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Healthcare, Unions, Ministers, and More: Civil Cases in the Supreme Court's 2011-12 Term

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We begin with a dilemma. Is there any corner of the American legal landscape in which readers have not already received word of the Supreme Court's monumental healthcare ruling in *National Federation of Independent Business v. Sebelius*? Then again, can one imagine any retrospective on the Court's 2011-2012 Term that does not make that ruling its headline? We will start by unapologetically giving *NFIB* its due, taking a broad view of the ruling's key elements and of the future battlegrounds to which the ruling points. We then will turn to many of the Term's other civil cases, focusing particularly on decisions that are likely to be of broad interest to those who work or litigate in the nation's state and federal courtrooms. Those rulings address important issues in the areas of administrative law, arbitration, *Bivens* actions, due process, equal protection, federal jurisdiction, qualified immunity, religion, speech, the Supremacy Clause, and more.

THE HEALTHCARE RULING: COMMERCE, TAXES, AND SPENDING

In the Patient Protection and Affordable Care Act, Congress's central purpose was to bring the nation closer to universal healthcare coverage. In the litigation that was immediately launched against the legislation, two provisions were primarily at issue. First, Congress imposed what became known as the "individual mandate," stating that, beginning in 2014, many Americans would be required to carry "minimum essential [health insurance] coverage."[1] Unless they fell within an exempted segment of the population, those who failed to carry such insurance would be required to pay a "penalty," or a "shared responsibility payment," to the Internal Revenue Service when filing their annual taxes.[2] Second, to help provide healthcare for many who could not afford to buy insurance, Congress adopted a plan to expand the Medicaid program to cover Americans whose incomes placed them below 133 percent of the federal poverty line. The federal government ultimately would pay 90 percent of the costs of that expansion, but the states would cover the rest. States that refused to participate faced powerful repercussions: they could lose *all* of their federal Medicaid funds. Joined by numerous organizations and individuals, roughly half of the nation's states sued, arguing that the individual mandate and the threat to states' Medicaid funding exceeded Congress's enumerated powers. The Court took up those matters in *NFIB*,[3] one of the most closely watched cases in the nation's history.

THE COMMERCE POWER AND THE MANDATE

Opponents of the individual mandate famously insisted that, if the mandate were held valid, then Congress could dictate all kinds of purchasing decisions, right down to the food we buy at the grocery store. At times, that argument had the feel of a substantive-due-process claim, drawing some of its rhetorical power from the implied premise that there is a realm of personal decision making that *no* government can invade. Rather than cast their legal arguments in those controversial terms, however, the Act's challengers urged the Court to draw an activity/inactivity distinction under the Commerce Clause, the enumerated power upon which Congress had most vocally relied when adopting the mandate. The mandate's opponents argued that the Commerce Clause empowers Congress to regulate the economic activities of those who have already entered a given market, but does not empower Congress to force people to enter a market in which they do not wish to participate.

Four Justices rejected that argument, finding the mandate easily sustainable under conventional Commerce Clause analysis. Writing for herself and Justices Breyer, Sotomayor, and Kagan, Justice Ginsburg pointed out that most uninsured Americans actively seek healthcare each year—imposing billions of dollars in costs on the healthcare system—and that nearly all uninsured Americans will require healthcare at some point in their lives. States cannot sustainably address the resulting economic challenges on their own, she said, because any state that unilaterally moves toward a system of universal coverage will become a financially strained magnet for economically disadvantaged individuals. Under those circumstances, Justice Ginsburg concluded, the Commerce Clause gave Congress ample power to require many Americans to carry health insurance.

The Court's other five Justices, however, embraced the proposed activity/inactivity distinction. Writing only for himself, Chief Justice Roberts stated that the power to "regulate" interstate commerce is not the power to "create" interstate commerce.[4] He found it unimaginable that the Framers would have authorized Congress to force people to buy goods or services from private sellers. The Chief Justice believed that allowing Congress to wield such a power would "fundamen-

Footnotes

1. 26 U.S.C. § 5000A(a).
2. *Id.* § 5000A(b); *see also id.* § 5000A(e) (exempting several classes of individuals).
3. 132 S. Ct. 2566 (2012).
4. *Id.* at 2586 (Roberts, C.J.).

tally chang[e] the relation between the citizen and the federal government."[5] On the government's reading of the commerce power, he said, Congress could "justify a mandatory purchase to solve almost any problem,"[6] regulating people's lives "from cradle to grave."[7] The Commerce Clause authorizes Congress to regulate only extant economic activities, the Chief Justice concluded, and individuals who have not purchased health insurance and are not currently seeking medical care are not active in the healthcare market.[8]

In a rare joint opinion[9] that they formally cast as a dissent, Justices Scalia, Kennedy, Thomas, and Alito made arguments that were substantially the same as the Chief Justice's. They found that "one does not regulate commerce that does not exist by compelling its existence,"[10] and that saying otherwise would "extend federal power to virtually everything,"[11] making "mere breathing in and out the basis for federal prescription."[12] The four Justices drew a connection between the decision-making freedom that the Act's challengers were claiming and the limitations on Congress's powers, arguing that when we disregard those limitations "we place liberty at peril."[13]

Although their arguments closely tracked one another, the Chief Justice and the four dissenters did not join one another's opinions.[14] One is thus left to wonder whether the five Republican appointees' reading of the Commerce Clause carries the force of binding precedent.[15] The well-known *Marks* doctrine does not squarely answer that question; it simply states that, when five or more Justices agree on which litigant should prevail in a given case but do not agree on the reasons, lower courts should regard themselves as bound by the "position taken by those Members who concurred in the judgment on the narrowest grounds."[16] In *NFIB*, however, the members of the joint dissent were indeed dissenters, rather than members concurring in the judgment. Does that matter? In a possible attempt to ensure that his analysis of the commerce issue would be seen as essential to the ultimate outcome of the case and thus binding on lower courts (with or without the support of the four dissenters), the Chief Justice wrote that he would not ultimately have found merit in the government's Taxing Power argument if he had not first rejected the government's reading of the Commerce Clause. Whether that explanation is sufficient to give the Chief Justice's commerce analysis the force of precedent remains to be seen.

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THE TAXING POWER AND THE (NON-)MANDATE

As a fallback argument, the government contended that the individual mandate actually was not a mandate at all. Rather, that provision of the Act could be upheld as a simple exercise of Congress's power to levy taxes. On this view, individuals are not legally required to purchase health insurance; they simply are assessed an additional tax if they opt not to do so. All nine justices believed that, if Congress had squarely called the "shared responsibility payment" a "tax," rather than a "penalty," the legislation could indeed have been sustained on those grounds. But Congress used the language of penalties, not taxes. Did that choice of wording matter?

Not in the eyes of five justices. Joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan, Chief Justice Roberts said that Congress's choice of labels was not dispositive. Under the Court's precedent, the Chief Justice explained, the Taxing Power allows Congress to impose taxes, but not penalties. These five justices found that the Act's shared responsibility payment fell into the former category: it was imposed only on those who were required to file federal income taxes; the amount of the payment was to be calculated as a percentage of individuals' taxable income; the payment requirement was to be enforced by the IRS; the measure was expected to produce substantial revenue for the government; and the legislation lacked the kind of scienter requirement that one typically finds

5. *Id.* at 2589 (Roberts, C.J.).
6. *Id.* at 2588 (Roberts, C.J.).
7. *Id.* at 2591 (Roberts, C.J.).
8. He rejected the federal government's arguments under the Necessary and Proper Clause for substantially the same reasons.
9. *Cf.* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ., reaffirming a right to abortion); Cooper v. Aaron, 358 U.S. 1 (1958) (jointly and unanimously declaring that state officials are obliged to abide by the Supreme Court's interpretations of the Constitution).
10. 132 S. Ct. at 2644 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).
11. *Id.* at 2648 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).
12. *Id.* at 2643 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).
13. *Id.* at 2676-77 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).
14. That may have been the result of a short-term breakdown in the working relationship among those five Justices. There are strong textual indications that much of the joint dissent was originally written as a majority opinion, with Chief Justice Roberts on board. Soon after the ruling was issued, leaks from the Court to the press indicated that the Chief Justice and the four dissenters were indeed initially united in declaring the individual mandate unconstitutional. *See generally* Adam Liptak, *After Ruling, Roberts Makes a Getaway from the Scorn*, N.Y. TIMES, July 2, 2012, at A10; Jonathan Peters, *The Supreme Court Leaks*, SLATE.COM, July 6, 2012, *available at* http://www.slate.com/articles/news_and_politics/jurisprudence/2012/07/the_supreme_court_leaking_john_robert_s_decision_to_change_his_mind_on_health_care_should_not_come_as_such_a_surprise_.html.
15. *Compare* Randy Barnett, *We Lost on Health Care. But the Constitution Won.*, WASH. POST, June 29, 2012, *available at* http://www.washingtonpost.com/opinions/randy-barnett-we-lost-on-health-care-but-the-constitution-won/2012/06/29/gJQAzJuJCW_story.html ("The Supreme Court has definitively ruled that the [individual mandate exceeded Congress's commerce power]."), *with* Deborah Pearlstein, *Early Thoughts on the Health Care Case*, BALKINIZATION, June 28, 2012, http://balkin.blogspot.com/2012/06/early-thoughts-on-health-care-case.html ("Aren't all the opinions (the dissent + Roberts' opinion for himself) concluding that the mandate exceeds the Commerce Clause power just dicta?").
16. Marks v. United States, 430 U.S. 188, 193 (1977).

Going forward, one of the big challenges in Spending Clause litigation will be further clarifying the line that separates enticement from coercion.

in the context of civil and criminal penalties. The majority concluded that individuals thus are free to opt against carrying health insurance; those making that choice simply must pay higher federal taxes when filing their annual returns.

For Justices Scalia, Kennedy, Thomas, and Alito, however, Congress's choice of terminology was controlling. "The issue is not whether Congress had the *power* to frame the minimum-coverage provision as a tax," the joint dissenters wrote, "but whether it *did* so."[17] In their view, the plain language of the Act indicated that Congress had issued a mandate, enforced by a penalty. "To say that the Individual Mandate merely imposes a tax," the joint dissenters concluded, "is not to interpret the statute but to rewrite it."[18] That argument sets the stage for future battles about when Congress's choice of labels is and is not dispositive on the question of whether Congress has properly exercised a given enumerated power.

THE SPENDING POWER AND THE MEDICAID EXPANSION

Although the Court had occasionally suggested that Congress's conditional grants to the States would be unconstitutional if they did not give states the freedom to reject the conditions and decline the federal money, the Court had never struck down a set of conditions on those grounds. In *NFIB*, however, seven justices concluded that Congress had crossed the line separating permissible enticement from unconstitutional coercion.

Joined by Justices Breyer and Kagan, Chief Justice Roberts found that, by threatening to withhold all of a state's Medicaid funds, Congress had not merely encouraged the States to participate in the program's expansion; rather, those conditions were "a gun to the head."[19] The Chief Justice identified three features of the Act that, taken together, were impermissibly coercive: federal Medicaid funds account for a large percentage of many states' annual revenues; "the States have developed intricate statutory and administrative regimes over the course of many decades to implement their objectives under existing Medicaid";[20] and the Medicaid expansion was not a mere alteration or amendment of the sort that Congress had reserved the power to make, but instead amounted to an entirely new program, marked by "a shift in kind, not merely degree."[21] The four justices in the joint dissent agreed, finding that "[i]f the anticoercion rule does not apply in this case, then there is no such rule."[22]

Two members of the Court found the conditions permissible. Joined by Justice Sotomayor, Justice Ginsburg found that, by expressly reserving the right to "alter" or "amend" the Medicaid program, Congress had long ago put the states on notice that a large expansion of the program was possible. States had been further alerted to the possibility of a significant expansion by all of the earlier occasions when, in smaller ways, Congress had placed additional segments of the population under the protection of the Medicaid umbrella. She also doubted the efficacy of her seven colleagues' conclusion: to avoid the constitutional constraints that the majority had identified, she said, Congress simply could have repealed the entire Medicaid program and then announced the creation of a new, much broader benefits program identical to the one that Congress envisioned in the Act.

On the question of what to do about the Spending Clause violation that the other Justices had found, however, Justices Ginsburg and Sotomayor joined the Chief Justice and Justices Breyer and Kagan. Those five justices concluded that the solution was not to invalidate the Medicaid expansion in its entirety, but rather to enforce the Act's conditions only with respect to the *new* funding that Congress was offering for the program's expansion. The four members of the joint dissent would have scrapped the expansion altogether.

Going forward, one of the big challenges in Spending Clause litigation will be further clarifying the line that separates enticement from coercion. What percentage of a state's federal revenues can the federal government permissibly threaten to cut? When and how does a state institutionalize a given federal program to such a degree that Congress cannot safely threaten to eliminate it? How does one distinguish between an amendment to a program and the creation of an entirely new, subsuming program? Were Justices Ginsburg and Sotomayor right when they suggested that Congress could evade the seven Justices' Spending Clause restrictions by canceling an old program altogether and replacing it with a new program of conditional federal spending?

ADMINISTRATIVE LAW

DEFERENCE TO AGENCIES

In *Christopher v. Smithkline Beecham Corp.*,[23] the Court was asked to determine whether pharmaceutical companies' "detailers"—employees who provide physicians with information about drugs with the hope that physicians will prescribe those drugs for their patients—are "outside salesmen" within the meaning of the Fair Labor Standards Act. Dividing 5-4, the Court held that detailers are indeed outside salesmen and that they thus do not benefit from the FLSA's overtime-pay provisions. There was one point, however, on which all nine Justices agreed: the Department of Labor's statutory interpretation did not merit any deference from the Court. Led by Justice Alito, the five Justices in the majority elaborated on their reasons for refusing to defer to the agency's reading of the FLSA. The department's employee-favoring interpretation would "impose massive liability on [pharmaceuticals] for con-

17. 132 S. Ct. at 2651 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).
18. *Id.* at 2655 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).
19. *Id.* at 2604 (Roberts, C.J.).
20. *Id.* (Roberts, C.J.).
21. *Id.* at 2605 (Roberts, C.J.).
22. *Id.* at 2662 (Scalia, Kennedy, Thomas, and Alito, J.J., dissenting).
23. 132 S. Ct. 2156 (2012).

duct that occurred well before that interpretation was announced"; the agency never voiced any objection over the many decades in which pharmaceutical companies treated their detailers as outside salesmen; the agency's initial interpretation "lack[ed] the hallmarks of thorough consideration" because it was first announced in a 2009 amicus brief without any period for public comment; the agency's interpretation shifted during the course of litigation; and, in the eyes of the majority, the agency's reading of the statute was at odds with the plain language of the statute.[24]

JUDICIAL REVIEW

In *Sackett v. EPA*,[25] the Court unanimously ruled that the owners of a residential lakeside lot were entitled to immediate judicial review of a compliance order issued to them by the Environmental Protection Agency. The Sacketts had filled a portion of their property with dirt and rock. The EPA determined that the Sacketts had thereby discharged pollutants into federal waters, and so issued a compliance order, directing the Sacketts to restore the property. For each day that the Sacketts refused to comply, they faced civil penalties of up to $75,000. Rather than wait for the EPA to file a civil enforcement action while the possible penalties piled up, the Sacketts sought judicial review under the Administrative Procedure Act, challenging the EPA's claim that the Sacketts' lot contained wetlands or waters within the agency's jurisdiction. Writing for the Court, Justice Scalia found that the EPA's compliance order was sufficiently final to merit judicial review under the APA and that the Clean Water Act did not bar such pre-enforcement review.

ARBITRATION

In a trio of rulings, the Court expressed varying degrees of frustration with lower courts for failing to follow what the Court regarded as the clear requirements of the Federal Arbitration Act (FAA).

Most of the Court's impatience was directed toward the Supreme Court of Appeals of West Virginia in *Marmet Health Care Center, Inc. v. Brown*.[26] In that case, family members of three patients had entered into contracts with nursing homes. A clause in those contracts stated that the parties would arbitrate any disputes that arose between them. After the three patients died, the family members sued the nursing homes, alleging that the homes had negligently caused the patients' deaths. Denying the defendants' motion to compel arbitration, the Supreme Court of Appeals of West Virginia did little to disguise its unhappiness with the Supreme Court's FAA precedent. Citing scholars and dissenting justices, the West Virginia court stated that Congress had intended the FAA "to serve *only* as a procedural statute for disputes brought in federal courts," that Congress had intended the FAA to apply only in cases involving "contracts between merchants with relatively equal bargaining power," and that the Supreme Court's expansive interpretations of the FAA were the result of "tendentious reasoning" and a willingness to create doctrines "from whole cloth."[27] The West Virginia court nevertheless believed it had spotted an opening in the Supreme Court's precedent—the Court had never before explicitly addressed the enforcement of pre-injury arbitration agreements in healthcare contracts or in personal-injury or wrongful-death cases. The state court filled that perceived gap by ruling that the public policy of West Virginia barred enforcing "an arbitration clause in a nursing home admission agreement adopted prior to an occurrence of negligence that results in a personal injury or wrongful death."[28]

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In a unanimous *per curiam* ruling, the Supreme Court reversed, finding that the West Virginia court had patently "misread[] and disregard[ed]" the Supreme Court's precedent.[29] Noting the state court's disparaging remarks about the Court's FAA rulings, the justices wrote that "[w]hen this Court has fulfilled its duty to interpret federal law, a state court may not contradict or fail to implement the rule so established."[30] The FAA does not include any exception relating to personal-injury or wrongful-death cases, the Court observed. All three cases thus were governed by the rule that the Court had reaffirmed just two months before the West Virginia court handed down its decision: "'[W]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA.'"[31]

The Florida Fourth District Court of Appeal provoked another unanimous *per curiam* ruling in *KPMG LLP v. Cocchi*,[32] though the tone of the exchange between the two courts was less prickly. In that case, investors who allegedly lost millions of dollars in the Bernard Madoff scandal filed a lawsuit against the partnerships that had invested their money and against those partnerships' auditing firm, KPMG. With respect to KPMG, the investors stated four causes of action. KPMG moved to compel arbitration based on an arbitration clause that appeared in its contracts with the investment partnerships. The Court of Appeal stated that the arbitration clause could be enforced against the investors only if their claims were derivative in nature, thereby bringing them within the ambit of the partnerships' contracts with KPMG. Citing Delaware law, the court concluded that two of the investors' claims against KPMG were direct, and thus beyond the reach of the arbitration clauses. The court failed to say anything about the investors' other two claims, however, apparently believing that if the court could not compel arbitration of some of the investors' claims, then the entire case should remain in state court.

The Supreme Court reversed, faulting "the Court of

24. *Id.* at 2167-70.
25. 132 S. Ct. 1367 (2012).
26. 132 S. Ct. 1201 (2012).
27. Brown v. Genesis Healthcare Corp., 724 S.E.2d 250, 278-80 (W. Va. 2011).
28. *Id.* at 292.
29. 132 S. Ct. at 1202.
30. *Id.*
31. *Id.* at 1203 (quoting AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1747 (2011)).
32. 132 S. Ct. 23 (2011).

[T]he Court refused to allow a prisoner to bring an Eighth Amendment *Bivens* action against employees of a privately operated federal prison.

Appeal's apparent refusal to compel arbitration on any of the four claims based solely on a finding that two of them . . . were nonarbitrable."[33] The Court stated that trial courts are obliged to enforce arbitration agreements "'even when the result would be the possibly inefficient maintenance of separate proceedings in different forums.'"[34] The Court remanded the case with instructions to determine whether the arbitration agreement was enforceable with respect to the investors' other two causes of action.

The Court's third arbitration ruling of the Term was the only one to spark at least minimal disagreement among the Justices. In *CompuCredit Corp. v. Greenwood*,[35] individuals who had obtained Aspire Visa cards filed a class action against the card's marketer and issuer. The cardholders alleged that, in various ways, the defendants had violated the Credit Repair Organizations Act (CROA), a federal statute regulating organizations that purport to help individuals improve their credit records, histories, or ratings. The defendants moved to compel arbitration, citing an arbitration clause that appeared in the card applications that the plaintiffs had signed. The cardholders resisted, arguing that Congress had intended to exempt CROA claims from the requirements of the FAA. Their argument centered primarily on a statutorily required disclosure statement that the defendants had given them. In that disclosure statement, the defendants had stated that cardholders had "a right to sue a credit repair organization that violates the [CROA]."[36] That statement, coupled with a provision of the CROA that declared certain statutory rights nonwaivable, led the cardholders to the conclusion that they had a right to sue the defendants in court, and that the arbitration clauses in their card applications could not waive that right.

The Ninth Circuit Court of Appeals was persuaded by the cardholders' argument, but a majority of the Supreme Court was not. Writing for six members of the Court, Justice Scalia explained that the disclosure statement told the cardholders that they were entitled to enforce their rights under the statute, but did not itself confer any of those rights. Those rights were conferred in other statutory provisions, he said, and those other provisions did not clearly state that cardholders had a right to sue *in court*. Justice Sotomayor and Justice Kagan concurred in the judgment, stating that the parties' arguments were "in equipoise" and that the cardholders had thus failed to carry "the burden of showing that Congress disallowed arbitration of their claims."[37] Justice Ginsburg filed a lone dissent. In her view, the majority had ironically interpreted anti-deception legislation in a manner that permitted credit-repair organizations to deceive vulnerable consumers about their rights.

BIVENS AND THE EIGHTH AMENDMENT

In *Minneci v. Pollard*,[38] the Court refused to allow a prisoner to bring an Eighth Amendment *Bivens* action against employees of a privately operated federal prison.[39] The prisoner claimed that the defendants failed to provide him with proper medical care after he injured his elbows and that the Eighth Amendment itself provided him with a damages remedy. The odds were stacked against him from the beginning: it had been more than 30 years since the Court last agreed to recognize a private cause of action directly under a constitutional provision.[40] An eight-justice majority of the Court continued that streak here.

Writing for the Court, Justice Breyer explained that "the question is whether, in general, state tort law remedies provide roughly similar incentives for potential defendants to comply with the Eighth Amendment while also providing roughly similar compensation to victims of violations."[41] The Court found that, while federal legislation would have barred the prisoner from bringing a state tort action against the prison officials if those officials had been employed directly by the federal government, there was no such bar here because the defendants were employed by a private firm. The Court acknowledged that state tort law might be somewhat "less generous" to the prisoner than the proposed *Bivens* action, but found those differences too small to be dispositive.[42] Justice Ginsburg dissented, arguing that the prisoner's claim should not be "remit[ed] to the 'vagaries' of state tort law."[43]

EQUAL PROTECTION AND RATIONAL-BASIS REVIEW

In *Armour v. City of Indianapolis*,[44] we were reminded of just how easy it is for legislation to survive rational-basis review under the Equal Protection Clause. For a number of years, the City of Indianapolis paid for sewer projects by imposing those projects' costs upon the owners of abutting properties. In 2004, the city funded a residential sewer project in precisely that way. Pursuant to longstanding practice, homeowners in that neighborhood were given the option of paying their share of the costs (about $9,000 per household) in one lump sum or over as many as thirty years. The following year, however, the city adopted a new financing system for sewer projects, imposing much lower fees on benefiting property owners and cover-

33. *Id.* at 25.
34. *Id.* (quoting Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 217 (1985)).
35. 132 S. Ct. 665 (2012).
36. *Id.* at 669.
37. *Id.* at 675 (Sotomayor, J., concurring in the judgment).
38. 132 S. Ct. 617 (2012).
39. *See generally* Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971) (authorizing a Fourth Amendment damages action against federal employees).
40. *See* Carlson v. Green, 446 U.S. 14 (1980) (authorizing an Eighth Amendment damages action against employees at a prison run by the federal government).
41. 132 S. Ct. at 625.
42. *Id.*
43. *Id.* at 627 (Ginsburg, J., dissenting) (quoting *Carlson*, 446 U.S. at 23).
44. 132 S. Ct. 2073 (2012).

ing the balance of the costs with bonds. When the city made the switch, it told homeowners who were paying their past obligations in installments that their remaining debts were forgiven, but it refused to issue refunds to homeowners who had already paid their debts in full. Many of the homeowners who had already paid off their debts sued the city, alleging a violation of their equal-protection rights.

Affirming Indiana's high court, the Supreme Court found a rational basis for the city's differing treatment of the homeowners. Writing for six justices, Justice Breyer said that either of the city's other alternatives—asking the installment-paying homeowners to continue paying down their debts or issuing refunds to those who had already paid their obligations in full—would have entailed administrative costs that the city rationally could have wished to avoid. Joined by Justices Scalia and Alito, Chief Justice Roberts dissented. The Chief Justice agreed that "we give great leeway to taxing authorities in this area," but argued that "every generation or so a case comes along when this Court needs to say enough is enough, if the Equal Protection Clause is to retain any force in this context."[45]

FEDERAL JURISDICTION

FEDERAL CAUSES OF ACTION

In *Mims v. Arrow Financial Services*,[46] the Court unanimously ruled that state and federal courts have concurrent subject-matter jurisdiction over private claims brought under the Telephone Consumer Protection Act of 1991. The Act provides a private cause of action for invasive telemarketing practices and authorizes plaintiffs to sue "in an appropriate court of [a] State" if such an action is "otherwise permitted by the laws or rules of court of [that] State."[47] The justices found that Congress did not thereby grant state courts exclusive jurisdiction over private claims brought under the Act. Writing for the Court, Justice Ginsburg explained that when federal law creates a cause of action and provides the substantive rules for adjudicating that cause of action, there is a strong presumption in favor of at least concurrent original federal jurisdiction under 28 U.S.C. § 1331. That presumption can be overcome only if—contrary to the facts here—Congress made it clear that it intended to divest the federal courts of their power to adjudicate the claims.

POLITICAL-QUESTION DOCTRINE

In *Zivotofsky v. Clinton*,[48] the Court clarified the scope of the political-question doctrine. The State Department had adopted a policy directing passport officials to list Jerusalem, rather than Israel, as the place of birth when preparing passports for persons born in Jerusalem. In 2002, Congress responded by enacting legislation stating that individuals born in Jerusalem could, upon their or their guardians' request, list Israel as their place of birth on their birth certificates or passports. Upon Menachem Zovotofsky's birth in Jerusalem, his parents (who were American citizens) applied for a United States passport for him and asked that his place of birth be listed as "Jerusalem, Israel." Citing its policy, the State Department refused and issued Zivotosky a passport that listed only "Jerusalem" as his place of birth. His parents sued the Secretary of State for declaratory and injunctive relief. Affirming the district court's dismissal of the case as a nonjusticiable political question, the United States Court of Appeals for the District of Columbia Circuit found that adjudicating the case would interfere with the Executive's exclusive power to recognize foreign sovereigns and determine the political status of Jerusalem. The Supreme Court reversed and remanded. Writing for six members of the Court, Chief Justice Roberts agreed that the federal judiciary cannot itself decide whether Jerusalem is Israel's capital, but found that the case presented separate questions over which the courts do have the power to speak—namely, whether the Secretary of State violated Zivotofsky's federal statutory rights and whether the legislation on which Zivotofsky relied is constitutional. If the statute infringes upon the President's power, the Court wrote, then the courts should declare the statute unconstitutional, rather than declare the case nonjusticiable.

[C]hanges in technology and the media landscape have caused many to wonder whether the *Pacifica* Court's rationales for allowing the government to restrict broadcasts of indecency remain apt.

FIFTH AMENDMENT—DUE PROCESS

Many court-watchers had anticipated that the Federal Communications Commission's recent actions against Fox Television Stations and ABC for fleeting expletives and fleeting nudity would prompt the Court to reassess its 1978 ruling in *FCC v. Pacifica Foundation*.[49] *Pacifica* has come under increasing pressure in recent years, as changes in technology and the media landscape have caused many to wonder whether the *Pacifica* Court's rationales for allowing the government to restrict broadcasts of indecency remain apt. It turns out, however, that the FCC's enforcement actions against Fox and ABC tripped over the Fifth Amendment's Due Process Clause instead, leaving the First Amendment issues to be decided another day.

In *FCC v. Fox Television Stations* (consolidated with *FCC v. ABC, Inc.*),[50] the Court focused on three instances of alleged indecency: Cher's unscripted use of the f-word during the 2002 Billboard Music Awards, broadcast by Fox; Nicole Richie's unscripted use of the s- and f-words during the same awards show on Fox the following year; and a seven-second display of an actress's buttocks (together with a momentary side view of one of her breasts) during a 2003 episode of ABC's *NYPD Blue*.

To understand the Court's decision, a brief timeline is

45. *Id.* at 2087 (Roberts, C.J., dissenting).
46. 132 S. Ct. 740 (2012).
47. 47 U.S.C. § 227(b)(3).
48. 132 S. Ct. 1421 (2012).
49. 438 U.S. 726 (1978).
50. 132 S. Ct. 2307 (2012).

[T]he Court ruled that both the Free Exercise Clause and the Establishment Clause bar ministers from suing their religious employers for employment discrimination.

required. When the *Pacifica* Court announced First Amendment standards allowing the FCC to regulate the broadcast of indecent speech, it explicitly noted that it was reserving judgment on whether "an occasional expletive . . . would justify any sanction."[51] For many years, the FCC took few actions against broadcast indecency. In 2001, the FCC signaled that it would begin to move more aggressively against indecency, but stated that an enforcement action was less likely if the given instance of alleged indecency was "'fleeting in nature.'"[52] In response to an award recipient's use the f-word during NBC's 2003 broadcast of the Golden Globe Awards, however, the FCC issued what has come to be known as the *Golden Globes* Order, finding that NBC's broadcast of the f-word was indecent despite its single and momentary use.

The FCC applied the *Golden Globes* standard against Fox and ABC, even though their broadcasts occurred *prior* to the *Golden Globes* Order, and even though in *Golden Globes* itself the FCC opted not to fine NBC because the agency recognized it was using that case to announce new standards. With Justice Sotomayor not participating, eight justices concluded that the FCC's actions against Fox and ABC were unconstitutional. Justice Kennedy wrote for seven members of the Court, finding that punishing Fox and ABC would violate the fundamental due-process principle "that laws which regulate persons or entities must give fair notice of conduct that is forbidden."[53] At the time of the FOX and ABC broadcasts, the Court found, the FCC's policies "gave no notice to Fox or ABC that a fleeting expletive or a brief shot of nudity could be actionably indecent."[54] The Court thus found it unnecessary to determine the constitutionality of the *Golden Globes* Order or to reassess the *Pacifica* standards.

Justice Ginsburg concurred in the judgment, briefly stating that *Pacifica* "was wrong when issued" and that "[t]ime, technological advances, and the Commission's untenable rulings in the cases now before the Court show why *Pacifica* bears reconsideration."[55] Five months later, concurring in the Court's denial of certiorari in the case concerning Janet Jackson's (in)famous "wardrobe malfunction" during a Super Bowl halftime performance,[56] Justice Ginsburg encouraged the FCC to "reconsider its indecency policy in light of technological advances and the Commission's uncertain course of conduct since this Court's ruling in [*Pacifica*]."[57]

FIRST AMENDMENT—RELIGION

In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*,[58] the Court ruled that both the Free Exercise Clause and the Establishment Clause bar ministers from suing their religious employers for employment discrimination. Hosanna-Tabor had hired Cheryl Perich to work as a schoolteacher. Based on Perich's completion of a variety of academic requirements, Hosanna-Tabor had designated Perich as a "called" teacher, granting her the title of "Minister of Religion, Commissioned." In that capacity, Perich spent most of her time teaching secular subjects, but she also taught a religion class several days each week, led students in prayer, attended weekly chapel services, and led those chapel services twice each year. After Perich missed a significant portion of the 2004-2005 school year due to illness, Hosanna-Tabor hired another teacher to fill the gap for the remainder of the year. Perich insisted that she be allowed to return to work, but Hosanna-Tabor refused. When Perich threatened to take legal action to protect her rights, Hosanna-Tabor terminated her, citing her threat of litigation. The Equal Employment Opportunity Commission sued Hosanna-Tabor on Perich's behalf, alleging that Hosanna-Tabor had violated the Americans with Disabilities Act by retaliating against Perich for threatening to vindicate her ADA rights. Hosanna-Tabor argued that it had terminated Perich because, by threatening to sue, she had violated the church's religious teaching that church members should resolve their disputes internally.

Led by Chief Justice Roberts, the Court ruled unanimously in Hosanna-Tabor's favor, joining the many circuit courts that had already recognized a "ministerial exception" to employment-discrimination laws. "Requiring a church to accept or retain an unwanted minister," the Chief Justice wrote, "interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs."[59] The Court declined "to adopt a rigid formula for determining when an employee qualifies as a minister," choosing instead to begin its line of "ministerial exception" cases by engaging in a fact-intensive analysis of Perich's own circumstances.[60] The Court found that Perich was a minister because Hosanna-Tabor had formally designated her in those terms, Perich had held herself out to the church and others as a minister, and Perich's job duties included conveying the church's teachings and performing other religious functions. In response to the EEOC's insistence that recognizing a ministerial exception would license religious groups to engage in

51. 438 U.S. at 750.
52. 132 S. Ct. at 2314 (quoting the FCC's 2001 policy statement).
53. *Id.* at 2317.
54. *Id.* at 2318.
55. *Id.* at 2321 (Ginsburg, J., concurring in the judgment).
56. The Third Circuit thus had the last word in the Janet Jackson case, invalidating the FCC's actions against CBS because the agency had "improperly imposed a penalty on CBS for violating a previously unannounced policy." CBS Corp. v. FCC, 663 F.3d 122, 124 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 2677 (2012).
57. FCC v. CBS Corp., 132 S. Ct. 2677, 2678 (2012) (Ginsburg, J., concurring in the denial of certiorari).
58. 132 S. Ct. 694 (2012).
59. *Id.* at 706.
60. *Id.* at 707. Joined by Justice Kagan, Justice Alito wrote separately to say that "formal ordination and designation as a 'minister'" should not be central to the analysis, lest churches that do not use those procedures or terms be excluded from the protection of the "ministerial" exception. *Id.* at 711 (Alito, J., concurring).

objectionable behavior (such as hiring children or aliens, or punishing ministerial employees for reporting criminal conduct), the Court said that it would "address the applicability of the exception to other circumstances if and when they arise."[61]

FIRST AMENDMENT—SPEECH

In addition to *Reichle v. Howards*[62] (which concerned speech but is better categorized as a qualified-immunity case) and *FCC v. Fox Television Stations*[63] (which has First Amendment implications but is better categorized as a Fifth Amendment case), the Court decided two noteworthy civil free-speech cases last Term.[64]

CAMPAIGN FINANCE AND CORPORATE SPEECH

In its 2010 ruling in *Citizens United v. Federal Election Commission*, the Supreme Court ruled (among other things) that "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption" in American elections.[65] The following year, the Montana Supreme Court declared that, due to that State's particularly rocky history of corporate corruption in state politics, the Montana Legislature was permitted to impose civil penalties on any corporation that makes "a contribution or an expenditure in connection with a candidate or a political committee that supports or opposes a candidate or a political party."[66] In *American Tradition Partnership v. Bullock*,[67] a five-justice majority of the Court summarily reversed in a one-page *per curiam* ruling, finding *Citizens United* wholly dispositive. Joined by Justices Ginsburg, Sotomayor, and Kagan, Justice Breyer filed a short dissent, stating that *Citizens United* was wrongly decided and that, even if the Court's ruling in that case were apt in some jurisdictions, Montana's history gave it a particularly "compelling interest in limiting independent expenditures by corporations."[68]

UNIONS—NONMEMBERS AND SPECIAL ASSESSMENTS

Although the Court's holding in *Knox v. Service Employees International Union*[69] is noteworthy in its own right, far more significant is five justices' suggestion in *dicta* that prior courts have given their blessing to arrangements that might violate the First Amendment.

Under the Court's past cases, a public-sector union may annually bill nonmember employees in a given unit to help pay the costs of that unit's "chargeable expenses"—namely, the costs of engaging in the kind of collective-bargaining activities that inure to the benefit of all of a unit's employees. The Court has said, however, that the First Amendment bars a union from forcing nonmembers to help pay for the union's political and ideological activities. Following the procedure approved in *Teachers v. Hudson*,[70] a union can annually notify members and nonmembers alike of what the union's dues will be for the coming year, so long as it gives nonmembers an opportunity to "opt out" from the union's political and ideological activities and thus pay reduced fees targeted solely for the union's anticipated chargeable expenses.

What is most significant about the ruling . . . was the discomfort that the majority expressed with some of the Court's prior rulings regarding unions and nonmember employees.

In *Knox*, a public-sector union in California (the SEIU) announced to members and nonmembers what the annual dues would be for 2005 and gave nonmembers a period of time to opt out from the political and ideological portion of the tab. After that opt-out period had closed, however, the SEIU concluded that it needed to raise additional money quickly to engage in political battles that were taking shape in the state. The SEIU issued a special assessment aimed at creating what it called "a Political Fight-Back Fund." It did not give nonmembers the ability to opt out, but it did tell those nonmembers who earlier had opted out from the political and ideological portion of the annual dues that they could pay a comparably reduced portion of the special assessment.

Joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas, Justice Alito found that the First Amendment obliged the SEIU to provide nonmembers with a period of time in which to decide whether they wanted to contribute to the Fight-Back Fund, and that the union could collect funds from nonmembers for the Fight-Back Fund only if they affirmatively opted in. Justices Sotomayor and Ginsburg concurred in the judgment, agreeing that the SEIU had violated nonmembers' rights but objecting to the majority's decision to require an opt-in (rather than an opt-out) scheme.[71]

What is most significant about the ruling—and what especially drew the criticism of Justices Sotomayor and Ginsburg in their concurrence in the judgment and Justices Breyer and Kagan in their dissent—was the discomfort that the majority expressed with some of the Court's prior rulings regarding unions and nonmember employees. Justice Alito stressed that forcing public-sector employees to contribute to unions—even if for collective-bargaining activities—raises serious First Amendment concerns. "Our cases to date have tolerated this 'impingement,'" he wrote, "and we do not revisit today whether the Court's former cases have given adequate recognition to the critical First Amendment rights at stake."[72] He

61. *Id.* at 710.
62. 132 S. Ct. 2088 (2012),
63. 132 S. Ct. 2307 (2012).
64. On the criminal side, see *United States v. Alvarez*, 132 S Ct. 2537 (2012) (finding an irreconcilable conflict between the First Amendment and the Stolen Valor Act).
65. 130 S. Ct. 876, 909 (2010).
66. MONT. CODE ANN. §13-35-227(1) (2011).
67. 132 S. Ct. 2490 (2012).
68. *Id.* at 2491 (Breyer, J., dissenting).
69. 132 S. Ct. 2277 (2012).
70. 475 U.S. 292 (1986).
71. Justices Breyer and Kagan dissented, relying in part upon arguments relating to administrative burdens and the SEIU's prior under-charging of nonmembers for chargeable expenses.
72. 132 S. Ct. at 2289.

[T]he Court ruled . . . that a private attorney may claim qualified immunity when sued under Section 1983 for the role he played in helping city officials investigate allegations of wrongdoing by a city employee.

expressed strong doubts about whether the desire to prevent free-riding was sufficient to justify those forced contributions by nonmembers. He also criticized the current rule that unions can require nonmembers to opt out if they do not wish to pay for the union's political and ideological activities as part of their annual fees, rather than presume that nonmembers do not wish to contribute and therefore require them to opt in if that presumption is mistaken. Justice Alito stated that the current arrangement is " a remarkable boon for unions," that the Court has paid "surprisingly little attention" to the choice between opt-out and opt-in arrangements, and that the Court's prior approval of opt-out schemes is "an historical accident" resulting from the Court's thinly considered "dicta" in a case half a century ago.[73] The majority indicated that those past rulings "approach, if they do not cross, the limit of what the First Amendment can tolerate," but the justices did not find it necessary to resolve that question here.[74] Non-union employees who bristle at the current state of the law undoubtedly will find in *Knox* an invitation to give the Court an opportunity to address these matters anew.

QUALIFIED IMMUNITY

The Court decided two noteworthy qualified-immunity cases last Term, the first dealing with private individuals' entitlement to qualified immunity when they do short-term work for governmental bodies and the second dealing with retaliatory arrests.

Invoking memories of a time in American history when private individuals frequently stepped in to help city, state, and federal entities carry out their business, the Court ruled in *Filarsky v. Delia*[75] that a private attorney may claim qualified immunity when sued under Section 1983 for the role he played in helping city officials investigate allegations of wrongdoing by a city employee. The United States Court of Appeals for the Ninth Circuit had held that the attorney could not claim qualified immunity because he was not a city employee. The Supreme Court unanimously reversed. Writing for the Court, Chief Justice Roberts returned to the familiar principle that Section 1983 did not abrogate well-established common-law immunities. Citing numerous examples, the Chief Justice said that, in the years leading up to Section 1983's enactment, governments frequently retained private individuals to help do the public's work, and courts did not distinguish between those private individuals and government employees when affording immunity to suit.

In *Reichle v. Howards*,[76] the Court ruled that Secret Service agents could raise the qualified-immunity defense in a lawsuit arising from an incident that occurred when they were protecting Vice President Dick Cheney at a Colorado shopping mall. Steven Howards had approached the Vice President and told him that the administration's policies in Iraq were "disgusting," then touched the Vice President's shoulder as the Vice President walked away. Secret Service agents approached Howards, who falsely denied touching the Vice President. Possessing probable cause to believe that Howards had lied to them and had physically touched the Vice President, the agents placed Howards under arrest. State officials charged him with harassment, but those charges were later dropped. Howards then sued the agents under Section 1983 and *Bivens*, alleging that the agents had arrested him in retaliation for his remarks to the Vice President about Iraq. Writing for six members of the Court, Justice Thomas found that the agents were entitled to qualified immunity because "it was not clearly established that an arrest supported by probable cause could violate the First Amendment."[77] The Court reserved judgment on the merits of the overarching constitutional question, declining to say whether a person does indeed have a First Amendment right to be free from a retaliatory arrest when officials have probable cause to arrest on other grounds. Joined by Justice Breyer, Justice Ginsburg concurred in the judgment. Distinguishing ordinary law-enforcement officers from those charged with protecting public officials, she argued that the former would not be entitled to qualified immunity in comparable circumstances, but that officers charged with making split-second assessments of threats to public officials are entitled to rely on an individual's statements when determining whether that person poses an immediate threat of harm. (Justice Kagan did not participate in the case.)

SOVEREIGN IMMUNITY AND THE FMLA

In *Coleman v. Court of Appeals of Maryland*,[78] the Court returned to the task of evaluating efforts by Congress to use its powers under Section 5 of the Fourteenth Amendment to abrogate a state's sovereign immunity. Daniel Coleman had sued the Maryland Court of Appeals (his former employer), alleging that the court violated his rights under the Family and Medical Leave Act by denying him sick leave. The FMLA identifies several circumstances in which an eligible employee is annually entitled to up to twelve weeks of leave. Most of the statute's provisions concern instances in which an employee needs to care for an ailing family member, but the "self-care" provision on which Coleman relied entitles an employee to obtain leave when "a serious health condition . . . makes the employee unable to perform the functions of" his or her job.[79] The Court already had ruled in *Nevada Department of Human Resources v. Hibbs*[80] that Congress validly stripped the states of their immunity for violations of one

73. *Id.* at 2290.
74. *Id.* at 2291.
75. 132 S. Ct. 1657 (2012).
76. 132 S. Ct. 2088 (2012).
77. *Id.* at 2093.
78. 132 S. Ct. 1327 (2012).
79. 26 U.S.C. § 2612(a)(1)(D).
80. 538 U.S. 721 (2003).

of the family-care provisions because Congress was rectifying a history of sex-based discrimination in states' administration of their family-leave policies. Here in *Coleman*, however, five justices concluded that states retained their immunity against damages suits for violations of the self-care provision.

Justice Kennedy wrote for a plurality of the Court, joined by the Chief Justice and Justices Thomas and Alito. Invoking the Court's reigning Section 5 analysis, the plurality found that the self-care provision was not "congruent and proportional" to any pattern of unconstitutional behavior by the states, and thus amounted to an effort by Congress to rewrite the Fourteenth Amendment.[81] When Congress enacted the FMLA, the plurality wrote, nearly all state employees were covered by paid sick-leave plans, and Congress never identified any pattern of sex discrimination in the states' administration of those plans. The plurality rejected Coleman's argument that the self-care provision was meant to attack sex discrimination in tandem with the family-care provisions. Coleman's argument went like this: if only the FMLA's family-care provisions had been enacted, some public and private employers would fear that women would miss a lot of work to care for sick family members; those employers thus would have an incentive to discriminate against female job applicants; and so Congress added the self-care provision to provide a category of leave that men would use, thereby helping to close the gap between the amounts of time that men and women could be expected to miss work. The plurality found this argument "overly complicated," "unconvincing," and unsupported by the legislative record.[82]

Justice Scalia concurred in the judgment, reiterating his view that, "outside the context of racial discrimination (which is different for *stare decisis* reasons)," the congruence and proportionality test should be abandoned and Congress's power under Section 5 should be limited to regulating "conduct that *itself* violates the Fourteenth Amendment."[83]

Justice Ginsburg dissented, joined by Justices Breyer, Sotomayor, and Kagan. She found that Congress wrote the self-care provision in broad, gender-neutral terms to shield women from the discrimination that might result if federal law had more narrowly provided self-care leaves only for illnesses relating to pregnancy and childbirth. Drawing heavily from *Hibbs*, Justice Ginsburg wrote that Congress had substantial evidence of public employers' discrimination against women—especially pregnant women—in the workplace. The dissent concluded by offering employees a measure of solace. As the Maryland court itself conceded, Justice Ginsburg wrote, the self-care provision is inarguably a valid exercise of Congress's power under the Commerce Clause. While that is not sufficient under the Court's precedent to permit Congress to abrogate a state's immunity from suits for damages, she said, it is sufficient for employees to get injunctive relief under *Ex parte Young*[84] and for the federal government to seek relief on an employee's behalf.

SUPREMACY CLAUSE

In *Douglas v. Independent Living Center of Southern California*,[85] a slim majority of the Court decided to sidestep, at least for the time being, the difficult question on which it had granted certiorari: can Medicaid providers and beneficiaries maintain a cause of action directly under the Supremacy Clause to enjoin state officials from implementing state regulations that allegedly are preempted by federal law? To alleviate stress on its budget, California had announced that it planned to reduce the rates at which it would reimburse certain Medicaid providers. Pursuant to federal requirements, California submitted those plans to the federal Centers for Medicare and Medicaid Services (CMS) for approval. While that request for approval was pending, various Medicaid providers and beneficiaries filed federal lawsuits seeking to enjoin California officials from implementing the reimbursement reductions. The plaintiffs argued that California's plans conflicted with—and thus were preempted by—Section 30(A) of the Medicaid Act, which requires states to provide reimbursements "sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area."[86] After the case was orally argued before the Supreme Court, the CMS approved most of the state's planned reductions, finding them consistent with the Medicaid Act's requirements. The Court then had to determine whether the CMS's approval had any bearing on the Court's disposition of the case.

Justice Breyer hinted that the plaintiffs faced an uphill climb: the CMS was not a party to the pending Supremacy Clause litigation, making that litigation an inefficient vehicle for adjudicating the merits of the agency's findings . . . .

Writing on behalf of himself and Justices Kennedy, Ginsburg, Sotomayor, and Kagan, Justice Breyer concluded that the case should be remanded without immediate resolution of the Supremacy Clause issue. Given the CMS's approval of the reductions, Justice Breyer found, it was possible that the unhappy Medicaid providers and beneficiaries should now be required to seek judicial review of the CMS's decision under the Administrative Procedure Act, rather than continue to press for relief in an action brought directly under the Supremacy Clause. Justice Breyer hinted that the plaintiffs faced an uphill climb: the CMS was not a party to the pending Supremacy Clause litigation, making that litigation an inefficient vehicle for adjudicating the merits of the agency's findings; allowing a Supremacy Clause action to proceed would

81. 132 S. Ct. at 1335 (plurality op.).
82. *Id.* at 1336 (plurality op.).
83. *Id.* at 1338 (Scalia, J., concurring in the judgment).
84. 209 U.S. 123 (1908).
85. 132 S. Ct. 1204 (2012).
86. 42 U.S.C. § 1396a(a)(30)(A).

[T]he Court unanimously confirmed the Social Security Administration's finding that the two posthumously conceived claimants . . . did not qualify for survivors benefits under the Social Security Act.

cause "inconsistency or confusion" if the federal courts ultimately reached a conclusion that differed from the CMS's findings; and courts typically owe a measure of deference to agencies' interpretations of the legislation they have been tasked with implementing.[87]

Joined by Justices Scalia, Thomas, and Alito, Chief Justice Roberts dissented, arguing that the Court should have resolved the Supremacy Clause issue in favor of the state. Congress had not itself provided a private cause of action to enforce Section 30(A), the Chief Justice wrote, and so permitting an action directly under the Supremacy Clause would allow plaintiffs to make an "end-run" around precedent that bars plaintiffs from suing to enforce federal statutes in the absence of a statutory cause of action.[88] Acknowledging the longstanding availability of injunctive relief against state officials under *Ex parte Young*,[89] the dissent argued that such relief is available in the absence of a federal statutory cause of action only if—unlike the Medicaid providers and beneficiaries here—the plaintiff is threatened with a state enforcement proceeding and wishes preemptively to assert a federal defense. In support of that reading of *Ex parte Young*, the dissent cited a line from a 2011 concurring opinion by Justice Kennedy.[90] When a majority of the Court agrees that the time is ripe to resolve this important issue, Justice Kennedy might indeed cast the decisive vote.

OTHER NOTABLE RULINGS

In *Astrue v. Capato*,[91] the Court unanimously confirmed the Social Security Administration's finding that the two posthumously conceived claimants in this case did not qualify for survivors benefits under the Social Security Act. To determine whether a given claimant is the "child" of a decedent and thus eligible for survivors benefits, the Act directs the Social Security Commissioner's attention to the laws of intestacy in the state where the claimant resides: if the claimant is ineligible to inherit under that state's intestacy laws, the claimant is typically deemed not to be a "child" of the decedent within the meaning of the Act. The two claimants in this case resided in Florida, which restricts intestate succession to individuals conceived during the decedent's lifetime. The claimants (conceived through in vitro fertilization after the father's death) thus were ineligible for survivors benefits.

In *FAA v. Cooper*,[92] the Court ruled 5-4 that when Congress stated in the Privacy Act of 1974 that an individual may sue an agency for "actual damages" resulting from certain kinds of "intentional or willful" violations of the Act,[93] Congress did not thereby waive the federal government's sovereign immunity against claims seeking damages for mental or emotional distress. Rather, it only waived the government's immunity against claims for pecuniary damages.

In *Freeman v. Quicken Loans, Inc.*,[94] the Court unanimously held that a provision of the Real Estate Settlement Procedures Act (12 U.S.C. § 2607(b)) bars a settlement-service provider from giving or accepting a portion of a settlement-service charge to a different person or entity that did nothing to earn the payment, but it does not bar a settlement-service provider from itself collecting unearned fees from clients. The Court reserved judgment on whether fees paid by borrowers to obtain lower interest rates are settlement-service charges within the meaning of the statute.

In *Golan v. Holder*,[95] the Court held that Congress acted within the constraints of the Copyright Clause and the First Amendment when it granted copyright protection to previously created works that had already entered the public domain.

In *Holder v. Martinez-Gutierrez*,[96] the Court unanimously accepted as reasonable the Board of Immigration Appeals' conclusion that the Attorney General cannot cancel an alien child's removal from the United States unless the child himself or herself satisfies the statute's residency requirements for such cancellation. The parents' years of residency within the United States cannot be imputed to the child.

In *Mayo Collaborative Services v. Prometheus Laboratories*,[97] the Court denied patent protection to a company that had done little more than identify a correlation between (1) the quantity of a person's natural production of certain metabolites in response to taking thiopurine drugs to treat autoimmune diseases and (2) the likelihood that the person's dosage would be either ineffectively low or harmfully high. In seeking patent protection, the Court found, the company had merely described natural laws, rather than set forth a unique way to apply them.

In *PPL Montana v. Montana*,[98] the Court clarified the test by which courts and others are to determine whether states hold title to particular riverbeds. PPL operated numerous hydroelectric facilities on three rivers in Montana. Montana contended that it held title to the full length of any river's bed within the state's borders, so long as much (even if not all) of that river was navigable at the time Montana acquired statehood in 1889. The state thus claimed that it could charge PPL

87. 132 S. Ct. at 1210-11.
88. *Id.* at 1204 (Roberts, C.J., dissenting).
89. 209 U.S. 123 (1908).
90. *See* Virginia Office for Protection & Advocacy v. Stewart, 131 S. Ct. 1632, 1642 (2011) (Kennedy, J., concurring).
91. 132 S. Ct. 2021 (2012).
92. 132 S. Ct. 1441 (2012).
93. 5 U.S.C. § 552a(g)(4)(A).
94. 132 S. Ct. 2034 (2012).
95. 132 S. Ct. 873 (2012).
96. 132 S. Ct. 2011 (2012).
97. 132 S. Ct. 1289 (2012).
98. 132 S. Ct. 1215 (2012).

rent. In PPL's view, however, a segment-by-segment analysis was required, with the federal government continuing to hold title to the riverbeds in those particular areas that were not navigable in 1889. Drawing from English common law, a line of nineteenth- and twentieth-century Supreme Court rulings, and a wealth of historical research about the exploration of American rivers, the Court unanimously sided with PPL.

In *Taniguchi v. Kan Pacific Saipan, Ltd.*,[99] the Court held that 28 U.S.C. § 1920(6), which authorizes federal courts to award a prevailing party costs for "compensation of interpreters," only covers costs for oral translations, and not costs for translating written documents. "Based on our survey of the relevant dictionaries," Justice Alito wrote for six members of the Court, "we conclude that the ordinary or common meaning of 'interpreter' does not include those who translate writings."[100]

In *United States v. Home Concrete Supply*,[101] the Court held that the ordinary three-year statute of limitations (rather than a more narrowly available six-year statute of limitations) applies to efforts by the federal government to collect unpaid income taxes resulting from taxpayers' overstatement of their basis in sold property. The statute providing a six-year limitations period applies only when (among other things) a taxpayer "*omits* from gross income an amount properly included therein."[102] By a 5-4 vote, the Court found that the word "omits" denotes leaving something unmentioned, and thus does not include instances when a taxpayer inflates his or her basis in property.

LOOKING AHEAD

At the time of this writing, the Court is slated to hear a number of attention-worthy civil cases during the 2012-2013 Term. The case likely to draw the most press is *Fisher v. University of Texas*,[103] in which the Court will take a close look at the University of Texas's race-conscious undergraduate admissions policy. Other pending cases of broad interest to the legal profession will address whether Congress exceeded its constitutional authority when it reauthorized Section 5 of the Voting Rights Act,[104] a state's effort to require proof of citizenship by individuals attempting to register to vote,[105] employers' vicarious liability under Title VII for harassment committed by supervisors,[106] corporations' civil tort liability under the Alien Tort Statute,[107] whether a state may deny citizens of other states the same right of access to public records that it affords to its own citiens,[108] the United States' liability for damages resulting from its own violations of the Fair Credit Reporting Act,[109] the threshold at which periodic flooding becomes a compensable taking under the Takings Clause,[110] whether courts owe any measure of deference to a federal agency's determination of its own statutory jurisdiction,[111] the circumstances in which a case becomes moot as a result of defendants' settlement offers,[112] whether attorneys can use personal information obtained from a state's department of motor vehicles to identify possible clients,[113] the reach of the Clean Water Act and the modes by which citizens can enforce that legislation,[114] the application of copyright law's first-sale doctrine to copies acquired abroad and imported into the United States,[115] issues relating to patent exhaustion and self-replicating technologies,[116] employees' plan-reimbursement obligations under ERISA,[117] and various issues relating to class actions.[118]

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99. 132 S. Ct. 1997 (2012).
100. *Id.* at 2003.
101. 132 S. Ct. 1836 (2012).
102. 26 U.S.C. § 6501(e)(1)(A) (emphasis added).
103. No. 11-345.
104. Shelby County v. Holder, No. 12-96
105. Arizona v. Inter-Tribal Council of Arizona, Inc., No. 11-71.
106. Vance v. Ball State Univ., No. 11-556.
107. Kiobel v. Royal Dutch Petroleum Co., No. 10-1491.
108. McBurney v. Hurlbert, No. 12-17.
109. United States v. Bormes, No. 11-192.
110. Arkansas Game & Fish Comm'n v. United States, No. 11-597.
111. City of Arlington v. FCC, No. 11-1545.
112. Genesis Healthcare Corp. v. Symczyk, No. 11-1059.
113. Maracich v. Spears, No. 12-25.
114. Decker v. Northwest Envtl. Def. Ctr., Nos. 11-338, 11-347; Los Angeles Cnty. Flood Control Dist. v. Natural Res. Def. Council, No. 11-460.
115. Kirtsaeng v. John Wiley & Sons, Inc., No. 11-697.
116. Bowman v. Monsanto Co., No. 11-796.
117. U.S. Airways, Inc. v. McCutchen, No. 11-1285.
118. Amgen, Inc. v. Connecticut Retirement Plans & Trust Funds, No. 11-1085; Comcast Corp. v. Behrend, No. 11-864; Standard Fire Ins. Co. v. Knowles, No. 11-1450.