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Overview of the Supreme Court's 2018–2019 Term

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Abstract

The Supreme Court's last term featured a number of wins for conservatives. In the upcoming term, the justices will tackle important issues including property rights, the Fifth Amendment's Double Jeopardy Clause, abusive class-action settlements, and Congress's over-delegation of its power to the executive branch. The next term also will mark the dawn of a new era at the Court with the retirement of longtime swing-vote Justice Anthony Kennedy. On the horizon, battles over war memorial crosses, Medicaid funding for Planned Parenthood, employment discrimination, and more may reach the Court later this term. The 2018–2019 Supreme Court term promises to be an important one.

October 1, 2018, marks the beginning of a new Supreme Court term. The 2017 term brings to mind then-candidate Donald Trump's promise that "[w]e're going to win so much, you're going to be so sick and tired of winning" with conservative victories in numerous cases, including ones involving free speech and free exercise of one's religion, unions, and the travel ban.

While the next term may not have the volume of high-profile, headline-grabbing cases, the Court will nevertheless hear many cases raising important issues, such as deciding what hoops property owners must jump through in order to challenge a government taking of their land, Congress's over-delegation of power to the executive branch, whether states are bound by the Eighth Amendment's ban on excessive fines, critical habitat designations under the Endangered Species Act, and more.

Key Points

- The U.S. Supreme Court's upcoming term begins on October 1, 2018, and the justices have already agreed to hear 38 cases.
- Each term, the justices agree to hear roughly 70 cases out of the nearly 7,000 petitions for review they receive each term.
- In the 2018 term, the Court will hear cases involving government taking of private property, Congress's over-delegation of power to the executive branch, the Eighth Amendment's ban on excessive fines, critical habitat designations under the Endangered Species Act, the Fifth Amendment's Double Jeopardy Clause, abusive class-action settlements, the division of authority between states and the federal government related to nuclear power, and more.
- The Court also may take up cases involving war memorial crosses, Medicaid funding for Planned Parenthood, and whether the prohibition on sex discrimination in employment includes sexual-orientation discrimination.

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This term will also mark the dawn of a new era at the Court, with the departure of longtime swing-vote Justice Anthony Kennedy and the possible confirmation of Judge Brett Kavanaugh. In the past 20 years, many of the highest-profile cases came down to Kennedy. He was in the majority in 90 percent of cases decided by a vote of 5–4 in the past five years, and 75 percent for the past 20 years. Though he once said "the cases swing, I don't," litigators have spent the past two decades angling for Kennedy's vote. Indeed, Jeffrey Rosen, a law professor and head of the National Constitution Center, dubbed any brief that sought to curry favor by citing Kennedy's previous opinions as a "Kennedy brief." Only time will tell how Kennedy's retirement will change the Court.

Each term features plenty of cases involving legal housekeeping issues, such as when lawsuits must be filed to be timely and how cases must be litigated or settled. Generally, the Supreme Court does not consider major legal issues until such matters have been considered by the lower courts. After the Court does address a major legal issue, its decision may lead to a host of related questions on which the lower courts, the academy, the media, and Congress have the opportunity to reflect and opine. For example, in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, the Court held that the state commission's hostile treatment of a baker who declined to make a custom cake for a gay wedding violated the Free Exercise Clause of the U.S. Constitution. The Court did not, however, reach the heart of the conflict, which is whether a business owner may assert a religious exemption to a state law that forbids discrimination based on sexual orientation in public accommodations. There are numerous other cases pending in state and lower federal courts that may bring this very issue back to the Court. And, in fact, the owner of Masterpiece Cakeshop has once again been hauled before the state commission for declining to make a cake for a gender-transition party.

Another example of a Supreme Court decision opening up more issues came in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, in which the Court struck down on First Amendment grounds many states' practice of forcing public-sector employees who opt out of union membership to pay "agency fees" to the union. A number of lawsuits have been filed seeking reimbursement of agency fees non-members were forced to pay, challenging the tactics unions use to prevent members from leaving, and directly attacking exclusive representation laws. With cases cropping up all over the country, this is an area of the law to watch.

Now the focus turns to the 2018–2019 term.

Cases on the Supreme Court's 2018–2019 Docket

On average, the Court hears approximately 70 cases out of the roughly 7,000 petitions for review it receives each term. It has already agreed to hear 38 cases and will add more to the schedule at its long conference in September. Eleven cases have been set for oral argument in October, and many more will be scheduled in the coming months. The upcoming term is shaping up to be an important one, with cases involving deciding what hoops property owners must jump through to challenge a government taking of their land, Congress's over-delegation of power to the executive branch, the Fifth Amendment's Double Jeopardy Clause, abusive class-action settlements, whether states are bound by the Eighth Amendment's ban on excessive fines, and critical habitat designations under the Endangered Species Act, among others.

Weyerhaeuser Company v. U.S. Fish and Wildlife Service. Under the Endangered Species Act, the Secretary of the Interior may designate privately owned land as "critical habitat" for an endangered species if it is deemed "essential to the conservation of the species." Such a designation carries with it a number of use restrictions and regulatory burdens. What happens when the government has designated land as critical habitat, but the endangered species does not and cannot inhabit that land?

In *Weyerhaeuser*, the Fish and Wildlife Service designated more than 1,500 acres of private land in St. Tammany Parish, Louisiana, as "critical habit" of the endangered dusky gopher frog. Yet for nearly 50 years, these frogs have not been found outside Mississippi and, in fact, they could not survive on the property in Louisiana without significant and costly changes. The Fish and Wildlife Service acknowledges that this designation could result in the property owners' loss of $34 million in future developments over the next 20 years.

A federal district court deferred to the Service and upheld the designation, although the judge called it "remarkably intrusive." A panel of the U.S. Court of Appeals for the Fifth Circuit agreed (over the dissent of one judge) that the Service was entitled to deference and upheld its "reasonable" conclusion that the

designation was "essential" to conservation—despite the fact that the frog does not inhabit the land. When the full Fifth Circuit denied review, six judges dissented, with Judge Edith Jones writing that the Endangered Species Act's text and history make clear that since the dusky gopher frog could not survive on the property, that land cannot not be deemed habitat for the frog, much less "critical habitat."

At the Supreme Court, the owners argue that the Endangered Species Act unambiguously requires habitability for critical habitat designation and that the lower court's ruling expands the scope of the Act by making it easier to designate uninhabited land as "critical habitat."

Gundy v. United States. Article I of the Constitution vests "[a]ll legislative Powers" in Congress. On paper, Congress is prohibited from delegating legislative functions to the executive branch. But in practice, Congress delegates quite a bit of its authority to executive branch officials and administrative agencies. Despite the Constitution's clear division of power, to date, the Supreme Court has struck down only *two* statutes as unconstitutional delegations of authority, both in 1935.

The Court has determined that delegations of authority do not violate the non-delegation doctrine as long as Congress specifies an "intelligible principle" to guide the agency or official in exercising discretion to make law. *Gundy* involves Congress' delegation of authority to the attorney general to decide whether and how to retroactively apply the Sex Offender Registration and Notification Act of 2006 (SORNA), which requires sex offenders to register in every jurisdiction where they live, work, or go to school. Congress delegated to the attorney general the power to determine how, when, and if the law's registration requirements would apply to sex offenders convicted before SORNA became law.

Herman Gundy is a pre-SORNA sex offender who drugged and raped an 11-year-old girl and was charged with failing to register as a sex offender after his release in 2012. There is no denying that he committed the kind of horrendous and predatory crime that illustrates why SORNA's registration requirement is necessary for public safety. But Gundy argues that Congress went too far in granting unfettered authority to the attorney general, an executive branch official, to decide whether and how to apply a law that carries criminal sanctions to an estimated 500,000 individuals.

This is not the first time the Court has considered the constitutional problem SORNA poses. In *Reynolds v. United States* (2012), Justices Antonin Scalia and Ruth Bader Ginsburg expressed concerns about the constitutionality of SORNA's delegation of authority. And when he was still on the Tenth Circuit, Neil Gorsuch in *United States v. Nichols* (2015) highlighted the separation of powers problem with this delegation in which Congress has authorized the attorney general to effectively write the law and then enforce it.

Knick v. Township of Scott, Pennsylvania. The ability to decide who is allowed on your property is central to the right to own property. The Township of Scott, Pennsylvania, passed an ordinance requiring all cemeteries on public or private land to be open and accessible to the public during the day. The ordinance also authorizes enforcement agents to enter and inspect private property within the township to determine the presence of a cemetery, and it provides for up to $600 in fines per violation.

Rose Mary Knick owns 90 acres in the township and maintains that there is no evidence of the existence of a cemetery on her property. Nevertheless, enforcement agents entered her property and found stones that they determined are grave markers. The township then issued a notice requiring Ms. Knick to open her property to the public during daylight hours, upon threat of daily fines. She filed a complaint in state court for a taking of her property, but the court declined to rule until the township filed an enforcement action. She then filed suit in federal court, alleging a Fifth Amendment violation, among other claims. The federal district court dismissed her takings claim as unripe, and the Third Circuit affirmed.

There are two procedural hurdles a property owner must clear to adjudicate a takings claim: First, the government action that "took" the property must have caused a clear and final injury to the property, and second, under *Williamson County Regional Planning Commission v. Hamilton Bank* (1985), the property owner must first seek and be denied compensation for a taking in state court before bringing the claim in federal court. At the Supreme Court, Ms. Knick argues that her takings claim was ripe when township agents entered her property pursuant to the ordinance. *Williamson County* effectively bars the doors to federal court for property owners asserting takings claims—particularly in light of preclusion rules that

prevent re-litigating in federal court claims that have been decided in state court. Further, she contends, the state litigation requirement wastes time and money and that takings in violation of the U.S. Constitution should be challengeable in federal court.

Virginia Uranium, Inc. v. Warren. Dating back to the early 19th century, the Supreme Court has held that under the Supremacy Clause, state laws that conflict with federal laws are preempted, or "without effect." Over the years, the Court has developed a number of preemption doctrines, including express, field, and implied or conflict preemption. In the case of nuclear safety concerns, the Atomic Energy Act of 1946 sets out the division of regulatory authority between states and the federal government over nuclear materials. The federal government has occupied the field regarding nuclear safety—which means *only* the federal government may regulate activities dealing with radiological safety, but states are free to regulate other activities, such as uranium mining.

In *Pacific Gas & Electric Co. v. State Energy Resource Conservation & Development Commission* (1983), the Supreme Court held that courts may look at a state's rationale for regulation to determine if it treads on federal authority. In the late 1970s, the largest uranium deposit in the United States (known as Coles Hill) was discovered in Pittsylvania County, Virginia. In 1982, the state banned uranium mining while a state commission studied the potential environmental, health, and safety implications of uranium development at Coles Hill, particularly relating to milling uranium ore and waste disposal. Efforts to repeal the ban stalled in the Virginia Assembly in 2013.

Virginia Uranium—a company formed by the families that own Coles Hill—sued in federal court, arguing that the federal Atomic Energy Act preempts Virginia's ban on uranium mining because it is based on radiological safety concerns. The district court held that the Act does not prohibit regulation of uranium mining and declined to evaluate the purpose underlying the ban. The Fourth Circuit agreed, over the dissent of Judge William Traxler. In addition to pointing out that the state concedes the ban was enacted due to radiological safety concerns, Judge Traxler explained that it frustrates the Atomic Energy Act's goal of encouraging private-sector participation in the development of nuclear energy. Virginia Uranium argues at the Supreme Court that the Atomic Energy Act clearly pre-empts state laws enacted to regulate radiological safety and that Virginia's ban frustrates the federal government's goal of promoting production and use of nuclear power.

Frank v. Gaos. The *cy pres* doctrine allows a court to rewrite a charitable trust if it would be illegal or impossible to carry out the trust's purpose. Under this doctrine, the funds will be redirected to another purpose "cy près comme possible" (as near as possible) to the trust's purpose. For example, in *Jackson v. Phillips* (1867), a court relied on *cy pres* to redirect funds from a trust created to support the abolition of slavery to instead support the education of freed slaves after slavery had been abolished. In recent decades, *cy pres* has migrated into the world of class actions, leading to defendants and class attorneys selecting third parties to receive settlement proceeds instead of class members.

Paloma Gaos filed a putative class action against Google for disclosing users' search terms to third parties, alleging violations of privacy, the Stored Communications Act, and other claims. Her action was consolidated with another similar suit bringing the estimated class size to 129 million Google users. Google agreed to settle for $8.5 million—with $2.125 million going toward attorney's fees, $1.075 million for administrative costs and "incentive payments" for the named plaintiffs, and $5.3 million paid to six *cy pres* recipients because it would be impractical to distribute settlement proceeds to the entire class. The *cy pres* recipients—who agreed to use the funds to promote awareness about digital privacy—included the class attorneys' colleges and organizations to which Google already donates.

Class members Ted Frank and Melissa Holyoak objected to the district court's approval of the settlement. A panel of the Ninth Circuit upheld the settlement, finding that a district court may approve class-action settlements in which class members receive no compensation if the settlement is "free, adequate, and free from collusion." Judge John Wallace dissented in part, writing that the district court should ensure that class attorneys' prior affiliations did not influence the selection of *cy pres* recipients, such as their *alma maters*. At the Supreme Court, Frank and Holyoak argue that *cy pres*-only settlements are easily abused and violate Federal Rule of Civil Procedure 23(e), which mandates that courts may only approve "fair, reasonable, and adequate" settlements. They contend that a settlement that binds 129 million individuals—while providing the vast majority of class members with zero compensation—cannot meet the Rule 23 standard.

Gamble v. United States. The Fifth Amendment's Double Jeopardy Clause ("nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb") guarantees that people may not be prosecuted more than once for the same crime. But the Supreme Court limited this guarantee when, in *Abbate v. United States* (1959) and *Bartkus v. Illinois* (1959), it determined that the Constitution does not prohibit dual prosecutions in state and federal court for the same conduct. The Court reasoned that because the states and the federal government are separate sovereigns, conduct that violates each sovereign's laws does not count as the "same offence" for purposes of the Double Jeopardy Clause.

When there were only a handful of federal crimes, successive prosecutions were rare. But today there are approximately 5,000 federal crimes and countless federal regulatory offenses, many of which overlap with state crimes. Given the proliferation of federal criminal law, opportunities for duplicative prosecutions abound. Terance Gamble, who had previously been convicted of a felony offense, was prosecuted by the State of Alabama for violating a state law barring felons from possessing firearms. He was simultaneously charged for the same offense under federal law.

Gamble was sentenced to one year for the state conviction and 46 months plus three years of probation for the federal conviction. He challenged the federal conviction on Double Jeopardy grounds, but the district and appeals courts held that the separate-sovereigns exception barred his claim. At the Supreme Court, he argues that the separate-sovereigns exception is inconsistent with the text and original meaning of the Double Jeopardy Clause, which was meant to protect people from successive prosecutions. In *Puerto Rico v. Sanchez-Valle* (2016), Justice Ruth Bader Ginsburg wrote a concurrence (joined by Clarence Thomas) noting that the separate-sovereign exception fails the Double Jeopardy Clause's objective of protecting individuals from the "harassment of multiple prosecutions."

Timbs v. Indiana. Most people would probably be surprised to learn that not all of the guarantees in the Bill of Rights apply against state governments. Though the Supreme Court made it clear in *Barron v. Baltimore* (1833) that these rights only restricted the federal government, starting in the 1920s, the Court began incorporating provisions of the Bill of Rights against state governments through the Due Process Clause of the Fourteenth Amendment.

Today, like the federal government, states may not abridge free speech, establish official religions, engage in unreasonable searches or seizures, or take property without just compensation. The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." While the Supreme Court has ruled that the prohibitions on excessive bail and cruel and unusual punishment apply against the states in *Schilb v. Kuebel* (1971) and *Robinson v. California* (1962), the Court has never held that the excessive fines clause applies to the states as well. The Court may soon resolve the issue in *Timbs*.

Tyson Timbs pleaded guilty to dealing heroin. He was sentenced to one year in home detention, five years of probation, and was ordered to pay $1,200 in police, court, and other costs. Although he faced a potential fine of $10,000, the court declined to impose one. He now challenges the State of Indiana's attempt to civilly forfeit the car he was driving when he was arrested. A state trial court found forfeiture of the car (a Land Rover with an estimated value of $40,000) would be "grossly disproportionate" (four times the potential monetary fine that the court could have imposed) in violation of the Eighth Amendment's Excessive Fines Clause. On appeal, the state supreme court declined to impose this prohibition against Indiana, noting that the U.S. Supreme Court has never incorporated the Excessive Fines Clause against the states. At the U.S. Supreme Court, Timbs contends that the Excessive Fines Clause should be incorporated through the Fourteenth Amendment's Due Process Clause and applied against the states because it is deeply rooted in our nation's legal history, just like the other Eighth Amendment prohibitions.

Cases on the Horizon

Attempting to predict what the Supreme Court will or will not do is always a gamble. The Court receives roughly 7,000 petitions for review each term, and the justices agree to hear fewer than 1 percent of those cases. That having been said, the following cases have a good chance of being reviewed by the Supreme Court in the near future.

The American Legion v. American Humanist Association/Maryland-National Capital Park and Planning Commission v. American Humanist Association. Though the First Amendment's text is straightforward ("Congress shall make no

law respecting an establishment of religion"), the Supreme Court's Establishment Clause jurisprudence is anything but clear. To determine if a government action amounts to an establishment of religion, the Court has developed a number of tests, by, for example, looking at how such actions were treated by the Framers at the time the Establishment Clause was ratified or looking for the primary purpose behind or effect of a government action, whether that action constitutes an endorsement of religion, whether it involves excessive entanglement by the government with religion, and whether it is unduly coercive to non-believers.

When it comes to the constitutionality of passive displays on government property, such as the Ten Commandments, Christmas decorations, and war memorials with crosses, the lower courts are divided about how and when to apply the various tests that the Supreme Court has applied in past cases, leading to widely inconsistent results. In *The American Legion,* the Fourth Circuit ruled that a 93-year-old war memorial in Bladensburg, Maryland, that includes a 40-foot cross violates the Establishment Clause. The panel concluded that the size and prominence of the cross conveys government endorsement of Christianity. Chief Judge Roger Gregory dissented, rebuking the majority's categorical approach that would render any large cross on public land unconstitutional. He pointed out that displays on government property may incorporate religious elements if they serve a legitimate secular purpose, such as honoring local soldiers who fought and died in World War I. Other appeals courts have considered history and context when reviewing the constitutionality of similar memorials that include a cross. This case presents the Supreme Court with an opportunity to bring some much-needed clarity to its Establishment Clause jurisprudence.

Andersen v. Planned Parenthood of Kansas and Mid-Missouri/Gee v. Planned Parenthood of Gulf Coast. The Medicaid Act's "free choice of provider" provision allows Medicaid recipients to obtain medical care from a qualified provider of their choice, unless that provider is unfit to provide medical services. Most states have provider agreements with Planned Parenthood, which allow Medicaid recipients to receive non-abortion services at Planned Parenthood clinics.

Following the release of videos that raised disturbing allegations of Planned Parenthood profiting from the sale of organs from aborted babies, several states including Arkansas, Kansas, and Louisiana sought to cancel their agreements with the abortion giant. Some Medicaid recipients sued, and the main legal issue is whether they have a judicially enforceable right to select their health care provider.

Under 42 U.S.C. § 1396a(a)(23)(A), state Medicaid plans must "provide that...any individual eligible for medical assistance (including drugs) may obtain such assistance from any institution, agency, community pharmacy, or person, qualified to perform the service or services required...who undertakes to provide him such services." In reviewing the Arkansas case, the Eighth Circuit concluded that a law directing officials to take an action (which § 1396a(a)23(A) does) does not create an individual entitlement that is enforceable in court. Further, the court held, it is not clear Congress intended to create an individual right to challenge the disqualification of a health care provider, and Congress's unambiguous intent is a prerequisite for the lawsuit to move forward. In the Kansas and Louisiana cases, the Tenth and Fifth Circuits reached the opposite conclusion, holding that federal law affirmatively requires states to allow Medicaid recipients to choose their providers. Louisiana and Kansas both have asked the Supreme Court to take up this issue.

Altitude Express Inc. v. Zarda. Title VII of the Civil Rights Act of 1964 prohibits employers from "discriminat[ing] against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin." During the Obama Administration, the Equal Employment Opportunity Commission began interpreting Title VII's prohibition on sex discrimination to include sexual orientation. Congress has never amended the statute to include sexual orientation as a protected class, and the Supreme Court has never ruled on the issue.

Until recently, all the federal appeals courts had ruled against extending Title VII sex discrimination to include discrimination on the basis of sexual orientation. But in *Hively v. Ivy Tech Community College* (2017), the Seventh Circuit concluded that Title VII extends to sexual-orientation discrimination. Applying the Supreme Court's 1989 *Price Waterhouse v. Hopkins* ruling that sex discrimination includes gender stereotyping, the *en banc* Seventh Circuit held that sexual-orientation discrimination is indistinguishable from sex stereotyping. The Second Circuit

agreed in *Zarda*. But the Eleventh Circuit came to the opposite conclusion in *Evans v. Georgia Regional Hospital* (2017), and the Supreme Court declined to review that case last year.

Now *Zarda* is pending before the Supreme Court, and at the appeals court, the Justice Department filed a brief explaining that the federal government does not support this new interpretation of sex discrimination. This split among the lower appellate courts increases the likelihood that the justices will take up the issue.

Conclusion

In the upcoming 2018–2019 term, the Supreme Court will tackle important issues including deciding what hoops property owners must jump through to challenge a government taking of their land, Congress's over-delegation of power to the executive branch, whether states are bound by the Eighth Amendment's ban on excessive fines, critical habitat designations under the Endangered Species Act, the Double Jeopardy Clause, abusive class-action settlements, the division of authority between states and the federal government related to nuclear power, and more.

This term also will mark the dawn of a new era at the Court with the retirement of longtime swing-vote Justice Anthony Kennedy and the possible confirmation of Judge Brett Kavanaugh. On the horizon, battles over war memorial crosses, Medicaid funding for Planned Parenthood, and employment discrimination, among many other significant legal issues may reach the Court later this term. The 2018–2019 Supreme Court term promises to be an important one.

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