Bellas Hess and Quill.129

Timeliness of Appeals and Tolling

After Christine Hamer lost her employment-discrimination suit, the district court gave her a two-month extension to file her notice of appeal so that she could seek new counsel after her original counsel withdrew. She filed near the end of the extension period. The Seventh Circuit sua sponte questioned the timeliness of Hamer’s appeal and ultimately dismissed the appeal as untimely based on Federal Rule of Appellate Procedure 4(a)(5)(C), which states that extensions of time to file a notice of appeal may not exceed 30 days.130

The Supreme Court held that the Seventh Circuit erred because it failed to distinguish between statute-prescribed appeal-filing deadlines, which are jurisdictional, and court-made rules (such as the Federal Rules of Appellate Procedure), which are not.131 Writing for a unanimous Court, Justice Ginsburg explained that “[o]nly Congress may determine a lower federal court’s subject-matter jurisdiction[,]” and that “[f]ailure to comply with a jurisdictional time prescription … deprives a court of adjudicatory authority over the case, necessitating dismissal.”132 A jurisdictional defect may not be waived or forfeited and can be raised at any time, including on appeal.133 In contrast, “[m]andatory claim-processing rules are less stern” and may be waived or forfeited under appropriate circumstances.134 Accordingly, the Supreme Court vacated the judgment and remanded so that the Seventh Circuit could review, applying the proper principles, the timeliness of Hamer’s appeal.135

In a near-unanimous opinion by Justice Ginsburg (Justice Sotomayor concurred separately), the Court placed limits on a putative class member’s ability to sue following denial of class certification.136

In two successive securities-related class actions against China Agritech Incorporated, the district court denied class certification, and, in each case, the parties then settled and the cases were dismissed. Shareholder Resh filed a third class-action complaint against the company and sought lead plaintiff status a year and a half past the date when the applicable statute of limitations had expired.137

The district court dismissed Resh’s action as untimely, but the Ninth Circuit reversed based on the American Pipe tolling rule. Under that rule, “the timely filing of a class action tolls the applicable statute of limitations for all persons encompassed by the class complaint[,]” and even where class certification is denied, “members of the failed class could timely intervene as individual plaintiffs in the still-pending [nonclass] action.”138 In later cases the Supreme Court clarified that the rule “is not dependent on intervening in or joining an existing suit; it applies as well to putative class members who, after denial of class certification, prefer to bring an individual suit rather than intervene[.]”139

The Supreme Court held that the Ninth Circuit was wrong to extend American Pipe to Resh because he brought a new class action after the statute of limitations had expired through which he sought to “piggyback on an earlier, timely filed class action.”140 The Court reasoned that tolling “the limitation period for individual claims” made sense “because economy of litigation favors delaying those claims until after a class-certification denial. If certification is granted, the claims will proceed as a class…. If certification is denied, only then would it be necessary to pursue claims individually.”141 But “[w]ith class claims ... efficiency favors early assertion of competing class representative claims ... [so that a] decision denying certification [is] made at the outset of the case, litigated once for all would-be class representatives.”142

127 Wayfair, 138 S. Ct. at 2089, 2097.
128 Id. at 2096 (internal quotation omitted).
129 Id. at 2099.
132 Id. at 17.
133 Id.
134 Id.
135 Id. at 22.
137 Id. at 1804–5.
138 Id. at 1804 (citing American Pipe and Construction Company v. Utah, 414 U.S. 538, 544, 552–53 (1974)).
139 Id. (internal quotation omitted).
140 Id. at 1806.
141 Id. at 1806–7.
142 Id. at 1807.
Artis v. District of Columbia is yet another Justice Ginsburg opinion on tolling, this time for a five-justice majority in which Chief Justice Roberts joined the liberal justices.143 The issue was how much time a plaintiff has to refile her state claim in state court after a federal district court dismisses the state claim. Federal district courts generally may exercise jurisdiction over state claims over which they otherwise would not have jurisdiction if those claims arise from the same controversy and are brought alongside proper federal claims.144 The statute of limitations for such a state claim “shall be tolled while the claim is pending in [federal court], but a plaintiff a fixed period in which to refile.”145 Applying the tenets of statutory interpretation, the majority went with the first interpretation. “[L]ook[ing] first to [the] language [of the subject statute], giving the words used their ordinary meaning,” the Court found that the “stop-the-clock” interpretation of “tolling” was consistent with the way “tolling” was used in many other statutes and with the Black’s Law Dictionary definition.147 The Court further noted that neither the defendant nor dissenting Justice Gorsuch identified a single statute in which “tolling” meant “grace period.”148 And the Court identified just one of its decisions in which it characterized a grace period as tolling the limitations period—“a feather on the scale against the weight of decisions in which ‘tolling’ a statute of limitations signals stopping the clock.”149 “Furthermore,” said Justice Ginsburg, the “grace period” interpretation would render the absurd result of “permit[ting] a plaintiff to refile in state court even if the limitations period on her claim had expired before she filed in federal court.”150 For plaintiff Artis, who refiled in state court 59 days after the district court dismissed her state claim, the ruling meant that, rather than being 29 days late, she got her state claim in with two years to spare.

Administrative Procedure
The Court decided a handful of cases affecting how administrative agencies conduct their quasi-judicial functions. Lucia v. Securities and Exchange Commission looked at whether the Securities and Exchange Commission’s administrative law judges are employees of the federal government or “Officers of the United States” within the meaning of the Constitution’s appointments clause. The answer is significant because the appointments clause allows only the president, courts of law, or heads of departments to appoint officers of the United States.151 If the administrative law judges were officers, then the commission’s administrative hearing was invalid because the administrative law judge was selected by commission staff rather than the commission itself.

Justice Kagan, joining the five-member conservative block, authored the majority opinion holding that Securities and Exchange Commission administrative law judges are officers subject to the appointments clause. The Court acknowledged that the administrative law judges prepared opinions that the commission could decide not to accept but, unlike the dissenting justices, the Court rejected this focus on finality.152 Instead the Court relied on a previous decision, Freytag v. Commissioner, which Justice Kagan said “says everything necessary to decide this case.”153 Freytag

144 Id. at 597.
147 Id. at 603 (internal quotation omitted).
148 Id. at 602–3.
149 Id. at 603.
150 Id. at 604.
Because the Court found the commission’s administrative law judges to be officers subject to the appointments clause, the administrative hearing was invalid.

applied “the unadorned ‘significant authority’ test” to find that “special trial judges” of the tax courts are officers of the United States.154 As in Freytag, the Securities and Exchange Commission administrative law judges hold career appointments under the law.155 Moreover, the commission’s administrative law judges exercise the same “significant discretion” to supervise discovery, decide motions, issue subpoenas, rule on admissibility of evidence, administer oaths, and take evidence, and impose sanctions.156 However, unlike the validity of the administrative law judge’s appointment, the appropriate remedy was a new hearing before a properly appointed administrative law judge.158

The Lucia remedy means that new administrative trials with properly appointed administrative law judges will need to occur where the claimant objected to the authority of the administrative law judge. The remedy could move beyond the Securities and Exchange Commission, however. The type of civil service appointment practices

This case arose when the acting secretary of the U.S. Department of Homeland Security announced he was going to rescind the Deferred Action for Childhood Arrivals (DACA) program.

tax court special trial judges’ opinions, which must always be reviewed by a tax court judge, the Securities and Exchange Commission can decide not to review the administrative law judge’s decision, at which point it “becomes final” and is “deemed the action of the Commission.”157

Because the Court found the commission’s administrative law judges to be officers subject to the appointments clause, the administrative hearing was invalid, and the only issue left was remedy. Again, following Freytag, the Court held that, because Lucia made a timely objection to

at issue in Lucia extends across many administrative agencies, including the Social Security Administration. Thus, where an objection was raised regarding the appointment of the administrative law judge, those agencies will probably need to offer new administrative trials. Questions remain about whether other individuals who are making administrative decisions should properly be deemed “Officers of the United States.”

Another administrative procedure case, In re United States, concerns the administrative record.159 This case arose when the acting secretary of the U.S. Department of Homeland Security announced he was going to rescind the Deferred Action for Childhood Arrivals (DACA) program. The plaintiffs filed suit and, among other reasons, argued that the administrative record filed by the government was incomplete. The district court agreed and issued an order requiring supplementation of the record. After the Ninth Circuit refused to disturb that ruling, the government went back to the district court and asked that the order to supplement be stayed until after the court had decided the government’s pending motion to dismiss the case. That motion made the difficult-to-win argument that the secretary’s determination to rescind DACA was committed to agency discretion and thus unreviewable by a court.160 The district court did not grant the government’s request for a stay, and the government appealed.

The Supreme Court ultimately accepted the case and vacated the order requiring completion of the record. The Court reasoned that if the government won its motion to dismiss, there would be no need for the lower court to examine an administrative record.161 And while this ruling is confined to the facts of the DACA case, it is notable given the government’s recent arguments for unreviewable agency discretion. For example, the government recently filed a motion to dismiss another Administrative Procedure Act case, arguing (unsuccessfully) that its decision to allow states to condition Medicaid coverage on a work requirement is committed to agency discretion.162

The 2017–18 Term marked the end of Justice Kennedy’s time on the Supreme Court. Justice Kennedy proved to be a reliable conservative vote, but his replacement,
Justice Kavanaugh, will almost certainly bring a more active conservative voice. As a result, the newly constituted Court will raise serious concerns for low-income people who must rely on the judiciary to protect their rights. Long-standing guides for judicial review could erode or be eliminated altogether. *Chevron* deference is already getting the snake eye from a number of justices, and a solid group—consisting of Justices Alito, Thomas, and Gorsuch—is discounting the role of legislative history altogether (when convenient). In a development that could have implications across the broad array of safety-net spending clause enactments, the Court is being asked to decide whether a provision of the Medicaid Act is privately enforceable under 42 U.S.C. § 1983. The Court has already granted certiorari in cases involving other access-to-court questions, including:

- Whether, or in what circumstances, a cy pres award of unclaimed class action settlement proceeds supports class certification and comports with the requirement that these settlements be fair, reasonable, and adequate?164
- Did the Ninth Circuit Court of Appeals commit an error when it held that the 14-day deadline for filing an interlocutory appeal of an order granting or denying class action certification under Federal Rule of Civil Procedure 23(f) is not jurisdictional, thus allowing equitable exceptions to excuse a party’s failure to meet the deadline?165
- Does the Fair Debt Collection Practices Act apply to nonjudicial foreclosure proceedings?166

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164 *In Re Google Referrer Header Privacy Litigation*, 869 F.3d 737 (9th Cir. 2017), cert. granted sub nom. *Frank v. Google*, 138 S. Ct. 1697 (U.S. April 30, 2018). Courts use the cy pres doctrine to distribute unclaimed proceeds to nonprofit entities and charities. This keeps the defendant from taking unclaimed funds but has been criticized as allowing uninvolved entities to reap benefits. Many public interest organizations, legal and nonlegal, rely upon cy pres awards for program funding. Chief Justice Roberts has raised concern about the practice (see *Marek v. Lane*, 134 S. Ct. 8, 9 (2013) (Statement of Chief Justice Roberts respecting denial of certiorari) (“In a suitable case, this Court may need to clarify the limits on the use of such remedies.”)).
