Greetings, Court Fans!


In a term thus far characterized by unanimous and lopsided decisions, the controversial 5-4 splits are starting to trickle out. In our last Update, we described *Nielsen v. Preap* (2019) as “one of [the] first truly divisive decisions of the term.” Well, The Nine doubled down with *Bucklew v. Pettigrew* (No. 17-8151), a 5-4 decision on one of the most controversial issues the Court faces. In an opinion by Justice Gorsuch, the conservative majority held that an inmate with a particular medical condition that would make lethal injection extremely painful cannot successfully challenge that method of execution under the Eighth Amendment unless
he offers up a feasible, readily implemented alternative method that would not cause severe pain.

In 1996, Russel Bucklew broke into a neighbor’s house where his girlfriend was hiding from him with her children. He shot the neighbor in the chest, fired a shot at one of the children (but missed), and pistol-whipped his girlfriend, whom he then drove to a secluded spot and raped at gunpoint. To top it off, he engaged in a shootout with state police before being arrested, charged with murder, convicted, and sentenced to death. He has been on Missouri’s death row for over twenty years. During that time, he developed a medical condition called cavernous hemangioma, which causes vascular tumors to grow in his head, neck, and throat. He also spent a lot of time challenging the constitutionality of the state’s lethal-injection protocol. Justice Gorsuch traced the history of these challenges with scarcely veiled exasperation. First, Bucklew and other death row inmates brought an Eighth Amendment challenge to the three-drug protocol that Missouri and many other states used. When that didn’t work, they brought successive lawsuits arguing that the protocol violated the State’s Administrative Procedure Act, that it was preempted by federal law, and that it violated the Eighth Amendment because unqualified personnel might botch its administration. Ultimately, these legal challenges didn’t succeed, but death-penalty abolitionists were able to pressure the drug company that manufactured sodium thiopental to stop supplying it, which forced Missouri and other states to adopt a new protocol. In 2012, the State adopted a one-drug protocol, using the sedative propofol. Bucklew and others challenged that protocol, arguing that it would cause excruciating pain. When the state revised the protocol to use pentobarbital instead of propofol, the inmates simply amended their complaint to allege that it, too, would cause excruciating pain.

Finally, twelve days before his scheduled execution in 2014, Bucklew filed a new lawsuit, arguing for the first time that, regardless of whether pentobarbital would cause would cause excruciating pain for all prisoners, it would cause him severe pain because of his particular medical condition. The Eighth Circuit rejected this argument because Bucklew had failed to identify an alternative procedure that would reduce the risk of pain he complained of, as required by the Supreme Court’s plurality opinion in Baze v. Rees (2008). However, the court sent the case back down to allow Bucklew to amend his complaint to identify a feasible alternative method of execution. On remand, Bucklew refused initially to do so, arguing that Baze only applies to facial challenges and does not require him to identify an alternative method in order to pursue his as-applied challenge. Ultimately, however, he alleged that execution by “nitrogen hypoxia” would reduce the risk of pain. The Eight Circuit again rejected the challenge, finding that Bucklew had produced no evidence that the risk of pain would be substantially reduced by the use of nitrogen hypoxia. The Supreme Court stayed the execution, however, and granted cert to clarify the standards that govern as-applied Eight Amendment challenges to methods of execution.

Writing for the conservative majority, Justice Gorsuch first clarified that the Court’s holdings in Baze and Glossip v. Gross (2015)—which require an inmate challenging a method of execution to identify a “feasible, readily implemented” alternative procedure that would “significantly reduce a substantial risk of severe pain”—do govern as-applied challenges, in addition to facial challenges. That requirement
comes from the understanding that “the Eighth Amendment does not guarantee a prisoner a painless death”—only a death that is not cruel and unusual because it “superadds” pain to the penalty. To establish that a penalty includes unnecessary pain, an inmate must show that there is a feasible and readily implemented alternative that would reduce the risk of pain, and that the State has refused to adopt it without a legitimate penological reason. Determining whether a punishment is unconstitutionally cruel because it superadds pain necessarily requires a comparison of the method to other alternatives. That doesn’t change just because the alleged reason that the method is cruel is unique to a particular prisoner; it just means the alternative method would have to be less painful to that particular prisoner.

Applying the Baze-Glossip test, Justice Gorsuch concluded that Bucklew failed to show that nitrogen hypoxia would be a readily implemented, less painful alternative. To pass this test, Gorsuch insisted, an inmate must show that his proposed alternative method is not just theoretically feasible, but also “readily implemented.” That means the proposal must be sufficiently detailed to permit a finding that the State could carry it out relatively easily and reasonably quickly. Nitrogen hypoxia has never been used before as a method of execution and therefore is merely hypothetical, not readily implemented. (For the same reason, Bucklew could not show that the State lacked a legitimate reason for not wanting to use an untested method of execution.) Second, Bucklew had failed to show that nitrogen hypoxia would be significantly less painful to him than death by pentobarbital. His only evidence came from an expert’s testimony regarding a study of euthanasia in horses that even Bucklew now agreed the expert had misunderstood or misstated. Justice Gorsuch ended his opinion where he began, with a critique of the way that abolitionist death-penalty litigation tends to delay justice for victims of crime.

Justices Thomas and Kavanaugh joined the opinion in full, but each penned a solo concurrence. Thomas wrote to reiterate his view (first expressed in Baze), that “a method of execution violates the Eighth Amendment only if it is deliberately designed to inflict pain.” Kavanaugh, meanwhile wrote to underscore the Court’s holding that an alternative method of execution need not be authorized under current state law in order to be deemed feasible and readily implemented. Given that understanding (which all nine Justices share), an inmate’s burden of identifying an alternative method of execution is not all that great. After all, Justice Kavanaugh noted, an inmate could almost always point to the firing squad as an available alternative method, even if not one currently in use.

Justice Breyer led the charge for the dissenters. He first attacked the majority’s view of the facts, arguing that Bucklew had more than satisfied his burden (at the summary-judgment stage) of establishing a genuine issue of fact as to whether execution by lethal injection would cause him severe and unacceptable pain. Although the experts disputed whether lethal injection would cause Bucklew as much pain as he claimed, the resolution of that dispute was a matter for trial. Turning to the legal question in the case, Justice Breyer argued that Glossip’s “alternative method” requirement should not be extended to as-applied challenges. Nothing in Glossip compelled that extension, and the alternative-method requirement, itself, is not deeply rooted in Eighth Amendment jurisprudence. Even if Bucklew were required to identify an alternative method, Justice Breyer continued,
he did so: nitrogen hypoxia is authorized in Missouri and other states (even if it hasn’t yet been employed) and there was at least a genuine issue of fact as to whether it would substantially reduce the risk of pain. Finally, in a section of his opinion joined by no other justice, Breyer argued that the delays in carrying out Bucklew’s death sentence are emblematic of the problems with capital punishment more broadly. The majority suggested that the answer is to carry out executions more quickly, but Justice Breyer stressed that many of the delays were occasioned by legitimate constitutional challenges. “It may be,” Breyer observed, “that there is no way to execute a prisoner quickly while affording him the protections that our Constitution guarantees to those who have been singled out for our law’s most severe sanction. And it may be that, as our Nation comes to place ever greater importance on ensuring that we accurately identify, through procedurally fair methods, those who may lawfully be put to death, there simply is no constitutional way to implement the death penalty.”

Though no other justice joined the last part of Breyer’s opinion, Justice Sotomayor did write separately to criticize “the troubling dicta with which the Court concludes its opinion.” “There are higher values than ensuring that executions run on time,” she argued. “If a death sentence or the manner in which it is carried out violates the Constitution, that stain can never come out. Our jurisprudence must remain one of vigilance and care, not one of dismissiveness.”

On a rather less divisive note, in Biestek v. Berryhill (No. 17-1184), the Court addressed a type of case that fills the federal courts’ dockets but garners few headlines: judicial review of social security disability benefits denials and, more particularly, the “substantial evidence” standard of judicial review. The application of this standard divided the Court, but the Justices’ disagreement appeared to derive more from differences in framing the question presented than in the substance of administrative law.

Michael Biestek’s disabilities kept him from his usual carpentry work. When he applied for social security disability benefits, the administrative law judge (“ALJ”) held a hearing to determine if Biestek could undertake a less physically challenging job and if those jobs are available. A vocational expert, one of many under contract with the Social Security Administration (“SSA”), testified at the hearing that those jobs exist for Biestek. On cross-examination, Biestek’s attorney determined that the expert’s opinion was based on the expert’s own labor market surveys and asked to see them. When the expert cited confidentiality concerns, the ALJ brushed aside Biestek’s willingness to accept redacted copies and ruled that the expert need not produce the survey data. After the ALJ denied Biestek’s claim for benefits based on the expert’s views, Biestek went to court, but he lost in the district court and Sixth Circuit.

The Supreme Court affirmed, in a majority opinion written by Justice Kagan and joined by the Chief Justice and Justices Thomas, Breyer, Alito, and Kavanaugh. Much depended on her narrow definition of the question in the case: whether an expert’s refusal at an SSA hearing to produce underlying data “categorically” precludes the testimony from counting as “substantial evidence” to support the agency’s decision. Justice Kagan’s answer was “no.” SSA hearings are informal, without pre-hearing discovery, and without the trappings of a court trial. An ALJ’s ruling stands if there
is substantial evidence, a deferential standard requiring more than a scintilla of evidence but only enough for a reasonable mind to accept as adequate to support the conclusion. Justice Kagan illuminated the standard with a hypothetical expert who is qualified and experienced, explains her methods and cogently answers all questions, but no one asks for the supporting data, and she does not produce it. Justice Kagan explained that this testimony would plainly be substantial evidence. And if the scenario changed with a request for the data that is declined with a rational explanation, that added fact alone would not categorically taint the evidence as insufficient. Yes, if an expert had no good reason for keeping the data private and otherwise provided only feeble evidence, there may be insufficient support for the ALJ’s conclusions. But Justice Kagan noted that Biestek’s lawyer did not press the expert further after the refusal to produce the data and was seeking only a categorical rule (which the Seventh Circuit had adopted) that all refusals to provide underlying data on request render the expert’s opinions insufficient evidence. The Court declined to adopt that rule.

In dissent, Justice Sotomayor examined the case from a different angle. While acknowledging that Biestek’s lawyer did not examine the expert further after the data was refused, Justice Sotomayor emphasized that social security hearings are “inquisitive rather than adversarial” and that the ALJ has a legal obligation to develop the record. That did not happen, and the expert offered no detail to support her opinion. Justice Sotomayor did agree, though, that a record could theoretically support an ALJ’s ruling even in the absence of supporting data if there are valid reasons for not producing the data and the expert provides additional support by describing the data and her methodology.

Justice Gorsuch also penned a dissent, joined by Justice Ginsburg (the second time this Term an opinion was signed by just those two Justices). He saw the bare, conclusory expert evidence as falling below the standard acceptable for summary judgment in court and therefore not substantial evidence either. He rejected the majority’s premise that Biestek’s appeal relied solely on an argument for a categorical bar to reliance on expert testimony following the refusal to produce underlying data, opining that the facts of “this case” do matter. He therefore also rejected the majority’s use of a hypothetical scenario where an expert supplies support for her opinion even absent the underlying data, because that is not this case. Because of the majority’s “level of abstraction” in shooting down Biestek’s proposed rule, Justice Gorsuch complained that the Court’s opinion fails “to offer lower courts meaningful guidance” in “real-world cases.” He would require a standard that prohibits “arbitrary executive decisionmaking” based on “secret evidence.”

Next up, in Lorenzo v. SEC (No. 17-1077), the Supreme Court clarified its (semi-) recent decision in Janus Capital Group v. First Derivative Traders (2011) by holding that those who disseminate others’ false statements with the intent to defraud can be liable under SEC Rule 10b-5, even if they are not the “maker” of the statement under Janus.

Lorenzo was the director of investment banking at Charles Vista, a broker-dealer registered with the SEC. Charles Vista was hired by a clean energy company to sell debentures to investors. Lorenzo’s boss wrote and approved email messages, later
sent by Lorenzo to prospective investors, which claimed the clean energy company had “confirmed assets” of $10 million. Lorenzo knew, however, that the company’s assets were actually less than $400,000. The SEC charged Charles Vista, Lorenzo, and his boss with violating SEC Rule 10b-5 and Section 10(b) of the Securities Exchange Act of 1934, finding that he had sent these emails to investors with the intent to defraud (a finding Lorenzo did not challenge on appeal).

On appeal from the SEC to the D.C. Circuit, Lorenzo argued that he could not be liable for violating Rule 10b-5(b). That subsection of 10b-5 makes it unlawful “to make any untrue statement of a material fact” in connection with the purchase or sale of any security. In Janus, the Supreme Court held that the “maker” of a statement is one with “ultimate authority” over the statement’s content and method of communication. Since Lorenzo’s boss wrote the statement and directed that it be sent out, Lorenzo contended he was not the statement’s “maker.” The D.C. Circuit agreed. But it nonetheless sustained the Commission’s finding, holding that by distributing a statement written by the boss that Lorenzo knew was false, he violated 10b-5(a) and (c), which make it unlawful “to employ any device, scheme, or artifice to defraud” or “to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit,” respectively. The Court granted cert to resolve whether someone who is not a “maker” of a statement for purposes of 10b-5(b) could, by that same conduct, violate 10b-5’s other subsections.

Justice Breyer, writing for a majority of six (with Justice Kavanaugh not participating, because he had dissented in the D.C. Circuit), affirmed. Lorenzo argued that Rule 10b-5(b) was the exclusive means by which 10b-5 regulated conduct involving false statements. And under Janus, only statement-makers, not statement-disseminators, could violate subsection (b), so disseminators could not be liable for violating any provision of 10b-5. But the majority took a different view of the Rule’s subsections: Rule 10b-5, and the 1934 Act that prompted it, were intended to prohibit every type of deceitful conduct clever fraudsters would ever devise (related to securities, that is). In the majority’s view, its subsections were not narrowly drafted to cover distinct “spheres of activity.” Instead, they were written as broadly as possible to ensure that no course of deceitful conduct could slip through the cracks. Giving subsections (a) and (c) their plain meaning, disseminating another’s false statement with the intent to defraud fell squarely within their scope. Thus, the fact that Lorenzo did not violate subsection (b) in no way spared his conduct from being a violation of subsections (a) and (c).

Justice Thomas, joined by Justice Gorsuch, dissented. He began with the maxim of statutory interpretation that the “specific governs the general.” Since 10b-5(b) addressed when conduct related to false statements violates 10b-5, the other subsections of 10b-5 should be read more narrowly so as not to encompass false statements. But should Lorenzo really be off the hook simply because he did not draft the email? No, Justice Thomas argued: Lorenzo’s liability should be addressed through secondary liability doctrines, like aiding and abetting. After all, Lorenzo appeared to have aided his boss’s violation of Rule 10b-5(b). The majority had found this unpersuasive, observing that secondary liability would sometimes be illusory, such as where the “maker” of the statement did not violate 10b-5 because he lacked the intent to defraud, precluding anyone else, no matter their intent, from being secondarily liable. Justice Thomas also worried that the Court’s holding
made Janus essentially irrelevant. Maybe it will, Justice Breyer had preemptively countered, but Janus was only answering a question about the meaning of subsection (b); it did not address the scope of (a) or (c) at all. Finally, Justice Thomas was concerned that eliding the distinction between primary and secondary liability in the securities fraud context could broaden liability in unforeseen ways (e.g., is the mail clerk who sends out a false mailer at the direction of the boss liable?). But the Court again had a response: Those questions can be addressed in a case directly addressing the scope of subsections (a) and (c); they need not be answered now given that Lorenzo’s conduct fell squarely within the heartland of a Rule 10b-5(a) and (c) violation.

Finally, in Sturgeon v. Frost (No. 17-949), the Court at long last resolved a simmering dispute between an Alaska moose hunter and the National Parks Service. You may recall this case making its way before the Court three years ago. As we explained back then, “John Sturgeon, an inaptly named moose hunter, was piloting up the Nation [River] in his hovercraft (that’s right) one day in 2007, when he stopped to make a repair on a gravel bar that fell within the preserve. National Park Service (NPS) rangers ordered Sturgeon to remove his hovercraft from the preserve pursuant to NPS regulations banning hovercraft within the ‘boundaries of federally owned land and waters’ and on ‘[w]aters subject to the jurisdiction of the United States,’ inside a national park. Sturgeon complied, but then sued for declaratory and injunctive relief, arguing that the NPS in fact had no authority to apply its regulations to the Nation River thanks to the Alaska National Interest Lands Conservation Act (ANILCA), which limits NPS authority over ‘conservation system units’ in Alaska to ‘lands, waters, and interests therein,’ to which the United States has ‘title.’” The main issue in the case is whether there is an Alaska-specific exception to the NPS’s general authority to regulate boating on waters within national parks. Sturgeon argued that, in Alaska, the NPS has no power to regulate land or waters that the Federal Government does not own; rather, it may regulate only what ANILCA refers to as “public land,” meaning federally owned land, and under the Alaska Statehood Act, Alaska owns the land beneath the Nation River, notwithstanding that it flows through a national park. The Ninth Circuit had originally declined to reach this argument, holding instead that the NPS had authority to regulate on the Nation River provided that it was enforcing nationwide, as opposed to Alaska-specific, rules. The Supreme Court didn’t buy that argument and remanded the case for consideration of the two key questions: First, whether the Nation River qualifies as “public land” for purposes of ANILCA; and second, whether, even if the Nation is not “public land,” the NPS has authority to regulate on the part of the river that flows through the Yukon-Charley national park. The Ninth Circuit concluded that the Nation River is public land, and therefore never got to the second question.

Back at One First Street, Sturgeon prevailed again. Writing for a unanimous Court, Justice Kagan concluded (after a lengthy and entertaining history of the disputes over Alaska land management) that the Nation River is not public land for purposes of ANILCA. Public land means “lands, waters, and interests therein” the “title to which is in the United States.” But running water cannot be owned, and the United States does not have “title” to the Nation River, in the ordinary sense. Under the Submerged Lands Act (which was incorporated into the Alaska Statehood Act), Alaska holds title to and ownership of the lands beneath the Nation’s navigable
waters. The NPS argued that the U.S. retained titled to an “interest” in the Nation River under the reserved-water-rights doctrine, but even assuming it held such a right, the river itself would not thereby become “public land.” The NPS might have a retained right to protect waters in the park from depletion or diversion, but that right would not justify prohibiting red-blooded moose hunters from operating their sick hovercrafts just above the water’s surface. As Justice Kagan cautioned, this doesn’t mean the Yukon-Charlie is going to become a hovercraft parking lot. For one thing, the non-public lands (i.e. state, Native, and private lands) within Alaska’s national parks are still subject to all sorts of regulations from the EPA, the Coast Guard, and the like. And even the National Park Service has the ability to acquire “inholdings” within the park system if it believes further regulation is required. That NPS doesn’t have the same powers over Alaska’s national parks as it does in the rest of the country is a feature, not a bug, of ANILCA, which the Court has repeatedly stated renders Alaska “the exception, not the rule.” “For that reason,” Kagan concluded, “park rangers cannot enforce the Service’s hovercraft rule on the Nation River. And John Sturgeon can once again drive his hovercraft up that river to Moose Meadows.”

Justice Sotomayor, joined by Justice Ginsburg, penned a brief concurrence emphasizing “the important regulatory pathways that the Court’s decision leaves open for future exploration.” Although the Court’s holding means that the NPS cannot apply its “ordinary park rules” to nonpublic areas like the Nation River, the Service still has two sources of authority over navigable rivers. First, it may regulate nonpublic areas in the midst of parklands when doing so is necessary or proper to protect public lands within the park—for instance, to ban pollution of the Nation River if necessary to preserve habitat on the riverbanks, or even to ban hovercraft use if needed to protect adjacent public park areas. Second, the Service likely retains the power to regulate as parklands a particular subset of navigable rivers designated as “Wild and Scenic Rivers” even though that authority does not expressly include the Nation River. She further encouraged Congress to act if it intended the NPS to have even more authority over these lands than the Court has left it with. So enjoy the hovercraft while you can, John!

With that, Fans, we’re all caught up. The Nine will be back in action on the 15th, so—barring any intervening excitement—you should expect to hear from us again in about two weeks.

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