

# SCOTUS 2019

MAJOR DECISIONS AND DEVELOPMENTS  
OF THE US SUPREME COURT



Edited by **DAVID KLEIN** and **MORGAN MARIETTA**



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David Klein · Morgan Marietta  
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*Editors*

David Klein  
Department of Political Science  
Eastern Michigan University  
Ypsilanti, MI, USA

Morgan Marietta  
Department of Political Science  
University of Massachusetts Lowell  
Lowell, MA, USA

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## Notes on Contributors

**Lawrence Baum** is Professor Emeritus of Political Science at Ohio State University. The primary focus of his research is the explanation of judges' choices as decision makers. His most recent books are *Ideology on the Supreme Court* (Princeton University Press, 2017), *The Battle for the Court: Interest Groups, Judicial Elections, and Public Policy* (University of Virginia Press, 2017, with co-authors David Klein and Matthew Streb), *The Company They Keep: How Partisan Divisions Came to the Supreme Court* (Oxford University Press, 2019, with co-author Neal Devins), and *The Supreme Court*, 13th edition (CQ Press, 2019).

**Bethany Blackstone** is Associate Professor of Political Science at the University of North Texas. Her research interests focus on American political institutions with particular emphasis on interbranch relations, judicial politics, and legislative politics. Her current research focuses on reconsideration of precedent in the US courts of appeals and the role of the US Supreme Court in contemporary American policymaking. Her previous work has been published in a number of journals including *The Journal of Politics*, *Law & Society Review*, *PS: Political Science & Politics*, *Justice System Journal*, and *Research and Politics*.

**Jennifer Bowie** is Associate Professor of Political Science at the University of Richmond in Richmond, Virginia. She is currently the Editor of the *Law and Politics Book Review* and is the author of *The View from the Bench and Chambers: Examining Judicial Process and Decision Making on the U.S. Courts of Appeals* (University of Virginia Press, 2014 with Donald R. Songer and John Szmer). Her research has appeared in a number of journals including *The Journal of Politics*, *Political Research Quarterly*, *The Journal of Law and Courts*, and *Justice System Journal*. Her research interests include examining judicial decision making in the US Courts of Appeals and state courts.

**Pamela C. Corley** is Associate Professor and Director of the Law and Legal Reasoning Minor in the Political Science Department at Southern Methodist University. Her research focuses on the US Supreme Court. She is the author of *Concurring Opinion Writing on the U.S. Supreme Court* (SUNY Press, 2010), and the co-author of *The Puzzle of Unanimity: Consensus on the United States Supreme Court* (Stanford University Press, 2013). She has published articles in *Journal of Politics*, *Law & Society Review*, *Political Research Quarterly*, *Judicature*, *Law & Policy*, *Journal of Legal Studies*, *Journal of Supreme Court History*, *Publius: The Journal of Federalism*, *Justice System Journal*, and *American Politics Research*.

**Brett Curry** is Professor of Political Science at Georgia Southern University. His research centers on aspects of judicial politics and decision making. His scholarship has been published in a number of journals including the *Journal of Politics*, *Law & Society Review*, *Law & Social Inquiry*, *American Politics Research* and *Justice System Journal*. His co-authored book, *Decision Making by the Modern Supreme Court*, was published with Cambridge University Press in 2011. A second book, *U.S. Attorneys, Political Control, and Career Ambition*, was recently published by Oxford University Press.

**Gerard Michael D’Emilio** is an attorney in Oklahoma City, Oklahoma. He received his J.D. with highest honors from the University of Oklahoma College of Law, graduating first in his class; his M.M. in Vocal Performance from Westminster Choir College; and his



B.M. in Voice and B.A. with highest honors in Politics from Oberlin College and Conservatory of Music. He is a former student of his co-author, Ronald Kahn, with whom he has collaborated on numerous projects. He served as a judicial law clerk for the US District Court for the Western District of Oklahoma over the 2018–2019 term, and he will again serve in that capacity for the US Court of Appeals for the Tenth Circuit over the 2020–2021 term.

**Abigail Diebold** is a senior at Swarthmore College and an honors candidate majoring in Political Science and History with an emphasis on American political development. She currently works for Congresswoman Mary Gay Scanlon (PA-05), and has worked as the Communications and Political Director for Rep. Jennifer O'Mara and a Communications Intern for Senator Jeff Merkley. In addition to conducting research with Professor Nackenoff, she has completed an independent research project on the political history of Delaware County and is on the editorial board of the Swarthmore *Phoenix* (Swarthmore College's only print newspaper).

**Mark Graber** is the Jacob A. France Professor of Constitutionalism at the University of Maryland School of Law. He is the author of *A New Introduction to American Constitutionalism* (Oxford University Press) and co-editor (with Keith Whittington and Howard Gillman) of *American Constitutionalism: Structures and Powers* and *American Constitutionalism: Rights and Powers* (both from Oxford University Press). He is presently working on *Forged in Failure*, a book that will examine how much constitutional change in the United States has been caused by the failure of constitutional practices to function as expected.

**Ronald Kahn** is Erwin N. Griswold Professor of Politics Emeritus, Oberlin College. He is a specialist in constitutional law, legal theory, and American political development, and the author of *The Supreme Court and Constitutional Theory, 1953–1993* (1994) and *The Supreme Court and American Political Development* (with Ken I. Kersch, 2006), both published by University Press of Kansas. His most recent book is *Constructing Individual Rights in a Conservative Age: The Supreme Court and Social Change in the Rehnquist and Roberts Court Eras* (with

Gerard D’Emilio, forthcoming, Kansas, 2020). Recent publications: “The Jurisprudence of Justice Scalia: Common Law Judging Behind an Originalist Facade,” in *The Conservative Revolution of Antonin Scalia*. Ed. David A. Schultz and Howard Schweber, (Lexington Books, 2018) (with Gerard D’Emilio) and “Supreme Court Decision-making and the Social Construction Process: Continuity in a Polarized Age,” *4 Constitutional Studies* (2019), part of a Festschrift in his honor.

**David Klein** is Professor and Department Head at Eastern Michigan University. He served as the inaugural editor of the *Journal of Law & Courts* (2011–2017) and is the author of three books: *Making Law in the United States Courts of Appeals* (Cambridge University Press, 2002), *American Courts Explained: A Detailed Introduction to the Legal Process Using Real Cases* (West Academic Publishing 2016, with Gregory Mitchell), and *The Battle for the Court: Interest Groups, Judicial Elections, and Public Policy* (University of Virginia Press, 2017, with Lawrence Baum and Matthew Streb). With Morgan Marietta, he is co-editor of the annual *SCOTUS* series at Palgrave Macmillan on the major decisions of the Supreme Court.

**Gary Lawson** is the Philip S. Beck Professor at Boston University School of Law. He has authored or co-authored five books on jurisprudence, constitutional history, and constitutional law; eight editions of a textbook on federal administrative law; a forthcoming textbook on constitutional law, and more than eighty scholarly articles. He is an associate editor of *The Heritage Guide to the Constitution*. His recent books include “*A Great Power of Attorney*”: *Understanding the Fiduciary Constitution* (University Press of Kansas, 2017) (with Guy Seidman) and *Evidence of the Law: Proving Legal Claims* (University of Chicago Press, 2017).

**Rory Little** is the Joseph W. Cotchett Professor of Law at U.C. Hastings College of the Law, where he has taught for 26 years. He is a graduate of Yale Law School and clerked for US Supreme Court Justices Brennan, Stevens, and Stewart—all in one year. He practiced privately and as a federal criminal lawyer for 12 years before teaching fulltime and is currently “Of Counsel” to the law firm of McDermott Will &

Emery. He teaches and lectures widely on Constitutional, Criminal Law and Procedure, and Legal Ethics topics and has published a number of scholarly works. You can find his regular commentary about the US Supreme Court's criminal docket at [SCOTUSblog.com](http://SCOTUSblog.com).

**Morgan Marietta** is Associate Professor of Political Science at the University of Massachusetts Lowell. He is the author of four books, *The Politics of Sacred Rhetoric*, *A Citizen's Guide to American Ideology*, *A Citizen's Guide to the Constitution and the Supreme Court*, and most recently *One Nation, Two Realities: Dueling Facts in American Democracy* on the causes and consequences of polarized perceptions of facts (Oxford University Press, with David Barker at American University). He and Bert Rockman from Purdue University are the co-editors of the *Citizen Guides to Politics & Public Affairs*, a series of books from Routledge dedicated to explaining the core issues and institutions of American politics. With David Klein, he is co-editor of the annual *SCOTUS* series at Palgrave Macmillan on the major decisions of the Supreme Court.

**Carol Nackenoff** is Richter Professor of Political Science at Swarthmore College, where she teaches constitutional law and American politics. She composed the entry on the Supreme Court for Oxford Bibliographies Online. She is the author of *The Fictional Republic: Horatio Alger and American Political Discourse* (1994) and co-editor of *Statebuilding from the Margins* (with Julie Novkov, 2014) and of *Jane Addams and the Practice of Democracy* (with Marilyn Fischer and Wendy Chmielewski, 2009). Her most recent book is *Stating the Family: New Directions in the Study of American Politics* (with Julie Novkov, forthcoming, 2020). Her current research examines conflicts over the extent and terms of incorporation of women, African Americans, Native Americans, workers, and immigrants into the polity between 1875 and 1925 and the role that organized women played in pressing new definitions of public work on the American state. She received her Ph.D. from the University of Chicago.

**Stephen Simon** is Associate Professor of Political Science at the University of Richmond. Before entering academia, he received a J.D. from the New York University School of Law, clerked for a federal

district court judge, and practiced law for several years in a Washington, DC. law firm. Since receiving his Ph.D. in Government and Politics (from the University of Maryland), he has taught courses in constitutional law, jurisprudence, and political theory. In addition to a number of articles on civil liberties, foreign law, and the Supreme Court, he is the author of *Universal Rights and the Constitution* (SUNY Press, 2014) and *The U.S. Supreme Court and the Domestic Force of International Human Rights Law* (Lexington Books, 2016). He is currently the Coordinator of the University of Richmond's program in Philosophy, Politics, Economics, and Law (PPEL).

**Marian Williams** is Professor of Criminal Justice in the Department of Government and Justice Studies at Appalachian State University. Her research focuses on the court process, especially issues surrounding the bail system, the right to counsel, capital punishment, and race and gender disparities the court system. Articles on these issues can be found in a number of journals, including *Criminology*, *Justice Quarterly*, and *Journal of Crime and Justice*. Her research on civil asset forfeiture can be found in *Criminology and Public Policy* and *Journal of Criminal Justice*.

Many thanks to our editorial assistant **Daniel Bauman**, UMass Lowell '22.



# 1

## Introduction: The 2018–2019 Term at the Supreme Court

Morgan Marietta

Two hundred and thirty-one years after the signing of the US Constitution in 1787, the Supreme Court addressed its meaning in four key areas during the 2018–2019 term: *defendants' rights*, *fair elections*, *separation of powers*, and the *establishment of religion*. Several major cases considered the rights of criminal defendants across a range of issues from jury selection to the death penalty. Two cases addressed election rules and the role of the Court in questions of partisan manipulation. Two cases dealt with how government agencies make influential decisions, grounded in how the Constitution divides powers among branches of the federal government. And the Court re-examined an old controversy about religious symbols in the public square. Each dispute has a strong influence on American life and law. In the following chapters, noted scholars of American law and politics discuss the major decisions of the year, concluding with a discussion of Justice Brett Kavanaugh's first year and its implications for the future of the Court.

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M. Marietta (✉)

Department of Political Science, University of Massachusetts Lowell,  
Lowell, MA, USA

To summarize the year's major rulings, they

1. Allow the death penalty to proceed (under the Eighth Amendment's prohibition of "cruel and unusual punishment") if the prisoner has a medical condition that causes excessive pain during the execution or does not remember the crime due to mental incapacitation, but *not* if a mental condition (including dementia) precludes the prisoner from understanding the reason for their execution,
2. Allow separate prosecutions by state and federal governments for the same act under the *separate sovereigns* doctrine without violating the Fifth Amendment prohibition against double jeopardy,
3. Allow law enforcement officers to draw a blood alcohol test from an unconscious driver without a warrant (which is not a violation of the Fourth Amendment's protection against "unreasonable searches and seizures"),
4. Apply the Excessive Fines Clause of the Eighth Amendment to actions by state governments (and await further proceedings to determine if civil asset forfeitures of cars or other high-value items are considered excessive),
5. Enforce the prohibition against using race to dismiss potential jurors during jury selection (a *Batson* violation, supported by the Sixth Amendment's jury right and the Fourteenth Amendment's guarantee of equal protection of the laws),
6. Prohibit additional mandatory minimum prison sentences without a jury trial (protected by the Sixth Amendment) for the commission of crimes while on supervised release following a period of incarceration,
7. Allow partisan gerrymandering—the practice of shifting the boundaries of electoral districts to advantage the party in power—as a political problem left to the representative branches rather than a question of rights determined by the judicial branch,
8. Disallow the Census Bureau from adding a citizenship question to the 2020 census without an accurate justification,
9. Continue to allow Congress to delegate policymaking authority to federal agencies without violating the separation of powers or the non-delegation doctrine,

10. Continue to defer to federal agencies to determine the meaning of terms employed in their own regulations (known as *Auer* deference),
11. Allow long-standing religious monuments to remain on public land (which is not a violation of the First Amendment’s prohibition of the establishment of religion).

## Criminal Law and the Rights of Defendants

Of the ten Amendments that form the Bill of Rights, four address the rights of defendants in criminal prosecutions. This emphasis reflects the Founders’ concerns with a common practice of tyrannical governments: charging enemies of the regime with crimes they did not commit, in order to remove them and intimidate others. This was done by the British crown (and other European royals) in the 1700s just as it is done by the Russian government (among others) today. The same threat applies to individuals and groups that are simply not popular with the majority or with the current elected leaders. For these reasons, Amendments IV, V, VI, and VIII include a wide range of protections against false prosecution. A major theme of this year’s cases is the tension between legitimate aims of law enforcement and necessary protections of individual rights against government overreach.

The Court addressed defendants’ and convicts’ rights regarding the death penalty, double jeopardy, blood alcohol tests, excessive fines, jury selection, and re-imprisonment during supervised release. Given the current Court’s conservative majority (Justices Alito, Gorsuch, Kavanaugh, Roberts, and Thomas), we might expect a consistent set of law and order outcomes ruling in favor of government prosecutors, with the four liberal Justices (Breyer, Ginsburg, Kagan, and Sotomayor) in dissent supporting the rights of defendants. But the outcomes were much more balanced and mixed.

To start with the most extreme imposition on liberty—the death penalty—the Court upheld the constitutionality of capital punishment when its imposition may cause severe pain, because as Justice Gorsuch phrased it, “the Eighth Amendment does not guarantee a prisoner

a painless death.”<sup>1</sup> However, in a different case the Court ruled that a prisoner cannot be executed if he is unable to “rationally understand the reasons for his death sentence,” which may be caused by dementia as well as forms of psychosis already recognized by the Court.<sup>2</sup> One outcome supported the imposition of the death penalty (5-4 divided by ideology) and the other limited it (with Chief Justice Roberts joining the four liberal Justices). In his discussion of these cases in Chapter 9, Mark Graber describes them as disputes over capital punishment at the margins, accepting the core constitutionality of the practice but not the details of its application. The debates reveal long-term disagreements among the Justices over the purposes as well as the procedures of the death penalty.

In the next two controversies, the Court upheld government prosecutions. *Gamble v. U.S.* allows for successive prosecutions by both state and federal governments (in Terance Gamble’s case for the illegal possession of a firearm). In Chapter 5, Rory Little explains how seven Justices believe this practice does not violate the Double Jeopardy Clause of the Fifth Amendment. Likewise, *Mitchell v. Wisconsin* allows an unconscious motorist to be subjected to a blood alcohol test without violating the Fourth Amendment’s protection against unreasonable searches and seizures. In Chapter 10, Pamela Corley explains the Court’s closely divided 5-4 ruling and its potential ramifications for allowing other searches without a warrant under the exigent circumstances exception.

One of the unresolved questions of the US Constitution was whether the Eighth Amendment’s protections against excessive fines create a restriction against the actions of state governments (in addition to the federal government). In Chapter 12’s discussion of *Timbs v. Indiana*, Marian Williams explains how that question has been resolved, but still

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<sup>1</sup>*Bucklew* decision, page 12. A brief note on citations in the volume: Recent decisions have not yet been printed in the *U.S. Reports* that collect all Supreme Court decisions at the Library of Congress (so the page number in the volume is still blank, as in 573 U.S. \_\_\_\_). To identify quotes from the recent decisions, we will use page numbers from the slip opinions issued immediately by the Court, which are readily available online at the U.S. Supreme Court Web site ([www.supremecourt.gov/opinions](http://www.supremecourt.gov/opinions)). Links to opinions, oral arguments, briefs by each party, and many other details are also available at [SCOTUSBlog.com](http://SCOTUSBlog.com).

<sup>2</sup>*Madison* decision, page 11.



to be decided is its application to the constitutionality of *civil forfeiture*: Can a state government seize assets like cars or boats used in the commission of crimes, especially when those assets are disproportionately large?

The last two cases clearly uphold the rights of defendants and convicts. In *Flowers v. Mississippi*, the Court addressed another chapter of the long-standing controversy about the role of race in jury selection. In Chapter 4, Jennifer Bowie discusses how the *Batson* decision in 1986 outlawed the dismissal of potential jurors on the basis of race. In *Flowers*, a decisive majority upheld a claim that *Batson* had been violated in a repeated set of trials characterized by the dismissal of black jurors by the prosecutor without adequate race-neutral justifications. The Court clearly reaffirmed its commitment to the *Batson* holding, including the types of evidence defendants may use in making a *Batson* challenge.

The final criminal law case addresses the right to a jury trial during *post-conviction* proceedings. *Supervised release* is the term for the period of time after completing a prison sentence in which the government can re-invoke prison time if the convict commits a further offense. Individuals on supervised release may be re-imprisoned if a judge finds after a hearing that they have committed an offense. However, in *U.S. v. Haymond*, the Court held that the right to a jury trial applies in at least some cases of re-imprisonment. As Stephen Simon discusses in Chapter 7, Andre Haymond was subjected to a mandatory minimum sentence of five years for the commission of a crime—possession of child pornography—while on supervised release. Emphasizing that the mandatory minimum expanded the sentence beyond the time period authorized by the jury’s verdict at his original conviction, a slim majority of the Court concluded that Haymond’s right to a trial had been violated. The dissenters see this ruling as not only wrong under the Constitution but also creating deep practical problems for how courts handle the supervision of convicts after release. In sum, the Court’s decisions this year on criminal procedures are a somewhat unexpected mix of pro-defendant and pro-prosecution rulings.