This was no small Supreme Court term for states—or anyone else. Same-sex marriage is the law of the land. The Affordable Care Act remains intact.

Someone who cares about Supreme Court cases that affect the states should not be so distracted by these blockbusters to miss the many other cases of importance to states this term. The court also held that voters may exclude state legislatures entirely from the redistricting process, states cannot be sued for providing inadequate Medicaid reimbursement, and disparate impact claims may be brought under the Fair Housing Act, among many other issues.

In a 5-4 decision written by Justice Kennedy the Supreme Court held in Obergefell v. Hodges that same-sex couples have a constitutional right to marry. The court articulated four principles that demonstrate why the fundamental right to marry applies with equal force to same-sex couples. First, the right to choose who you marry is “inherent in the concept of individual autonomy.” Second, because the right to marry is “unlike any other in its importance” it should not be denied to any two-person union. Third, marriage between same-sex couples safeguards children and families just as it does for opposite-sex couples. Finally, marriage is a keystone of American social order from which no one should be excluded. The court relied on the Constitution’s 14th Amendment Due Process Clause and the Equal Protection Clause. In previous marriage cases like Loving v. Virginia, invalidating bans on interracial marriage, the court relied on both clauses.

In a 6-3 decision in King v. Burwell the court ruled that health insurance tax credits are available on the 34 federal exchanges. The Affordable Care Act allows states and the federal government to establish health care exchanges. Tax credits are available when insurance is purchased through “an Exchange established by the State.” The technical legal question in this case was whether a Federal Exchange is “an Exchange established by the State” that may offer tax credits. The Supreme Court said yes. The court first concluded that the language is ambiguous. But by looking at it in the context of the entire statute the meaning became clearer. Specifically, if tax credits weren’t available on federal exchanges “it would destabilize the individual insurance market in any State with a Federal Exchange, and likely create the very ‘death spirals’ that Congress designed the Act to avoid.”

In a 5-4 decision in Arizona State Legislature v. Arizona Independent Redistricting Commission the court held that the Constitution’s Elections Clause permits voters to vest congressional redistricting authority entirely in an independent commission. Justice Ginsburg’s majority relies on the history and purpose of the Elections Clause and the “animating principle of our Constitution that the people themselves are the originating source of all the powers of government.” Founding era dictionaries typically defined legislatures as the “power that makes laws.” In Arizona, that includes the voters who may pass laws through initiatives. The purpose of the Elections Clause was to “empower Congress to override state elections rules” not restrict how states enact legislation. “We resist reading the Elections Clause to single out federal elections as the one area in which States may not use citizen initiatives as an alternative legislative process.”

In Alabama Legislative Black Caucus v. Alabama the Supreme Court held 5-4 that when determining whether unconstitutional racial gerrymandering occurred—if race was a “predominant motivating factor” in creating districts—one-person-one-vote should be a background factor. And Section 5 of the Voting Rights Act (VRA) does not require a covered jurisdiction to maintain a particular per-
cent of minority voters in minority-majority districts. The Alabama Legislative Black Caucus sued Alabama claiming by adding more minority voters to majority-minority districts than were needed for minorities to elect a candidate of their choice Alabama engaged in unconstitutional racial gerrymandering. The court concluded that one-person-one-vote should be taken as a given and not be weighed with other nonracial factors (compactness, contiguity, incumbency protection, etc.) because the predominance analysis is about “whether the legislature ‘placed’ race ‘above traditional districting considerations in determining which persons were placed in appropriately apportioned districts.’” Section 5 does not require covered jurisdictions to maintain a particular percent of minority voters in majority-minority districts. Instead, it requires that a minority’s ability to elect a preferred candidate be maintained. State legislatures must have a “strong basis in evidence” to support their race-based choices when redistricting.

In *North Carolina State Board of Dental Examiners v. FTC* the Supreme Court held 6-3 that if the majority of state board members are active market participants, antitrust immunity applies only if the state actively supervises the board. The North Carolina State Board of Dental Examiners is a state agency principally charged with licensing dentists. Six of its eight members must be actively practicing, licensed dentists. After the board issued cease-and-desist letters to nondentist teeth whitening service providers, the Federal Trade Commission charged it with violating federal antitrust law. In *Parker v. Brown*, the Supreme Court held that states receive state-action immunity from federal antitrust law when acting in their sovereign capacity. According to the court, nonsovereign entities controlled by active market participants receive state-action immunity only if the challenged restraint is clearly articulated in state policy and the policy is actively supervised by the state. Without active supervision, the court reasoned, agencies, boards and commissions made up of a majority of market participants may act in their own interest rather than the public interest. Here, the parties assumed the clear articulation requirement was met and agreed the board wasn’t actively supervised by the state. So the court denied the board state-action immunity.

In *Armstrong v. Exceptional Child Center* the Court held 5-4 that Medicaid providers cannot rely on the Supremacy Clause or equity to sue states to enforce a Medicaid reimbursement statute. 42 U.S.C. §1396a(a)(30)(A) requires state Medicaid plans to assure that Medicaid providers are reimbursed at rates “consistent with efficiency, economy, and quality of care” while “safeguard[ing] against unnecessary utilization of … care and services.” Medicaid providers sued Idaho claiming that its reimbursement rates for rehabilitation services were lower than §(30)(A) permits. The Court first rejected the argument that the Supremacy Clause creates a private right of action. “It instructs courts what to do when state and federal law clash, but is silent regarding who may enforce federal laws in court, and in what circumstances they may do so.” The Court also rejected the providers’ argument that equity should permit their case to proceed. First, the statute provided a remedy for a state’s breach—Health and Human Services may withhold funds—suggesting Congress intended no other remedies. Second, it would be difficult for a court to fashion a remedy in this case—a reimbursement rate—given the broad and unspecific language of §(30)(A).

In *Michigan v. EPA* the Supreme Court held 5-4 that the Environmental Protection Agency (EPA) acted unreasonably in failing to consider cost when deciding whether regulating mercury emissions from power plants is “appropriate and necessary.” Per *Chevron v. Natural Resource Defense Council* (1984) courts accept an agency’s reasonable interpretation of an ambiguous statute. The court concluded the EPA’s interpretation of “appropriate and necessary” to exclude costs wasn’t reasonable stating: “Agencies have long treated cost as a centrally relevant factor when deciding whether to regulate. Consideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages and the disadvantages of agency decisions. It also reflects the reality that ‘too much wasteful expenditure devoted to one problem may well mean considerably fewer resources available to deal effectively with other (perhaps more serious) problems.’”

In *Texas Department of Housing and Community Affairs v. Inclusive Communities Project* the Supreme Court held 5-4 that disparate-impact claims may be brought under the Fair Housing Act (FHA). The Inclusive Communities Project sued the Texas Department of Housing and Community Affairs claiming the Department was giving too many tax credits to low-income housing in predominately black inner-city areas compared to predominately white suburban neighborhoods. In prior cases the
court held that disparate-impacts claims are possible under Title VII (prohibiting race, etc. discrimination in employment) and the Age Discrimination in Employment Act relying on the statutes’ “otherwise adversely affect” language. The FHA uses similar language—“otherwise make unavailable”—in prohibiting race, etc. discrimination in housing. And Congress seems to have acknowledged that disparate-impacts claims are possible under the FHA. Congress amended the FHA in 1988 to include “three exemptions from liability that assume the existence of disparate-impact claims.”

In *Walker v. Sons of Confederate Veterans* the Supreme Court held 5-4 that Texas may deny a proposed specialty license plate design featuring the Confederate flag because specialty license plate designs are government speech. The court relied heavily on *Pleasant Grove City v. Summum* (2009), where the court held that monuments in a public park are government speech and that a city may accept some privately donated monuments and reject others. First, just as governments have a long history of using monuments to speak to the public, states have a long history of using license plates to communicate messages. Second, just as observers of monuments associate the monument’s message with the land owner, observers identify license plate designs with the state because the name of the state appears on the plate, the state requires license plates, etc. Third, per state law, Texas maintains control over messages conveyed on specialty plates and has rejected at least a dozen designs, just as the city in *Summum* maintained control monument selection.

The Railroad Revitalization and Regulatory Reform Act (4-R Act) prohibits state and local governments from imposing taxes that discriminate against railroads. Railroads and other commercial and industrial taxpayers in Alabama pay a 4 percent fuel and exempting its competitors (even though railroads paid less in sales tax than trucks paid in excise tax). In *Alabama Department of Revenue v. CSX Transportation* the Court held 7-2 that railroads can be compared to their competitors (rather than other commercial and industrial taxpayers) when determining whether a tax is discriminatory under the 4-R Act. Competitors are a “similarly situated” class “since discrimination in favor of that class most obviously frustrates the purpose of the 4-R Act,” including restoring financial stability to railroads and fostering competition between railroads and other modes of transportation. Because “[t]here is simply no discrimination when there are roughly comparable taxes” different taxes paid by railroads and their competitors must be compared. And the justifications Alabama offered for why water carriers don’t pay any tax on diesel fuel must be examined when determining if railroads have been discriminated against.

In 1992 in *Quill Corp. v. North Dakota*, the court held that states cannot require retailers with no in-state physical presence to collect use tax. Since 2010, Colorado has required remote sellers to inform Colorado purchasers annually of their purchases and send the same information to the Colorado Department of Revenue. Direct Marketing Association sued Colorado in federal court claiming these requirements are unconstitutional under *Quill*. The court held unanimously in *Direct Marketing Association v. Brohl* that the Tax Injunction Act (TIA) does not bar a federal court from deciding this case. Per the TIA, that federal courts may not “enjoin, suspend or restrain the assessment, levy or collection of any tax under State law” where a remedy is available in state court. The TIA was modelled on the Anti-Injunction Act, which concerns federal taxes. According to the Court, “the Federal Tax Code has long treated information gathering as a phase of tax administration that occurs before assessment, levy, or collection.” And, while DMA’s lawsuit sought to “limit, restrict, or hold back” tax collection in Colorado, it did not “restrain” tax collection in the narrow sense—by stopping it.

In a 5-4 decision in *Comptroller v. Wynne* the Supreme Court held that Maryland’s failure to offer residents a full credit against income taxes paid to other states violates the dormant Commerce Clause. Maryland taxes residents’ income earned in- and out-of-state. If Maryland residents pay income tax to another state for income earned there, Maryland allows them a credit against Maryland’s “state” tax but not its “county” tax. Nonresidents who earn income in Maryland pay Maryland “state” tax and a “special nonresident tax” equivalent to Maryland’s lowest “county” tax. The problem with Maryland’s tax scheme the court reasoned was that it had the potential to result in double taxation of income earned out-of-state. More specifically, it failed the “internal consistency” test. If all states had a tax scheme like Maryland’s “county” and “special nonresident
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tax” that taxed income residents earned in-state, income residents earned in other jurisdictions, and non-residents’ income earned in-state, residents who earn income out-of-state would be taxed by their state of residence and the state where they earned the income.

In Glossip v. Gross the Supreme Court held 5-4 that death row inmates are unlikely to succeed on their claim that using midazolam as a lethal injection drug amounts to cruel and unusual punishment in violation of the Eighth Amendment. In Baze v. Rees (2008) the court approved a three-drug protocol that begins with a sedative, sodium thiopental, which is no longer available; Oklahoma now uses midazolam. In Baze the court stated that prisoners challenging a lethal injection protocol must identify a known and available alternative method of execution. The prisoners in this case did not do so and claimed they did not have to. The court concluded that the prisoners failed to establish that Oklahoma’s use of a massive dose of midazolam causes a substantial risk of severe pain. The inmates’ experts acknowledged that no scientific proof establishes that a 500-milligram dose of midazolam would not render a person sufficiently unconscious to “resist the noxious stimuli which would occur with the application of the second and third drugs.” While midazolam may have a “ceiling effect,” where an increased dose produces no more effect, only “speculative evidence” suggests that it renders prisoners insensate to pain.

As always, the Supreme Court’s term was a mixed bag for the states. Armstrong is a significant win. Had the court ruled otherwise, the Supremacy Clause would have provided a cause of action for every federal statute that arguably conflicts with state law. North Carolina State Board of Dental Examiners and Arizona State Legislature v. Arizona Independent Redistricting Commission were significant losses for the states because they both reduce the authority of state legislatures. Justice Kennedy’s concurrence in Direct Marketing Association v. Brohl, almost certainly prompted by the SLLC’s amicus brief, that the “legal system should find an appropriate case for this Court to reexamine Quill” perhaps provided the biggest welcome surprise to states.

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*Editor’s Note