Midnight Approaches: A Supreme Court 2018-19 Term Preview

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Decades ago, wealthy far right interests started pouring money into an elaborate network of organizations established to advance radical right-wing theories about the law. They also provided political training for young conservatives to advance in electoral office, empowering them to change the makeup of the federal courts. With Justice Kennedy possibly being replaced by a nominee fully vetted by the Federalist Society, they now stand poised to grasp the unified and consistent far-right majority on the Supreme Court they have worked toward for decades.

As bad as it has been over the past decade, the Supreme Court would have been far worse without Justice Kennedy. He sometimes imposed at least some restraint on the arch-conservatives in order to keep him with their 5-4 majority. In some cases, he voted with them only on the result but not on their reasoning, denying them a majority opinion fully adopting their ideology. He even joined the moderate justices on occasion, advancing LGBTQ equality, maintaining affirmative action, and protecting abortion rights.

No longer.

Basic tenets of the Constitution are at risk, threatening every aspect of our lives. These include reasonable limits on powerful corporations; the right to vote; racial equity; gender equity; church-state separation; LGBTQ equality; and so much more.

Several cases this term offer the Roberts Court opportunities to expand corporate rights and impose their right-wing political ideology on the nation. Two particularly important cases are being argued on the first two days of the new term, which is likely one of the many reasons that Republicans have been in such a rush to get Kavanaugh confirmed quickly. They present the ultra-right with a long-sought-after opportunity to strike a blow against environmental regulations (*Weyerhaueser v. U.S. Fish and Wildlife Service*) and to revive a constitutional doctrine that could decimate federal agencies across the board (*Gundy v. United States*).

Corporate Power and Restrictions on Government Regulation

***Weyerhaueser v. U.S. Fish and Wildlife Service*: Environmental law; scope of Commerce Clause to protect the environment**

This is a challenge to a U.S Fish & Wildlife Service (FWS) designation of private land as a "critical habitat" for the endangered dusky gopher frog. Weyerhaeuser and other owners want to use the land for development and timber. They claim the designation violated the Endangered Species Act because its economic impact outweighs the environmental benefit, and because the land is not currently inhabited—or even inhabitable—by the frog. Their challenge, if successful, could have significant implications beyond this one case, because it is based not only on the Endangered Species Act (ESA), but also on the Constitution.

The ESA requires the Interior Department to designate critical habitats for an endangered species, and they can include both areas "occupied by the species" or "areas outside the geographical area occupied by the species" that are "essential for conservation of the species." Congress did not define "essential," but instead delegated that authority to the Interior Department (which FWS is part of).

FWS engaged in extensive research and determined that designating land only where the dusky gopher frog already lives would not preserve the species. The agency determined that the land Weyerhaueser wants to develop is essential for conservation of the species, as required by the Endangered Species Act.

The landowners and developers argue that land where the species cannot currently live can't reasonably be considered "essential for its conservation" under the statute. But even if it can be, they argue, the Court should interpret the provision otherwise in order to avoid what they claim are constitutional concerns. They claim that the Commerce Clause does not allow Congress to regulate land for the dusky gopher frog where that species does not and currently cannot live. More generally, even if the frog were present on its parcel, they state flatly that "[t[here is no interstate commerce in the dusky gopher frog."

Since the New Deal, the Supreme Court has recognized the constitutional legitimacy of any number of laws protecting individuals from the consequences of unbridled corporate power. The environment, workplace safety, food and drug safety, and anti-fraud protections are just a few of the areas where Congress has acted under the Commerce Clause. Weyerhaueser is inviting the conservatives on the Court to start the project of undermining, weakening, and perhaps outright overruling those precedents.

Oral arguments are scheduled for October 1, the first day of the term.

***Gundy v. United States*: Congressional ability to empower other governmental entities to make law**

Although this case involves criminal law, it could potentially have an enormous impact on the modern structure of the U.S. government.

This is a challenge by Herman Gundy to his conviction for not registering as a sex offender when he moved to another state, as required by a 2006 statute passed after he had committed his sex offense. The Sex Offender Registration and Notification Act (SORNA) authorized the Attorney General to determine whether it should apply retroactively, which Gundy argues was an unconstitutional delegation of legislative authority to the executive branch.

The Court has struck down laws under the delegation doctrine only two times, both to invalidate parts of the New Deal in 1935. But since then, the Court has recognized Congress's authority

under the Constitution to delegate rulemaking authority to regulatory agencies that—unlike Congress—have the expertise best-suited to address extremely complex issues. Generally, the Court simply requires that Congress provide some "intelligible principle" to guide the executive branch.

Unlike most of the precedents, this case involves criminal law, which raises the consequence of noncompliance. In a 2012 case on the interpretation of SORNA (as opposed to its constitutionality), both Justice Ginsburg and the late Justice Scalia expressed concerns about this same provision. Then-Judge Gorsuch wrote a dissent on SORNA's delegation of authority to the attorney general in 2015, concluding that the law was unconstitutional.

The Court can resolve this case without undermining its decades of precedent since the New Deal. But the ultra-conservatives may choose to use it as a vehicle to do just that, as a first step toward weakening the ability of administrative agencies to effectively implement laws passed by Congress addressing the environment, workplace safety, telecommunications, food safety, and any number of other areas. Indeed, the conservative Pacific Legal Foundation has filed an amicus brief in favor of Gundy, urging the Court to depart from the "overly deferential" jurisprudence of the past 80 years, a request not made by amici supporting Gundy like the ACLU or the National Association of Federal Defenders.

This may be one of the reasons that Senate Republicans—knowing this case will be argued on the second day of the term—have taken so many corrupt measures to confirm Brett Kavanaugh before then. A justice who was not on the Court during oral arguments may participate in the case anyway, but that has generally not been the practice. The Supreme Court generally decides such cases without the new justice's participation or, on occasion, schedules it for re-argument so all nine can participate.

Oral arguments are scheduled for October 2, the second day of the term.

***Frank v. Gaos*: Weakening class actions**

This is a challenge to a proposed class action settlement in which class members (other than those involved in the lawsuit) would receive no money. Google settled a class action lawsuit for violating users' privacy. But the class is enormous (involving 129 million Google search users) and hard to identify, and it would very difficult to distribute the tiny amount of damages that would be due to each person. So the parties agreed on a "next best use" cash settlement called *cy pres* (from old Norman French) that is commonly used in the context of wills. If someone leaves money for a charity that no longer exists, the probate court will identify another charity that is similar to the original, to best approximate the deceased person's wishes.

In this case, the settlement funds would not go to class members at all, but would instead pay for the class's attorney fees and then go to nonprofits that work on protecting online privacy. Five class members objected, arguing that it violated the requirement that settlements that bind class members must be "fair, reasonable, and adequate." The objectors are attorneys with the Center for Class Action Fairness, a project of the Competitive Enterprise Institute that frequently objects to class action settlements. Backed by amici such as the Chamber of Commerce, they state that if members of a proposed class can't get a direct benefit, then the trial judge must deny class certification. This would be a boon to large corporations, since class actions are sometimes the only way to hold them accountable for unlawful behavior.

Oral arguments are scheduled for October 31.

***Obduskey v. McCarthy & Holthus*: Protections for homeowners during foreclosures**

This is a challenge by homeowner Dennis Obduskey against the company hired by the mortgage holder to foreclose on his house (a "non-judicial foreclosure"). Obduskey claims that the company violated the federal Fair Debt Collection Practices Act (FDCPA), which prohibits abusive practices by professional debt collectors.

The 10th Circuit ruled that companies hired to foreclose on people's homes are enforcing security interests, not collecting debts. Therefore, according to the court, they are not "debt collectors," and the homeowner is not entitled to the statute's protections. Obduskey argues otherwise, noting that the whole point of initiating foreclosure is to pressure the homeowner to pay the debt. In addition, the purpose of the actual foreclosure is to sell the house so the creditor can recover the funds it had loaned.

The NAACP Legal Defense and Education Fund (LDF) filed an amicus brief in support of Obduskey, with a special focus on how the protections of the FDCPA are particularly critical to African Americans and other people of color:

Studies that control for income, credit score, and other risk variables consistently show that borrowers of color were and continue to be disproportionately steered into predatory high-risk loans.

…

The downstream effects of the foreclosure crisis … disproportionately harm Black families and communities of color [and] restrict Black families' options for preventing foreclosure. … The result is that Black families often have fewer options for escaping foreclosure, and they have a particular need for accurate information to evaluate what options they do have.

Oral arguments have not yet been scheduled.

***Virginia Uranium v. Warren*: State ban on uranium mining**

Virginia prohibits uranium mining except on land belonging to the federal government. Virginia Uranium and three other companies sued to overturn this ban. They argue that the federal Atomic Energy Act (AEA) preempts states' authority to ban activities relating to nuclear power out of concern for the effects of radiation.

A divided panel of the Fourth Circuit disagreed for several reasons. It noted that while the AEA explicitly gives the Nuclear Regulatory Commission (NRC) authority to regulate uranium mining on *federal* land, it is says nothing about the NRC's power to regulate elsewhere. In addition, the court found, NRC regulations address refinement and waste disposal activities occurring *after* the uranium is removed from the ground, but the Virginia law says nothing about these processes. Instead, the law is a prohibition that prevents corporations from even getting to the stage where NRC safety regulations would kick in.

The Chamber of Commerce and the Trump administration have filed amicus briefs supporting the businesses.

Oral arguments have been scheduled for November 5.

***Merck Sharp & Dohme Corp. v. Albrecht*: Failing to warn of a medication's dangers**

This is a lawsuit under state law by users injured by the prescription drug Fosamax, claiming that the manufacturer (Merck) should have modified the drug's label earlier to warn users about recently identified serious side effects. The Supreme Court held in 2009's *Wyeth v. Levine* ruling that state-law failure-to-warn claims aren't preempted by federal law unless there is "clear evidence" that the FDA would have rejected a label change. The current case addresses just what constitutes such clear evidence. Merck would make it easier for drug companies to show such "clear evidence" so that the state law cases against them would be dismissed.

Wyeth v. Levine was decided 5-4, with the now-retired Justice Kennedy in the majority. His replacement may be the fifth vote to effectively shield drug manufacturers from lawsuits for not adequately warning the public about potential dangers with their medication.

Oral arguments have not yet been scheduled.

***New Prime Inc. v. Oliveira*; *Henry Schein, Inc. v. Archer and White Sales*; and *Lamps Plus v. Varela*: Arbitration cases**

In a series of 5-4 decisions, the ultra-conservatives on the Court have strengthened the ability of powerful corporations to force one-on-one arbitration on employees, customers, and smaller businesses. The Court has upheld arbitration requirements in contracts that were invalid under state law, in contracts imposed through the unlawful use of monopoly power, and in contracts forcing employees to waive rights that federal labor law says cannot be waived. The effort to privatize the law to the benefit of large corporations continues this term, with three arbitration cases accepted so far.

- ***New Prime Inc. v. Oliveira*:** This is a challenge to a First Circuit ruling that a trucker is not bound to the arbitration agreement that the trucking company sought to impose when he accused it of underpaying him. The First Circuit agreed with the trucker that the Federal Arbitration Act (FAA) does not cover his contract, because the text of the FAA states that it does not cover "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." The company argues the *arbitrator* should make that decision, which would put the job of interpreting congressional legislation into private hands.Oral arguments have been scheduled for October 3.
- ***Henry Schein, Inc. v. Archer and White Sales*:** This is a challenge by dental equipment distributor (and antitrust defendant) Henry Schein, Inc. to a lower court ruling against the arbitration agreement it sought to enforce on a competitor. The arbitration agreement gives the arbitrator the power to decide questions about whether a particular issue is to be decided by arbitration. But in this case, the district judge concluded that the court could decide the issue because the arbitrability claim was groundless, and the conservative Fifth Circuit affirmed the ruling. Henry Schein appealed to the Supreme Court, which has already stayed the circuit court's ruling.Oral arguments have been scheduled for October 29.
- ***Lamps Plus v. Varela*:** This is an employer's challenge to a Ninth Circuit ruling that it cannot compel one-on-one arbitration (rather than class arbitration) on employees harmed by the company's giving away personally identifiable information about them in a

phishing scam. The company claims its arbitration agreement prohibits class actions. The contract states that "arbitration shall be in lieu of any and all lawsuits or other civil legal proceedings relating to my employment." The 9th Circuit upheld a district court finding that this language was ambiguous: Since "any and all legal proceedings" includes class actions, arbitration "in lieu of" a class action lawsuit can reasonably be interpreted to allow class arbitration. Under state law, ambiguity is resolved against the company that drafted the "take it or leave it" contract.Oral arguments have been scheduled for October 29.

***Lorenzo v. SEC*: Liability for securities fraud**

This is a challenge by investment banker Francis Lorenzo against his conviction for securities fraud for sending potential investors emails containing false statements provided and approved by the principal of the company he was seeking investors for. He claims the statute doesn't apply to him, based on the 5-4 corporation-friendly Janus Capital Group decision in 2011, which ruled that a Janus investment advisement company could not be liable for "making" false statements it may have put out about a Janus investment fund in that fund's prospectus, because the fund and not the advisor has ultimate approval over the material.

Janus was all about the word "make" in Rule 10b-5(b). The D.C. Circuit ruled that, under Janus, Lorenzo had not violated Rule 10b-5(b) because under the rule he did not "make" the statements and reversed the SEC on that score. However, the word "make" does not appear in Rules 10b-5(a) or (c), or in the statute these rules implement, and the majority upheld the SEC's conclusion that Lorenzo had violated them.

Judge Brett Kavanaugh was on the panel, writing in dissent that none of the rules covered Lorenzo. If he is confirmed to the Supreme Court, he would presumably recuse himself from this case.

Oral arguments have not yet been scheduled.

***Apple Inc. v. Pepper*: Abuse of monopoly power to raise prices**

As more and more of us rely on electronic devices for work, communications, entertainment, and even health care, large tech companies gain more and more power and influence. In this case, consumers who have purchased apps from Apple's online apps store brought a class action antitrust lawsuit for treble damages against Apple, based on the monopolistic 30% surcharge that Apple added to the price of all apps. That surcharge is paid directly to Apple each time that an app is purchased.

Under longstanding Supreme Court doctrine, only "direct purchasers" have standing to sue an alleged monopolist for damages. The district court ruled that the consumers did not have such standing because they bought through the app store distributor. But the Ninth Circuit reversed, in accord with its interpretation of Supreme Court and other appellate court rulings. If the Supreme Court sides with Apple, it will give large companies like Apple an easy way to make monopolistic surcharges and avoid enhanced treble damages under antitrust law.

The Chamber of Commerce and the Trump administration have filed amicus briefs supporting Apple.

Oral arguments have not yet been scheduled.

***Sturgeon v. Frost*: Protecting national parks**

The Supreme Court agreed to hear a case brought by frequent litigator and Alaska hunter Jim Sturgeon. His case started more than ten years ago, when National Park Service rangers told him that it was a crime to operate his hovercraft (which he was using to hunt moose) on a river that is within the Yukon-Charley Rivers National Preserve, based on a Park Service rule that prohibits the use of hovercraft on public lands. Sturgeon challenged the order in court, claiming that the rule could not be enforced because the river was owned by the state. Although the lower courts had ruled in favor of the state, the Supreme Court in 2016 vacated and remanded the case, ruling that the courts below had misinterpreted the Alaska National Interest Lands Conservation Act (ANILACA), a federal law that governs the National Park Service's authority over lands in Alaska, and deciding that the lower courts should try again to interpret the law.

The Ninth Circuit again ruled that the National Park Service had authority to enforce the rule on the Alaska river. Sturgeon is again asking the Supreme Court to rule that the ANILCA bars the National Park Service from regulating other land – owned by the state, native corporations or private owners – within the boundaries of Alaska national parks.

A number of environmental groups, both inside and outside Alaska, have filed amicus briefs in support of the National Park Service.

Oral arguments have been set for November 5.

***Air & Liquid Systems Corp. v. Devries*: Asbestos liability**

Roberta Devries and Shirley McAfee are both widows of men who served in the United States Navy and developed cancer after being exposed to asbestos. The widows sued a number of product manufacturers, including some who delivered engines and other products to the Navy "bare metal" – that is, without material like insulation containing asbestos, which was added later.

The district court granted summary judgment to the manufacturers. But the Third Circuit reversed and remanded, ruling that the manufacturers could be liable under maritime law if they knew or should have known that their conduct would lead to the injuries – for example, if a manufacturer knew that its product would be used with a part that contained asbestos. The case is very important to the many people exposed to asbestos in the Navy or in connection with work on ships, as well as their families.

The Chamber of Commerce has filed a brief in support of the manufacturers.

Oral arguments have been set for October 10.

Immigration and Immigrants

***Nielsen v. Preap*: Indefinite detention of immigrants who are permanent residents**

This is a class-action lawsuit filed by three immigrants—all longtime documented permanent residents—who are challenging the Department of Homeland Security for taking them into custody and detaining them indefinitely without a bail hearing.

Generally, the Immigration and Naturalization Act guarantees a bond hearing when non-citizens living in the U.S. are taken in for detention, to determine if they are a danger to the community

or a flight risk. But the statute carves out an exception: detention without bail for non-citizens when they are released from criminal custody for having committed certain specified crimes. The question is whether Congress intended this indefinite no-bail provision to apply only to people who are detained by DHS *as soon as they are released from criminal custody* (as the Ninth Circuit ruled), or whether it also applies to non-citizens who are not detained by immigration authorities upon release from criminal custody but are detained later, as happened in this case.

Mony Preap has been here lawfully since he came as an infant refugee from Cambodia in 1981. Eduardo Vega Padilla also immigrated as an infant and has been a lawful permanent resident since 1966. Juan Lozano Magdaleno has been a lawful permanent resident since he immigrated to the United States as a teenager in 1974. All three had long ago finished serving short criminal sentences and had returned to their communities. But years after their release, DHS took them into custody and claimed they had to be held without bail, with no inquiry permitted into whether their lives over the intervening years show them not to be a danger to the community or a flight risk. Preap, Padilla, and Magdaleno are being represented by the ACLU and Asian Americans Advancing Justice.

Oral arguments are scheduled for October 1.

Criminal Justice/Capital Punishment

***Bucklew v. Precythe*: Infliction of extreme pain in execution**

This is an Eighth Amendment challenge by a Missouri man on death row to the method of his planned execution (lethal injection). He has a rare disease that may, in combination with the lethal drugs, cause choking and suffocation. He could experience agonizing pain while the paralytic would prevent him from moving or signaling his pain in any way. Bucklew has requested execution by gas chamber, but the state has refused.

An Eighth Circuit panel ruled that Bucklew had failed to meet his burden of presenting an alternative way for the state to execute him. The court rejected his request for the gas chamber, which Missouri has not used in decades, because there is little data available as to the pain it might cause Bucklew as compared to the lethal injection. The circuit voted 6-4 against en banc review. Among those voting against review were three circuit judges nominated by President Trump: Steve Grasz, David Stras, and Ralph Erickson. The Supreme Court stayed the execution, but by a 5-4 vote with Justice Kennedy joining the moderates. With the remaining justices evenly divided, Kennedy's replacement will likely be the person responsible for how Missouri executes Bucklew.

Oral arguments have been scheduled for November 6.

***Madison v. Alabama*: Executing inmates suffering from senility**

This is an Eighth Amendment challenge to a state's plan to execute Vernon Madison, who has dementia and does not remember the crime he committed. As with Bucklew v. Precythe, the Supreme voted 5-4 to stay the execution, with Kennedy in the majority.

Oral arguments are scheduled for October 2.

***Gamble v. United States*: Multiple prosecutions for the same crime**

One of the major protections of liberty in the Constitution is the prohibition against "double jeopardy," or putting someone on trial more than once for the same crime. The Fifth Amendment states clearly: "… nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb …" Nevertheless, in a 1959 case called *Abbate v. United States*, the Supreme Court held that prosecution in federal and state court for the same conduct does not violate the Double Jeopardy Clause because the state and federal governments are separate sovereigns.

Terance Gamble is currently in prison for possession of a firearm by a convicted felon, having completed his state sentence but serving an additional three years under the federal sentence for the same offense. He urges the Court to overrule *Abbate*, arguing that it goes against the plain text and purpose of the Fifth Amendment and was therefore wrongly decided. Recognizing the importance of *stare decisis*, Gamble points out that there has been an enormous change in the constitutional underpinnings of the 1959 decision: At the time, the Court had not yet held that the Double Jeopardy Clause applies to states. In a 2016 concurrence in a case called *Puerto Rico v. Sánchez Valle*, Justice Ginsburg—joined by Justice Thomas—wrote that the precedent "bears fresh examination in an appropriate case."

Oral arguments have not yet been scheduled.

***Timbs v. Indiana*: Unconstitutionally excessive fines**

While the Eighth Amendment is best known for its prohibition of cruel and unusual punishment, it also prohibits excessive fines. The Supreme Court has never ruled that this part of the amendment was incorporated by the Fourteenth Amendment and made applicable to the states.

Tyson Timbs pleaded guilty to selling heroin twice (to undercover officers each time). The maximum fine under Indiana criminal law was $10,000. In a civil proceeding, the authorities claimed his car, since it was used in the commission of a criminal offense. The car was worth $40,000, four times the maximum fine. Timbs' assertion that this violated the Excessive Fines Clause was rejected by the Indiana Supreme Court, which presumed that this Eighth Amendment provision was not incorporated to the states because the U.S. Supreme Court has never held that it was.

Amicus briefs for Timbs have been filed by organizations across the ideological spectrum, including the Constitutional Accountability Center, the Chamber of Commerce, the National Association of Criminal Defense Lawyers, the Pacific Legal Foundation, the ACLU, the CATO Institute, the NAACP Legal Defense and Education Fund, and the Rutherford Foundation.

Oral arguments have not yet been scheduled.

Disability Rights

***Biestek v. Berryhill*: Denying Social Security disability payments**

This case stems from the denial of Social Security disability benefits to Michael Biestek, a carpenter and construction worker who had been unemployed due to lower back pain from a degenerative disc disease, Hepatitis C, and depression. The denial was based in part on a vocational expert's testimony that Biestek could make an adjustment to do other work in which jobs were available. However, the expert did not provide the data supporting her conclusion. The

question before the Supreme Court is whether such expert testimony without the supporting data can be used to deny disability benefits.

Oral arguments have not yet been scheduled for this case.

Cases in the Pipeline

The Court will be accepting dozens more cases this term. We do not know what they are, but below are a few of the major cases and issues in the lower courts that could potentially reach the Supreme Court:

Presidential Power and Corruption

Blumenthal v. Trump, *District of Columbia v. Trump*, and *Zervos v. Trump* are three cases challenging the president's routine and unprecedented violations of the Foreign and Domestic Emoluments Clauses. One or more of these cases seem likely to eventually reach the Supreme Court. And should the special counsel's investigation of the president, his family, and his campaign lead to subpoenas or indictments against Trump, his efforts to withhold information or otherwise avoid accountability would be decided by the Supreme Court. Indeed, many believe that was a factor in his selection of Brett Kavanaugh, since the nominee believes presidents cannot be criminally indicted or investigated and that Trump has the constitutional authority to fire the special counsel.

Healthcare

Texas v. United States: Conservative states have created a meritless lawsuit to eliminate life-saving protections for millions of people with pre-existing conditions and other key provisions of the Affordable Care Act. President Trump had announced opposition to the ACA as one of his litmus tests for a Supreme Court nominee, and the administration supports the lawsuit effort. The legal argument is so weak that career Justice Department officials refused to sign the brief. Nevertheless, that would not stop an openly partisan Supreme Court justice like Brett Kavanaugh from working with the other ultra-conservatives to undo one of President Obama's signature achievements.

Abortion Rights

June Medical Services v. Gee: TRAP (targeted regulation of abortion providers) laws are presented as protections for women's health, but in reality they are designed to reduce if not eliminate women's access to abortion. On September 26, a sharply divided Fifth Circuit panel upheld Louisiana's TRAP law, despite a similar law in Texas recently being struck down by the Supreme Court in *Whole Woman's Health v. Hellerstedt*. The dissent criticized the majority for inappropriately creating its own factual record in order to reach its conclusion, rather than—as is generally the case—accepting the facts as established by the trial court and focusing only on the law. Should the case reach the Supreme Court, Justice Kennedy will not be there to provide the fifth vote in support of women's constitutional right to abortion. Instead, his replacement will determine the outcome.

Other far right efforts to burden abortion and related rights may soon be heard by the Court, including a Mississippi ban on abortion after 15 weeks of pregnancy (*Jackson Women's Health Center v. Currier*), a restrictive law that effectively bans medication abortions (*Planned*

Parenthood of Arkansas & Eastern Oklahoma v. Jegley), and prohibit Planned Parenthood from serving women on Medicaid (*Andersen v. Planned Parenthood of Kansas and Mid-Missouri*).

Immigrants and Latino Americans

The Court may determine the legality of the Trump administration's mistreatment of immigrants and overall efforts to marginalize Latinos from society: Cases currently in the lower courts include challenges to the administration's policies of forcibly separating immigrant children from their parents at the border; seeking to undo a consent order that had prevented the federal government from keeping children in extended detention; suspending DACA; and punishing sanctuary cities.

LGBTQ Equality

Justice Kennedy authored every one of the Supreme Court's major opinions recognizing LGBTQ equality. Several were decided 5-4, so his replacement could create a new and hostile majority. Certiorari petitions are currently pending in cases addressing whether Title VII's prohibition of sex discrimination in employment includes discrimination on the basis of gender identity (*R.G. & G.R. Harris Funeral Homes v. EEOC*) and sexual orientation (*Altitude Express Inc. v. Zarda*). Treating a woman employee engaged to a man differently from a male employee engaged to a man is obviously a sex-based decision that lower courts are increasingly recognizing as covered by Title VII. In addition, in a seminal 1989 case called *Price Waterhouse v. Hopkins*, the Supreme Court held that employment actions based on sex stereotypes constitute prohibited sex discrimination under Title VII.

Other litigation in the lower courts includes cases like *Arlene's Flowers v. Washington* (denying LGBTQ people their legally-protected right to be free from discrimination in public accommodations under the guise of religious liberty) and *Karnoski v. Trump* (challenging the administration's ban on military service by transgender people).

Church-State Separation

The ultra-conservatives may also give themselves an opportunity to continue their ongoing effort to significantly erode the wall between church and state. *American Legion v. American Humanist Association* involves an enormous state-owned cross that was built by private individuals as a memorial to residents of Prince Georges County, Maryland, who were killed in World War One. The state acquired it several decades ago. It is 40 feet high and situated on a traffic island in one of the busiest intersections in the county. The Fourth Circuit correctly ruled that Maryland's display and upkeep of the cross violates the Establishment Clause. The state defends the monument's constitutionality, arguing that it is a secular monument that simply "bears the shape of a cross." The Court could employ this case as a vehicle for overturning the well-established principle that government conduct that appears to a reasonable observer to endorse religion violates the First Amendment.

Race and Capital Punishment

Jones v. Oklahoma and *Woods v. Oklahoma* spring from the same source: a study showing that non-whites accused of killing white males are statistically more likely to receive the death sentence in Oklahoma on that basis alone. Two prisoners of color cite the study as newly-discovered evidence giving them the right to argue before the state that their sentence was

affected by their race in violation of the Constitution. Oklahoma has denied their petitions without considering the constitutional merits, and the men have appealed to the Supreme Court.

Voting Rights

Last term, the Court delayed a decision on the constitutionality of extreme partisan gerrymandering in Wisconsin by sending the case back to the lower court for further consideration (*Whitford v. Nichols*). Maryland's partisan gerrymander is being challenged in *Benisek v. Lamone*. These or other cases could end up before the Court. In the past, Justice Kennedy was the fifth vote to deny specific challenges, but also the fifth vote to keep the door open to future challenges. With his departure, the justices are evenly divided on whether courts can even consider such claims.

Turzai v. League of Women Voters of Pennsylvania is Pennsylvania state Republicans' effort to undo the state supreme court's finding that their 2011 politically gerrymandered congressional redistricting maps violated the state constitution. Courts frequently hear challenges to congressional redistricting that are based on *federal* law. But Republican Speaker of the Pennsylvania House Michael Turzai argues that the U.S. Constitution does not allow *state*-law-based judicial challenges to the legislature's congressional redistricting decisions. Should Brett Kavanaugh be confirmed, his partisan rant against Democrats before the Judiciary Committee should disqualify him from participating in political cases such as these.

Conclusion

As the Court begins the 2018-2019 term, Justice Kennedy has yet to be replaced. The far right has been breaking every rule in the book to get Brett Kavanaugh confirmed before the first day. His nomination is currently pending on the Senate floor.

Depending on what the Senate does, our nation may take an enormous leap backward, strengthening the powerful and taking rights away from the rest of us.