LLOYD TEVIS
INVESTMENTS, LLC

Securing your future through Precision Investing™

Review of Supreme Court Decisions 2025

Introduction

The Supreme Court hears cases from October to July issuing opinions from time to time. Generally the more difficult or controversial decisions receive the longest gestation within the Court. They tend to come out on as a batch in June. It is our custom to review them annually to keep track of how the Court is thinking and where that thought is going – particularly in as it relates to issues of investment interest.

The Supreme Court occupies a special position in the United States government. Members of Congress are explicitly in place to look after local interests. The Court, by contrast, is tasked with looking after the national interest. Only the President has a similar national responsibility. And whereas Presidents are in place for just four or eight years, Justices typically hold office for decades. Each year the nine Justices co-author approximately 5000 pages of judicial opinions. Each Justice is individually turning out the equivalent of a full 500 page novel a year – a production rate comparably to our most prolific authors. Further this flood of writing is intended to fully explain and illuminate the author's thinking. As a result, among the high officials of our government the Justices are the most transparent and individually the best known to the watching public. We see how their minds work, what their favorite turns of phrase are, what issues hold their attention year after year and where their thinking has evolved both with the times and with the internal logic of the law. In addition, the cases they handle have been selected for their importance and an extensive process of fact finding and legal consideration has gone on before the cases arrive at the Court. As such the cases provide a ground truth about what is going on at least a part of the the country. For investment managers, who are always trying to understand what is happening in the broadest sense, this datum can be a useful correction to the more superficial and often biased reporting of the press or the narrowly focused detail of financial reports. But 5000 pages of mostly dry, only occasionally entertaining, technical writing is a stiffer

cocktail than most will choose to drink. For this reason we publish our annual review. Our object is to compress those 5000 pages into about 35 which will convey to the non-attorney reader an accurate feel for who the Justices are, how they think, what they decided this year and why. We also offer our own remarks on what it adds up to and what it tells you relevant to the investment climate in the United States. Clearly to keep our composition within readable length we must be selective, often cursory and entirely dismissive of technical apparatus. Hopefully, however, we achieve a final portrait which, while not perfect in every detail, is accurate in its broad strokes.

Background

It is helpful to begin with some basic information about how the Court functions.

Supreme Court decisions serve three basic purposes. First to decide the actual issue before the Court.

Second to supervise the subsidiary district and appellate courts, providing them with direction on how the Supreme Court wants them to go about their job. Third, it is common for some of the Justices to have ambitions about how they wish to shape the evolution of the law in the long run. They may use a sequence of cases to establish a legal principle or develop an interpretative theory. They utilize the cases before them as stepping stones in this longer term project.

In recent years the Justices have broken into three groups. These groups are different from the partisan political labels of Liberal/Conservative and so we pick deliberately different names for them: Radicals, Institutionalists and Traditionalists. These labels are our own and not yet widely adopted, although the groupings they name are well recognized.

The Radicals are led by Thomas and joined by Alito and Gorsuch. Their long term project is to establish a theory of jurisprudence in which meaning of legal texts is closely tied to the use of language at the time the texts were enacted (if laws) or written (if opinions.) Their goal is to halt evolution of the law or (if it has evolved improperly in their opinion) to

rewind it to its original state. They recognize that this will frequently result in decisions which are dysfunctional from a practical perspective. That is fine with them as they view it as the job of Congress to fix those dysfunctions and they are happy to shovel work on to Congress's shoulders.

The second troika is the Institutionalists led by Chief Justice Roberts joined by Kavanaugh and Barrett. They see law as a fundamental institution of government and they seek to keep it functioning in a practical manner. In judging practicality, their value judgments usually (but not always) align with traditional Republican policy positions. Here by traditional we mean Republican thinking of circa 2000.

The final group is the Traditionalists led by Sotomayor and joined by Kagan and Jackson. They argue for the traditional understanding of the law and uphold settled precedents which are under attack from the radical camp. This group is sometimes called Liberal by commentators, but that is a mistake. Liberals place an emphasis on expanding individual rights and freedom of action. The Traditionalists are not trying to expand individual rights. At most they are trying to protect them from the Radicals clawing them back.

Many decisions on the current Court are made 6-3 by two of these groups joining together in opposition to the third. Usually it is the Institutionalists who swing between the settled poles of the Radicals and the Traditionalists.

However, on some issues individual Justices depart from the thinking of their closest colleagues. In these cases the standard coalitions often dissolve and then 5-4 or 7-2 decisions result. Very rarely one sees an 8-1 decision if some Justice feels strongly about an issue but cannot persuade any of his colleagues to join him. Unanimous decisions are more common. Usually these arise because the Justices feel a subsidiary court is out of line and needs to be called to order. However on politically very hot topics the Justices may pull together and speak unanimously to preserve the Court's influence and power in the political process.

The decision of the Court is the opinion which settles the case before the Court. When the Chief Justice belongs to the majority he assigns the authorship of this opinion and that

gives him considerable sway over the reasoning and sharpness of the decision. When the Chief is not in the majority then authorship is set by the senior most judge who is part of the majority – often Thomas on the present Court. However this situation is rare. One or more dissents will be written by the Justices disagreeing with the majority. It is usually the Traditionalists who are in the minority and often their dissents on major issues are penned by Sotomayor with Kagan and Jackson sharing the work load on the other matters.

Concurring decisions are written by Justices from time to time. In this case the Justice either agrees with the decision but not the reasoning of the majority, or the Justice wants to develop that reasoning further than the majority was willing to go along with. One can take the Opinion of the Court as representing the current consensus of the Court, while the dissents and concurrences reveal more about how the individual judge thinks. Opinions of the Court can sometimes be foggy compromises, whereas the dissents tend to sharp reasoning focused on the weak points of the majority's decision. As a result, dissents can be influential to the longer run development of the law.

A rather standard reason for a judge to write a concurrence is because they feel the Court made a broader decision that was strictly necessary to settle the case before it. Similarly a judge may write a concurrence because they feel the Court's ruling is too narrow and ad hoc and it should have made a broader decision. The same issues come up in dissent. Usually one judge will write a dissent on behalf of several judges. Another judge will join it but add a personal dissent addressing the scope of the dissent. Some judges have more appetite for this work than their brethren. Barrett in particular tends to offer narrowing concurrences/dissents, while Thomas often offers broadening concurrences/dissents.
In general Barrett's outlook is to conserve law, while Thomas seeks radical change. For the most part our discussion glides over these individual opinions without comment.

An Overview of the Cases

This years decisions offer some contrasts with last years. There are fewer bold decisions and much less tendency to

strike a bon mot at a colleague's expense. There were a notable number of unanimous opinions offered. The Chief Justice was almost always in the majority and thus influencing the opinion of the Court. One might say that last year's decisions displayed a certain rowdiness from the bench, but this term felt much more as if the teacher had called the class to order and told the team to apply itself with proper energy and decorum. In short, one sense greater leadership from the Chief at work. The overall environment of plummeting public regard for the Court and a President eager to sweep all other power centers aside has probably contributed to the regained spirit of collegiality on the bench. An occasional tart remark shows that the tensions of last term are not fully resolved, but for the moment the Justices seem to be agreed on putting their institution ahead of their personal agendas.

We have found it convenient to organize the cases into several groups. The first group consists of three cases bearing on how the government is run:

A. Cases Regarding How The Government is Run

1. Trump v Casa - power of District courts to issue national injunctions

2. Kennedy, Secretary of Health & Human Services v Braidwood Management – appointment of officers

3. Riley v Bondi – deportation procedures

The next group of cases touch on sovereign immunity and lawsuits of involving foreign entities

B. Cases Regarding Sovereign Immunity

1. Fuld v The Palestinian Liberation Organization and The Palestinian Authority

2. CC Deval (Mauritius) Ltd v Antrix Corporation

3. Martin v The United States

Fundamentally the issue in these suits is the power of the Courts at the borders of their jurisdiction.

Here we note Martin v US as having the highest entertainment value of the cases considered.

The third and largest group of cases deal with the government agencies

C. Government Agencies

1. FCC v Consumer Research
2. FDA v RJ Reynolds Vapor Co
3. McLaughlin Chiropractic Associates Inc v McKesson Corp
4. Diamond Alternative Energy LLC v EPA
5. NRC v Texas
6. EPA v Calumet Shreveport Refining LLC
7. Oklahoma v EPA
8. Commissioner Internal Revenue v Zuch

A number of these cases bracket questions of who can sue the agencies, where and over what. As a result they have some relation to the sovereign immunity cases, which is why we place them directly after those cases.

The next group is cases dealing with criminal law matters

D. Criminal Law Cases

1. Hewitt vs the United States
2. Gutierrez vs Saenz
3. Esteras v United States
4. Perttu v Richards
5. Rivers vs Guerrero

These cases tend to turn around close reading of statutes and so they will warm the hearts of grammarians and editors. We note Esteras v US for its historical interest.

Our final group of cases bears on the rights of persons
E. Cases Concerning Rights of Persons

1. Mahmoud v Taylor – freedom of religion
2. Free Speech Coalition, Inc v Paxton – access to pornography
3. Medina vs Planned Parenthood South Atlantic – right choose a doctor
4. Stanley v City of Sanford – protection of the disabled
5. United States v Skremeti – rights of transgender minors

We close with a survey of the Emergency Docket. Whereas most petitions to the Court ask it to decide something, petitions to the Emergency Docket ask it to do something. Critics of the Court have accused it of using the Emergency Docket to make summary judgment in support of controversial policies. Our review sought to understand how this docket is being used.

Implications For Investors

The government interacts with the business community in two important ways. First through its spending decisions and how that spending is managed and organized. For the health care and defense industries the government is the critical customer. The second way is through the actions of the government's regulatory agencies – specifically through their rule making and rule enforcement activities. In general Congress has carved off sections of the economy which it regards as complex and important. To each such area it has assigned a regulatory agency which is intended to be the depository of the government's subject matter expertise for the area in question. To carry out its duties, Congress gives each agency the mix of powers Congress judged necessary to the mission. One topic which comes up is whether Congress crafted a Constitutionally proper mix of powers. But most of the agencies have been around for 50 to 120 years at this point, and by now most such Constitutional questions have been answered. As a result, the much more common question is whether an agency is acting in conformity to its specific enabling legislation and general administrative practice. The Court is currently engaged in multi-term project to rethink the legal framework in which these questions are answered.

In general as investors we prefer stability in economic regulation. Established firms will have conformed themselves to existing regulations - often at considerable cost. When regulations shift the value of that investment in compliance is wiped out and a potential competitive advantage is delivered to new market entrants. As investors we tend to own the established firms and not own the upstarts. As a result an environment of regulatory flux is a systematic risk factor for us. Accordingly the Court's project

of overhauling the regulatory machinery is not greeted by us with warmth and generally seems like something we should keep a close eye on. We note that the business community as a whole is often enthusiastic about the idea of regulations changing – particularly when regulatory burdens are being reduced. But as investors we do not share that enthusiasm. This matter is a classic owner/manager dichotomy. Similarly clarity of regulation serves to protect our investments, while a murky regulatory structure imperils them. Here again our viewpoint is opposite to that of management's.

This year the Court made a lot of progress with its regulatory overhaul. It is building legal machinery with a good degree of nuance and gradation. Our concern, however, is that it may be sufficiently innovative as to let loose a flood of litigation which makes the regulator environment less stable. It will take a few years to judge the investment impact of these developments. For the moment it remains a risk factor. Readers will want to devote close attention to the Agency group of cases to understand what is going on here.

The Cases

A. Cases Bearing on How The Government Is Run

1. Trump v Casa Inc

By a 6-3 decision the Supreme Court decided to limit the power of District Courts to grant injunctive relief.

On the first day of his Presidency Trump issued an Executive Order defining two classes of persons who historically had been recognized as citizens of the United States. Trump ordered that henceforth persons in these classes were to be denied citizenship. On its face the Order is unconstitutional. Historic custom, statutory law, Constitutional text and Supreme Court precedents are uniformly against the President on this one. Indeed, there is no doubt the President knew his order was illegal and unconstitutional.

Naturally those effected rushed to their local District Court seeking relief. Uniformly the District Courts granted relief. They found that the plaintiffs were likely to prevail on the merits and they issued injunctions halting implementation of the Order while the matter was under judicial

consideration. These injunctions applied not just to the specific plaintiffs in the Court house but to all members of the two classes defined in the Order, whether or not they were parties to the Court proceedings.

The injunctions were appealed by the Government on the grounds that the District Court lacked the authority to grant such broad relief. In its decision the Supreme Court held that the District Courts had the power to grant complete relief to the parties before them but they could not extend that relief to non-parties. The practical consequence of this decision is that non-parties who seek relief must begin or at least join themselves to new suits. Thus the decision shifts the burden. Previously the Government, having deliberately issued an obviously illegal order, was burdened with attempting to establish a legal theory under which its order was valid before it could enforce it. Now it can proceed to enforce it summarily and every aggrieved party is burdened with seeking court protection. A secondary effect of the decision is to multiply lawsuits before the courts. Suits now must be commenced to incorporate new parties even if no new issues are raised.

The decision of the Court was written by Barrett with the concurrence of the Institutionalists and the Radicals but opposed by the Traditionalists.

First Barrett applied the Court's favorite historical method. With its aid she found that the Court's power to grant injunctive relief is founded in the Judiciary Act of 1789 which conferred upon the Federal Courts the power to hear suits in equity. She then pointed out that under English law a suit in equity was a plea that the Crown exercise its plenary powers to suspend or modify the operation of law to avoid obvious injustice. Since an exercise of plenary power is not a very good basis from which to find that a judge has exceeded his authority, Barrett first had to narrow that power. She found that exercise of equitable powers were delegated by the Crown to The Lord Chancellor who as a matter of practice limited his reliefs to the parties before him. Barrett therefore concluded that the Judiciary Act could not have intended to grant the power to grant relief to non-parties and so it had not done so. Against this argument the plaintiffs had

advanced the Chancellor's custom of issuing “bills of peace” which extended to broad classes of persons and not just parties to lawsuits. Barrett found that bills of peace were basically identical to class action lawsuits and thus a precedent applicable to suits but not injunctions.

In our view Barrett plays the historical game ably, as she always does, but in the process she exposes the limitations of the historical analysis. First, the powers of the English Crown unify the legislative, judicial and administrative powers in a fashion explicitly rejected by the United States. In the English power structure there was no call for the Chancellor to deal with reliefs for classes of persons and arguing from his non-action to an affirmative bar on judicial exercise of power in the American power structure is a stretch at best. In other words, the historical analysis focuses closely on historical detail while utterly ignoring the historical context. Second, the Judiciary Act does not address specific writs and pleas. It confers a general power to hear suits in equity and that power, as Barrett shows, was a plenary power to right injustice. Barrett ends up saying it was the intention of the legislators to limit plenary power to its customary forms at that time. But how do we know that? The Judiciary Act does not say so, and for all we know the legislator's primary concern was with empowering Courts to right wrongs. To complete the logic of her argument, Barrett must silently slip in a missing premise.

The second point Barrett addressed was the issue of equities. Would the Government suffer an irreparable harm from the district judge having possibly exceeded his authority. Barrett found that the Government being constrained improperly in the exercise of its powers, even when it was almost surely abusing those powers itself, was ipso facto an irreparable harm. In dissent, Sotomayor raised the point that in itself seeking equitable relief the Government must first prove its eligibility and that eligibility required one to come to Court with clean hands. According to Sotomayor this the Government had failed to do and so she would not have granted relief.

We note that neither judge actually got down to weighing the equities between the Government, perhaps improperly delayed in its exercise of power, and the non-parties, perhaps

improperly deprived of their citizenship or at least burdened with defending it.

The third matter that Barrett needed to address was the special interests of the state plaintiffs. Besides members of the two classes of persons directly effected by the order, three states appear as plaintiffs in the suit. The states argue that it will be a costly administrative nightmare to deal with the situation where part of the two classes are protected from operation of the order while the other part is not. The states, therefore, argue that the only remedy that can relieve them of this costly burden is to extend injunctive protection to the entirety of the two classes. Barrett's decision was simply to dodge this issue. She referred it back to the District Court for fact finding.

We admit a sympathy to the States. Citizenship is a fundamental building block of civil society. Throwing it into confusion, even on a temporary basis for a limited class of persons, is going to be productive of all sorts of ramifying problems. We would not burden the states with documenting that fact. Surely the administratively sensible step is to pause the Order until its legality is determined. Where, after all, is the need for haste in changing an institution that has been in place for at least 150 years?

At least, that is what three District and two Appellate Courts thought. But the Supreme Court did not. The President was ebullient on receiving this decision. Probably he also did not think this one would go his way.

2. Kennedy, Secretary of Health and Human Services v Braidwood Management, Inc.

Government officials are classified as principal officers or inferior officers. Cabinet secretaries are an example of principal officers. Principal officers must be appointed by the President and confirmed by the Senate. Inferior officers are supervised by Principal officers. For these Congress may specify how they shall be appointed. Often they may be appointed by a principal officer on his sole authority.

This case decided that certain officials in the Department of Health and Human services were inferior officers and they

could be appointed by the Secretary on his own authority. The decision is 6-3. Kavanaugh delivered the opinion of the court in which the Institutionalist and Traditional blocks concurred and the Radicals dissented.

Specifically the case concerns members of the US Preventive Services Task Force. Historically they were appointed by the Secretary of Health and Human Services who drew from recognized experts in medical care and public health. They serve on an uncompensated (i.e. "volunteer") basis. They function as an advisory panel which recommends which medical services are useful for preventative medical care. The Affordable Care Act ("Obama Care") conferred additional power on them insomuch as medical insurers are now required to provide coverage for the services they recommends.

In reviewing the history Kavanaugh found that the recommendations of the panel were initially purely advisory. As such its members were not considers officers. Their standing practice was to review evidence on the usefulness of various preventive medical procedures and summarize their opinion in a letter grade A-D or I. Here A and B are judged strongly or moderately beneficial, while C and D are of little or no benefit. I is assigned to measures for which the panel has not yet reached a determination, i.e. the investigation is incomplete. The Affordable Care Act mandated that insurers cover procedures graded as A or B. As a result it made a grant of substantial authority to the panel, and, by common consent, that raises panel members to the status of officers of the United States. However, Congress was silent as to the method of appointing these officers.

Kavanaugh found that their recommendations are reviewed by the Secretary of Health and Human Services and the Secretary has the power to remove members at will. Applying a test originally formulated by Justice Scalia, he concluded that the panel members operate under the supervision of a principal officer and are therefore inferior officers.

Thomas authored the dissent. He argued that the default method of appointment by the President was required unless expressly provided otherwise by Congress. As no such

express direction existed he found that the officials were principal officers.

What we have here is a rather typical situation. Congress picks up some existing piece of machinery and reuses it for new purposes without rethinking the whole matter from the ground up. As a result it creates an ambiguous situation. The Court is willing to step in and resolve the matter to keep the wheels of government turning smoothly. But the Radicals dissent. In their view Congress must be kept under discipline by blocking it on every occasion in which it fails to comport with the Court's requirements.

The Institutionalist/Traditionalist blocks have no appetite for this doctrinaire approach and so they reject it.

3. Riley v Bondi

This decision concerns the procedure for deporting illegal aliens who raise a claim under the Convention Against Torture. Alito wrote for the Court. Part of the decision garnered a unanimous court. Part did not and the dissenters were the Traditionalists partly joined by Gorsuch.

In 1996 Congress attempted to create a streamlined process for deporting aliens who have committed felonies in the United States. A layman's understanding might be that Congress wants proceedings to progress through the administrative process to a point of completion before one single review by the regular courts takes place. In particular the administrative courts should issue a final order for removal before judicial court review takes place.

Riley came to the United States in 1995 on a tourist visa from Jamaica and overstayed his visa. He got involved in selling marijuana, was arrested, and was eventually convicted of felony possession with intent to distribute in 2008. He served his sentence. On his release in 2021 deportation proceedings were commenced. Riley had no grounds to contest the administrative hearings which moved to issuance of a Final Administrative Review Order (FARO.) The government later notified Riley he would be sent to Jamaica. Riley protested under the Convention Against Torture (CAT.) The CAT is an international treaty which the

US joined many years ago. It provides that countries will not repatriate individuals to jurisdictions in which they face the likelihood of torture or murder. Riley asserts there is a drug lord in Jamaica who presents that sort of threat to him. Supporting his claim, Riley points to two family members previously killed by his alleged enemy. This claim was ruled against by a hearing officer, reversed by an Immigration Judge and then ruled against again by the Board of Immigration Appeals (BIA). Riley immediately appealed to the Fourth Circuit which denied jurisdiction as untimely sought since the appeal was more than 30 days after the FARO was issued. In fact the previous proceedings over the CAT claim had consumed 18 months. Such was the scrambled egg which came to the Court.

The Court resolved the matter in to two questions. First what was a final order of removal under the streamlined process - the initial FARO or the subsequent BIA decision. The Court found that it was the FARO because it determined Riley was deportable and under the streamlined process it was not subject to further administrative review. The second question was whether failure to file within 30 days of the FARO was grounds for denying jurisdiction. The Court ruled it was not. The question turned on what sort of rule it was - one establishing jurisdiction or one establishing regular court procedures. The Court found it to be of the second type. The Court held the first type of rule, because of its large consequences, to be disfavored. A rule can only be of the first type when clearly qualified which the instance rule is not. As a result Riley's case was sent back to the Circuit Court with instructions to consider its merits.

The dissenters argued that the Court left the egg still scrambled. The Justices speak well for themselves so let us hear them out. Sotomayor writes:

“The question is when Riley should have petitioned for judicial review of the Board's order. Was his petition due 30 days after the Government first notified him he would be deported, well over a year before the Board issued the order Riley sought to challenge? Or was it instead due 30 days after the order denying his claim for deferral of removal? The

answer is clear: One should not be required to appeal an order before it exists.

Incomprehensibly the Court disagrees. It acknowledges that immigration laws require Riley to appeal the Department's decision that he was "deportable" together with the Board's (much later) order denying him relief from removal to Jamaica. It admits the only way to review both orders is to do so after the latter of the two issues. Yet it concludes Riley's appeal was due before the Board issued the second order. Because Congress did not write so incoherent a judicial review provision I respectfully dissent."

To which the Court through Alito indirectly replied:

"These are legitimate practical concerns, but we must nevertheless follow the statutory text and our prior precedents. And in any event, these problems are not unavoidable. In a case like this the Government can inform aliens of the need to file a petition within 30 days after issuance of a FARO and it can alert the court of appeals to the pendency of a withholding-only proceeding [a proceeding about deportation destination not deportation itself] so the review there can wait until that that issue is decided. And if requests for withholding of removal in cases like Riley's are decided expeditiously - and that was the whole point of the supposedly streamlined procedure adopted by Congress to effect the quick removal of dangerous aliens - petitions for review of removal orders should not linger long on the court of appeals docket before the withholding issue is ready for review."

Let us now form our own opinion. Of the 30 years Riley has been in this country, for 17 years he has been in the grips of the Justice system. He has served 13 years in prison for engaging in an activity which is now a legitimate licensed business. Should he next be sent to a location where he may be tortured or killed? Our bureaucracy, after three rounds of consideration, thinks so, but our highest Court at least agrees he should get his day in Court first. So far we with our Justices. But at least in the abstract there is agreement that dangerous convicted felons should be promptly deported, even if concretely Riley is not a very convincing member of the class. Swift deportation requires designing a coherent

implementable process. That design responsibility rests somewhere but not with our Supreme Court according to its majority. Alito's conception of his role is to parse texts. In essence he sees himself as an English teacher grading Congress's work. If his grading is going to muck up the system with a huge number of provisionally filed appeals which the applicant may or may not choose to proceed with, well that's not Alito's problem. Someone else can fix this problem and meanwhile prisoners can continue to enjoy the government's hospitality. We are not entirely satisfied with this conception of the Court's responsibilities. With the dissenter's we agree that there should be a presumption that Congress is not intentionally idiotic.

B. Cases Concerning Sovereign Immunity

1. Fuld vs Palestinian Liberation Organization and The Palestinian Authority In 1990 Congress passed the Anti-Terrorism Act (ATA) giving private parties the right to sue foreign terrorist organizations for civil damages. In 2019 Congress passed the Promoting Security and Justice for Victims of Terrorism Act (PSJVTA) subjecting the Palestinian Liberation Organization and the Palestinian Authority to the operation of the ATA so long as they pay subsidies to the families of “terrorists serving in Israeli prisons” and “deceased terrorists.” The law further elaborates that prisoners must be sentenced after far trial and the acts of terror must have harmed a US national.

While clear on the surface, these laws raise certain issues. First, the PLO is regarded by some nations as sovereign and the UN has granted it observer status. Second the Palestinian Authority has been granted governmental powers by Israel in parts of the West Bank. Normally governments paying salaries and pensions to members of their security forces is not something that subjects them to US law. And “terrorism” is somewhat in the eye of the beholder. US B-2 pilots dropping bombs on Iranian factories are regarded as terrorists in Iran and as glamorous heroes in the US. Third, Israel has been trading imprisoned terrorists for hostages taken by Hamas - a fact that suggests that some of the persons held as “terrorists” in Israeli prisons are not regarded in Israel with quite the same level of horror as they are in

Washington DC. Fourth, how should a US national killed while serving in the Israeli Defense Force be regarded? Under these laws that might be considered an act of terrorism directed at a US national, but in practice it might simply be a local Palestinian engaged in self defense.

The case before the Court was whether the laws could comport with Constitutional requirements of due process. Basically this came down to the question of whether the US courts could give the defendants a fair trial. Unanimously the Court held that they could. It ruled that under US law the defendants were not sovereigns and thus not entitled to the customary protections of sovereigns in international law. As to the interwoven issues of tort liability and foreign relations, the Court held those were for Congress to settle as it pleased.

Judicially this decision is neither particularly surprising nor informative. It bears remark on for two reasons however. The real rub comes not in trying terror organizations but in trying to collect any money judgment. Real terrorist organizations typically do not have acknowledged bank accounts or other assets to levy and few debt collectors would be willing to knock on the door of their headquarters. Practically this law can only apply to entities which are not really terrorist organizations but which it pleases the US Congress to so regard. Second, we have seen judges in other countries subscribing to the concept of "universal jurisdiction." This concept holds that certain criminal cases can be heard in any Court - even one with no link to the perpetrator or victim of the criminal act. Thus far universal jurisdiction has mainly been asserted for crimes against humanity and other very serious crimes recognized in international law. Thus far the US has been skeptical of this legal development or even actively opposed. Here, however, we see the US backing in to its own version of extraterritorial jurisdiction.

Let us suppose Iran were to bring suit in a Court exercising some degree of universal jurisdiction, for instance Spain, seeking to seize assets of a US instrumentality, say the US Export-Import Bank, as compensation for damage done by the aforementioned B-2 pilots. Could the Court find these laws as adoption of concepts of universal jurisdiction by the

US and thus as consenting to levies against it? It is difficult to say. Probably it would take a series of legal developments before private US corporations operating abroad would be put at risk by this train of legal thought, but the matter bears watching.

2. CC Devas (Mauritius) Ltd vs Antrix Corporation

This case is another sovereign immunity case. The specific question was whether the District Court in the State of Washington correctly supplemented the Foreign Sovereign Immunities Act (FSIA) with its local requirements as well. Unanimously the Court concluded that it erred in so doing.

What is interested about this case is not so much the Court's decision as the overall facts. Antrix is a corporation owned by the Government of India engaged in marketing space services offered by India's equivalent of NASA. Devas is a private corporation owned and doing business in India. The two companies entered into a contract whereby Devas would build a satellite for Antrix which Antrix would launch and some of whose capacity it would lease back to Devas so Devas might provide broadcast services in India. After a few years, however, the Government of India decided it wanted some of that capacity and it ordered Antrix to cancel the contract. The two companies entered into commercial arbitration under Indian law to wind up the contract and Devas ultimately received a billion dollar award. It proceeded to register that award in the UK, France and the US - presumably to collect against assets of Antrix in those locations should the Government of India be unwilling to pay the award.

In the US Devas applied to the referenced District Court. Now sovereigns generally do not submit themselves to their domestic courts and as a matter of grace and comity they normally extend a similar immunity to their fellow sovereigns - both to avoid the tensions in relations that can result and to enjoy the benefits of reciprocation. This immunity applies not just to the foreign sovereign, but also to its instrumentalities as, for instance, Antrix. Until 1950 the US had a strict policy of granting immunity to foreign sovereigns. Between 1950 and 1976 international practice was evolving and the US generally extended immunity but

made a few exceptions in a somewhat erratic manner. In 1976 Congress passed the FSIA which confirmed immunity except in a small list of exceptional cases. One of these exceptions is registration of arbitration agreements.

Accordingly, the District Court found that the FSIA permitted registration and it recorded a $1.29 billion dollar judgment in favor of Devas against Antrix. Before Devas could collect, however, the Indian Corporate Law tribunal found that Devas secured its contract with Antrix through fraud. It appointed a government official to wind up Devas. At this point certain of Devas's shareholders and its US subsidiary joined together to take over the collection of the award against Antrix and thus to keep it out of the winding up process in India. They acted through a Mauritius registered corporation which is the plaintiff in this suit. Again the District Court granted standing and award registration to the new representative of the Devas interests. But the local Appellate Court reversed based on the historic practice in that district of only taking jurisdiction over matters which had a certain minimum nexus within the district. To further complicate the matter, the Delhi High Court intervened at this point to cancel the arbitration award based on the finding of fraud by the Corporate Law Tribunal.
The question coming to the Supreme Court was whether the Appellate Court had erred in imposing the local nexus requirement (and thus in refusing registration.) The opinion of the Court was that the FSIA was the sole and complete determinant of when immunity would be waived. Accordingly it ordered the Appellate Court to ignore its local requirement and to register the award.

The case well illustrates the complexities and even dangers of doing business with a sovereign. Prudent avoidance of these sticky situations is the basic reason for granting sovereign immunity. Although international practice and treaties encourage recognition of offshore arbitration awards, the complexity is still present in these matters. The Appellate Court's instinct to avoid registration is comprehensible. But the Supreme Court is undoubtedly correct that adding local rules to a complex enough matter is unhelpful.

3. Martin vs the United States

In 2017 an FBI team set out to raid a house but got lost in the

dark, went up an adjoining street from their intention and raided Martin's house where they terrorized the occupants and did considerable property damage before stumbling across a utility bill which revealed their mistake. This event is not unique. These wrong house raids occur from time to time but fortunately are rare. Martin filed a complaint under the Federal Tort Claims Act (FTCA) which in specified instances waives the Federal government's normal defense of sovereign immunity from tort suits. The Eleventh Circuit (for Alabama, Georgia and Florida) denied Martin the right to proceed based on a novel reading of the FTCA. The Court reversed in part and in part sent the matter back to the Circuit Court for further consideration. Gorsuch wrote for a unanimous court.

The FBI is a Federal agency so the question is when may the Federal government be sued for damages. The general rule is that the government enjoys the same immunity from suit as the King, so called sovereign immunity. As the Courts are the sovereign's creatures they are not permitted to act against the sovereign's interests. But the King may not wish to extend his immunity to protect deficient servants, and similarly, the Federal government, as an act of Grace, has permitted itself to be sued in a set number of circumstances laid out in the FCTA.

The FCTA is a long tedious bill which we shall follow Gorsuch in rolling up into its essentials Section 1346 (b) The federal government shall be immune from torts committed by Federal employees acting within the scope of their employment ..... Except that such immunity shall be waived when the acts complained of would be a tort in the jurisdiction where the complaint is made if the acts were committed by a private party, unless section 2680 Except where such immunity is waived in section 1346(b) unless one of 13 specific circumstances listed (a)-(n) apply [in which case immunity is reasserted] of which (a) [discretionary function exception] Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency

or an employee of the Government, whether or not the discretion involved be abused.

(h) [intentional torte exception] any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit or interference with contract rights: provided that with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. [The act then defines the 'investigative or law enforcement officer' for the purposes of this passage and the FBI agents clearly are included under that definition.]

Sensing that some clarification might be helpful a prior opinion of the Court (United States v Gaubert) offered the directive "The discretionary tort exception forbids suits challenging decisions that involve an element of judgment or choice of the kind that ... the exception was designed to shield" But as Gorsuch remarks lower courts have not always been sure how to apply this directive.

Parenthetically we offer some illumination of the intentional tort exception. Normally a party injured by one of the listed torts would sue the actor committing the tort and that individual would be unable to claim that they committed the act as part of their regular duties as a federal employee and so the actor would not be able to invoke sovereign immunity. The exception of course is a law officer whose normal duties include investigating and arresting people and who might therefore be able to claim sovereign immunity. Accordingly the exception restores the immunity for the benefit of the United States except in instances where it might shelter law officers.

However, per Gorsuch, the Eleventh Circuit misread the FCTA to say: Acts of law officers shall be subject to tort claims unless the complained of act bears some nexus with furthering federal policy or can reasonably be characterized

as complying with the full range of federal law. It then analyzed each act Martin complained of and found them immune from suit.

Where did the Eleventh Court find this formula? Well not in the FCTA. It fell back on the supremacy doctrine which is normally used to resolve differences between state and federal law in favor of the Federal government. Here the court reasoned that state law forbade forcible invasion of people's homes but Federal law authorized the FBI to carry out searches and arrests so the supremacy doctrine applied and the federal authorization should prevail over the state limitation. Additionally the Eleventh Circuit relied on the precedent in re Neagle which it read as sheltering federal officers from the operations of state law.

Gorsuch laid out the following decision process in the case of a tort action against the United States: the trial court shall examine each act in turn.

1.If the act is an intentional tort committed by a law officer and appears on the list of six intentional torts (assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution) then proceed to 3, but if it is an intentional tort not fully meeting these conditions then do not allow it to proceed to suit.

2.If the act is one of claimed negligence and the complained of party cannot successfully argue that the inaction was the legitimate exercise of policy discretion authorized by superior authority then proceed to 3, otherwise do not allow this act to come to suit.

3.If the act would constitute a tort under local law when committed by a private party then allow it to proceed to suit, otherwise do not allow it to proceed.

Once each act shall have been scrutinized in this way, those acts which have survived the scrutiny may proceed as a tort action against the United States.

Commenting on In re Neagle Gorsuch found it helpful to review the full set of circumstances which we repeat here in our own words with only slightly more elaboration than the learned Justice. David Neagle was a lawman who first rose to

prominence in defeating Virgil Earp in election for the position of chief of police in Tombstone Arizona after Virgil had the misfortune to be partially incapacitated by the gun play of the Cochise Cowboys. In 1889 at the whistle stop town of Lathrop California, Neagle shot dead David Terry, a former Chief Justice of the California Supreme Court. This misadventure arose as a result of the doings of one Sarah Althea Hill.

Hill was a gently reared young lady of the sort of personal beauty at that time credited with stopping horses in the street. Regrettably the young lady twice had the misfortune of discovering documents purporting to confer substantial riches upon her which documents the courts became convinced were forgeries. Specifically, while not of the equine species, Senator William Sharon - owner of half the Comstock Load, the Palace Hotel and the Bank of California - had been sufficiently arrested by Ms Hill's accomplishments that he had invited her to take up residence at his hotel and for the greater convenience of visiting her had built a sky bridge across Montgomery Street from his business offices to her suite. Ms Hill had understood these facts to constitute cohabitation, which at that time in many of the western states was sufficient to establish a marriage at law - a practice adopted to the general scarcity of religious or governmental offices capacitated to record marital status. A contract of marriage conferring part of the Senator's property upon her as part of her marriage settlement was also alleged to have confirmed her in this belief.

Dismayed to discover the Senator running after some low dame, Sarah had become emotional and the Senator had judged it best to remove from their hinges the doors of her suite. Sarah's dismay increased when to her subsequent suit for divorce the Senator had offered the defense that she was merely his mistress and the signature appearing on the purported marriage contract was not his. The Senator enjoyed politically powerful friends who passed a bill in the State Legislature denying cohabitation as a grounds for marital status, and while the bill could not have retroactive effect, as an expression of community belief it tended to support the Senator's position. The Senator dying about this time Sarah next brought forward his purported will

bequeathing upon her nearly his entire fortune - a document whose authenticity was much doubted by the Senator's legitimate children from an undoubted earlier marriage. Legal battle being joined, Sarah retained several advocates among whom was Terry.

Terry was himself a colorful character. He joined the US Army as a member of a Texas volunteer regiment of mounted rifles. During the Mexican War he served at the Battle of Monterrey. After the war he left for the California gold fields. However, the Civil War called him to the Texas colors and he held the rank of Colonel in the 8th Texas Cavalry. He was present at several actions of which the Battle of Chickamauga is the best remembered. After the defeat of Southern hopes, he returned to California. In California he was one of several authors of the state Constitution and served as the fourth Chief Justice of the State Supreme Court. Here he was associated with a fellow justice Stephen Field, brother of Cyrus Field the layer of the transatlantic cable. Sensitive in questions of personal honor, Terry had ended up in duel with Senator David Broderick who Terry killed. Terry judged it best to resign from the State Court after this and Field succeeded him as Chief. Although he was a friend of Broderick's, Field himself was known to carry two dueling pistols about on his person in specially constructed pockets. So it is likely that Field's personal feelings about Terry were complex.

Entering private practice, Terry became acquainted with Sarah Althea Hill in the course of her probate litigation and he rapidly progressed from advocacy to sympathy for and then marriage to Hill. Field was raised to the US Supreme Court by Lincoln in 1863 and, as was then the custom, was deputed to ride Circuit in California. Hill's probate claims coming up before him, Field read from the bench a decision which not only deprived her of a large fortune but extended to some remarks about her character which much excited both Sarah and David Terry. When Sarah drew her pistol and David his Bowie knife, Field ordered them into custody for contempt of court, sentenced the wife to a week's confinement and the husband to a month. David Terry was understood to have uttered threats against Field's life which had some considerable credibility given his reputation in

matters of honor - especially in matters touching the name of a Southern gentleman's wife - and his prior record of dueling. And of course it escaped no one at the time that relevant facts were that Field was by birth a Yankee and a Federal officer appointed by Lincoln and that Terry was that combustible combination a Texan of Irish descent and a Cavalry officer to boot.

Accordingly, when Field next came out to California to ride circuit the US Attorney deputed David Neagle, then a US Marshall, to serve as his personal bodyguard. As fate would have it Field was on the transcontinental train to San Francisco when the Terrys boarded at Stockton. When the train stopped at Lathrop for breakfast, Sarah suddenly came face to face with Field. She left abruptly to fetch her purse from her compartment. David Terry coming up moments latter, allegedly cuffed Field and was shot at point blank range by Neagle. Sarah returned to find her husband stretched out on the floor and distraught threw herself upon him. Unkindly persons attributed to her the motive of concealing his weaponry upon her person. What was established was that no weapon was found upon the corpse but Sarah's purse was found to contain both her pistol and his Bowie knife. Friends of Terry maintained no southern gentleman would knife another gentleman in the back and Terry's only motive could have been to deal Field a coupe d'honneur which should lead to their latter meeting at a more convenient place. Accordingly, Neagle was indicted for murder and looked to be in considerable danger of being strung up. However, as a Federal officer he was able to remove his case to Federal court and the Supreme Court In re Neagle ruled he was a validly deputized officer engaged in the proper functions of his office and thus immune from trial in State Court.

Field was to be a long serving Justice of the Supreme Court. He made it a point to stay on the Court to break the record of Chief Justice Marshall for the longest tenure, at which he succeeded despite suffering what was described at the time as “intermittent senility” (intermittent spells of deep reverie - possibly an atypical presentation of Parkinson's disease.) His own record of 34 years service remained the record until bested by William O'Douglas who served from 1939 until his

death in 1975 (also with some diminution of powers at the end.) On the Supreme Court Field authored some 544 opinions, a record bested only by three Justices of whom our own Justice Thomas is one. One of Field's contributions to jurisprudence was the development of the doctrine of substantive due process which has helped make the 14th amendment into the powerful legal tool which it is. As a California jurist Field was initially a protector of Chinese immigrants against discriminatory legislation. He in particular is remembered for striking down the "Pigtail Statute" which mandated the head shaving of jailed inmates. However on the Federal Court his positions ran with the discriminatory doctrines of the day. He sided with the majority in Plessy v Ferguson which became the foundation stone of Jim Crow segregation and he found that the 14th Amendment was compatible with the exclusion of blacks from juries. He also upheld the Chinese Exclusion Case.

The subsequent history of Sarah Althea Terry (nee Hill) was sadder. She was destitute and took to wandering the streets of San Francisco talking to spirits. She had the good fortune to be rescued by a long time friend - Mary Ellen Pleasant - who secured her admission to an insane asylum. Here she was diagnosed with schizophrenia. For a number of years she was treated as a violent inmate but in later years she seems to have peacefully settled into the delusion that she was living as mistress of a large mansion in which the medical staff were her servants.

Mary Ellen Pleasant was herself an interesting person. She was a free black woman who had been a "conductress" on the Underground Railroad - a network of persons which assisted the escape of fugitive slaves to Canada. She sought employment as a household servant in wealthy households and used knowledge gained there in successful stock market speculations. That initial capital was further expanded by successful real estate projects and she became the first self made black millionaire in the country's history. She never married but devoted her wealth to charity and to political influence in favor of civil rights.

The Sharon fortune, the actual center of this whole melodrama, fared only marginally better than the

unfortunate Mrs Terry. It passed into the hands of an English noble family whose most prominent member's mishap with her hair had inspired a well loved poem of Alexander Pope's and whose more striving members had, by a century of effort in the provision of malted fermented drinks and a few timely contributions to Lloyd George's coffers, gained admission to the upper house of Parliament. There they quickly acquired that body's habitus for slow heirs with a love of fast horses and cars. An estate not protected by entail suffered the damage usual in such circumstances and ended up providing the sort of salutatory object lesson with which probate attorneys delight to frighten their clients - much as their grandparents once sought to restrain teenage lust with vivid depictions of a warm and sulfurous afterlife.

In commenting on this history Gorsuch said that he saw no applicability of in re Neagle to the more recent misadventures of federal lawmen as gunning down Terry was within Neagle's authorized duties but roughing up Martin was not.

We will remark that it has taken eight years of litigation for Martin to get his foot securely within the Court House and that that situation is mostly due to unnecessarily opaque statutes and precedents. On the other hand, we note that a good scandal never really dies and we predict a long run for the more recent precedent of Marshall v Marshall.

C. Cases Concerning Government Agencies

1. Federal Communications Commission v Consumers Research

The question here is whether Congress has improperly delegated its powers of taxation. By 6-3 the Court determined that it has not and the test to apply is clarified. Kagan wrote for the majority formed from the Institutionalist and Traditional blocks. Gorsuch wrote a dissent for the Radical block.

The Communication Act of 1934 established the Federal Communication Commission. It also established that the FCC should further, to the extent possible, universally available communication services at moderate prices. The actual cost to provide such services in remote or sparsely populated areas is greater than in metropolitan centers. To further the policy

of universal access, the FCC for many years exercised its rate making powers to create subsidies for high cost areas by raising rates in low cost areas. While this achieved the goal of universal access, the method lacked transparency.

In 1996 Congress amended the act to further competition in the Communications industry and it directed the FCC to adopt a more transparent method. Specifically the FCC was to set up a fund to distribute subsidies as per Congressional direction. The FCC was to levy a fee on the industry sufficient to keep the fund solvent. The FCC for its part decided to hire a private contractor to administer the fund. One of the duties of the administrator was to make projections of future financial requirements to assist the FCC in setting its universal access levy.

After 25 years of operating in this manner, Consumer Research challenged the arrangement. It argued that the scheme involved an impermissible delegation of Congress's taxation powers. The Fifth Circuit Appellate Court (Mississippi, Louisiana, and Texas) was inclined to agree. It found the double delegation to first an agency and second a private administrator to be suspect. It argued that the combination of a too sweeping delegation to the FCC and the FCC's further unauthorized delegation to the Administrator was an invalid delegation of taxing power. Plaintiff went further and argued that each delegation, on its own, was impermissible.

Kagan rejected both the contention that the individual delegations were impermissible and that their combination was impermissible. Kagan found that in general Congress may delegate power to agencies provided it supplies intelligible principles as to how the agency should exercise the power. Thus the court's long standing test is whether Congress has provided adequate guidance to the agency and that the guidance should be proportionate to the delegated power (i.e. greater for broader powers.) Further, Congress must provide clear limits to the delegated authority. Here the Court was satisfied that the delegation to the FCC met the test. Consumer Research attempted to argue that delegation of tax powers must be limited by Congress placing a limit on the levy. However, Kagan found that the Court had

previously rejected attempts to place delegations of tax power on a different basis from other delegations of power. Accordingly, she found there was a uniform standard for delegation of powers with no special treatment of tax powers.

Gorsuch dissented. As legal arguments go his analysis differs from Kagan's on the question of whether delegation of tax powers are different from other delegations of power. But our interest in his opinion is as an eloquent statement of the politics of the matter rather than the legalities of the matter:

"The framers divided power among legislative, executive and judicial branches not out of a desire for formal tidiness, but to ensure ours would indeed be a nation ruled by "We the People". By vesting executive power in a single President, the framers hoped to ensure vigorous enforcement of the laws. And by vesting judicial power in life-tenured judges, they hoped to ensure laws would be applied fairly by those insulated from political pressure. But, as the framers saw it, the power to make the laws that govern our society belongs to elected representatives more accountable to the people in whose name they act. And nowhere did the framers see that principle as applying with greater force than in the field of taxation.

In many other arenas, this Court vigorously policies the Constitution's allocation of power. We have refused to tolerate congressional intrusions on on powers reserved to the President. We have prohibited the Executive from encroaching on power vested in Congress. We have found unconstitutional, too, legislation seeking to confer judicial power on other branches.

Yet there is one exception. When Congress has willingly surrendered its power to the executive Branch, this Court's response can only be described as feeble. Always, to be sure, the Court dutifully recites the creed "the legislative power belongs to the legislative branch and to no other." Too often though, these professions amount (at most) to faith without works, and the results are not hard to see. Today, the "vast majority" of the rules that govern our society are made not by Congress, but by Presidents or agencies they struggle to superintend. Those rules reflect not the public deliberations of elected representatives, but the concerns of small cadres of elites. And as those cadres turn over from administration to

administration, the rules revolve too, inflicting whiplash on those who must live under them. If there is any consistency over time, it may be because Presidents and their deputies do not always call the shots. Lower level officials, unknown to the public and sometimes even to the White House, now make many of the rules we live by.

To its credit, the Court has sometimes mitigated its failure to police legislative delegations by deploying other tools, like the major questions doctrine and de novo review review of statutory terms, to ensure the Executive acts within the confines set by Congress. But every doctrine has its limits. What happens when Congress, weary of the hard business of legislating and facing strong incentives to pass the buck, cedes its lawmaking power, clearly and unmistakably, to an executive that craves it? No canon of construction can bar the way. Then our anemic approach to legislative delegations leaves the Court with a choice. It can permit the delegation to stand and move us all one step further from being citizens in a self-governing republic and one step closer to being subjects of quadrennial kings and long-tenured bureaucrats. Or the Court can, as it does today, usurp legislative power, rewrite the statute and dictate its own terms for Congress's surrender. Either way, we wind up in much the same place, now only with judges, rather than President's or bureaucrats,making our laws.

There is another way. The Constitution promises that our elected representatives in Congress, and they alone, will make the laws that bind us. To honor that commitment, historical practice and our cases, suggest other guides, beyond the intelligible principle test for assessing when Congress has impermissibly ceded legislative power."

We think the learned Justice is not unaware that Constitutional law is made by small cadres of experts and long serving unelected officials. Nor is he unaware that some public dismay has been expressed at the whipsaw changes observed of late in that activity. We think, therefore, there is a combination of bravura and humor in the Justice's attempt to to align that dismay with his desire for a more settled decision making process. But what exactly is Gorsuch's concern? It would seem to be multi-part:

1. small unknown elites are making decisions for the rest of us 2. there is a loss of accountability 3. there is a loss of stability 4. Congress is losing power to the Executive and/or the Judiciary. According to Gorsuch this is happening because Congress is lazy. We think there is a better explanation, and the key point is that is not small unknown groups of people but actually groups of special people – namely "elites." In 1996 Congress confronted a technically complex rapidly evolving telecommunication industry. Congress had decided to encourage that evolution. But historically it had protected certain constituencies under the policy of universal access and it did not mean for the evolution it was abetting to reverse that policy. Accordingly it charged the FCC with maintaining universal access. Not knowing how things would turn out at the technical level, it gave the FCC latitude within a general guidance for defining the universal access program and it gave it the FCC a limited power to raise revenue to fund the program. In short, Congress was trying to keep a hold of the key policy issue ("shall there be universal access") while delegating to its chosen expert the more technical determination of what should universal access mean. The realistic alternative would be for Congress to ask the FCC for advice on what universal access should be at that moment in time and then write the advice in to law. Inevitably in a rapidly evolving technical field that determination would be stale in a few years and Congress would need to update the law. We may presume Congressmen to be experts in the law making process and in their institution's ability to make timely updates to law. In this case, they judged it better to give the FCC a wide grant of authority rather than attempt frequent updates themselves. After all, if the FCC misunderstood their policy guidance they could always intervene in the future to update the law.

Was Congress wrong? The proof is somewhat in the pudding. Universal access currently includes services that did not exist in 1996, so the FCC has succeeded in keeping the policy technically relevant. The cost has grown – it is currently $8 billion a year. That growth concerns Gorsuch. He points to two measures of it being out of control. First it is about twice the inflation adjusted base line. Second the tax rate is now 25% versus an initial tax rate of 4%. But we note that an $8 billion tax is only 2.4% of industry revenue – actually lower

than baseline. The apparent increase in tax rate is because the FCC is only levying its support charge on a part of industry revenue and that part has been a diminishing fraction of total industry revenue. Telecommunications is a fundamental and increasingly important infrastructure of modern society. Physical infrastructure has long had operators of toll bridges and roads who both set and collect the fees needed to keep their infrastructure maintained and performing. This practice is neither particularly controversial nor a threat to the Constitutional order. We see Gorsuch's concern but we do not share his urgency. We think it is the growing technical complexity of society which is bringing to the fore expert rule making (i.e. causing reliance on "elites".) Ideally it would be good to update the Constitution to reflect that circumstance. But such an update is more likely to better found rather than curtail power of the professional civil service.

Readers with a certain ear may have noted in Gorsuch's dissent the unexpected reference to faith without works. Most quotations in Supreme Court opinions are drawn from prior opinions or from the Constitution, but here the Justice reaches back to a more ancient authority – the letter of the Apostle James to the twelve tribes scattered abroad where it is written "faith without works is dead" (translation from the King James version, 2:26.) The phrase is famous from debates between Protestants and Catholics as to the nature of salvation. The Protestant Reformation began with a revolt against the leadership of the Catholic Church which it saw as a narrow elite that had captured the Word of God and bent it to support the elite's various projects. The Protestants themselves split into two groups. The "mainstream" Protestants felt that correction of past errors was needed but the basic structure of an educated clergy leading believers was to be retained. The fundamentalists, by contrast, argued that God spoke directly to each person through the Holy Text whose plain unadorned meaning was open to all and which required no filtering through an educated class. All three groups agreed that salvation was God's gift to man unearned by human effort. But the Catholics maintained that if faith was truly present it would be manifested by a flowering of good (i.e. charitable) works. The Protestants opposed this

viewpoint which they saw as leading to the confusion of charity as something necessary to earning salvation. To their minds corrupt elites were teaching the populace as to the necessity of charity as a way to raise funds which would be controlled by the elites and whose administrative rake off would support a lifestyle not conforming to Apostolic simplicity. But if you put strong emphasis on the plain text then James's statement would be a problem for the Protestants and especially for the Fundamentalists. The yearning for a life not subject to the control of the powerful is a deep one in the American soul and the distrust of the educated with their gradated world view goes along with that yearning. It is no wonder that Steve Jobs is a popular hero for having made technology at least superficially simple and thus broadly accessible. Often the writings of the Justices seem dryly technical, but in Gorsuch's opinion we see connections to wider cultural value structures poking through. Among the Justices, Gorsuch's passages sometimes gain an eloquence from being a cri de coeur which reaches out to these wider cultural currents.

2. FDA v RJ Reynolds Vapor Co

This case revolves around the somewhat disreputable practice of Court shopping. The 7-2 decision was a split of Radicals and Institutionalists joined by Kagan against Sotomayor and Jackson. Barrett wrote for the majority and Jackson for the dissent. The Court decided to pass on restricting Court shopping.

In principle Justice is dispensed even evenhandedly by all courts. But the United States is a large country with real cultural variation within its borders and individual Justices are appointed by a political process. Attorneys have settled beliefs that certain jurisdictions will be more or less sympathetic to their cases. Left to their own devices, they would bring their cases where it will get the most sympathetic hearing. This process is known as “court shopping” and, as it seeks to exploit imperfections in the Justice process, it is not an entirely reputable practice even if widely practiced. Congress and the Supreme Court attempt to limit court shopping by providing that certain courts will be the primary venue for certain classes of cases.

When government agencies issue rules their actions are considered analogous to decisions by Courts of first instance (I.e. district courts.) The reason is that the court of first instance is supposed to grapple with the matter at the factual level and build the record upon which further review will occur. This engagement with the nitty-gritty details is exactly the task delegated to the agencies. Accordingly, judicial review of agency rule making normally begins at the appellate court level and thence proceeds to the Supreme Court for final review. Congress has designated the Washington DC Appellate Court as where most judicial review should occur. This designation has three points in its favor. First, it is convenient to the agency which will be defending the suit. Second by placing this flow of legal business in one court, its justices can build up an expertise in the relevant law and ensure a desirable uniformity of practice in handling related cases. Third, a good deal of the Supreme Court's workload is harmonizing practice across Appellate jurisdictions. Having a designated Appellate Court eliminates this source of workload and ultimately leads to quicker case settlement.

But, of course, the expert Court is exactly where a court shopper does not want to go. Another principle is that cases should be heard in the local jurisdiction where they occur. Suppose a company with a nationwide business wishes to have a rule reviewed. Perhaps somewhere it its business connections it can find a business associate also unhappy with the rule making, located in a friendlier jurisdiction than the designated Washington Court of Appeals or the jurisdiction of the company's own headquarters. It and its associate can join together to request review in the local jurisdiction of the associate.

That is exactly what happened in this case. The FDA (Food & Drug Administration) issued a rule forbidding the sale of certain tobacco vaping products. The tobacco company RJ Reynolds (RJR) was disappointed to lose this business opportunity and so it teemed up with a local vape shop in Texas to bring its complaint before the Fifth Circuit Court of Appeals, which is known to be business friendly and generally hostile to the government. Indeed this Court is so out of line with its brethren Courts of Appeal that a substantial part of the Supreme Court's workload is reversing

its decisions. In short it is exactly the right court from the tobacco company's point of view. Now such law cases are probably going to cost a million dollars or more and the decision taken will have nationwide impact. Obviously the local vape shop claiming to be unfairly damaged by the FDA is a purely convenience litigant in this matter. Indeed we see case after case wind its way to the Supreme Court conforming exactly to this pattern - a major national economic interest fronted by a sympathetic mom & pop local operator.

One could take two views of this matter. One could support the designation of the Washington DC Court as the primary venue as an administratively well thought out rule clearly made by Congress which is being challenged by RJ Reynolds in a sham proceeding. Or one could feel that the Courts sit to protect citizenry from bureaucratic oppression and that litigants should have the convenience of complaining to their local Courts which is easier for them and where perhaps the Justices will understand their local context better. After all, the government can afford the burden of litigating outside its home town and if it is going to make rules of national applicability it should be prepared to justify them nationwide and not just to justices deep immersed in the government bubble that is Washington DC. Which way one tilts on this question comes down to whether one regards the local litigation partner as a real litigant or just a front man. And for the Supreme Court the issue is not so much the particular litigant in front of them as whether they can craft a rule which will exclude a reasonable number of sham litigants without depriving bona fide litigants of access to to the Court.

With this framing of the issues we see at once what the split will be on the Court. Radicals will rally to defend local business against oppressive bureaucracy. Traditionalists will be repulsed by the sham of Court shopping and the particularly malodorous litigant RJR which is seeking to addict the public to its novel but still carcinogenic product. Institutionalists will waver between the two choices. On the one hand they are sympathetic to orderly administration, but on the other hand they hesitate to curtail access to the Courts for bona fide litigants.

The FDA had a line to propose to the Court. The legislation

underlying the litigation permits the FDA to grant or deny licenses to product manufacturers and it provides that "anyone adversely affected" may seek judicial review. The FDA argued that "anyone" should here be read as "any manufacturer" and that therefore a retailer could not seek review, even though withdrawal from the market of a product generating revenue for them would adversely impact their interests. The countervailing argument is that the Administrative Practices Act (APA) establishes a right of review in similar language and legal precedent has established that the term is to be interpreted broadly as meaning "anyone arguably in the zone of interests affected" and not narrowly as "anyone actually affected by the agency rule making." FDA counters that the APA is just setting a default standard that should apply absent specific provisions on right of review, but in the instance legislation Congress explicitly sets up a right of review in this case which supersedes the APA. To which the counter is, that the question is not the origin of the review authority but the meaning of a term of art and when such a term appears in multiple laws the presumption is that Congress intends it to have a uniform meaning - as otherwise why employ it? To which the FDA responds that a broad reading is appropriate for setting up a catchall default procedure but the narrow reading is more suitable to a specific procedure. This distinction has viability for Institutionalists, but their difficulty is that the FDA began by proposing a line between litigants (manufacturers vs retailers) but it has devolved into asking the Court to split the meaning of a term of art. Were the Court to do so, the consequences could rumble through the legal system in unpredictable ways and Institutionalists much prefer narrow decisions with mostly foreseeable consequences.

Barrett's opinion for the majority carefully wades through numerous decisions on a whole range of laws to establish that the broad reading of the term of art is a prevalent use of this term.

Jackson in dissent goes a different way. She argues that there is an established zone of interest test of which the term of art is a part. She is content to accept the broad reading as the established reading. But she focuses on how the zone is

defined. Here the subject law, The Family Smoking Prevention and Tobacco Control Act (TCA), is exclusively focused on how manufacturers must license their products for sale. Issues of tobacco retailing of course exist, for instance age limits on purchase, but such issues do not appear in the TCA. For Jackson it is clear that the zone covered by the law is limited to manufacturers. Her criticism of the majority's reasoning is that it basically eviscerates the established test by expanding it so broadly that almost anyone could say they have an interest affected by the ruling. For instance, one could imagine consumers, advertisers, exporters and packagers all claiming they participate in the product's value chain and so should have their right to a day in a Court of their choosing.

In this case the majority felt the importance of protecting the established term of art outweighed the risk of diluting the "zone of interest" into meaninglessness, and so court shopping lived for another day. This was good news for the high priced Washington attorneys (in this case Jones Day and specifically its partner Ryan Watson) whose command of administrative law allowed them to out argue the Solicitor General's office into persuading the Court to focus its attention on the meaning of a term of art.

But what of our interest as investors - do we have a dog in this fight?

We think so. We buy companies basically on a multiple of their earnings. It is very discouraging to buy a company on a well established earnings history only to have a chunk of revenue and earnings suddenly vanish in a puff of smoke possibly leaving behind a cloud of legal liabilities. We would like clear rules so companies cannot get into dodgy businesses which may suddenly vanish like this. And given the incentive structure of management contracts, we must realize our CEOs may well feel an incentive to push into dodgy businesses if it juice earnings for a few years, whereas we as owners would much prefer they did not. From this perspective, leaving a weak or vague regulatory structure around is just a recipe for setting earnings traps in which we risk getting caught. We are permitted to feel strongly about that. Court shopping, to the extent it muddies the regulatory

structure, is in our eyes not a harmless practice. And we have too much respect for the skills of Jones Day and its brethren to think this a just a slight inconvenience. So yes, we think we had a dog in this fight and today's battle did not go our way.
But as investors we must take the world as it is and recognize that no one is wandering the corridors of the Court or Congress concerned about our zone of interest and how they might make the world a warmer safer place for providers of capital. Sadly we are less sympathetic persons in the eyes of the world than purveyors of fruit flavored nicotine laced vapor products. Indeed the world sees us as the very definition of a dangerously powerful elite – even if all we are trying to do is protect our 401ks from rape by financial promoters. Our best solution is to cast a skeptical eye over the earnings quality of firms such as RJR which we find making their living in the dodgy gray zone of economic life and apply a good healthy discount to their PE.

3. McLaughlin Chiropractic Associates Inc v McKesson Corp

The case concerns the scope of the Hobbs Act which regulates decisions made by regulatory agencies. The decision was 6-3 with Radicals and Institutionalists joined together to reaffirm powers of the District Court. Kagan wrote for the dissenting Traditionalists.

The Telephone Communication Act (TCA) seeks to protect the public from aggravation by telemarketers. In particular, distribution of unsolicited advertisements by fax can draw a fine of $500 per instance. McKesson Corp sent violating faxes of two types to the plaintiff. There were both traditional paper faxes and more modern online faxes. The plaintiff sued claiming it had received 12 paper faxes and several thousand online faxes. The plaintiff also sought to certify a class for extending its action into a class action. Initially in fact it was able to certify a class. However, after litigation had begun at the District Court, the FCC issued a final order determining that the TCA should be read narrowly as applying only to paper faxes. The District Court concluded that under the Hobbs Act it had to treat the FCC's order as authoritative. Accordingly it dissolved the class, so ending the class action, and awarded the plaintiff $6000 in damages.

The majority found that the District Court erred in not reviewing the FCC's order and it sent the case back for reconsideration. As Kavanaugh explained review could take place in two different ways. It could be a review at the time the order is issued and before any action to enforce the order is taken or it could be a review taken by a court in the context of an action to enforce the order against an alleged violator. Kavanaugh held that the Hobbs Act governed pre-enforcement review and the underlying law controlled review during enforcement. Kavanaugh distinguished three cases, where the law precluded enforcement review, where it permitted it and where it was silent. In the third case Kavanaugh held that the Court should review the order as it would an ordinary statute with due deference to the expert opinion of the regulatory body. The District Court was correct that the Hobbs Act did not authorize it to conduct a pre-enforcement review. But the action before the district Court was an enforcement action and the TCA was silent on the subject of enforcement review. Accordingly Kavanaugh judged that the District Court erred in not allowing itself to review the FCC's order.

Or to put the matter more succinctly, Congress may preclude enforcement review of administrative orders but it must do so explicitly - the Court will not accept that enforcement review is silently precluded.

The Traditionalists disagreed. They felt the default rule should be that the pre-enforcement review was a final review. It made no sense to them that Congress would authorize a pre-enforcement review, but a party subject to the order could violate the review and when made subject to enforcement, potentially yeas later, still have the right to challenge the order. Kagan wrote that the Hobbs Act was clear on the point that only the Appellate Court had the power to review an order and only in the context of a pre-enforcement action. Kagan criticized the majority decision as introducing a “default rule” which tended to disturb the administrative structure the Hobbs Act envisioned.

We note that last year nearly this same issue came up with a gas station in North Dakota challenging the Federal Reserve's regulations regarding merchant fees on card

transactions. In our prior analysis we pointed out that introducing this sort of instability into the regulatory structure worked very much against the interests of investors. It is clear that an argument for stability has no attraction for the Radicals as they are eager to change law and precedent. But why is stability not attractive to Institutionalists? Off hand we might have expected them to appreciate stability.

Fortunately we know what the Institutionalist think as Kavanaugh addressed this point:

"As McKesson and the Government see things, when the initial window for pre-enforcement review closes, no one can argue in court that the agency's interpretation is incorrect - no matter how wrong the agency's interpretation might be. In other words their argument would require the District Court to afford absolute deference [emphasis in original] to the agency. We see no good rationale for reading the Hobbs Act to embody such an absolute deference rule."

As readers know we strongly favor stability. But we think the majority is making the right decision here. Pre-enforcement review occurs in the abstract and as a result is much centered in the law and analysis of statutory context. Enforcement review occurs in a particular factual set of circumstances and is more grounded in "where the rubber hits the road." It is a different perspective and it has the potential to contribute a more nuanced understanding. We think the majority is right to preserve the possibility of review in the context of enforcement. But like all statutory review, conclusions must be tempered by stare decisis and grounded in actual fact patterns rather than legal thought experiments. If the Court is to trust its lower courts with power, it is incumbent upon the Court to ensure that power is exercised in a responsible fashion.

4. Diamond Alternative Energy LLC v EPA

California adopted regulations to promote sales of electrical vehicles. These regulations were approved by the EPA. Various oil companies sued the EPA saying its regulation hurt their sales and that the regulations exceeded the EPA's authority. California attempted to dismiss the challenge as

mooted by subsequent events. The District Court accepted California' argument apparently as a result of misreading the record. The Court reversed this error and returned the case to the lower Court for further proceedings. The decision was 7-2 with the majority formed from Radicals and Institutionalists joined by Kagan. Kavanaugh wrote for the Court. Sotomayor and Jackson dissented individually.

5. NRC v Texas

The Court denied Texas and a private party standing to challenge a license granted by the Nuclear Regulatory Commission to a third party.

Here the Court once again reversed the Fifth Circuit. The decision was 6-3 with the Traditionalists and Institutionalist in agreement against the Radicals. Kavanaugh wrote for the majority and Gorsuch for the dissenters.

The issue here is similar to the tobacco case discussed at length earlier. In both cases the question is whether related secondary parties have standing to challenge regulatory action.

The underlying dispute concerns waste generated by nuclear electric power generators. Normally this waste is stored on the grounds of the plant where it is generated. The plan is to ultimately transfer it to permanent long term storage, but pending that transfer it may be held at the plant for decades. Temporary storage at the plant becomes problematic when the plant shuts down at the end of its service life. As a solution to this issue, Interim Storage Partners (ISP) proposes to build and operate a storage facility in west Texas. The Nuclear Regulatory Commission (NRC) considered the plans of ISP and issued a 40 year renewable license. Texas and a neighboring landowner (in fact a cattle ranch) brought suit complaining that the NRC is not authorized by the underlying legislation, the Atomic Energy Act (AEA), to issue such a license. The Supreme Court did not consider the merits of this complaint, but rather considered the threshold question as to whether the parties had the right to be heard in the first place.

Writing for the Court, Kavanaugh held that they did not. He

explained that the issuance of a license by the NRC is an order under the AEA and the procedures for seeking judicial review of an order are established by the Hobbs Act (officially the Administrative Orders Review Act of 1950.)

The act gives a right of legal review to parties to an order proceeding. The parties are either 1. The original applicant for the order or 2. Any other person who successfully intervened in the proceeding (i.e. was previously granted standing by the regulator.) Kavanaugh found that the plaintiff's efforts to intervene in the proceeding were unsuccessful and so they were not parties under the Hobbes Act.

Readers of our comments on the case FDA vs RJ Reynolds Vapor will quickly see the distinction. The FDA's case was dealt with in a framework established by the Administrative Procedures Act which is read to give an aggrieved person in the zone of interests of the regulatory action permission to seek judicial review. But here we are dealing specifically with an order, orders fall under the Hobbes Act and only aggrieved parties have a right to legal review.

Of course here is the rub. Texas and the rancher want to argue the NRC has gone Rambo, but before they can be heard by a Court the NRC must admit them as parties to its proceeding. Rather naturally the NRC feels it does not need these NIMBYs ("not in my back yard" protestors) interfering in the serious business of regulated the nuclear power industry and so it did not get around to qualifying them as parties. In fact, almost everything the NRC does draws opposition from NIMBYs and so this is pretty much business as usual for the NRC.

Writing for the dissenters Gorsuch takes issue with the majority's approach. To Gorsuch it is evident that the plaintiffs have a winning case and he feels they ought to be allowed to make it. Accordingly he would read a party to a licensing proceeding to be someone who participated in the process regardless of whether the intervention was successful or not.

He would argue that the NRC should not be allowed to put itself beyond the reach of the law.

The implicit response of the majority is that is yes the NRC is beyond the reach of the law and it is Congress which put it there. When Congress conferred on the NRC the power to issue orders it gave it a part of the government's sovereign immunity in the sense that the NRC itself gets to decide when it will allow its actions to be challenged. The Institutionalists and Traditionalists have no difficulty concluding this is just the government governing. But for the Radicals this its a bitter pill to swallow. Their settled predisposition is to limit regulatory authority by a close reading of the law. But on this occasion close reading reveals the government asserting its authority. The bitterness of this pill caused the Radicals to reach for other reasoning, but their colleagues found their thinking unpersuasive.

6. EPA v Calumet Shreveport Refining LLC

This is another court shopping case. The Clean Air Act determines in what court legal review of EPA decisions should be made. Decisions of national scope should be sought in the DC Appellate Court and local decisions should be brought in the local court. Here EPA issued regulations covering a class of refineries. The Fifth Circuit granted jurisdiction and the EPA protested. By 7-2 the Court ruled that a regulation covering a class of entities was a national policy that should be heard in the DC court. In this case Thomas wrote for the majority while Gorsuch wrote a dissent in which the Chief Justice joined.

7. Oklahoma vs EPA

This is the same issue as in EPA v Calumet with a change. The primary regulation requires certain entities to submit plans. EPA issued a disapproval of a number of plans along with guidance on how their deficiencies should be rectified. The Court held that the plans were subject to local review as collective disapproval did not articulate a national policy. This was an 8-0 decision with Alito recusing himself.

Thomas authored the opinion of the Court. Gorsuch wrote a concurrence in which the Chief joined.

8. Commissioner of Internal Revenue vs Zuch

Normally disputes about tax law go to the Tax Court for

resolution. But that Court's jurisdiction is limited. In this case the Supreme Court held that the Tax Court cannot adjudicate disputes between the IRS and the taxpayer in which the IRS is not seeking a levy. Consequently Zuch, who claims over payment of tax, should file a refund suit. The decision was 8-1. Barrett wrote for the majority while Gorsuch was the lone dissenter.

The facts of the case explain Gorsuch's dissent. The controversy is fifteen years old. The IRS told Zuch that she owed money on her 2010 taxes. Her then husband (Gennaro) paid it on her behalf in 2012, but the IRS erroneously credited it to his account and continued to pursue the wife - who of course resisted. In later years, the IRS found that Zuch overpaid her taxes. Rather than refunding those taxes, it applied them to the alleged 2010 deficiency. It then moved to dismiss Zuch's case before the Tax Court on the grounds that it was no longer seeking to levy Zuch. The Tax Court agreed that it no longer had jurisdiction and 8 Supreme Court Justices concurred. Gorsuch argues that this is a sleight of hand on the part of the IRS which has put its 2010 error beyond judicial review. He argues that absent the error there was no basis for withholding the refunds due in later years, and so the 2010 dispute remains live. Gorsuch's view is that it is dispute about the existence of a liability and not the payment status of the liability which determines access to Tax Court. His colleagues disagree. They find the Tax Court's powers limited to reviewing decisions of IRS officers and as the officer has decided to discontinue the levy on Zuch there is no matter for them to review.

On the Court, Gorsuch is probably the Justice most skeptical of the Government's exercise of administrative powers. While the Radicals usually join with him and the Institutionalists lean towards the government, in this case the strict constructionism of the other radicals caused them to split from Gorsuch.

D. Criminal Law Cases

1. Hewitt vs the United States

2. Gutierrez vs Saenz

These are both criminal law cases. The first case concerns a gang of bank robbers. Initially they were sentenced to 325 year terms. They were twice re-sentenced, most recently to 130 years. Their case argues that a recently passed law, the First Step Act, applies to them and they sought a third re-sentencing. The First Step Act provided that it would apply to both persons convicted after its passage and to persons convicted before its passage upon who sentence had not yet been imposed. The robbers were convicted before the laws enactment but as their initial sentences were vacated they argued that sentence had not yet been imposed upon them and they were entitled to have the Act applied in their re-sentencing. As it was not, they were suing for a re-sentencing under the Act. The second case is an appeal from a convicted murderer upon whom Texas has imposed a sentence of death. He is seeking to have certain evidence from the crime scene tested for the presence of his DNA. He argues that a negative finding should relieve him of the findings upon which his qualification for a sentence of death rests. Texas permits post-conviction DNA testing in cases where exoneration may result. Gutierrez is not expecting to achieve complete exoneration, and so Texas denied him the DNA testing he sought.

These cases both relate to the rights of convicted persons. In neither appeal is there a claim that the plaintiffs are innocent. But under due process even convicted persons may urge that their sentence is unduly harsh and request relief. Notably both cases rise up from the Fifth Judicial Circuit (Texas, Louisiana, Mississippi) which has something of a reputation for not being a bleeding heart liberal jurisdiction.

In both cases the Court ruled for the criminals. In Hewitt vs the United States the vote was 5-4. Jackson wrote the opinion of the Court in which the other Traditionalists, the Chief Justice and Gorsuch joined. Alito wrote a dissent in which Thomas, Kavanaugh and Barrett joined. In Guttierrez vs Saenz the vote was 6-3 with Sotomayor writing on behalf of the Traditionalists and Institutionalists. Alito wrote a dissent in which the other Radicals joined and Thomas contributed a second dissent.

The first case is of interest for turning on a point of grammar. The First Step Act grants sentencing relief "if a sentence for the offense has not been imposed as of [the enactment date]." In this case sentence had been imposed but subsequently vacated. Let us hear Justice Jackson on the matter:

"focus first on the language Congress used. Most notably, the operative phrase is not written in the past-perfect tense, excluding anyone upon whom a sentence "had" been imposed. Rather, Congress employed the present-perfect tense—thereby requiring evaluation of whether "a sentence . . . has . . . been imposed" upon the defendant. In this context, that distinction makes a difference.

See United States v. Wilson, 503 U. S. 329, 333 (1992) ("Congress' use of a verb tense is significant in construing statutes"). The present-perfect tense can refer to either (1) "an act, state, or condition that is now completed" or (2) "a past action that comes up to and touches the present." The Chicago Manual of Style §5.132, p. 268 (17th ed. 2017) (emphasis7Cite as: 606 U. S. _____ (2025) Opinion of the Court added). But when used in either sense, the tense simultaneously "involves reference to both past and present." R. Huddleston & G. Pullum, The Cambridge Grammar of the English Language 143 (2002). That is, while "the primary focus is on the present," the past maintains " 'current relevance.' " Ibid. (confirming that the present-perfect tense addresses "a time-span beginning in the past and extending up to now").5 Thus, one might employ the present-perfect tense to describe situations "involving] a specific change of state" that produces a "continuing result."

Jackson further pointed out that when someone's conviction is vacated that person is treated in subsequent proceedings as if they had never been convicted. Jackson held that consistency requires someone whose sentence is vacated to be treated in subsequent hearings as if they had never been sentenced.

In other words, the sentence having been vacated for different reasons and thus not still being in position, one could say that the sentence had been imposed but not that it has been imposed. So the conditions meet the necessary

conditions to claim the reliefs offered by the First Step Act. The case is remanded for re-sentencing under the act.

Alito wrote a a detailed and careful dissent. We doubt the reader has the patience for it, so we will summarize it by saying Alito doubts that Congress was so nice in its use of grammar.

Alito is probably correct that most Congressmen do not recall much from their high school grammar classes. But when we convict criminals we ask for certitude beyond a reasonable doubt. When the law itself is uncertain, the Supreme Court tends to resolve the ambiguity in favor of the accused and that is what the Court did here.

Turning to the case of Gutierrez such reasoning would lead you to the conclusion that if there is a chance to escape a death penalty one should get the chance. Indeed the Texas Circuit Court thought so. It found "Due process does not countenance procedural sleight of hand whereby a state extends a right with one hand and then takes it away with another." What specifically concerned the court was that Guttierrez was granted a right of appeal but was denied access to potentially exculpatory evidence in the hands of the District Attorney. However the Court of Appeals disagreed. A split bench ruled that "a declaratory judgment [by the Federal Court] would be unlikely to cause the [State] prosecutor to 'reverse course and allow testing' and therefore Gutierrez's injury was not redressable. While Gutierrez was waiting for a rehearing, Texas scheduled his execution and the Supreme Court issued a stay pending its consideration of the case.

Writing for the Court Sotomayor was quick to correct the reasoning of the Fifth Circuit. The Fifth Circuit had noted a prior Supreme Court precedent Reed which would decide the case in Gutierrez's favor. But the Appeals Court attempted to distinguish this case from the earlier precedent on two points. Sotomayor was quick to toss the distinctions out and inform the Fifth Circuit that it should abide by the Court's decision in Reed.

Fundamentally this case was about the Supreme Court keeping a lower court in order. For investors the most interesting detail of the case is the victim – an 85 year old

woman living in a trailer park who kept her life savings (supposedly $600,000) in cash with her in the trailer because she did not trust the banks. Unfortunately that proved a tempting target for robbers. The robbers claimed (and probably did) plan on robbing her when she was out. But they goofed, broke in when she was at home, panicked and killed her. Investors who are considering keeping substantial valuables in their home would be well advised to remember that criminals do dumb things.

3. Esteras v United States

The case turns on how to parse a sentencing statute. The Court corrected a reading of a District Court, thereby granting relief to the convicted.

The decision was 7-2 with the Traditionalists and Institutionalist in agreement and joined by Thomas. Alito wrote the dissent joined by Gorsuch.

Here the issue is that in one place the law gives a list of 12 factors to consider in one context and later relists 10 of those factors to be considered in a second context. The question is whether the two omitted factors are to be taken as deliberately excluded from consideration in the second context. The majority concluded they should be - pointing to the hoary maxim expressio unius est exclusio alterius. Indeed this rule of statutory construction can be found in Justinian's statement of the law (534 ad) and it was already old then. The dissenters quibbled that factors included by common sense and factors intrinsic to the statute's construction should not be excluded by this rule. But the majority preferred to respect Justinian's judgment on this one - the Roman Emperor's arm is still a long one when it reaches out to a former colony of a former province to pluck a criminal out of jail.

4. Perttu v Richards

Richards is an imprisoned person who complained of being sexually harassed by Perttu, a gaoler. The Prison Litigation Reform Act (PLRA) establishes procedures to be followed in handling such complaints. Richards claimed he tried to do so but Perttu flushed his filings down the toilet. Richards then

added a First Amendment claim for interference in his right to file grievances. Perttu asked for summary judgment against Richards for not following the procedures of PLRA. The magistrate hearing the matter in the first instance found the evidence for the destruction of filings unconvincing and recommended dismissal without prejudice. The District Court affirmed but the Circuit Court reversed, finding that the procedural question was intertwined with a substantive factual question of the violation of Richards rights. Accordingly the Circuit Court deemed a jury trial to be necessary to resolve the matter. This knotty matter generated a 5-4 decision which breaks with the usual pattern of judicial alignments. The Chief wrote for a majority in which he was joined by the Traditionalists and Gorsuch. Barrett wrote for the minority in which she was joined by Thomas, Alito and Kavanaugh. The opinion of the Court was that the Circuit court's reasoning was correct and Richards might make his case to a jury.

5. Rivers vs Guerrero

In general prisoners are entitled to a first habeus corpus proceeding in which to challenge their conviction on Constitutional grounds but their right to additional such proceedings is circumscribed. Rivers filed a habeus corpus proceeding, the District Court ruled against him and he appealed. While his appeal was pending he discovered evidence supporting a new point of appeal. He sought to amend his appeal, but was denied. The District Court held that a second habeus proceeding was required and transferred the matter to the Circuit court to determine River's right to proceed. The Circuit court agreed that the second filing rules applied. Rivers appealed that decision to the Supreme Court. Writing for a unanimous court, Jackson affirmed the Circuit Court.

E. Rights of Persons

1. Mahmoud v Taylor

2. Free Speech Coalition, Inc v Paxton

These two cases both raise First Amendment issues and child protection issues. The first case grew out of the desire of the

Montgomery County Maryland School Board's decision to develop a reading curriculum that reflected the broad diversity of contemporary society. The chosen materials included storybooks and other readers suitable for use with very young children that dealt with such adult issues as same sex marriage and gender identity and transition. In general the materials conveyed very accepting and positive messages and tone. Guidance provided to teachers working with this material encouraged them to inculcate secular values of social toleration and personal choice. Statements of Board members went further and could be taken as characterizing traditional religious teachings in these areas as hate speech. Several thousand parents rebelled a what they saw as the School Board's effort to teach a secular value system in displacement of the religious formation the parents were seeking for their children. Initially the Board temporized with the parents by offering an option to opt out of the planned instruction, but later the Board adopted a harder line and made the curriculum mandatory. Revocation of the opt out drove the parent's to Court, where they argued the compulsion involved was a use of government power forbidden by the First Amendment as developed by previous Supreme Court decisions.

The second case involved the State of Texas. Provision of pornographic materials to adults has long been protected by the First Amendment. But local authorities have been allowed to erect various restrictions to exposing children to such material. For instance movies are age rated, racy magazines are sold in sealed plastic bags and sex shops are off limits to minors. These restrictions keep the material from obtruding on the consciousness of children, while placing only nominal barriers in the way of adults. In an update to such regulations, Texas enacted that websites offering such material needed to restrict access to persons over the age of 18.

Both cases were decided 6-3 by an alignment of Radicals and Institutionalists. Alito penned the Opinion of the Court in the first case and Thomas in the second. The dissents were penned by Sotomayor and Kagan respectively.

The question in both cases is whether the State's intended

action is barred by the First Amendment. In general the Court has approached such questions in a graduated manner. A sharp clash with the amendment requires strict scrutiny and can be permitted only if the State has compelling reason for its action and has sought to minimize the curtailment of the freedoms guaranteed by the amendment. If the clash is less sharp, intermediate scrutiny applies. Here the State is asked to have only reasonable motives and to make only a reasonable attempt to preserve freedoms.

The first case arises from the prohibition in the First Amendment against the State establishing a religion. In corollary to that, the Court in its precedent Wisconsin v Yoder held that parents have a "right to direct the religious upbringing of their children" and that laws which present "a very real threat of undermining the parental guidance" infringe that right. Here the Court found that the parents were entitled to a preliminary injunction on the compelled use of the school readers while the matter was under judicial consideration given the probability that the parents would prevail in final judgment and that they would suffer irreparable harm in the meantime from having the material taught to their children. In particular the Court found that the readers combined with the guidance to teachers and the hard line attitude of the School Board constituted an environment hostile to the sincerely held religious beliefs of the parents which rose to the level of undermining the the religious formation they were seeking for their children.

In a concurring opinion Thomas traced the history of the Yoder precedent. It arose in the late nineteenth century. The then dominant protestant faction in the country was concerned about the Roman Catholicism of a recently immigrated Southern European population and they wished to encourage the assimilation of the immigrant's children to the American mainstream through mandatory public instruction which would inculcate "American" (i.e. protestant) values. In his analysis Thomas was able to draw out the many parallels in thinking and rhetoric between the "right minded" thinkers of both periods who wished to shape the minds of children. In general we are skeptical of the history based jurisprudence which Thomas practices. But in

this case we felt he applied to the historical method to generate genuine insight into the question before the Court.

In dissent, Sotomayor argued that the real issue was exposure. To her mind the School Board was at most exposing children to new ideas which the parental teaching might not. She argued that no one had a right in a free society to be sheltered from ideas outside their preferred mindset. Sotomayor was concerned that the majority's decision could be used to justify and legally protect closed mindedness.

Assessing the matter ourselves it seemed that the fact that very young children were involved, that the School Board had revoked its earlier opt out and that thousands of parents were feeling threatened by the Board's action all pointed to a real effort on the Board's part to push specific values on the students in conscious opposition to the traditional religious viewpoints represented by the parents. We see Sotomayor's concern with enabling closed mindedness, but to our mind teaching is more than just exposure. When books are stripped from public and school libraries one can fairly say there is a policy against exposure. But teaching, especially in the case of very young children, invokes a quantum of authority not present simply in stocking library shelves.

Turning to the pornography website matter, this was a somewhat simpler case. Writing for the Court, Thomas found the proposed restriction within the bounds of established practice. Kagan, in dissent, argued that the correct standard to apply was strict scrutiny rather than intermediate scrutiny. As such, she felt Texas should have been required to minimally impact website users. For instance, under Kagan's rule it would be necessary to implement age checks in such a manner as to hold private the identity of website users, whereas under intermediate scrutiny that requirement would not apply.

3. Medina vs Planned Parenthood South Atlantic

This case concerns how Federal statutes are enforced against violations by a State. By 6-3 the Court restricted powers of enforcement by private suit. Gorsuch wrote for the majority of Radicals and Institutionalists, while Jackson wrote for the Traditionalists.

In 2018 one Julie Edwards became pregnant. As she was diabetic this was an at risk pregnancy and Edwards sought a doctor to take her through the pregnancy. She found a practitioner she liked at the Planned Parenthood office in Charleston South Carolina. She planned on paying for her medical care with the benefits she was entitled to under the Medicaid program. Unfortunately for Edwards, part way through her pregnancy the Governor of South Carolina issued an executive order that Planned Parenthood was not eligible to provide services under the Medicaid program because the organization also provided abortion services. Edwards was unhappy about being denied the doctor of her choice and she and Planed Parenthood sued the South Carolina Administrator of the Medicaid program.

Medicaid is a Federally funded State administered program. In return for its money the Federal government imposes 80 requirements on the State's administration of the program. One of the conditions is that patients must be able to select any qualified practitioner. Edwards based her suit on section 42 USC § 1983 which was originally enacted as part of the Civil Rights Act of 1871. The law provides that any citizen may seek redress in federal court "for deprivation of any rights, privileges or immunities secured by the Constitution and the laws" of the United States." Edwards claimed that the Federal statute setting up the Medicaid program established her right to a doctor of her choice, that the State official Medina was denying her that right and that she, Edwards, had a right to be heard in Federal court. After seven years of process, this contention had made its way to the Supreme Court.

Gorsuch found that Edwards did not have the right to be heard. The counter to Edward's argument is that the Medicaid statute is actually addressed to States. It offers them funds which they may claim if they choose to set up a program conforming to the Federal government's blue print. Although that establishes a benefit for Edwards the benefit comes from participation in the States's program as defined by the State, not from the Federal government's spending bill. The cited §1983 pertains to rights but not benefits. As Gorsuch explained the matter, there is no clause in the Constitution authorizing the Federal government to set up a

medical care program. Rather it is permitted to spend money for general welfare. Historically the Court has viewed such arrangements as contracts between the Federal and State governments. Normally contracts are litigatable only between the parties. Thus the Court has allowed a presumption that spending bills do not create personal rights unless Congress clearly and unambiguously so intends. Further, for most of its history §1983 was limited to enforcing constitutional rights. It only was used for enforcing statutory rights from 1980. According to Gorsuch its usefulness for that purpose only arises if 1. Congress explicitly intended to create a personal right and 2. Congress did not provide a specific enforcement mechanism. According to Gorsuch the proper, if extreme, remedy in this case would be for the Federal government to cancel its funding of South Carolina's Medicaid program as not conforming to requirements.

Jackson's dissent argued that Gorsuch's analysis did not look closely enough at the matter. She noted that in 1992 the Supreme Court in Suter v Artist M had found that a provision of the Adoption Assistance and Child Welfare Act was not enforceable under §1983 in part because the provision appeared in a section of the statute requiring States to submit specific plans as a condition of receiving federal funds. In reaction to the Court decision, Congress in 1994 enacted a fix reading a "provision is not to be deemed unenforceable because of its inclusion in a section of this chapter [of USC] requiring a State plan or specifying the required contents of a State plan." Congress's fix went on to explicitly reject the Court's theory in Suter. However, the Court was reluctant to accept this statement of Congress's will as applying broadly. In Gonzaga University v Doe (2002) the Court held that for a provision to be enforceable under §1983 the party receiving funds must have clear notice that it may be subject to private suit for violation of conditions under which the funds are conferred. However in Health and Hospital Corporation of Marion City v Talevski (2023) the Court found that the Medicare statute did create a private enforcement action under §1983 when it directed that nursing home residents were not to be subjected to unnecessary chemical restraints. Thus, for Jackson the

matter is not settled by the presumptions attached to spending bills but rather by the test the Court stated in Gonzaga that a provision unambiguously conferring individual federal rights is enforceable under §1983. Jackson read the relevant provision of the Medicaid statute as meeting that test, whereas Gorsuch did not.

Stepping back from the reasoning of our learned Justices, let us pause to consider this matter. Clearly Julie Edwards suffered the misfortune of having her medical care caught up in a political battle over abortion. She was an "innocent bystander" in this battle. Why should the Court be so reluctant to recognize that she had an enforceable right to a doctor of her choice? Despite the Court's concern that recipients of Federal funds not be subjected to private suit without fair notice, it is hard to believe South Carolina was truly taken by surprise to receive Edwards's suit. Rather the Court's concern seems to be how common §1983 suits are – more than 10,000 per year according to Justice Thomas. The Court perhaps feels Congress has dumped on the judicial system work which more properly should be handled administratively. Reading the law as narrowly as possible is how the Court chooses to protest being overworked.

Another point of view would identify the Constitution rather than Congress as the defaulter in this picture. Congress has found welfare programs such as Medicaid to be necessary and it has also favored State administration of such programs as permitting a desirable degree of local control over how such programs are implemented. But the Constitution, while permitting such spending, does nothing to structure the interaction of the public with two levels of government. As a result the Court has been called to address the structuring and it has fallen back on the common law of contracts for guidance. As a rather long string of cases shows, that solution is problematic. Perhaps after a century of experience with these sorts of programs it is time to write a Constitutional amendment to more directly address the structuring issues.

For whatever reason, the result of the Court's decision is to deprive all Medicaid beneficiaries of an enforcement power. It is likely this case will extended to Medicare and a range of similar Federal programs as well. Literally millions of citizens have been disempowered by this decision.

4. Stanley v City of Sanford

The American Disabilities Act protects disabled persons from discrimination in the workplace. Stanley was a firefighter who, due o disability, retired prior to vesting in full post retirement health insurance. Stanley alleged an ADA violation under two separate arguments. The court rejected the first argument 9-0 and the second 7-2. Jackson, partially joined by Sotomayor, dissented from the majority on the final argument.

5. United States v Skremeti

Here Skremeti is the Attorney General of Tennessee. The state banned sex transition therapy for minors. The issue in this case was whether the ban constituted impermissible discrimination forbidden by the Equal Protection Clause Clause. The Court decided 6-3 that the law was permitted. The Chief wrote for a majority formed from the Institutionalists and the Radicals. Sotomayor wrote a dissent joined by Jackson and by Kagan in part.

In general Equal Protection Clause jurisprudence involves first classifying a dispute as to the level of scrutiny it should draw and second applying the test appropriate to that level. Laws involving three protected classes (race, ethnicity and alien status) draw the highest level of scrutiny. Laws distinguishing on the basis of sex will often draw intermediate scrutiny. Finally there is a lower level of scrutiny applicable in other cases. Note that discrimination on the basis of religion typically does not appear here because religion has particular protections established for it in the First Amendment. Discrimination against protected classes is allowed only for compelling government interests and must be narrowly tailored. At intermediate scrutiny the law must be substantially related to achieving important government objectives. At the lowest level of scrutiny there is a presumption in favor of the law and challengers must show that it is unreasonable or unnecessarily broad. There are a number of well defined and vulnerable groups which have not been granted ipso facto heightened scrutiny, for instance the poor, mentally ill or elderly.

The Chief reasoned that the law distinguished between people on two bases: age and medical condition. He found that those distinctions qualified the law for rational basis review (the lowest level of scrutiny.) Plaintiff argued that the law distinguished on the basis of sex and that intermediate review applied. The Chief disagreed. He felt that the actual distinction was on the basis of medical condition and proposed treatment. Applying the reasonableness standard, Roberts assessed the State's desire to limit access to specific treatment for specific conditions was a reasonable State purpose which was drawn with adequate care. Accordingly, he upheld the law as Constitutional. The Chief acknowledged that the question of treating gender dysphoria in minors is a complex topic with sincerely held beliefs of many shades. But he felt the political process was the best venue in which to debate these points and that the Equal Protection Clause had little to say on the matter.

This case drew an unusual number of opinions. In concurrence, Thomas emphasized that the medical view on the banned therapies was evolving and he argued that in situations of controversy where the medical consensus was lacking, Courts should look to legislatures rather than medical experts for guidance. Barrett emphasized that many defined classes (e.g. the mentally ill, children, the elderly) do not meet the criteria for heightened review. Accordingly, she argued that transgender status was a similar class. Alito's concurrence developed a similar viewpoint and also focused on permissible situations in which laws distinguish by sex.

Sotomayor contributed the principal dissent. She pointed out that the banned medical treatments are regularly applied to treat conditions other than gender dysphoria and are still allowed for that purpose. Whereas Roberts saw in this circumstance a reasonable restraint on the part of lawmakers, Sotomayor saw it as evidence of discrimination against those with a specific medical condition. Further she pointed to the ban being a blanket one which allows no consideration of the degree of dysphoria, the views of doctors and parents/guardians or the consequences of denying treatment. Sotomayor found in these characteristics a degree of unreasonableness on the part of the legislators. Finally Sotomayor reminded the Court of its long standing precedent

that a more searching judicial review is warranted when the rights of "discrete and insular minorities" are at stake. Following the Court's reasoning that only rational basis review applies in this car, Sotomayor would still hold that review to a higher standard than a law which made distinction between men and women generally. In effect Sotomayor is pointing to problems with the Court's scrutiny levels when a sex based distinction addressing a minority of a sex is involved. In particular, she points to the Court's prior handling of pregnancy (a medical condition applicable to just one sex) as a similar situation which has generated controversy in the past.

Kagan joined Sotomayor in holding that the law should be scrutinized at an intermediate level, but she noted the question of whether the law met the reasonableness standard was not before the Court and the record before the Justices indicated sufficient complexity to the matter that she would not volunteer an opinion on the matter. Accordingly, she withheld concurrence with Sotomayor's opinion in that regard. Jackson concurred with Sotomayor and offered no opinion of her own.

The number of opinions offered in this case points to the Justices feeling there was something substantive to grapple with. But how exactly to join with the issue was less clear. It is probably decisive to the decision that medical opinion itself is in flux. In a case where medical opinion was firm that treatment was necessary, efficacious and proportionally safe but the legislature was interfering nonetheless, the Justices might have formed a different plurality.

F. The Emergency Docket

Petitions to the emergency docket seek immediate intervention by the Supreme Court to prevent irreparable harm to the petitioner occurring before the petitioner's legal argument can be fully considered in the court system, A typical matter is an appeal from a death penalty prisoner looking to stay an order for his execution. In 2025 the Court received 33 such appeals on behalf of 28 prisoners. It denied 31 of the requested stays. Two appeals were mooted, in one case by prior execution of the petitioner and in the other by

the concerned State granting a reprieve. Another common source of petitions was large corporations petitioning to stay an order made by the EPA. Eighteen such petitions were made and all were denied.

The rest of the docket shows the Court modestly more willing to intervene

Petition	Number	Mooted	Denied	Granted	% Granted
Stay sought	41	3	24	14	34%
Injunction sought	10	0	9	1	10%
Lift an Injunction	7	1	4	2	29%
Permission to commence action	2	0	2	0	0%
Request for bail	1	0	1	0	0%
Total	61	4	40	17	28%

In general when the Court denies a petition it is upholding the decision of a lower court as properly made. Accordingly attention naturally focuses on where the Supreme Court intervened to reverse a lower court. Most of these interventions occurred in areas where the Trump administration has sought to make abrupt policy changes. Often lower Courts have opposed those policy changes as not adhering to established process. For the most part – but not entirely – the Court's interventions upheld the power of the Executive.

Specifically:

1. power to manage staff

In three actions the Court allowed the Executive to broadly restructure the Federal workforce. But in Bessant v Dilinger it denied the Administration the power to fire a special prosecutor.

2. power to manage data

In two cases the Court granted DOGE access to privileged government data.

3. power to manage money

In State Department v Aids Vaccine Advocacy the Court required the government to honor completed contracts it had previously made. But in Department of Education v California it allowed the government to cancel grants previously made but not yet paid.

4. power to deport

In 2 cases the Court allowed the government deportation plans to proceed. In particular Department of Homeland Security v DVD allowed deportation to third countries. Noem v Doe lifted temporary protected status from Cubans, Haitians and Venezuelans. Another pair of cases provided a more mixed decision. In AARP v Trump the Court halted deportation of a group of persons held in Texas who the government sought to deport under the Enemy Aliens Act. But in Trump v JGG the Court struck down a nationwide injunction on application of this act. And in Noem v Abrego Garcia the Court basically upheld the lower Court's effort to hold the government to account for ignoring the lower court's directions in a specific deportation case.

5. power to set transgender policy

In US v Schilling the Court permitted the Department of Defense to adopt policies adverse to transgender persons. In Libby v Fecteau the Court held the Maine legislature could not withhold the voting rights of a member whose social media posts had opposed the States's policies in favor of transgender student athletes.

6. other matters

Beals v Virginia Coalition of Immigration Rights allowed Virginia to proceed with plans to purge non-citizens from voter registration rolls. Garland v Texas Top Cop Shop lifted a nationwide injunction with which a Texas Court attempted to halt enforcement of anti-money laundering law. In Horse Racing Integrity and Safety Administration vs National Horseman's Benevolent and Protective Association the Court allowed the sport's anti-doping law to be enforced during judicial consideration of its legality.

In general one could say the Emergency Docket exhibits a strong pro-government slant, or at least a disinclination to see lower courts engaging with the government on broad policy issues. But on narrower matters the Court sometimes supports discrete petitioners against the government. In the four classes of cases which pitted the Administration against others the administration won 8 and lost 4. In the two

transgender cases the Court declined to recognize transgender persons as a protected group, but that stance could be seen more as the Court taking its time with a hot issue rather than as specifically supporting the Administration. The final group of cases is a miscellany of discrete issues.