ANALYZING THE COURT’S DECISIONS FOR THE 2006–07 TERM, INCLUDING ...

ANTITRUST
Alamdar S. Hamdani explains why Sherman Act plaintiffs are running into trouble in the Roberts Court.

ENVIRONMENTAL LAW
Robert Abrams explains why this term’s environmental cases were of unusual importance.

SCHOOLS
Vikram Amar connects the dots between the Court’s decisions in the race-based student assignment cases and the “Bong Hits 4 Jesus” case.

WOMEN’S ISSUES
Martha Davis analyzes the continuing repercussions of Justice O’Connor’s retirement, for women in general and for Justice Ginsburg in particular.

STATISTICS
Supreme Court litigator Thomas C. Goldstein provides a comprehensive statistical analysis of the entire term.

COMPLETE CASE HIGHLIGHTS
PREVIEW highlights the bottom line in every case decided during the October 2006 term. Case highlights are organized by topic area and feature the main questions presented, the Court’s answers, how the justices voted, and key excerpts from the majority or plurality opinions.
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Case highlights are arranged by topical area and include reports on the outcome of every case previewed prior to oral argument in PREVIEW Issues 1–7. In the interests of readability, most citations and internal quotes are omitted from the highlights, which can also be located via the alphabetical and subject indexes beginning on page 498.
As Tom Goldstein discusses in his analysis of the end-of-term statistics this issue, it was the 5-4 decisions that garnered the most attention last term. Twenty-four of the term’s 72 cases were decided by this narrowest of margins—the highest percentage of 5-4 opinions in a decade—even as the share of unanimous opinions fell “below levels seen during most recent years under former Chief Justice William Rehnquist.”

The chief justice, who famously told the Atlantic Monthly that “it’s bad, long-term, if people identify the rule of law with how individual justices vote,” can’t be overly pleased with the attention these numbers place on the Court’s ideological divide in general and on the votes of Justice Kennedy in particular. Yet, if not always helpful, such focus is at least understandable. For years, the Rehnquist Court had two “swing voters,” Justice O’Connor and Justice Kennedy, ideologically poised between three comparatively conservative justices and four comparatively liberal justices. But after Chief Justice Rehnquist’s death and Justice O’Connor’s retirement, the confirmations of Chief Justice Roberts and Justice Alito (we now know) have transformed the Court.

Now four outright conservative justices—Chief Justice Roberts and Justices Scalia, Thomas, and Alito—are frequently balanced against Justices Stevens, Souter, Ginsburg, and Breyer. In most of the high-profile and controversial cases, that means there is only one swing voter left—Justice Kennedy. As the essays in this issue strongly suggest, in general, that has made for a more reliably conservative Court.

Prof. Vikram Amar of the University of California Davis School of Law shows in his essay how the Court’s opinions in the race-based student assignment cases and the “BONG HiTS 4 JESUS” case, while instructive in their own right, can be taken together as illustrations of the increasing durability of the Court’s five-member majority while also revealing some differences within that same conservative bloc. Both cases also help confirm Justice Kennedy as the Court’s fulcrum while saying something about the Court’s relationship with the Ninth Circuit.

Meanwhile, Houston attorney Alamdar Hamdani writes that plaintiffs are finding the new Court less congenial to suits based on the Sherman Antitrust Act. Beginning with the Court’s 5-4 decision in Leegin Creative Leather Products, Hamdani goes on to analyze how the sum of the Court’s 2006 term decisions will require future plaintiffs to meet higher standards of proof in order to prevail in a Sherman Act case.

Then, as Prof. Martha Davis points out in her essay, the difference between the current Court and the Rehnquist Court plays out further in cases involving women’s rights. The new lineup has left Justice Ginsburg the only female justice, a fact that may have contributed to the 5-4 results in cases central to women’s rights—abortion rights and employment discrimination. These decisions could easily have gone the other way if Justice Kennedy had swung the other way or if Justice O’Connor had not retired. In both cases Justice Ginsburg issued stinging dissents.
In his essay, Prof. Robert Abrams writes that this 5-4 trend stretched even into the area of environmental law. Although two less controversial cases resulted in unanimous or near unanimous decisions, two others were of exceptional importance and both resulted in a split Court. However, unlike the pattern in other areas this term, while Justice Kennedy voted with the conservatives in one case, he also voted with the liberals in the other high-profile case.

In the first instance, Justice Kennedy was the key vote holding that the EPA isn’t bound by certain requirements under the Clean Water Act when making decisions to transfer permitting authority. In the latter, Kennedy and his more liberal colleagues publicly disagreed with President Bush and the conservative bloc when the justices determined that scientific evidence shows greenhouse gases are likely impacting our environment and that therefore the EPA must regulate their emission.

Finally, as always, this issue also features PREVIEW’s Case Highlights, which give you a quick picture of what happened in every one of the cases we previewed prior to oral argument in Issues 1–7.

Thanks are owed Tom Goldstein and Akin, Gump, Strauss, Hauer & Feld LLP for their continued generosity in sharing their statistical work and other analyses with us. Special thanks are owed the Public Education Division’s Catherine Hawke for her hard work on all aspects of this summer issue.

Charles F. Williams
Editor
The Justices decided 68 cases after argument this term, the lowest number in recent history. Last term they decided 71 after argument, 76 in 2004, and 74 in 2003. The greatest number of cases decided after argument over the last 16 years was in both 1992 and 1991 when the Justices decided 107 each year. In total, the Justices decided 72 cases in this term, including four summary dispositions, also a recent low. Previous total numbers of cases decided include 82 in 2005, 80 in 2004, 79 in 2003, 80 in 2002 and 81 in 2001.

Of the cases that the Court decided this term the share of unanimous opinions fell, compared to the previous term. This year, the Court issued fully unanimous decisions in 18 of 72 cases (25 percent), not including an additional ten cases in which the Justices were unanimous in judgment only. By comparison, 37 of 82 (45 percent) cases were fully unanimous in 2005. Measured against previous terms, the share of unanimous opinions in 2006 fell below levels seen during most recent years under former Chief Justice William Rehnquist. The percentages of fully unanimous decisions from previous years are 21 percent in 2004, 32 percent in 2003, 39 percent in 2002, 32 percent in 2001, 29 percent in 2000, and 32 percent in 1999.

This term, it was the 5-4 split decisions that garnered the most attention. Given the makeup of today’s Court, Justice Kennedy has proven to be an important vote in controversial cases. In 2006, 24 of 72 cases (33 percent) were decided by a 5-4 margin—the highest share in at least a decade. After the relatively calm term last year, in which only 11 of 82 cases (13 percent) cases were decided by a 5-4 vote, the level of divisiveness returned to a level closer to that of the 2004 term, when 24 of 80 cases (30 percent) were decided 5-4.

Nineteen of the 5-4 cases broke down along ideological lines and, as in most every recent term, the Court’s five more conservative members won a greater share of 5-4 victories. Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Alito prevailed in 13 of 24 (54 percent) 5-4 decisions, while Justices Stevens, Souter, Ginsburg, and Breyer prevailed in only six of 24 (25 percent) decisions. Unlike previous terms, members of the Court’s left-leaning bloc were unable to sway anyone besides Justice Kennedy to prevail in a 5-4 case.

In 5-4 cases during previous terms, the five most conservative Justices—which formerly included Chief Justice William Rehnquist and Justice Sandra Day O’Connor—prevailed in 6 of 11 cases (55 percent) in 2005, 5 of 24 cases (21 percent) in 2004, 10 of 21 cases (48 percent) in 2003, 6 of 15 cases (40 percent) in 2002, and 8 of 21 cases (38 percent) in 2001. By comparison, the four more liberal Justices prevailed in 4 of 11 cases (36 percent) in 2005, 8 of 24 cases (33 percent) in 2004, 7 of 21 cases (33 percent) in 2003, 5 of 15 cases (33 percent) in 2002, and 6 of 21 cases (29 percent) in 2001.

When reviewing this term, it is important to note that this 5-4 split in the Court is not necessary always due to ideology. Not
all of the 2006 5-4 cases went straight
down ideological lines. Among the 5-4
cases not decided along liberal-conserva-
tive lines in 2006, two featured the Chief
Justice and Justices Kennedy, Souter,
Breyer, and Alito in the majority (Philip
Morris and James); one featured Justices
Stevens, Kennedy, Ginsburg, Breyer and
Alito in the majority (Zuni); and one fea-
tured the Chief Justice and Justices
Scalia, Kennedy, Thomas and Breyer in
the majority (Limtiaco). Watters v.
Wachovia, which arguably would have
been decided 5-4 had Justice Thomas not
recused himself, featured Justices
Kennedy, Souter, Ginsburg, Breyer, and
Alito in the majority.

Justice Kennedy’s central role in these
5-4 cases extended even to their author-
ship. Justice Kennedy wrote for the
majority in six 5-4 opinions this term,
followed by Justices Stevens, Thomas,
and Alito with four each, and the Chief
Justice with three. Justice Breyer wrote
two and Justice Ginsburg authored one.
Justice Souter wrote no 5-4 decisions this
term, nor did Justice Scalia. In compari-
son, Justice Scalia authored four 5-4
decisions in 2005.

Even within the traditional
majority/minority breakdowns, distinct
smaller groups of Justices appeared in
agreement numerous times throughout
the term. This term, the Chief Justice
and Justice Alito found themselves in
agreement more than any other pair of
Justices. The two Bush appointees agreed
in full in 88 percent of the cases they
both heard, essentially equal to their 89
percent rate the previous term. Among
the other conservative members of the
Court, Justices Scalia and Thomas agreed
in full in 80 percent of the cases they
heard, versus 88 percent in 2005.

Factoring in agreements in part and in
judgment only, both the Chief Justice
and Justice Alito and Justices Scalia and
Thomas agreed in more than nine of 10
cases. The Chief Justice and Justice Alito
agreed in judgment or more in 94 per-
cent of cases they both heard, and
Justices Scalia and Thomas agreed in
judgment or more in 93 percent of the
cases they both heard (almost equal to
the 95 percent rate for both pairs in
2005). Justices Kennedy and Alito also
agreed in judgment or more in 91 per-
cent of cases they both heard (like their
92 percent rate the previous term).

Among the Court’s more liberal mem-
ers, Justices Stevens and Ginsburg and
Justices Souter and Breyer each agreed
in full 79 percent of the time. Justice
Ginsburg maintained similar full agree-
ment rates with Justice Souter (81 per-
cent) and Justice Breyer (76 percent).
Justice Stevens agreed in full less often
with Justice Souter (71 percent) and
Justice Breyer (67 percent) than he did
with Justice Ginsburg. After including
agreements in part and in judgment,
Justices Stevens and Ginsburg and
Justices Souter and Breyer again share
the same rates of agreement—89 percent.

Overall, Justice Stevens enjoyed the low-
est rates of full agreement with more con-
servative members of the Court. He
agreed in full with Justice Thomas in
only 32 percent of the cases they both
heard, the lowest rate of any pair of
Justices. He also agreed in full only 36
percent of the time with Justice Scalia,
41 percent of the time with the Chief
Justice, and 42 percent of the time with
Justice Alito. Justice Kennedy, who found
himself in the minority only twice all
term, agreed in full more often than not
with all other members of the Court.
Justice Kennedy’s full agreement rates
ranged from 82 percent with the Chief
Justice and Justice Alito to 52 percent
with Justice Stevens.

Given this low rate of full agreement, it is
no surprise that Justice Stevens was in
the minority more frequently than any
other Justice this term. He counted as a
member in the minority 26 times during
the term. Justice Ginsburg followed with
20 dissents, Justice Breyer with 17 dissents, Justices Souter and Thomas with 16 dissents, and Justice Scalia with 14 dissents. Justice Alito dissented 10 times, the Chief Justice dissented eight times, and Justice Kennedy dissented twice during 2006. Justice Thomas dissented alone four times, followed by Justice Stevens with three, and Justices Scalia and Souter with one solo dissent each.

The Court reversed or vacated the lower court decision in 52 of 72 cases (72 percent) and affirmed the lower court in 18 of 72 cases (25 percent). In two cases, it affirmed in part or reversed or vacated in part. The previous term, the Court reversed or vacated the lower court in 59 of 82 cases (72 percent) and affirmed the lower court in 20 of 82 cases (24 percent), with three cases being affirmed in part or reversed or vacated in part.

Once again, the Court considered more cases from the Ninth Circuit—21 of 72 cases (29 percent)—than any other federal Court of Appeal. The Court vacated or reversed the Ninth Circuit in 18 of 21 cases (86 percent), versus in 15 of 18 cases (83 percent) the previous term. The Sixth Circuit came next with seven of 72 cases (10 percent), and the Second, Fifth, and Eleventh Circuits each had five of 72 cases (7 percent). The Court also resolved four cases (6 percent) from the Federal Circuit, reflecting a desire to clarify the nation’s patent laws. State courts accounted for seven cases this term, versus 15 cases in 2005.

When a Supreme Court term is filled with high-profile, extremely controversial cases, it is sometimes necessary to stop and look at the straight numbers to fully appreciate the voting patterns of the Justices and the impact a certain ideological makeup can have. And the 2006 term was no different. By stopping to take in the statistics that came out of this term, one gains a better understanding of the Court’s current makeup, and perhaps where it is heading in the future.
Splits in Decisions

Unanimous or 9-0 (28 cases)
8-1 or 7-1 (9 cases)
7-2 or 6-2 (9 cases)
6-3 (3 cases)
5-4 (**24 cases)

Notes: ** Watters v. Wachovia Bank, N.A. is treated here as a 5-4 decision although Justice Thomas was recused.

Opinion Authorship: Summary

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<tr>
<th></th>
<th>Total Number of Opinions</th>
<th>Majority Opinions (including Unanimous Opinions, excluding Plurals)</th>
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FIVE-TO-FOUR CASES: ALIGNMENTS

- Roberts, Scalia, Kennedy, Breyer, Alito – 1 case
- Stevens, Kennedy, Ginsburg, Breyer, Alito – 1 case
- Roberts, Kennedy, Souter, Breyer, Alito – 2 cases
- Stevens, Kennedy, Souter, Ginsburg, Breyer – 6 cases
- Roberts, Scalia, Kennedy, Thomas, Alito – 13 cases

MINORITY MEMBERSHIP
## Circuit Scorecard—Federal Courts and State Courts

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In an interview last year commemorating the one-year anniversary of Justice O'Connor’s departure from the Supreme Court, Justice Ginsburg predicted that the Court’s 2006-07 term would be “very revealing.” Indeed, the decisions from the past term revealed quite a lot about the current majority’s perspective on women’s issues, and Justice Ginsburg’s increasing alienation from that majority. Not only is Justice O’Connor’s own mildly feminist voice absent from both deliberations and decisions, but her moderating influence on the other Justices, particularly Justice Kennedy, is gone. As a result, Justice Ginsburg is the sole, self-described “lonely” representative of the female gender on the Court, her opinions rather easily marginalized and dismissed by her more conservative colleagues because of her long, distinguished, and notorious career as a women’s rights activist.

Justice O’Connor’s departure is not the only factor contributing to the Court’s shift in tone that, Justice Ginsburg feels, increasingly ignore the realities of women’s lives and experiences. Significantly, Justice O’Connor’s replacement by Justice Alito has been compounded by the substitution of Chief Justice Roberts for Chief Justice Rehnquist. While Chief Justice Rehnquist was not known to embrace the feminist label, his decisions in the area of women’s employment rights were often quite pro-woman. He wrote the first Supreme Court decision in 1986 upholding a sexual harassment complaint under Title VII, Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986). In a series of subsequent sexual harassment cases, including Harris v. Forklift Systems, 413 U.S. 17 (1993), Faragher v. City of Boca Raton, 524 U.S. 775 (1998), and Burlington Industries v. Ellerth, 524 U.S. 724 (1998), Chief Justice Rehnquist parted ways with Justices Scalia and Thomas to uphold the plaintiffs’ claims.

Similarly, in 2004, Chief Justice Rehnquist wrote for the Court’s more liberal Justices in his opinion in Hibbs v. United States, 538 U.S. 721 (2003), leaving Justices Scalia, Kennedy, and Thomas to dissent. There, he repeatedly acknowledged states’ history of gender discrimination in employment and the real-world constraints facing women in the workplace, and upheld Congress’s constitutional authority to enact the Family and Medical Leave Act to address that discrimination. Chief Justice Rehnquist may not have been a women’s rights ally in the reproductive rights arena or the area of constitutional equality, but when women’s workplace roles were at issue his vote was one that was always in play.

In contrast to what might have been expected from their predecessors, Chief Justice Roberts and Justice Alito this term marched in lockstep in opposition to women’s rights in two high-profile cases: Gonzales v. Carhart, 127 S.Ct. 1610 (2007), dealing with a congressional ban on a late-term abortion procedure, and Ledbetter v. Goodyear Tire, 127 S.Ct. 2162 (2007), a Title VII case challenging sex-based wage discrimination. In both cases the new justices’ votes, combined with those of Justices Scalia, Kennedy, and Thomas, made up a 5-4 majority, with Justice Ginsburg issuing powerful dissents. Particularly in the Ledbetter decision, feminists might have
hoped for more from the newcomers, given Roberts’s marriage to a highly accomplished professional woman (a law firm partner and leader of the anti-abortion group “Feminists for Life”) and both jurists’ status as baby boomers raised in a cultural atmosphere of gender equality. Instead, the dire predictions of the women’s rights organizations that opposed their nominations were borne out.

TWO CONTENTIOUS CASES: GONZALES V. CARHART AND LEDBETTER V. GOODYEAR TIRE

The much-anticipated Gonzales case, which received considerable publicity throughout the term, addressed the legality of Congress’s “Partial Birth Abortion Ban Act of 2003” barring certain abortion procedures, i.e., intact dilation and extraction (D&E), without regard to the health of the woman undergoing the abortion. In 2000, in Stenberg v. Carhart, 530 U.S. 914 (2000), the Court considered a similar state law enacted in Nebraska and concluded that an exception to protect a woman’s health was required. The Court’s decision in Stenberg, also 5-4, was approved by a slim majority that included Justice O’Connor. In a separate concurrence, she wrote succinctly that the “lack of a health exception necessarily renders the statute unconstitutional.” Justice Kennedy wrote a separate, impassioned dissent in Stenberg. He decried the majority opinion that viewed “the procedure from the perspective of the abortionist rather than from the perspective of a society shocked when confronted with a new method of ending life.” He dismissed evidence that the intact D&E procedure “may present an unquantified lower risk of complication for a particular patient.” And he called Justice O’Connor’s proposed health exception “meaningless” because it rested on the medical judgment of individual doctors who are disposed to use the procedure.

By the time Gonzales v. Carhart reached the Court, however, the personnel had changed. Essentially reversing its view in Stenberg, the Court in Gonzales upheld—for the first time in the Court’s history—an abortion ban that did not provide an exception to protect a woman’s health. Writing for the majority, Justice Kennedy romanticized motherhood, opining that “[r]espect for human life finds an ultimate expression in the bond of love the mother has for her child.” This notion of a special, almost mystical relationship between mother and child is a theme that he has also used as a rationale for limiting women’s autonomy in other circumstances—for example, in Nguyen v. INS, 553 U.S. 31 (2001), a case involving transmission of citizenship from parent to child in which Justice Kennedy wrote that women (as opposed to men) could not avoid their parental responsibilities because “the opportunity for a meaningful relationship between citizen parent and child inheres in the very event of birth.” Citing this special relationship again in Gonzales, Justice Kennedy suggested that women’s mental health might be better protected by barring them from having abortions that they will later regret. This same idea of protecting women from themselves is one that has long been raised by anti-abortion activists—for example, in the 2004 South Dakota political campaign to ban abortion—and that is now apparently finding purchase in the courts. In fact, Kennedy felt comfortable citing this phenomenon, including women’s alleged severe depression and loss of self-esteem post-abortion, even though he could “find no reliable data” to measure it. Finally, because of these concerns about the poor choices that women might make and because of the importance of states’ interest in protecting potential life, Justice Kennedy articulated the rule that, in the face of medical disagreement on the impact of the intact D&E ban on women’s health, the legislature could decide to forgo a health exception.

In a rare oral dissent from the bench, Justice Ginsburg, joined by the reliably pro-choice Justices Stevens, Souter, and Breyer, expressed her outrage at Justice Kennedy’s decision. Calling the majority’s decision “alarming,” she chastised Justice Kennedy’s failure to take seriously his own opinion on Planned Parenthood v. Casey, 505 U.S. 833 (1992), which specifically restricted states’ ability to ban abortions in the face of women’s health concerns. Addressing the justifications he proffered in the majority opinion, Ginsburg noted the Court’s own admission that “moral concerns” motivated its conclusions—concerns that are, Justice Ginsburg observed, “untethered to any grounds genuinely serving the Government’s interest in preserving life.” Along those lines, she underscored the loaded language adopted by the majority to “spin” its decision. Among other things, the Court described a fetus as an “unborn child” and a “baby,” and used the terms “abortion doctor” or “abortionist” to describe obstetrician-gynecologists and surgeons.

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Finally, attacking the Court’s statements about the need to protect women from the consequences of their own purportedly uninformed decisions to undergo abortions, Justice Ginsburg cited a litany of cases with which she is intimately familiar, including *Muller v. Oregon*, 208 U.S. 412 (1908), and *Bradwell v. State*, 83 U.S. 130 (1873), in which the Supreme Court upheld protective policies based on generalizations about women’s inferior physical and mental capacities. It was Justice Ginsburg’s pioneering work in the 1970s as the founder of the American Civil Liberties Union’s Women’s Rights Law Project that finally brought that era of judicial protectionism to a close; in fact, Ginsburg referenced Muller in her own first oral argument to the U.S. Supreme Court in *Frontiero v. Richardson*, 411 U.S. 677 (1973).

Indeed, it would be hard to overstate Justice Ginsburg’s impact on this aspect of women’s rights jurisprudence, since her *Gonzales* opinion cites not only *Califano v. Goldfarb*, 430 U.S. 199 (1977), which she litigated and argued, but *United States v. Virginia*, 518 U.S. 515 (1996), in which she authored the Court’s opinion, for the proposition that such generalizations are “archaic and overbroad.”

Whatever satisfaction she might have gained from the success of her campaign toward women’s equality is surely now tempered by the Court’s current willingness to revert to such protectionism as a basis for restricting a right to reproductive choice that the Court continues to claim is “fundamental.” Justice Ginsburg’s dissent concluded that the Court’s decision “cannot be understood as anything other than an effort to chip away at a right declared again and again by this Court—and with increasing comprehension of its centrality to women’s lives.”

The “revelations” that Justice Ginsburg predicted at the beginning of the term continued with another 5-4 rejection of a woman’s rights claim issued at the end of May. In *Ledbetter v. Goodyear Tire*, 550 U.S. ___ (2007), Lilly Ledbetter sued her employer under Title VII, seeking compensation for nearly two decades of pay discrimination. Because the employer did not share wage information with employees, and because her wages had only gradually slipped to a significant level below the pay given to men in comparable jobs, she didn’t determine that her pay was discriminatory until 1998, a few months before she retired, when she received an anonymous letter spelling out the longstanding disparate wages within her department. Not surprisingly, she was afraid of losing her job or other repercussions if she challenged her employer immediately, so she waited and filed a complaint promptly upon her retirement.

Title VII includes a statutory requirement that complaints be filed with the Equal Employment Opportunity Commission within 180 days of the discriminatory act. A number of decisions from lower courts suggested that wage discrimination such as this was a classic continuing violation, that each paycheck embodied the history of discriminatory treatment, and that the plaintiff could sue under Title VII provided that there was at least one discriminatory paycheck within the 180-day window. Ledbetter would have met this standard and could have recovered back pay and damages from the entire time that the discriminatory wages were paid. However, in a 5-4 decision, the Court rejected her theory. Instead, in a decision written by Justice Alito, the Court opined that the plaintiff had waived her right to sue for past discrimination when she failed to file within 180 days of the initial discriminatory decision regarding her wages.

Once again, an irate Justice Ginsburg delivered her dissent orally from the bench, a prerogative that she used twice in this “revealing” term but had not used for years previously. Joined by Justices Stevens, Souter, and Breyer, Justice Ginsburg stressed the realities of wage discrimination—the fact that the details of the discrimination are virtually always hidden from the victims (as was the case here), and that many employers even bar their employees from discussing wages, thus ensuring that such discrimination will be almost impossible to discover within 180 days of an initial discriminatory decision affecting pay.

In her dissent, Justice Ginsburg also implored Congress to take immediate steps to rectify the impact of the majority’s decision, which would apply to all forms of Title VII discrimination including race, color, religion, sex, or national origin. Congress responded. Within two weeks, the House Committee on Education and Labor scheduled hearings on the impact of the *Ledbetter* decision, and bills to address *Ledbetter’s* impact were pending in both houses of Congress.

**A WOMAN’S VOICE**

When Justice O’Connor announced her decision to retire, Justice Ginsburg did not hesitate to express her hope that another woman would be
nominated to the Court. In fact, President Bush initially did nominate former White House Counsel Harriet Miers for the position but proceeded with Justice Alito when Miers withdrew. If the Court included more than one woman, even if (as with O’Connor and Ginsburg) the women jurists did not have significant ideological overlap, would the term have come out differently?

Much has been written about women’s “different voice” and its possible impact on judging. Yet the empirical results have been mixed and several studies have found that having a female judge at the trial level has no discernible effect on case outcome. However, a recent study published in *The Yale Law Journal* (Jennifer L. Peresie, “Female Justices Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts,” 114 Yale L. J. 1759 (2005)), focused more specifically on appellate outcomes, studying the impact of female judges’ participation on appellate panels. The study found that individual female judges were more likely to favor plaintiffs in sexual harassment or sex discrimination cases. Further, the data demonstrated that female judges have an indirect effect on outcomes, and that when at least one female judge served on an appellate panel, a male judge was more likely to favor the plaintiff. The effect was significant, and the author found that “[p]anels with at least one female judge decided cases for the plaintiff more than twice as often as did all-male panels.” Interestingly, this phenomenon affected both liberal and conservative male judges, who were equally likely to be moved toward the plaintiffs by the presence of a female judge.

Peresie offers a number of possible explanations for this phenomenon. First, female judges may simply influence male judges’ perspectives, and change their votes, through the collegial give-and-take of deliberation. Alternatively, some male judges may be more apt to defer to a female judges’ view of a sex discrimination case. Third, male and female judges may be trading votes in these sex discrimination cases in exchange for votes in future matters. Finally, Peresie posits that the presence of female judges may simply inhibit male judges from fully expressing their anti-plaintiff views. Significantly, ideology does not explain the result. While female judges tend to be more liberal than male judges, the author took steps to control for ideology in analyzing the results.

Of course, merely adding additional women to the Supreme Court will not necessarily ensure different case outcomes. For example, in the 2005 term, the Court considered a case, *Castle Rock v. Gonzales*, 545 U.S. 748 (2005), filled with compelling facts about violence against women. Jessica Gonzales alleged that she had repeatedly asked the county to enforce a restraining order that she held against her estranged husband after he absconded with their three children. However, the county did little to enforce the order and that same evening her husband murdered the children. Despite Justice O’Connor’s interest in issues of domestic violence, her deference to states’ rights prevailed and she ruled with the majority that Gonzales could not recover from the county for its failure to enforce the order. Justice Ginsburg joined Justice Stevens in dissent.

Likewise, Justice Ginsburg does not always take the position urged by women’s rights lawyers either. For example, this term in *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. ___ (2007), the Court upheld a Department of Labor regulation that excludes certain workers who provide in-home care for elderly or disabled people from the Fair Labor Standards Act’s wage and overtime protections. Though the individuals affected by this provision are largely women, and though there was legislative history demonstrating that Congress intended to expand FLSA to cover domestic services in 1974 in part because of discriminatory impact of the exclusion, the Supreme Court upheld the regulation as beyond the scope of that amendment. Justice Breyer wrote the Court’s opinion and was joined by Justice Ginsburg in this unanimous decision.

Nevertheless, the Peresie study does suggest that women’s participation in appellate decision making makes a difference over the course of a term, if not in every individual case. Viewed in light of these results, Justice O’Connor’s replacement by Justice Alito is more significant than the change from a more moderate justice to a more conservative one, with long-term implications that cut across a range of substantive areas.

Justice O’Connor herself believed that women bring something different—diverse perspectives and life experiences—to the bench. On the one hand, she often repeated the quote attributed to Minnesota Supreme Court Justice M. Jeanne Coyne that “A wise old man and a wise old
woman reach the same conclusion. ...” On the other hand, several of Justice O'Connor's opinions reflect an appreciation of the ways in which sex and race shape individuals' perspectives and experiences. For example, in *J.E.B. v. T.B.*, 511 U.S. 127 (1994), considering the constitutionality of peremptory challenges based on sex, Justice O'Connor filed a concurrence in which she observed that “like race, gender matters.” Noting a “plethora of studies” as well as her own intuition, she observed that “in certain cases a person's gender and resulting life experience will be relevant to his or her view of the case.” Likewise, in her opinion in the affirmative action case *Grutter v. Bollinger*, 539 U.S. 306 (2003), Justice O'Connor further acknowledged these differences in noting that people of different races are likely to bring different life experiences and perspectives to the classroom and the workplace.

Because of their influence on male justices, having two or even three female justices rather than just one could create a very different dynamic during the deliberation phase, particularly in a case relating to women's rights. Now, however, with only one wise woman on the Court, the common experiences of women are even more marginal to the Court's deliberations and decisions, as Justice Ginsburg discovered this term.

**THE SYMBOLIC IMPACT**

In addition to their potential influence on case outcomes, female justices serve an important symbolic role on the Supreme Court as well. As with any branch of government, diversity sends an important message of inclusion to constituents. The Supreme Court, however, has female representation of only 11 percent, at a time when nearly 50 percent of law students are female and 30 percent of lawyers are women.

While there are other countries in similar straits—for example, India's Supreme Court is entirely male—many nations have done much better in terms of expanding women's representation in their highest courts. South Africa's Constitutional Court, consisting of 11 justices, includes three women. The Israel Supreme Court has 12 judges in total, half of whom are women, including the Court's chief justice. Significantly, since the Israel Supreme Court sits in appellate panels, some litigants find their cases heard by panels composed only of women. Finally, the Canada Supreme Court currently includes four women out of nine justices, including Supreme Court Chief Justice Beverly McLachlin. Most state courts within the United States have also outpaced the U.S. Supreme Court in terms of inclusion of women. On the New York Court of Appeals, for example, female judges command a majority of the seats, occupying four out of seven positions, with Chief Judge Judith Kaye leading the court. In the state of Washington, women occupy four out of nine state supreme court seats. Female judges also hold the chief judge spots on a growing number of state supreme courts, including Alaska, Arizona, Colorado, Florida, Georgia, Kansas, Maine, Massachusetts, Missouri, Montana, New York, North Carolina, South Carolina, Utah, West Virginia, and Wisconsin.

In short, even absent any substantive impact on decision making, there is no doubt that the stark lack of representation of women on the U.S. Supreme Court strains its legitimacy, regardless of ideology. This strain is particularly potent in areas such as reproductive rights or sex discrimination, in which female judges are, rightly or wrongly, deemed to have special expertise by virtue of their life experiences.

**CONCLUSION**

As the lone woman on the Court this term, Justice Ruth Bader Ginsburg stepped up to the plate with searing dissents in two high-profile cases involving women's rights. But absent another change in the Court personnel, there seems little chance that those dissents will be converted to majority views any time soon. Further, because of her long career as a women's rights advocate and feminist, Justice Ginsburg may be in a particularly poor position to sway her more conservative colleagues. Instead, in a sad irony, after decades in which her views on women's rights held sway in the courts, Justice Ginsburg may now spend the last years of her career trying to limit the damage to women's rights and autonomy wrought by the Court's increasingly solid conservative majority.
The Court decided a number of high-profile cases this term involving limits the Constitution places on public schools. Maybe the two most prominent rulings were *Parents Involved in Community Schools v. Seattle School District No. 1*, No. 05-908 (June 28, 2007), concerning the permissibility of using race in pupil school assignment, and *Morse v. Frederick*, No. 06-278 (June 25, 2007), involving the constraints schools may place on student speech at school-sanctioned and school-supervised events. *Parents Involved* was itself one of two cases (the other being *Meredith v. Jefferson County Board of Education*, No. 05–915) that were argued and decided together addressing the Fourteenth Amendment’s restraints on governmental use of race.

Each of these cases is doctrinally important in its own right, and together they illustrate some important emerging features about the current Court.

I. THE RACE-BASED PUPIL ASSIGNMENT CASES

**Background and Lower Court Analyses**

In *Parents Involved*, a 5-4 majority held that local school boards in Seattle and Louisville ran afoul of the Equal Protection Clause of the Fourteenth Amendment when they voluntarily—that is, without being ordered by a court to do so—adopted race-based programs to redress de facto racial segregation in their respective school districts. The majority concluded that the school districts’ use of individual students’ race as a factor in assigning them to particular schools was not, in constitutional parlance, “narrowly tailored” to advance a “compelling” objective.

Although the details of the two school assignment plans differed in some particulars, a description of how the Seattle School District plan worked will suffice to provide context for analyzing the important legal issues.

Area students going into high school were asked to register their preferences among any of the 10 high schools within the district. The district placed as many students in their “first choice” schools as possible. But the district could not satisfy everyone; at least four of the 10 schools have typically been “oversubscribed”—more students wanted in than could be accommodated.

For these oversubscribed schools, students were admitted pursuant to four “tiebreakers” considered in sequence. The first was whether an applicant had a sibling already attending the school. The third was the applicant’s geographical proximity to the school. And the fourth was a random lottery. But the second tiebreaker—considered ahead of geography or a lottery—focused on whether the oversubscribed school was “racially imbalanced.” A school was considered imbalanced if its racial makeup—that is, the percentages of nonwhites and whites at the school—diverged by more than 15 percent from the racial makeup of the whole district.

The entire district is currently about 60 percent nonwhite and 40 percent white. That means a particular school would be considered imbalanced if less than 45 percent or more than 75 percent of its students were nonwhite. (To put the numbers the other way around, a school would be imbalanced if less than 25 percent or more than 55 percent of its student body were white.)

Vikram Amar is a professor of law at the University of California Hastings College of the Law. He can be reached at amarv@uchastings.edu or (415) 565-4663.

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Under the district’s student assignment plan, when an oversubscribed school was deemed imbalanced, the race of individual applicants was then used to redress the imbalance. So, for example, in 2000–01 (the one year for which the opinions provide data), at oversubscribed Ballard High, if the racial tiebreaker had not been used and only the other tiebreakers (sibling presence, geography, and lottery) had been used, nonwhites would have comprised only 33 percent of the school, whereas with the tiebreaker in place, nonwhites comprised 54 percent (well within the range of 45–75.) At Franklin High, another sought-after school, without the tiebreaker, nonwhites would have constituted 79 percent, whereas with the tiebreaker, their numbers were reduced to about 59 percent.

The Ninth Circuit Court of Appeals, applying Supreme Court precedents, applied “strict scrutiny” to the plan because it made use of the race of individuals. This doctrinal test requires the government to document a “compelling interest” and to use race to accomplish that compelling goal only in a carefully tailored or “necessary” way. The school district argued, and the Ninth Circuit agreed, that the district had met this standard because ensuring that every school mirrors, to some extent, the racial makeup of the larger district community improves education. Racially balanced schools help promote racial and cultural understanding and teach students to operate in a multiracial/multiethnic world much more than do imbalanced schools.

In upholding the plan, the Ninth Circuit majority applied and extended the holding and rationale of the Supreme Court’s University of Michigan Law School affirmative action ruling of 2003, in which Justice O’Connor wrote for a five-member majority upholding the Michigan law school’s ability to take the race of applicants into account for the purposes of assembling a “critical” mass of racial minorities at the law school to further educational diversity. Grutter v. Bollinger, 539 U.S. 306 (2003).

SUPREME COURT HOLDING AND ANALYSIS
A majority of the Supreme Court rejected the Seattle plan (and the similar Louisville plan, which had been upheld by the Sixth Circuit). Writing for himself and Justices Kennedy, Scalia, Thomas, and Alito, Chief Justice Roberts held that the plan was not necessary and carefully enough tailored—and thus failed strict scrutiny—for a number of reasons. First, unlike in Grutter, race in Seattle and Louisville were “not considered as part of a broader effort to achieve ‘exposure to widely diverse people, cultures, ideas and viewpoints.’” Instead, the only kind of diversity the school districts seemed to care about was racial diversity, and that single-minded focus on race contravened the teaching of Grutter that if an individual’s race is ever to be considered, it has to be considered as part of an inquiry into the whole person.

Second, the racial definitions used by the school districts were too “limited.” In Seattle, students were characterized as merely “white” or “nonwhite,” and in Louisville students were divided only into “blacks” and “others.” As Chief Justice Roberts pointed out, a Seattle school with 50 percent Asian American students and 50 percent white students but no African American, Native American, or Latino students would be considered “balanced,” but a school with 30 percent Asian American, 25 percent African American, 25 percent Latino, and 20 percent white students would not. In the majority’s view, “[i]t is hard to understand how a plan that could allow these results can be viewed as being concerned with achieving enrollment that is ‘broadly’ diverse.”

Third, and more generally, the Court held that lower courts should not lightly extend the framework of Grutter outside “considerations unique to institutions of higher learning” because the “context of higher education” occupies a “special niche in our constitutional tradition.”

Finally, the Court suggested that strict scrutiny was not satisfied because other means besides making use of the race of individual students may very well have been effective in achieving the school districts’ stated goals but were inadequately considered by school officials.

Four justices in the majority—all but Justice Kennedy—went further and attacked not just the narrow tailoring of the school districts’ plans but also their very objective. Indeed, Chief Justice Roberts, joined by Justice Scalia, Justice Thomas (who also wrote a separate concurrence for himself), and Justice Alito, concluded that the districts’ goal of trying to make each school look racially more like the districts as a whole was itself not constitutionally legitimate, let alone a “compelling interest.” In Grutter, Michigan’s assertion that assembling a “critical mass” of minority students would enhance the classroom was supported
by much educational research, and more importantly it did not require government to use racial proportionality—or anything close to it—as a baseline; as long as there were a nontrivial number of minority students enrolled, critical mass and the educational benefits could be realized.

In the Parents Involved setting, by contrast, the plurality pointed out that the school districts’ use of race was tied to “each district’s specific racial demographics, rather than to any pedagogic concept of the level of diversity needed to obtain the asserted educational benefits.” This “working backward to achieve a particular type of racial balance, rather than working forward from some demonstration of the level of diversity that provides the purported benefits,” was, according to the plurality, “a fatal flaw under … existing precedent” because the Court has made clear that “racial balance is not to be achieved for its own sake.”

These four justices in the Parents Involved plurality also invoked the legacy of the famous Brown v. Board of Education, 347 U.S. 483 (1954), litigation in the 1950s. After asserting that “when it comes to using race to assign children to schools, history will be heard,” the plurality opinion quoted the Brown remedial ruling (a term after the merits ruling was issued by the Court) to the effect that “full compliance” with the merits ruling required school districts “to achieve a system of determining admission to the public schools on a nonracial basis.” Justice Thomas, in his separate writing, amplified this “color-blind” mandate.

Justice Kennedy, who provided a fifth vote to strike down the assignment plans, wrote separately to avoid associating himself with the plurality’s reading of Brown v. Board of Education, 347 U.S. 483 (1954), litigation in the 1950s. After asserting that “when it comes to using race to assign children to schools, history will be heard,” the plurality opinion quoted the Brown remedial ruling (a term after the merits ruling was issued by the Court) to the effect that “full compliance” with the merits ruling required school districts “to achieve a system of determining admission to the public schools on a nonracial basis.” Justice Thomas, in his separate writing, amplified this “color-blind” mandate.

Justice Stevens wrote a short dissent taking issue with the plurality’s use of history and Brown, and Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg, wrote a lengthy dissent arguing that a more generous standard of review than the majority’s understanding of strict scrutiny ought to apply when race is used in an inclusionary rather than exclusionary way and when no particular racial groups bear the logistical burden of trying to accomplish integration in important societal institutions such as public schools. This, argued Justice Breyer, was the lesson of the school desegregation cases—such as Swann v. Charlotte-Mecklenburg, 402 U.S. 1 (1971)—following Brown in the 1960s and 1970s.

PARENTS INVOLVED’S USE OF THE PAST

One key issue that divided the justices in Parents Involved was the meaning of history and past precedent. On the key question of how “color-blind” the Court’s approach actually was in the Brown litigation 50 years ago, it is true that the Court wrote about the need for assignment on a “nonracial basis” in its remedial opinion, quoted by Chief Justice Roberts. And this phrasing, when analyzed in isolation, seems to condemn all governmental consideration of the race of students. But to read Brown as a case about color-blindness is to ignore much of the analysis and language that the Court used to explain why it was invalidating the segregation schemes before it.

Indeed, perhaps the most famous language from Chief Justice Earl Warren’s merits opinion for the Court in the Brown cases spoke not in terms of color blindness, but in terms of the special damage done to some racial groups when race is used by government in an overt attempt to create racial hierarchy and stigma: “To separate [African American children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”

Thus, the Parents Involved plurality recited language talking about achieving a “system of determining admission to public schools on a nonracial basis” without acknowledging that this language

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was used in a setting where, unlike the Seattle and Louisville settings, there was a clear stigma and message of inferiority visited upon one race. Such an omission is certainly open to the charge of being historically misleading.

Ultimately, while the result in *Brown* certainly can be reconciled with a color-blind approach, the analysis and language in *Brown*, read in its entirety and against the historical backdrop that was 1954 America, does not really make *Brown* very strong *stare decisis* support for a total or near-total ban on governmental race consciousness.

The Court’s current proponents of a color-blind approach to the Fourteenth Amendment might also be making selective use of precedent when they invoke, as did Justice Thomas in his extensive concurrence, Justice Harlan’s famous 1896 dissent in *Plessy v. Ferguson*, 163 U.S. 537 (1896). *Plessy* is the notorious case in which the Court, over Justice Harlan’s protestations, permitted Louisiana to mandate separate railway cars for blacks and whites. Interestingly, justices who otherwise hold themselves out to be “originalists” do not tend to make arguments about what the framers of the Fourteenth Amendment said or did in 1868—perhaps because originalism doesn’t necessarily support them here—but tend instead to quote from Harlan in 1896.

Supporters of a complete ban on government race consciousness invoke the famous Harlan statement that “[o]ur Constitution is color-blind,” largely because Harlan’s vote in *Plessy* was legally right and morally just. Yet those who invoke Harlan ignore other nearby language from his writing that focused not on absolute color blindness, but instead on the need to avoid the creation of a “caste” in the United States.

Indeed, there are yet other passages from Harlan’s dissent that advocates of modern color blindness ignore even more tellingly. In describing the world that would result if government adhered to his prescription about the use of race, Harlan wrote: “The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it … holds fast to the principles of constitutional liberty.”

Small wonder people who want to draw upon Harlan’s “color-blind” metaphor don’t mention where he himself believed that metaphor would lead us.

On the other hand, Justice Breyer’s dissent needed to acknowledge—perhaps more than it did—that, regardless of the rationale of *Brown* and the cases implementing it over two generations ago, the strong doctrinal trend of the modern Court has been in the direction of color blindness.

Perhaps what Justice Kennedy said in *Lawrence v. Texas*, 539 U.S. 558 (2003), the famous case involving substantive due process, is also applicable here: “In all events we think that our laws and traditions in the past half century are of most relevance, …” And over the past 25 years, there is forceful language indicating an almost absolute ban on consideration of individual’s race in the dissenting opinion to *City of Richmond v. Croson*, 488 U.S. 469, 507 (1989)—(which would soon garner five votes after Justice Thomas’s arrival on the Court)—in, *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 610 (1990), and in *Adarand Constructors v. Pena*, 515 U.S. 200, 211 (1995).

In many ways, these more recent cases might be thought to eclipse cases such as *Swann v. Charlotte-Mecklenburg*, with *Grutter* being the one—very fact-specific—exception to this modern color-blind trend. And whatever one might say of the school districts’ plans in *Parents Involved*, they were not as careful and thoughtful and balanced as the University of Michigan program upheld by a narrow Court majority four years ago.

**Parents Involved’s Implications for the Future**

The practical consequences of the *Parents Involved* ruling are unclear, largely because the separate writing of Justice Kennedy—whose vote was necessary to the case’s outcome—is itself unclear. Justice Kennedy, distancing himself from the plurality, did proclaim that the “Nation has a
moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children.” And Justice Kennedy’s concurrence explicitly allows government to act in a “race conscious” way when deciding, say, where to locate new schools, where to draw attendance zone lines, how to allocate faculty and resources for special programs that might attract different kinds of students to previously racially isolated schools, and so forth.

Why Justice Kennedy believes the Fourteenth Amendment itself distinguishes between this kind of race consciousness on the one hand and the consideration of the race of individual students on the other is far from clear. But it should be added that Justice Kennedy does not even absolutely foreclose the consideration of the race of individual students for purposes of admission or assignment if a plan were more careful in its definition of race and its inclusion of other diversity factors beyond race. Whether any such K–12 education plan—modeled more closely on the Michigan Law School program—would ever satisfy Justice Kennedy is, of course, hard to predict. But the one thing that is foreseeable, in light of the vagueness of Kennedy’s opinion, is the specter of more local experimentation and more litigation.

II. MORSE V. FREDERICK
The Morse case arose from an incident in Juneau, Alaska, in which a group of high school students, including senior Joseph Frederick, unfurled a banner reading “Bong Hits 4 Jesus” on a sidewalk as the Olympic Torch Relay passed through town. The incident took place off school grounds but during school hours; the high school principal, Deborah Morse, decided to “permit staff and students to participate as an approved social event or class trip.” Students were permitted to leave class to witness the Relay, and school personnel “monitored” the students during this time. The high school’s pep band and cheerleaders performed at the event.

Together with his friends, Frederick unfurled the banner when TV cameras were passing by. Principal Morse, also attending the rally, saw the banner and told the students to take it down. When Frederick refused, she took the banner herself, later explaining that she thought the banner’s message encouraged illegal drug use and later suspended him for 10 days. Frederick filed suit, seeking money damages as well as injunctive relief, for violation of, among others, his First Amendment rights. The Ninth Circuit upheld Frederick’s First Amendment claim, but the Supreme Court, in a 5-3-1 ruling (with Justice Breyer being the “1,” as he thought the merits should not have been resolved in a case in which qualified immunity doctrine could have disposed of the suit), reversed in an opinion written by Chief Justice Roberts and joined by Justices Kennedy, Scalia, Thomas, and Alito.

In rejecting Frederick’s First Amendment claim, the Court began by characterizing the litigation as a “school-speech case,” governed by school speech precedents. Although, as Chief Justice Roberts recognized, “[t]here is some uncertainty at the outer boundaries as to when courts should apply school-speech precedents … [because this event was school-sanctioned and school-supervised, there is no doubt as to whether to apply these precedents] on these facts.”

The Court then turned to the key precedents, which included the famous Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 506 (1969), ruling that invalidated a school’s discipline of a student who wore an armband to school to protest the Vietnam War because, among other things, the wearing of the armband wasn’t demonstrated to be likely to substantially disrupt educational activities. The Court also examined Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675 (1986), in which the Court upheld the authority of school officials to punish a student for lewd and indecent speech at a mandatory school assembly. From these two cases, the Morse Court deduced two principles: (1) Students may have the right to do and say things off campus that they do not enjoy First Amendment protection to do or say at school; and (2) The “substantial disruption” standard of Tinker is not “absolute,” and there may be other justifications besides substantial disruption that school authorities may properly invoke to restrain harmful speech.

The key justification in this case, said the majority, was the overwhelming need to discourage and deter illegal drug use. Congress, as well as past precedents of the Court, wrote Chief Justice Roberts, made clear that school suppression of speech—even content- or viewpoint-based suppression—was permissible when the “speech is (Continued on Page 442)
reasonably viewed as promoting illegal drug use.” In the present case, while the banner was cryptic to be sure, its reference to “Bong Hits” could easily and reasonably be understood as a celebration or advocacy of illegal drug use.

Justice Thomas wrote a separate concurrence in which he advocated overruling Tinker and the judicial oversight of school officials it ushered in. Justice Alito, joined by Justice Kennedy, wrote separately to make clear he did not think Tinker should be overruled, that speech “commenting on any political or social issue, including speech on issues such as ‘the wisdom of the war on drugs or of legalizing marijuana’” was not implicated by the Court’s ruling against Frederick, and that beyond the need to avoid “substantial disruption,” lewd and indecent speech, and speech advocating illegal drug use, public schools had no additional “special characteristics … [that would] necessarily justify other speech restrictions” down the road.

Dissenting, Justice Stevens, joined by Justices Souter and Ginsburg, assumed without deciding that schools could ban speech advocating illegal drug use without demonstrating that such speech would meet Tinker’s “substantial disruption” standard but then concluded that the school must show at least that “Frederick’s supposed advocacy stands a meaningful chance of making otherwise [law abiding] students try marijuana.” The school could not do this, the dissenters believed, because the banner was essentially nonsensical, and did not really contain any discernable message advocating anything, much less illegal drug use.

Justice Breyer would have held that any First Amendment violation of Frederick’s rights was not sufficiently clear to override the qualified immunity from damage liability enjoyed by Morse and that the Court should overrule Saucier v. Katz, 533 U.S. 194 (2001), which requires courts in qualified immunity cases to resolve the question of constitutional violation before deciding whether immunity is appropriate. Because he believed immunity resolved the damage claim (and because he believed the injunctive claim might go away for other reasons), Justice Breyer declined to weigh in definitively on whether Morse’s actions did or did not violate the First Amendment.

MORSE’S DOCTRINAL SIGNIFICANCE
In adding another basis—beyond “substantial disruption” and “lew and indecent” speech—on which schools may regulate student speech in a content- and viewpoint-based way, Morse does make some significant First Amendment law. Interestingly, however, there does not seem to be wide disagreement between the majority opinion and Justice Stevens’s dissent on this question of law. Justice Stevens allows that “it might well be appropriate to tolerate some targeted viewpoint discrimination in this unique setting … [and that perhaps] our rigid imminence requirement [otherwise governing advocacy/incitement cases] ought to be relaxed at schools.” The largest disagreement between the majority and the dissent appeared to be how drug-related and drug-encouraging Frederick’s banner really was. (Interestingly, Justice Stevens never explains why, if the message was itself nonsense, the First Amendment should protect it so vigorously in the first place.) To be sure, Justice Stevens’s dissent would seem to insist on more evidence of speech actually impairing the war on drugs than would the majority, but the disagreement seems almost as much factual as legal.

A thornier legal question might be what is meant by Justice Alito’s and Justice Kennedy’s distinguishing Frederick’s banner from “speech commenting on any social or political issue.” Would the Court permit punishment of a student for wearing a T-shirt to school bearing the message: “Resist the war on drugs by all available means,” or “Flout the war on drugs because it is unjust”? Is this proscribable drug advocacy, or is it protected political speech? Justices Alito and Kennedy hold the key going forward here.

III. THE TWO SCHOOL CASES TAKEN TOGETHER
As interesting as Parents Involved and Morse are individually, taken together they also illustrate some important features of the Roberts Court this term. First, these two cases are part of a pattern in which the Court reached the “conservative” result in the vast majority of high-profile cases this year. Beyond these school cases, one could see this trend by looking at Gonzales v. Carhart, No. 05-380 (April 18, 2007), upholding the Partial Birth Abortion Ban Act, Hein v. Freedom From Religion, Inc., No. 06-157 (June 25, 2007), limiting taxpayer standing in Establishment Clause challenges, Watson et al. v. Philip Morris Cos. et al., No. 05-1284 (June 11, 2007), invalidating a $79 million punitive award against tobacco titan Philip Morris, and Federal Election Commission v. Wisconsin Right to Life, Inc., No. 06-969 (June
25, 2007), striking down provisions of the McCa

2007), striking down provisions of the McCain-Feingold Campaign finance reform law. The lone exception among the most highly watched cases (outside of the death penalty setting, at least) was Massachusetts v. EPA, No. 05-1120 (April 2, 2007), in which Justice Kennedy sided with Justices Stevens, Souter, Ginsburg, and Breyer to confer standing on the state of Massachusetts in its claim against the federal agency and to reject the EPA’s assertion that it lacked statutory authorization to regulate greenhouse gas emissions.

Second, and related, Parents Involved and Morse are representative of how most of these high-profile conservative results were reached by a bare, though increasingly durable, 5-member majority consisting of Chief Justice Roberts along with Justices Scalia, Kennedy, Thomas, and Alito. All of the rulings mentioned above that came out in the “conservative” direction except the Philip Morris case were decided by this bare 5-member majority coalition.

Third, Parents Involved and Morse highlight that there certainly are differences within the working 5-member majority bloc. Indeed, oftentimes, even if the result is supported only by the 5 justices in the majority bloc, the lineup is more accurately described as 1-3-1-4 (as in Parents Involved) or 1-2-2-1-3 (as in Morse), or 2-3-4 (as in Hein). In each of these complicated patterns, it is Justice Kennedy who occupies the middle seat. Justice Kennedy was with the majority in each and every one of the two dozen 5-4 rulings this term, and he was in the majority in 69 out of the 72 cases in which he participated overall. His vote is clearly a strong indicator of Supreme Court outcomes these days. And Parents Involved and Morse illustrate that his concurring opinions often become the law of the land.

If Parents Involved and Morse help confirm that Justice Kennedy is the Court’s fulcrum, they also make clear that Justice Thomas—alone—occupies the fundamentalist conservative end of the Court. His absolutist color-blind approach reflected in his writing in Parents Involved, and his willingness to overrule the seminal Tinker case in Morse, can be added to his writings on the Commerce Clause as opinions that highlight his willingness to stand alone.

These two school rulings also illustrate something about the relationship between the Supreme Court and the largest federal court of appeals—the Ninth Circuit. Both Parents Involved and Morse reversed Ninth Circuit rulings, and that was a common occurrence this term. The Ninth Circuit was reversed 19 times—as many times as the First, Second, Third, Fourth, Fifth, Sixth, Seventh, and Eighth Circuits combined—this year. This extraordinarily high number of reversals is really attributable to the fact that the Court reviewed 21 cases from the Western Circuit, a disproportionately high number even taking into account that the Ninth Circuit processes the most cases of any circuit. This year, as in many recent years past, the Court seems to be particularly interested in reviewing decisions from the Ninth. And perhaps more important than the reversal rate of 19/21 is the Ninth Circuit’s propensity to be reversed lopsidedly or unanimously. This term, 8 of the 21 Ninth Circuit decisions were reversed unanimously. Overall, Ninth Circuit rulings garnered less than 2 votes (out of a possible 9) to affirm when they arrived at the high Court. That compares to an average of all the other circuits combined of over 3 “justice-votes-to-affirm-per-case reviewed,” a metric I think is superior to simple reversal rates for evaluating circuit relationships with the Supreme Court.

If Parents Involved and Morse are similar in all these respects, they are markedly divergent in one important way that opens the Court up to criticism—deference to local authorities and so-called legislative facts; that is, matters of general knowledge about the way people and institutions operate, upon which legislatures and agencies routinely make policy decisions. Consider the deference to school authorities in Morse about how Frederick’s banner might affect other students and the school environment. No evidence demonstrating that such speech is likely to increase drug use was required; the Court deferred to local school authorities on their predictive sense. But where was such deference concerning the expected benefits of an integrated learning environment in Parents Involved? There, the Court seemed to insist that the school districts prove exactly how their proposed policies might help kids in the classroom. Why deference was appropriate where the First Amendment was involved but not where the Equal Protection Clause was involved is completely unexplained. If the Roberts Court is going to avoid the criticisms of methodological inconsistency that the Rehnquist Court endured, attention to questions like that may be necessary.
Environmental Law in the
“New” Supreme Court

by Robert Abrams

In the 2006 term the United States Supreme Court issued plenary decisions in four environmental cases. As is usually the case, all four environmental cases that reached the Supreme Court presented nuanced questions of statutory interpretation, most of which were intertwined with administrative law issues. The decisions this term are of unusual importance, as all have significant aspects, either practical, precedential, or attitudinal. Additionally, two of the cases exhibit the 5-4 cleavage, so common in this term’s decisions, in which Justice Kennedy is the outcome-determinative swing voter. Not surprisingly, of the four environmental decisions issued this term, the two higher visibility cases fit that voting pattern, with Justice Kennedy joining the respective groups of four (Justices Scalia, Thomas, Roberts, and Alito on the right hand, and Justices Stevens, Souter, Ginsburg, and Breyer on the left hand) once each. Finally, on unusual occasions there are environmental cases decided by the Supreme Court that are of broader societal interest, and this term saw the decision of one such case.

Environmental Cases in the Term

CLEAN AIR ACT
Massachusetts v. Environmental Protection Agency, 127 S.Ct. 1438 (April 2, 2007)

CERCLA/SUPERFUND
United States v. Atlantic Research Corp., 127 U.S. 2331 (June 11, 2007)

ENDANGERED SPECIES ACT

THE “EASY” CASES
Of the four cases, the most straightforward decision is United States v. Atlantic Research, No. 06-562 (June 11, 2007). The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) is the statute enacted to procure the cleanup of releases of hazardous substances into the environment. CERCLA contemplates both government-led and private-party-led cleanup activities. It has as one of its organizing precepts, the “Polluter Pay Principle.” CERCLA effectuates that principle by making those responsible for the contamination strictly, jointly, and severally liable for the cost of proper site cleanup. The statute uses the term “potentially responsible parties” (PRPs) to describe the class of persons having statutory liability for these cleanups. PRPs include owners and operators of the facility at which the hazardous release occurred, generators of the hazardous materials released into the environment, and persons who transported the waste to the site. Given the variety of parties that fall
into the PRP class, it is a very unusual site that has only one PRP. Thus, because modern tort law principles (and CERCLA) allow for equitable contribution among tortfeasors, a major part of CERCLA litigation has been directed toward allocating the loss among the PRPs.

**Overview of the Cases**

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eyes of those who think CERCLA's liability scheme is ill-conceived. The decision “repairs” the problem created by the rather crabbed reading given to § 113(f) in Cooper Industries without requiring a statutory amendment.

The second “easy” case was Environmental Defense v. Duke Energy, No. 05-848 (April 2, 2007). The case is easy to understand both factually and in regard to legal principles applied by the Court, but the statutory and regulatory context is very complicated. Over a period of years, Duke Energy had totally replaced the steam boiler tubes that drove the turbines in 30 of its older power plants placed in service between 1940 and 1975 so that those plants could run more hours per day than was possible under the previous design. The change in steam tubes both extended the life and expanded the generating capacity of the plants, all of which were large, heavily emitting coal-fired power plants. Concurrently, since no improvements were made to the pollution control systems, the plants that were now operating many more hours each year were also emitting hundreds of thousands of tons more pollutants each year than was previously the case.

The 1977 amendments to the Clean Air Act (CAA) added, among other things, the Prevention of Significant Deterioration (PSD) program that applies in all areas of the country where the air is meeting the National Ambient Air Quality Standards (NAAQS). (As a rough guide, having air quality that just barely meets the NAAQS means that the air is clean enough to breathe “safely”—when safety is defined as an acceptable level of increased mortality or morbidity. Thus, even in so-called attainment areas (synonymous with PSD areas), there is considerable room for the air to be cleaner and health risks lower.)

A key part of the 1977 amendment requires that major emitting facilities in PSD areas of the nation obtain revised operating permits that limit emissions to the level achieved through application of best available technology to the plant's emissions. PSD “modification” was statutorily defined after the fact by a technical amendment that cross-referenced a pre-existing definition of modification that was in place for the New Source Performance Standard (NSPS) program of CAA § 111. PSD modifications were subsequently further defined in 1980 by a duly promulgated EPA administrative rule. That rule defined the statutory term “modification” to include situations that involved an increase in overall emissions.

The complicating factor was that the EPA definition of “modification” for NSPS purposes was different than the PSD definition. The NSPS definition was not linked to increases in overall emission, but to the rate of emissions. Thus, under the NSPS rule, the changes made by Duke Energy would not trigger review as a modified source.

Eight members of the Court found this to be a relatively routine administrative law case. Relying on the methodology developed in Chevron USA v. NRDC (1984), the majority looked first at the statute itself and found that did not fully define “modification” and, therefore, the case was one in which the courts should defer to the agency interpretation so long as that interpretation is “permissible.” On that basis, the Court found it “permissible” in the context of administering a program aimed at preventing deterioration in air quality to make an increase in emissions a part of a definition of an important operational term. In his concurring opinion, Justice Thomas noted that he felt the case was controlled by the other initial phase of Chevron under which courts determine statutory matters de novo when the statute is clear. He believed the statutory definition of “modification” in the PSD portion was clear because the cross-reference to NSPS imported the identical definition, leaving no room for the 1980 PSD rule to vary from the rate of emissions definition used in the pre-existing NSPS rule.

An interesting aspect of this case was its political context, because as the case went through the appeals process, it was one that might fracture the current Supreme Court along its by-now familiar right/left cleavage, leaving Justice Kennedy as the swing voter. EPA had never been very aggressive in enforcing this part of the PSD program that is sometimes referred to as “New Source Review” (NSR). In 2000, the soon-to-be-departing Clinton Administration EPA filed this suit against Duke Energy and several other suits against other power companies. All of these lawsuits targeted heavily polluting facilities that had undergone similar major modifications that increased emissions in PSD areas without seeking revised permits or coming up to best available-technology emission control standards. Following the 2000 election, the Bush Administration EPA inherited...
those pending cases and did little or nothing to prosecute them. Instead, EPA appeared almost eager to lose them. For example, EPA declined to appeal when Duke Energy won summary judgment in the district court. It was actually the intervening environmental groups that took the appeal and moved the case forward. When Duke Energy again prevailed in the Fourth Circuit, the EPA aligned itself with the power companies and opposed a grant of certiorari. Only after the Court agreed to hear the case did EPA defend application of the existing PSD rule. As a respondent, EPA filed a perfunctory brief in support of the environmental intervenor-petitioners arguing for Chevron deference to its PSD definition of major modification. (See 2006 WL 2066660.) Thus, there was room for a politically motivated Court to side with a conservative, antiregulatory position and adopt either of the decisions below and their regulation-limiting result. The Court did not do so. Instead, both wings honored Chevron deference to the PSD rule as drawn and reached a near-unanimous result.

**THE DIVIDED CASES**

**Defenders of Wildlife**
- 1972 enactment CWA § 402
  - 9 factors that state must satisfy to obtain delegation/transfer of permitting authority
  - If EPA finds factors (related to state ability to properly carry out the program) are all met, it “shall” approve the delegation/transfer
- 1973 enactment ESA § 7(a)(1), (2)
  - All agencies of the federal government “shall”...“utilize their authorities”...“to insure that any action authorized, funded, or carried out by such agency is not likely to jeopardize ... any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species.”

In comparison to these two “easy” cases, which resulted in unanimous or near-unanimous opinions, this term the Court also ruled on two very closely divided cases, both of which focused on more controversial subject matter. *National Association for Home Builders v. Defenders of Wildlife*, No. 06-340 (June 25, 2007), finds the Court closely divided on questions of statutory interpretation in a way that reflects the ideological cleavage of the justices on matters of federalism and on the reach of the Endangered Species Act. Justice Kennedy voted with the majority to limit the federal role under the Endangered Species and Clean Water Acts. *Massachusetts v. EPA*, No. 05-1120 (April 2, 2007), finds the Court closely divided on both standing and on the permissibility of an EPA action (the nonregulation of mobile source greenhouse gas (GHG) emissions) under the Clean Air Act. In that case, the ideological issues splitting the Court are of the utmost importance, touching on nothing less fundamental than the respective roles of the three branches of government in facing one of the most pressing problems of the coming century—regulation of GHG emissions. In that case Justice Kennedy again voted with the majority, but this time with the liberal four. The result was a holding that curbed executive branch discretion when there was a pressing problem that Congress had brought within the purview of the Clean Air Act.

The *Defenders of Wildlife* case sits at the intersection of the Clean Water Act (CWA) and the Endangered Species Act (ESA). For each statute there is a separate implementing agency: EPA and the Fish and Wildlife Service (FWS) of the Department of Interior, respectively. Quite importantly, the specific statutory provisions involved both use the mandatory verb “shall” in relation to agency action. Additionally, on at least one reading of the statutes, the two provisions make inconsistent commands.

This case arose in relation to a state’s request that it be delegated authority (which the court refers to as a “transfer” of authority) to issue permits allowing discharges into the nation’s waters. The CWA § 402 allows EPA to make such transfers, meaning that statutorily the EPA may delegate this authority to individual states. Since 1972, when the CWA took its present form including this type of permitting program and delegation, 44 states have sought and received delegation/transfer of pollution discharge permitting. The CWA § 402 lists nine criteria that a state must meet to obtain transfer. Those factors address the state’s ability to operate the program consistently with the statutory requirements Congress has erected. EPA, if it finds all nine factors are met, “shall” transfer authority. In this case, Arizona applied for transfer after satisfying the nine factors.
In reviewing the Arizona request, EPA also took a mandatory action required of it by the ESA § 7(a). This Section requires that EPA consult with FWS to “insure that any action authorized, funded, or carried out by such agency is not likely to jeopardize ... any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species.” (Emphasis added.) (N.B.—You may recall the broad reading given to the word “all” by a unanimous Court in the Atlantic Research case and thus might expect the broad word “any,” when read in conjunction with the strong verb “insure,” to be treated similarly, but that did not happen.) When EPA consulted with the regional FWS office, it got a mixed answer: (1) letting Arizona take primacy over the program would not jeopardize species as a result of decreases in water quality, and (2) once primacy was granted, Arizona was likely to be asked to grant permits that would support land development that would adversely affect the critical habitat of several listed terrestrial species. FWS then reasoned that because Arizona, unlike EPA, is not subject to the ESA § 7 consultation requirement, Arizona might issue permits that did not consider or mitigate habitat impacts, an omission that would not be allowed if EPA were still running the program.

EPA wanted to move forward despite the FWS opinion and followed procedures set out in a Memorandum of Understanding of EPA and Interior that referred the matter to the Washington, D.C., headquarters of the agencies for review and resolution. FWS modified its position and issued a biological opinion finding no jeopardy to species. The key conclusion was that any potential threatened loss of habitat would not even indirectly be a result of agency (EPA) action. FWS further noted that EPA’s continuing CWA oversight of Arizona’s actions could adequately protect species. This protection came from the statutory authority that allows the EPA to object to the individual permitting actions of a delegated state’s program. With the no jeopardy biological opinion in hand, and the nine factors of CWA § 402 satisfied, EPA transferred authority to Arizona.

Under a special CWA provision that channeled § 402 appeals directly to the circuit court level, the case was appealed to the Ninth Circuit by Defenders of Wildlife. That court issued a 2-1 decision vacating EPA’s transfer ruling. Several issues and arguments became the fulcrum of that decision and its subsequent reversal by a 5-4 majority of the United States Supreme Court.

First and foremost was a statutory argument that the nine CWA § 402 factors are an exclusive list of the criteria that may be considered by EPA in deciding on transfer/delegation, and the ESA is a tenth factor that Congress excluded from consideration. Second was an argument based upon an administrative rule promulgated by the Department of Interior implementing the ESA (see 50 CFR § 402.03, which reads, “Section 7 ... applies] to all actions in which there is discretionary Federal involvement or control.”). The administrative law argument relying on that portion of the rule first notes that the “shall” language in § 402 means that EPA had no discretion to exercise in ruling on transfer requests. The second part of the argument joins to the “mandatory” nature of the action involved in this case the negative implication of the administrative rule—that is, since the rule applies ESA to cases in which there is agency discretion, and since there is no discretion to be exercised under the CWA, the rule removes this decision from ESA review. This latter reading of the administrative rule effectively rewrites the rule to add the word “only” between the verb “applies” and the object of the verb, which is discretionary actions of the agency.

Writing for the Court majority that included the right-hand four and Justice Kennedy, Justice Alito agreed with both of those arguments. They are, in effect, alternate grounds of decision because either one would be sufficient to reinstate EPA’s decision to approve the permitting transfer/delegation to Arizona.

The left-hand four dissented vigorously on both counts, with Justice Stevens writing their opinion. The dissent argued that on the statutory issue there is no doubt that ESA was intended to be superimposed on “all” agency actions. That was clear in the statutory language and statutory structure of ESA. It would have been almost impossible for Congress to go provision by provision to every occurrence of the word “shall” or otherwise indicated mandatory statutory duty of an agency and spell out which required ESA consultation and which were free of it. The nature of what was being legislated—an overarching
requirement—makes it rather plain in the eyes of the dissenting justices that the controlling provision is that of ESA § 7 and that focusing on CWA § 402 inverts the statutory intent of Congress.

Justice Stevens’s explanation of the proper interpretation of the administrative provision is also quite forceful. First, he argues that reading in a wholesale limitation that excludes actions that are not entrusted to discretion is inconsistent with section 7, which the rule claims to be interpreting. Second, the rule does not have the exclusionary language that would deny it application to mandatory actions. Third, in the rulemaking itself, the language changed from “all actions” in the draft rule circulated for comment to “discretionary actions” in the final rule with no explanation of the change, which implies that there was not a substantive change intended. In addition, Justice Stevens notes that the limitation is inconsistent with other sections of the same rule that describe section 7 as applying to all actions of an agency, including in one place a list of types of actions that include mandatory actions. Finally, Justice Stevens finds it inapposite to give Chevron deference to EPA’s view of a Department of Interior rule. It was only outside this litigation and well after this litigation began and consultation had taken place that Interior, for the first time ever, stated, by issuing a letter of “clarification,” its view that consultation was not required in this setting.

It is not necessary to embrace either of Justice Alito’s lines of argument to reverse the result barring the transfer. Moreover, it is also possible, even likely, that after a remand with proper instructions, EPA will still be able to grant the transfer. Recalling how the case proceeded, the two statutory “shall”s”—both that of the CWA and that of the ESA—received their due. EPA consulted and fulfilled its ESA obligations when it eventually obtained the “no jeopardy” biological opinion from FWS. EPA then fulfilled its § 402 obligation by transferring authority to Arizona when it found the nine factors were met. A party that had standing could and did challenge the decision on its merits, but the real crux of the case should have had nothing to do with the relationship of ESA to CWA or even with the meaning of the ESA administrative rule. The issues for appellate decision are the rectitude of EPA’s findings that the nine factors were satisfied and the rectitude of the FWS no-jeopardy biological opinion. Both of those issues arise in the non-Chevron context of challenges to agency actions brought under the Administrative Procedure Act and would be resolved under the arbitrary and capricious standard of § 706(2)(A). On the facts as they seem to appear, with a tenuous link between the transfer and any habitat loss, the actions of both EPA finding the nine factors met and FWS issuing the no-jeopardy biological opinion would be sustained by a reviewing court. Stated somewhat differently, there was no need to take a big bite out of the ESA to decide this case, but the Court majority seems to have reached out to do so.

Thus, while Justice Stevens’s dissent concludes that Justice Alito’s opinion is wrong on both points (statutory interpretation and interpretation and application of the FWS administrative rule), at a minimum Justice Alito’s opinion can be criticized as unnecessarily broad. The likely effect of that breadth is that this case will be cited as a precedent for the proposition that ESA never applies to any mandatory agency action or that ESA does not apply when the word “shall” appears in a statute. In that manner, the Defenders case, if its broad approach is followed in subsequent cases, will be one of the ways in which the “new” members of the Court are changing the Court’s approach in the environmental field. This apparent effort to orchestrate a change in direction should not come as a surprise. Both Justice Alito and especially Chief Justice Roberts expressed a very hostile attitude toward the ESA during their time on the court of appeals. Within the remainder of the right-hand bloc, Justices Scalia and Thomas have previously expressed concerns about the reach of the ESA and dissented in critical cases involving its application, such as Babbitt v. Sweet Home Chapter, 515 U.S. 687 (1995). Trying to single out what is motivating the swing voter, Justice Kennedy, is quite difficult. He has not shown the same hostility to ESA in the past, as exemplified, for example, by his vote in Sweet Home joining Justice Stevens’s majority that upheld a broad administrative definition of the term “harm” in a Section 9 case that applied ESA in its most intrusive setting, an application to private activities occurring on private land.

(Continued on Page 450)
The other closely divided environmental case decided in the 2006 term was Massachusetts v. Environmental Protection Agency. Massachusetts v. EPA is the rare environmental case that by itself sets this term apart and makes it special. It is the most memorable environmental decision since Hill v. TVA was decided in 1976 holding that the Endangered Species Act, in accordance with its statutory language, was a roadblock that barred federal agency actions that would jeopardize species. The element that sets this case apart has very little to do with the environmental law issue actually decided by the Court, another statutory interpretation question posed with an administrative law overlay. The real impact of the case is on the public debate over GHG emissions, global warming, and the consequences of climate change. For those old enough to turn back the clock and remember the galvanizing effect of the first Earth Day and the spate of environmental laws passed in its wake, Massachusetts v. EPA is a similar watershed event. By putting the Supreme Court's imprimatur on the scientific linkage of GHG emissions to warming and measurable environmental effects, it is almost as if the Court has taken uncertainty and dithering out of the public debate in this country and replaced them with a unified will to act to address the problem. A spate of legislation addressing GHG emissions, global warming, and climate change seems certain to follow and is already beginning to appear at every level of government.

The case itself presented for decision issues of statutory construction and administrative implementation together with a major standing issue. The CAA empowers EPA to regulate mobile sources, here, automobiles and light trucks. Concerned about the serious effects of global warming, a group of 12 states, including most of the Northeast as well as California, Washington, and Illinois, joined with local governments and a number of private organizations to petition EPA to engage in rulemaking and regulate automobile emissions of GHGs under § 202 of the CAA. After receiving an extraordinary number of public comments (more than 50,000) related to the petition, EPA issued an order declining to engage in regulatory rulemaking on this matter. See 68 Fed. Reg. 52922 (2003). As described by Justice Scalia's dissent, the EPA decision rested on two conclusions: "(1) contrary to the opinions of its former general counsels, the Clean Air Act does not authorize EPA to issue mandatory regulations to address global climate change, see id., at 52925-52929; and (2) that even if the agency had the authority to set greenhouse gas emission standards, it would be unwise to do so at this time, id., at 52929-52931." 127 U.S.1438, 1474 (2007).

For ease of discussion, these two issues can be termed “authority” (whether the EPA has the authority to make such regulations), and “discretion” (whether the EPA can exercise discretion in deciding whether or when to make such regulations).

The decision considered CAA § 202(a)(1), the text of which is set forth above. Justice Stevens's five-member majority examined and rejected the reasons cited by the EPA for finding lack of authority to regulate GHG emissions from mobile sources. Principal among EPA's lack of authority arguments was EPA's conclusion that carbon dioxide was not a pollutant. Congress defined the term “air pollutant” as including "any air pollution agent or combination of such agents, including any physical, chemical ... substance or matter which is emitted into or otherwise enters the ambient air. ...” (127 S.Ct. at 1460, quoting the statutory “Definitions” section, CAA § 302(g), emphasis supplied by Justice Stevens.) Describing that statutory definition as “sweeping,” Justice Stevens found the EPA determination that carbon dioxide was not a pollutant to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” which was the standard of review erected by the CAA § 307(d)(9)(A) for cases of this particular type. Justice Scalia's dissent points out that § 302(g) begins with words...
omitted by Justice Stevens that refer first to air pollutants as being “any air pollution agent.” Although the opinion is not very clear, it may be implying that “air pollution agents” constitute a narrower class than the majority’s expansive view of “air pollutants.” Justice Scalia then argues that in § 302(g), when it uses the word “including” in the definition of “air pollutant,” Congress is using the word in its permissive (rather than definition-al) sense, so that whatever follows the word “including” in the statutory definition may be an air pollutant, but it also may not be an air pollutant. From there, he argues that deference is due to EPA’s view about which chemical substances are air pollution agents or air pollutants and which are not.

The more contested statutory issue revolved around the discretion vested in EPA under the statute. The statute facially limits the obligation of the administrator of EPA to promulgate mobile source emission standards to those air pollutants “which in [the administrator’s] judgment cause, or contribute to” the pollution that endangers health or welfare. EPA, initially, in line with the Bush Administration view, “judged” the predicate causal linkage between mobile source GHG emissions and climate change as either missing or too uncertain to justify action. EPA, in its order rejecting the petition for rulemaking and in its brief to the Supreme Court, gave great importance to a passage in a 2001 National Research Council report (NRC) on climate change that EPA characterized as stating that a causal link between GHG emissions and climate change “cannot be unequivocally established.”

That particular EPA argument proved problematic for two main reasons. First, it was not in accord with the great weight of scientific studies on the subject. Second, it was not supported by the very NRC report from which it was taken. In a brief submitted on behalf of several of the authors of that same NRC report, those scientists stated unequivocally that the phrase was taken totally out of context and described in considerable detail the numerous ways in which the NRC report said exactly the opposite of what EPA claimed. The equivocal language was inserted specifically to respond to the way in which the request for the NRC report had come from President Bush. His request had explicitly asked for a delineation of what was considered settled science and what was still uncertain in the science. EPA cherry-picked the language from the discussion of what was still, in scientific terms, uncertain and treated the quoted language as if it applied to all of the areas of scientific inquiry reviewed by the NRC report. That language was not applicable to the great majority of the science canvassed by the report, which unequivocally found that anthropogenic GHG emissions have caused and are continuing to exacerbate global warming and that the amount of warming is directly correlated to the concentration of GHG gases in the atmosphere.

The tenor of the scientists’ brief is not particularly argumentative, but it is quite firm. For example, the brief’s first section is titled as follows: “The Science of Climate Change Indicates that It Is Virtually Certain that Greenhouse Gas Emissions from Human Activities Cause Global Climate Changes, Endangering Human Health and Welfare.” The level of certitude could hardly be described more forcefully, when the greenhouse effect is stated to be “as certain as any phenomena in planetary sciences.”

Oral argument made it plain that at least Justice Stevens was prepared to accept the soundness of the science linking GHG emissions (which his majority opinion considered to be air pollutants per § 202) to global warming and injury to welfare. Mr. Garre, representing EPA, was engaged in a colloquy with Justice Breyer in which Mr. Garre mentioned EPA’s reliance on the NRC report as a reason supporting its exercise of discretion. Justice Stevens cut in saying first:

I find it interesting that the scientists who worked on that report said there were a good many omissions that would have indicated that there wasn’t nearly the uncertainty that the agency described.

And then, after a reply from Mr. Garre:

But in their selective quotations, [EPA] left out parts that indicated there was far less uncertainty than the agency purported to find.

Reliance on the scientific position actually set forth in the NRC report is the keynote of the majority opinion. The very first words of the majority opinion recite those most certain of all the GHG propositions:

A well-documented rise in global temperatures has coincided with a significant
increase in the concentration of carbon dioxide in the atmosphere. Respected scientists believe the two trends are related. For when carbon dioxide is released into the atmosphere, it acts like the ceiling of a greenhouse, trapping solar energy and retarding the escape of reflected heat. It is therefore a species—the most important species—of a greenhouse gas. 127 S.Ct. at 1446.

With that view in place, the majority could disagree with the EPA despite the usual role of Chevron deference—there was no “permissible” room for a judgment that mobile source emissions of carbon dioxide did not contribute to pollution that endangered public welfare.

The NRC report was not the only basis for the EPA’s decision not to engage in rulemaking. EPA offered other, more policy-based reasons for using “judgment” to decline to act. For example, EPA felt that acting under § 202 would be a piecemeal approach to a problem that needs a comprehensive approach. Again, somewhat politically, the approach that EPA called for was the “comprehensive” approach of the President that relied on support for technological innovation, voluntary nonregulatory private control programs, stronger international controls than those currently in place under the Kyoto Protocol, and continued research into climate change mechanisms. Without denying other approaches that might also be beneficially pursued, the majority noted that all the other bases offered by EPA as the discretionary reason for declining to act rested “on reasoning divorced from the statutory text.” 127 U.S. at 1462. For the majority, the statute provided no such latitude—“the use of the word ‘judgment’ is not a roving license to ignore the statutory text. It is but a direction to exercise discretion within defined statutory limits.” Id.

Justice Scalia’s dissent accepts that premise in part, agreeing to what is relevant in making the judgment, but his opinion insists that “the statute says nothing at all about the reasons for which the Administrator may defer making a judgment. …” Id. at 1473 (Emphasis in original). Scalia’s dissent, on that basis, concludes that the majority has imposed a limitation of its own making that interferes with the way in which agencies should decide whether to enter into a regulatory field.

The standing issue seems more hotly debated than were the statutory and administrative law merits of the case. Through a series of interpretations of Article III’s case and controversy requirement in the last 40 to 50 years, the Court’s more conservative members have expanded the constitutional content of the standing inquiry from its roots as a ban on advisory opinions and guarantee of genuine adversariness to an elaborate jurisprudence that also includes justiciability and requires (1) injury in fact, (2) a form of causal nexus between the actions of the defendant and the injury, and (3) redressibility of the injury by relief that can be granted in the case. Justice Roberts’s dissent succinctly frames those three inquires in the language set out above. See 127 S.Ct. at 1464 (Roberts, C.J., dissenting).

The five-member majority and the four-member dissent disagreed sharply on all three aspects of the standing inquiry. The Court’s modern standing cases require that a plaintiff be able to demonstrate a concrete and particularized injury. Interestingly, the case that now stands as the totem for this requirement is an ESA case, Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992), a case that involved extraterritorial application of ESA. In that case Justice Kennedy concurred in a finding that generalized claims of injury are insufficient. Justice Kennedy there stated his view that Congress, in the way it legislates, affects the standing analysis. He stated, “Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.” Id. at 580 (Kennedy, J., concurring). Thus, it was reasonably
clear that the swing voter, Justice Kennedy, would take a close look at the particularized injuries and statutory delineation of injury or causation, if Congress provided it.

The majority, with Justice Kennedy on board, found concrete, particularized injury to the state of Massachusetts, which according to uncontradicted affidavits stood to lose a “considerable” amount of public territory to higher ocean levels. A rise in sea level of 10 to 20 centimeters had already occurred. Justice Stevens’s opinion also recognized a cognizable injury to a state that has a sovereign interest in protecting the “earth and air in its jurisdiction” and the interests in those resources of the state’s citizens.

Chief Justice Roberts dissent for the Court’s right-hand bloc rejected both prongs of the injury-in-fact analysis, finding that the state’s claim of its own loss was not sufficiently concrete and particularized, and that the parens patriae “booster” is inapposite because state standing in those kinds of cases is only present if the individual citizens would have standing, which he did not believe they did. In the end, the broader view of the Chief Justice is made clear when he states, “The very concept of global warming seems inconsistent with this particularization requirement.” 127 U.S. at 1467 (Roberts, C.J., dissenting).

Returning to the tripartite standing inquiry, the majority had little difficulty in finding causation and redressibility. On causation, the argument resembles a syllogism:

• There is a causal connection between anthropogenic GHG emissions and the injuries that result from global warming.
• EPA refuses to regulate such anthropogenic GHG emissions from mobile sources despite the power and duty to do so (that are confirmed by the majority’s view of the statutory merits issues).
• Therefore, EPA is causing the injury.

Once the causal link is in place in that form, the redressibility requirement is easy to satisfy with a similar syllogistic argument:

• If EPA regulates mobile source GHG emissions, there will be fewer GHG emissions than would otherwise be the case.
• If there is less GHG in the atmosphere, there will be less global warming and injury.
• Therefore, EPA mobile source GHG emission regulation will reduce/redress the injury.

In further support of its position, the majority cites precedents that hold a remedy need not completely redress the problem to satisfy that prong of the standing inquiry.

The Chief Justice’s dissent responds by framing the causation question more narrowly, asking what is the specific link between the EPA failure to regulate mobile source GHG emissions and the ocean’s rise that is causing the loss of Massachusetts coastal land. The opinion then considers whether Massachusetts has successfully quantified just how much of its lost coastal area is attributable to EPA inaction under CAA § 202. Chief Justice Roberts finds that there are so many confounding causative variables that the plaintiffs cannot carry their burden on the issue of causation. That uncertainty as to causation becomes the springboard for finding a lack of redressibility. Here, the dissent points at the great uncertainty of what will happen in the rest of the emitting world that accounts for most GHG emissions. The dissent also notes the possibility of technological change and the likelihood that other major steps will be taken to reduce GHGs in the future. Cumulating those factors, the dissent concludes those larger movements are the ones likely to redress Massachusetts complaints, not § 202 regulation of mobile source GHG emissions.

Justice Kennedy joins the left-hand bloc in finding standing and an obligation to prescribe pollution control standards for GHG emissions of mobile sources. One colloquy during oral argument suggested that this might occur, at least on the critical issue of injury. In particular, the portion of the majority opinion giving special solicitude to states suing for natural resource injuries suffered by its citizens appears to have originated with Justice Kennedy. During the oral argument, Chief Justice Roberts was in the process of questioning Mr. Milkey, the attorney for Massachusetts, about the state’s claim of lost land. Mr. Milkey was having a hard time quantifying the extent of state land being lost to the ocean’s rise and the portion of the rise attributable to mobile source nonregulation. Chief Justice Roberts then asked what precedents best supported Mr. Milkey’s claim of standing. Mr. Milkey suggested a case with a special citizen suit provision that was not particularly pertinent because this lawsuit did not arise under that

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statute. At that point, Justice Kennedy joined in the discussion and asked whether states had special standing rights beyond their own interest in state land. Moments later Justice Kennedy suggested that he viewed the century-old public nuisance case of Georgia v. Tennessee Copper, 206 U.S. 230 (1907), as the strongest precedent that would give the state a special interest in raising the legally protected interests of its citizens that would constitute injury sufficient to support standing. None of the many, many briefs in the case on either side had addressed this possibility or cited that case.

When the majority opinion was issued, Justice Stevens adopted the Tennessee Copper rubric as the leading ground for establishing injury in fact, finding that seeking redress for widespread damage to its territory constitutes a “suit by a State for an injury to it in its quasi-sovereign capacity” and an interest “independent of and behind the titles of its citizens.” 127 U.S. at 1454. In what is a most interesting aspect of this argument, Justice Stevens’s opinion goes back to the rationale of Justice Holmes that permeated Tennessee Copper and other cases from that era when state resource interests were affected—the right of states joining the nation to be treated specially when they sued asserting sovereign interests was a quid pro quo for surrendering their rights as independent sovereigns to respond to injuries to their resources with force.

Even if it is true that Justice Kennedy was the source of the Tennessee Copper argument for state standing, that fact does not fully explain why the argument would be attractive to him. Somewhat speculatively, it is possible to find common ground between the majority opinion here and Justice Kennedy’s Lujan concurrence. Justice Kennedy is clearly on record as recognizing a role for Congress in shaping the standing analysis in a particular case. In this case, while there is not a standing-affecting statute, as a member of the merits majority he believes that Congress, on these facts, legislated a duty to regulate that is going unmet and causing widespread, perceptible harm. Under the view propounded by the Chief Justice in dissent, harm as widespread as that caused by global warming results in a preemptive conclusion that no one has an injury sufficient to create standing to challenge governmental action or inaction. In the event that Justice Kennedy (or any other jurist) believes that a very concrete yet hard-to-quantify injury is being imposed on whole populations at once, by an action that Congress does not allow, it is very unsatisfying to say that no one has standing. The Tennessee Copper approach cumulates those interests in a prima facie appropriate suitor, the state, and avoids the dilemma of governmental lawlessness that cannot be challenged without opening a floodgate of litigation.

There also is a possibility that looking at the longer term, Justice Kennedy believed that it was simply important for the Court to solidify public opinion around the science on this issue and usher in an era of more immediate action to limit GHG emissions. Whether that motivated Justice Kennedy or not, that is the way this case will be remembered. Massachusetts v. United States will be the symbol that announced an era of effort to address global warming long after reams of additional legislation and administrative rules have made § 202 of the Clean Air Act a forgotten relic. Massachusetts v. United States on its own is a case of vast importance to the environmental world and to Americans at large. But given its place as one of four significant environmental cases decided this term, it only partially reflects the changing dynamics of the “new” Court and the possible implications this change may have on environmental law for years to come.
On the last day of its October 2006 term, the Supreme Court issued an opinion that overruled nearly 100 years of precedent. The 5-4 decision ended a term during which the Supreme Court examined four antitrust cases—a relatively large number compared to the past few years. This essay explores the rulings and far-reaching effects of three of those four cases, *Leegin Creative Leather Products, Inc. v. PSKS, Inc. dba Kay's Kloset … Kay's Shoes*, 127 S.Ct. 2705 (2007), *Weyerhaeuser v. Ross-Simmons Hardwood Lumber*, 127 S.Ct. 1069 (2007), and *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955 (2007). Each decision continues a recent trend in favor of antitrust defendants and provides an indication that this Supreme Court is wary of “chilling” procompetitive conduct when analyzing the 117-year-old statute whose purpose is to protect and even facilitate procompetitive conduct. See Darren S. Tucker and Kathleen M. Pessolano, “Supreme Court’s Weyerhaeuser Decision Follows Recent Pattern,” *The Antitrust Source* (April 2007) (general discussion about patterns in Supreme Court antitrust cases since 2004), available at www.abanet.org/antitrust/at-source/07/04/Apr07-TuckPess4=27f.pdf.

**SHERMAN ANTITRUST ACT**

In an attempt to counter the abuses of monopolies, which took the form of “trusts” in post-Civil War America, President Benjamin Harrison signed into law the Sherman Antitrust Act in 1890. The statute is as brief in words as it is broad in scope. Section 1, which prohibits “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States,” has been the subject of a long line of cases interpreting its seemingly straightforward language. 15 U.S.C. § 1 (emphasis added). Part of that interpretation has involved the word “every.” Although that language literally bars all contracts in “restraint of trade,” the Supreme Court has refused to take a “literal approach to [its] language” and instead has “long recognized that Congress intended to outlaw only unreasonable restraints.” *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997).

The Rule of Reason

In 1911, in *Standard Oil Co. v. United States*, 221 U.S. 1 (1911), the Supreme Court created the standard for testing whether a particular practice unlawfully restrained trade: the “rule of reason.” This rule was based on common-law principles and “served to promote the right to contract, not to smash it.” Alan J. Meese, “Price Theory, Competition, and the Rule of Reason,” 2003 *U. Ill. L. Rev.* 77, 84 (2003). Under the rule of reason, when examining a specific conduct alleged to be a restraint of trade, “the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition” and considers such factors as “specific information about the relevant business” and the “restraint’s history, nature, and effect.” *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977); *Khan*, 522 U.S. at 10. In addition, the rule of reason also involves an inquiry into relative market power of the target business. See *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984). Or as one com-
mentator has stated, the rule of reason “inquires into all conceivable circumstances before determining the legality of a particular restraint.” Thomas A. Piraino, Jr., “Reconciling the Harvard and Chicago Schools: A New Antitrust Approach for the 21st Century,” 82 Ind. L.J. 345, 353 (Spring 2007). The rule is supposed to distinguish restraints with anticompetitive effects that are harmful to the consumer from restraints that stimulate competition and hence are in the consumer’s best interest. And as one can imagine, inquiring into all of the “conceivable circumstances” translates into an incredible burden for the plaintiff, and “[t]raditionally, the rule of reason means a decision for the defendant. …” Id.

Per Se Illegality

Fortunately for the antitrust plaintiff, the rule of reason has not governed all restraints. Some restraints, such as agreements between competitors—“horizontal agreements”—to fix prices or to divide markets, are considered illegal per se. What that means is that once the plaintiff establishes that such an agreement exists, the trial court need not examine the reasonableness of the particular restraint. This per se illegality rule, also known as “the per se rule,” usually means a victory for the plaintiff. Id. And in 1911, a couple of months before the Court promulgated the rule of reason in Standard Oil, the Court, without considering whether the practice was procompetitive, ruled that a medicine manufacturer’s requirement that its dealers set a minimum price for the manufacturer’s products was invalid.

In Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911), the Court found that the vertical arrangement known as a resale price maintenance (RPM) was invalid under the Sherman Act because “a general restraint upon alienation is ordinarily invalid: … [and has] been generally regarded as obnoxious to public policy. …” Restraint upon alienation is a common-law rule, often associated with real property, that is related to the public policy against restrictions on a person’s ability to transfer or sell real property.

Since Dr. Miles, the Supreme Court has maintained there is a per se rule against RPMs. So, with Dr. Miles and Standard Oil, there emerged two standards when examining Section 1 of the Sherman Act, each with polar results: the per se rule and the rule of reason. RPMs were considered per se illegal until earlier this summer, when the Court issued its ruling in Leegin. With that decision, the Court essentially overturned nearly 100 years of precedent and forged in its stead a new framework for analyzing RPM agreements.

A NEW APPROACH: LEEGIN

In Leegin, a high-end leather goods manufacturer sold belts under the name “Brighton” through boutiques and small specialty stores. One of those boutiques, Kay’s Kloset out of Lewisville, Texas, became the primary outlet in the Lewisville area to buy Brighton products. In 1997, Leegin instituted an RPM with its retail stores in an effort to differentiate itself by selling Brighton products at specialty stores that could provide service and support not found at “mega stores like Macy’s, Bloomingdales, May Co., and others. …” Leegin believed the RPM would give retailers “sufficient margins to provide customers the service central to its distribution strategy” and would prevent discount retailing from harming Brighton’s brand image and reputation. After Leegin found out that Kay’s Kloset had discounted prices below Leegin’s suggested retail price because other area stores were doing the same, Leegin requested that Kay’s Kloset cease discounting. When Kay’s Kloset refused to do so, Leegin stopped selling to the store. This caused a large negative impact on Kay Kloset’s revenues.

Kay’s Kloset then sued Leegin, alleging that Leegin had violated the Sherman Act by entering into an RPM. Leegin, in response, planned to introduce expert testimony about the procompetitive benefits of the RPM. But based on the per se rule established in Dr. Miles, the U.S. District Court for the Eastern District of Texas excluded the testimony. The jury then found for Kay’s Kloset and awarded it $1.2 million. The district court trebled the damages under 15 U.S.C. § 15(a) and entered judgment against Leegin for $3,975,000.80. Leegin appealed to the U.S. Court of Appeals for the Fifth Circuit, which affirmed the judgment. The Fifth Circuit found that the district court had not abused its discretion because the per se rule “rendered irrelevant any pro-competitive justifications for Leegin’s pricing policy.” The Supreme Court then granted certiorari to examine whether RPMs should continue to be treated as per se unlawful.

Justice Kennedy, once again proving that he has taken up the mantle as the new swing vote on the Court, delivered an opinion for a 5-4 majority that ran along traditional ideological lines. This time
around Justice Kennedy wrote for the traditional conservatives on the bench, Justices Scalia, Thomas, and Alito, and Chief Justice Roberts. Justices Ginsburg, Stevens, Souter, and Breyer dissented, with Justice Breyer penning the dissent. The Leegin Court concluded that it was time to overrule Dr. Miles for two reasons: (1) RPMs, based upon modern-day economics, have both procompetitive and anticompetitive effects, but because they do not “always or almost always tend to restrict competition and decrease output,” the rule of reason, not the per se rule, applies; and (2) concerns about stare decisis and Dr. Miles are minimal because the Court has, over the century, continued to temper the once strict vertical restraint prohibitions of Dr. Miles, which is consistent with the evolution of a “common law” statute such as the Sherman Act.

Justice Breyer’s dissent, while conceding that there may be procompetitive effects to RPMs, argued that there is nothing new about the economics of RPMs and that switching to the rule of reason places incredible administrative burdens on the courts. Justice Breyer then focused the rest of his energies on the majority’s disregard for the stare decisis effect of a decision that is almost a century old.

The majority and the dissent did, however, agree on two things: that there are procompetitive and anticompetitive aspects to RPMs. But before diving into the economic analyses, the Leegin Court noted that the per se rule applies to restraints “that would always or almost always tend to restrict competition and decrease output.”

Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 723 (1988). And consequently, the Court observed, the per se rule “is appropriate only after courts have had considerable experience with the type of restraint at issue and only if courts can predict with confidence that it would be invalidated in all or almost all instances under the rule of reason.” (Emphasis added.) Finally, the Court stated that a “departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than … upon formalistic line drawing,” (quoting GTE Sylvania, 433 U.S. at 58-59).

So the Leegin Court looked to commentators and experts to examine the procompetitive aspects of RPMs. One of those experts the Court relied upon was the Department of Justice’s Antitrust Division. In its amicus brief supporting Leegin, the Justice Department claimed that “there is a widespread consensus that permitting a manufacturer to control the price at which its goods are sold may promote welfare in a variety of ways.” These include stimulating competition among manufacturers selling different brands of the same type of product—interbrand competition—by reducing intraband competition—competition among retailers of the manufacturer’s product. For example, a reduction in intraband competition encourages retailers to invest in services and promotional efforts to improve their position against the brands of competing manufacturers. This gives the consumers a choice between choosing “low-price, low-service brands; high-price, high-service brands; and brands that fall in between.”

In addition, without RPMs, discounting retailers can “free ride” on retailers who provide services “and then capture some of the increased demand those services generate.” For instance, a consumer may go to a “brick and mortar” store with a reputation for carrying high-quality merchandise to learn about the qualities of a digital camera from a trained salesperson and then buy the same camera at a cheaper price from an online discount retailer who does not have the overhead expense of either a store or trained sales staff. This, in turn, “may lead retailers to offer less than the amount of support that would be best for manufacturers and consumers.” Brief for Economists as Amici Curiae at 6. According to the Leegin Court, an RPM “alleviates the problem because it prevents the discounter from undercutting the service provider. With price competition decreased, the manufacturer’s retailers compete among themselves over services.”

The dissent acknowledges that there is a “consensus in the literature that ‘free-riding’ takes place” but then asks “how much” free riding really takes place? Justice Breyer answers his own question with “an uncertain ‘sometimes.’”

Besides potentially preventing free riding, another benefit not denied by the dissent is that RPMs facilitate new entrants into a market. For instance, RPMs will help new manufacturers or manufacturers entering new markets to induce retailers, who will have a guaranteed margin, to stock their shelves with the new entrants’ products and aggressively market that product. According to the majority, “[n]ew products and

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new brands are essential to a dynamic economy, and if markets can be penetrated by using resale price maintenance there is a procompetitive effect.”

Although there are procompetitive benefits to RPMs, the majority admits some anticompetitive pitfalls can accompany them too. For example, RPMs may facilitate a “manufacturer cartel” when the cartel wants to insure that the market share of each manufacturer remains the same. From the cartel’s perspective, there is a danger that a particular manufacturer might gain market share by providing a slightly lower price to retailers than the rest of the cartel. In essence, the efficient manufacturer becomes the “cheat.” But “[m]arket circumstances or prudence” may preclude the cartel from effectively policing for “cheats.” Brief for Economists as Amici Curiae at 12. An RPM may solve the cartel’s problem. Having an RPM in place, the cartel need not worry about monitoring for cheats. With an RPM in place, manufacturers have no incentive to cut prices because its efficient production will not translate into lower prices for the consumer and hence will not produce a higher demand from the consumer.

Another danger is that RPMs might also facilitate a retailer cartel. For instance, a retailer cartel might want to fix prices and then “compel a manufacturer to aid the unlawful arrangement with an RPM.” This prevents more efficient retailers from charging lower prices. The horizontal cartels at the manufacturer and retailer levels as described above reduce competition or output so as to increase price and are per se unlawful. And according to the Court, to the extent an RPM facilitates such an unlawful arrangement, that RPM should also be held unlawful under the rule of reason. RPMs also could be used to help further the inefficient goals of a retailer or manufacturer with significant market power. For instance, a powerful retailer might request an RPM to “forestall innovation in distribution that decreases costs,” and a weak manufacturer may have no choice but to comply in order to protect its access to the retailer’s distribution network. A manufacturer with a large market share also might use RPMs to discourage retailers from selling the products of “smaller rivals or new entrants.”

After listing the risks of RPMs, the Leegin Court then went back to the test for deciding whether to declare contracts or arrangements illegal per se: whether the agreements “always or almost always tend to restrict competition and decrease output.” The Court concluded that, although an RPM can have anticompetitive effects, the “limited” empirical evidence on RPMs did not suggest that “efficient uses of the agreements are infrequent or hypothetical.” But for Justice Breyer the question is “[h]ow easy is it to separate the beneficial sheep from the antitrust goats?” To Justice Breyer that is very difficult, especially for judges and juries who seldom are economists. Couple that handicap with the conflicting views of economists on many topics, and the dissent rests on the notion that the simple per se rule should stay in place for RPMs because “[o]ne cannot fairly expect judges and juries in such cases to apply complex economic criteria without making a considerable number of mistakes, which themselves may impose serious costs.” See Frank H. Easterbrook, “The Limits of Antitrust,” 63 Tex. L. Rev. 1, 11 (August, 1984) (explaining that if you gave twelve economists all the same data and resources, “we would not get agreement about whether the practice promoted consumers’ welfare or economic efficiency”). But the majority explains that keeping the per se rule because of the administrative advantages of a simple rule suggests that the exception of per se illegality instead becomes the rule. And to do so would “undermine, if not overrule, the traditional ‘demanding standards’ for adopting per se rules.” Thus, the Leegin majority explained that had they been looking at the issue of RPMs for the first time, they would have found that rule of reason and not the per se rule would be the “appropriate standard to judge vertical price restraints.”

Stare Decisis
But this is not the first time the Court has examined vertical restraints. Justice Kennedy’s majority opinion overturned a long-established precedent. In the beginning of his dissent, Justice Breyer explained that “[w]ere the Court writing on a blank slate, I would find [the question about a per se or rule of reason standard] difficult.” However, because the Court was not writing on a “clean slate” but instead “on a slate that begins with Dr. Miles” and a century’s worth of cases, legal advice, and business decisions in reliance upon that advice, Breyer believed the Leegin Court did not meet its “heavy burdens” before overturning “so well-established a statutory precedent.”
The majority agreed that *stare decisis* may justify the retention of even an erroneously decided case. But it did not feel *Dr. Miles* was one of those cases. First, economists to the antitrust enforcement agencies, the Department of Justice, and the Federal Trade Commission all agree that the *per se* rule is inappropriate for RPMs because there is “widespread agreement” that RPMs have procompetitive effects. Second, the majority turned to the Supreme Court opinions that have slowly chipped away at the notion that vertical arrangements are *per se* illegal. The first decision emerged just eight years after the Court decided *Dr. Miles* and explained that a manufacturer can “announce suggested resale prices and refuse to deal with distributors who do not follow them.” *United States v. Colgate & Co.*, 250 U. S. 300, 307-308 (1919). Through the following years, the Court applied the rule of reason to nonprice vertical arrangements, including agreements regarding sales territories, and vertical maximum-price fixing arrangements (overruling a 29-year-old precedent in that case). Thus, the majority concluded, the procompetitive benefits of RPMs and the Court’s “continued limiting of the reach of the decision in *Dr. Miles* and recent treatment of other vertical restraints justify the conclusion that *Dr. Miles* should not be retained.” Hence, the rule of reason analysis applies to RPMs, and the defendant, Leegin, probably wins.

But does the rule of reason necessarily mean an insurmountable hurdle for the plaintiff, and does it necessarily translate into an administrative nightmare for judges and juries? Not necessarily. Justice Kennedy offers some ways to analyze a market to discover indicators of conduct that edges closer to either the legal or illegal ends of the Article I spectrum. For instance, if only a few manufacturers lacking market power adopt RPMs, it’s less likely that the practice facilitates a manufacturer cartel because rival manufacturers would undercut the cartel. But if there is a manufacturer with dominant market power, then there should be closer scrutiny of the practice because the manufacturer could use the RPMs to keep competitors away from distribution outlets. Also, if “many competing manufacturers adopt the practice,” it could deprive consumers of a meaningful choice between discount outlets and “high-service” outlets. Finally, if the impetus for an RPM is the retailer, “there is a greater likelihood that the restraint facilitates a retailer cartel or supports a dominant, inefficient retailer.” These are but a few of the tests Justice Kennedy claims courts can employ to “devise rules over time for offering proof, or even presumptions where justified, to make the rule of reason a fair and efficient way to prohibit anticompetitive restraints and to promote procompetitive ones.”

But Justice Breyer’s concern with the efficient administration of RPM is not misplaced, despite the guideposts for proof burdens and presumptions offered by Justice Kennedy. These cases can in fact become monumental battles of the experts, with juries, judges, and businesspeople struggling to understand dense conflicting views on economics. And there are advantages, of course, in having a bright-line test. The question, then, is whether the law should change at the expense of the administrative goals of simplicity, when a particular arrangement might encourage competition. Justice Breyer answered that question affirmatively 24 years ago—in terms of price competition—when he was a judge on the First Circuit Court of Appeals:

> [W]hile technical economic discussion helps to inform the antitrust laws, those laws cannot precisely replicate the economists’ (sometimes conflicting) thinking. For, unlike economics, law is an administrative system the effects of which depend upon the content of rules and precedents only as they are applied by judges and juries and by lawyers advising their clients. Rules that seek to embody every economic complexity and qualification may well, through the vagaries of administration, prove counterproductive, undercutting the very economic ends they seek to serve. Thus, despite the theoretical possibility of finding instances in which horizontal price fixing, or vertical price fixing, are economically justified, the courts have held them unlawful *per se*, concluding that the administrative virtues of simplicity outweigh the occasional ‘economic’ loss. Conversely, we must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition.

*Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 234 (1st Cir. 1983)(citations omitted) (emphasis added); see also Easterwood, 63 Tex. L. Rev. at 16-17 (citing the above quote for the proposition that it is “[b]etter to change the presumption than to take” a risk where a legal system err by condemning beneficial procompetitive arrangements).

(Continued on Page 460)
So, Kennedy and the majority reasoned, if the threshold test is whether RPMs will “always or almost always” tend to restrict competition, the answer is decidedly not “Yes.” By overruling Dr. Miles, the Court made it clear that the per se rule is not the rule, but rather the exception, and continued a recent tradition of ruling in favor of antitrust defendants.

**WEYERHAUSEN: MAKING IT MORE DIFFICULT TO PROSECUTE PREDATORS**

With six sawmills, the 21-year-old Weyerhaeuser Company had become a significant player in the Pacific Northwest’s hardwood-lumber mill industry. One of the ways companies such as Weyerhaeuser acquire logs for their sawmill operations is by purchasing them through an open bidding market. And logs represent up to 75 percent of a sawmill’s total costs. From 1998–2001, one of these types of logs, alder sawlogs, increased in price while the price for finished hardwood lumber, the products of the mills, fell. One of Weyerhaeuser’s competitors, Ross-Simmons, suffered heavy losses during this time and eventually shut down its only mill in 2001. Ross-Simmons then sued Weyerhaeuser, contending that Weyerhaeuser had intentionally overpaid for its logs in an attempt to artificially drive up log prices and force Ross-Simmons out of business. Specifically, Ross-Simmons claimed that Weyerhaeuser violated Section 2 of the Sherman Act by engaging in a “predatory-bidding” scheme when it used “its dominant position in the alder sawlog market to drive up the prices for alder sawlogs to levels that severely reduced or eliminated the profits margins of Weyerhaeuser’s competitors.” After trial, Weyerhaeuser moved for a judgment as a matter of law because Ross-Simmons had not satisfied the standards under *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), a case that considered what it takes for a plaintiff to succeed on a predatory pricing claims under Section 2 of the Sherman Act.

A predatory pricing scheme exists when a producer reduces the sales price of its product (its output) to below cost in an attempt to drive its competitors out of business. With the competition out of the picture, the surviving producer then raises its output prices to a “supracompetitive level.” For the scheme to make economic sense, the profits, with interest, made at the supracompetitive level must outweigh the losses suffered while the predatory producer first sells its output below cost. To determine whether such a scheme took place, the *Brooke Group* Court formulated two prerequisites to recovering damages for predatory pricing. “First, a plaintiff … must prove that the prices complained of are below an appropriate measure of costs,” and second, the plaintiff must prove that there is a “dangerous probability” of the defendant recouping its investment in below-costs prices.” *Brooke Group* at 222, 224. This last prong requires the plaintiff to “demonstrate that there is a likelihood that the predatory scheme alleged would cause a rise in prices above a competitive level that would be sufficient to compensate for the amounts expended on the predation, including the time value of the money invested in it.” *Id.* at 225. The *Brooke Group* Court understood that satisfying the two prongs was “not easy” but reasoned that such a high standard was necessary because otherwise there would be a danger that lowering prices, a competition stimulator, might be mistaken for predatory pricing. And that, according to *Brooke Group*, would hamper conduct that the antitrust laws were designed to protect.

At trial, Weyerhaeuser claimed that the elements to meet in a predatory pricing claim should apply to Ross-Simmons’s parallel predatory bidding claim and hence require Ross-Simmons to scale the same mountain as a predatory pricing plaintiff. The district court disagreed and the jury found for Ross-Simmons. The trial court then entered judgment, which included treble damages, for $79 million. The Ninth Circuit Court of Appeals affirmed the judgment, and on February 20, 2007, Justice Thomas issued a unanimous opinion reversing the Ninth Circuit.

Justice Thomas’s concise opinion begins its analysis of the economic realities of a predatory bidding scheme. In such a scheme, a predator looks to gain a monopsony, market power on the “buy side of the market.” This is similar to a monopoly, which is market power on the “sell side of the market.” The predatory bidding scheme involves a purchaser’s attempt to bid up inputs to such an artificially high price that the competition will not be able to afford them and will be forced out of the market. When that happens, the predatory bidder will have successfully maintained or increased its monopsony power. Once it has sufficient monopsony power, the predatory bidder will reduce its input purchases below a competitive
level and in turn reduce the unit prices for future input purchases. The predatory bidder then offsets the lost profits with the “significant cost savings” of very cheap input prices. There is a strong symmetry between the economic models of predatory pricing and bidding, considering both models involve the “deliberate use of unilateral pricing measures for anticompetitive measures” and both “logically require firms to incur short-term losses on the chance that they might reap supracompetitive profits in the future.”

That symmetry also led the Court to conclude that there needs to be a similarly high burden for successful predatory-bidding case plaintiffs to overcome. According to Justice Thomas, there are a “myriad legitimate reasons—ranging from benign to affirmatively procompetitive—why a buyer might bid up input prices.” For example, bidding too high could be a miscalculation, it could be part of a “procompetitive strategy to gain market share,” or it could be part of an effort to stock inputs as a “hedge against the risk of future rises in input costs or future input shortages.” So, with the similarities in mind, including a need to avoid ensnaring procompetitive bidding strategies, the Weyerhaeuser Court laid out a two-prong test very similar to the Brooke Group test. Under the new test, first a “plaintiff must prove that the alleged predatory bidding led to below-cost pricing of the predator’s outputs. That is, the predator’s bidding on the buy side must have caused the cost of the relevant output to rise above the revenues generated in the sale of those outputs.” Interestingly, the Court offered no guidance for the “appropriate measure” of costs.

And second, the plaintiff must “prove that the defendant has a dangerous probability of recouping the losses incurred in bidding up input prices through the exercise of monopsony power.” Otherwise, “[a]bsent proof of likely recoupment, a strategy of predatory bidding makes no economic sense because it would involve short-term losses with no likelihood of offsetting long-term gains.” And because Ross-Simmons admitted that it had failed to satisfy the Brooke Group standard, the Court found that its predatory-bidding theory could not support the $79 million jury verdict. The Court vacated the Ninth Circuit’s judgment and remanded the case back to the trial court.

The Weyerhaeuser decision and its new rule continue the tradition of making it difficult for plaintiffs to prove an unlawful scheme in violation of the Sherman Act. Because it is determined not to inadvertently “chill” the long-term procompetitive behavior that the Sherman Act is designed to protect, the Court is giving more latitude to firms with market power who engage in short-term behavior that might seem anticompetitive on its face.

While Weyerhaeuser and Leegin are decisions that will find a home in most antitrust-related briefs, the Court’s decision in Bell Atlantic Corp. v. Twombly has the potential to be a case known less for its antitrust rulings than for its citation in Federal Rule 12(b)(6) motion to dismiss a complaint for failure to state a claim.

**BELL ATLANTIC AND THE PLAUSIBLE COMPLAINT**

On May 21, 2007, the Supreme Court dealt yet another blow to the antitrust plaintiff, when Justice Souter, writing for a 7-2 majority, reversed the Second Circuit Court of Appeals and ended a putative class action of Internet and telephone customers against local telephone line operators for violations of Section 1 of the Sherman Act. In Bell Atlantic, the Court analyzed the sufficiency of a pleading and in turn may have turned the concept of “notice pleadings” on its head. The “notice pleading” principle was promulgated back in Conley v. Gibson, 355 U. S. 41, 47 (1957) when the Court held that a “complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle to him relief.”

The pleading at issue in Bell Atlantic was a complaint alleging that the local telephone line operators, the remnants of the 1984 AT&T divestiture—also known as Incumbent Local Exchange Carriers (ILECs)—had conspired to restrain trade by (1) engaging in “parallel conduct” in their respective service areas to inhibit the growth of “upstart” competitive local exchange carriers (CLECs), and (2) agreeing to refrain from competing against one another.

After the 1984 AT&T divestiture, what remained were ILECs, which were in essence local monopolies providing local telephone service. In 1996, however, Congress passed the Telecommunications Act of 1996 in an attempt to bring competition to the areas ruled by these
ILEC monopolies. That competition came in the form of CLECs, and to help the CLECs enter the market, the Telecommunications Act obligated the ILECs to share their networks with the CLECs. The act allowed CLECs to make use of that network by (1) allowing CLECs to purchase local telephone services at wholesale rates and by (2) obligating ILECs to lease unbundled elements of their networks to CLECs or (3) permitting CLECs to interconnect its own facilities with the ILEC’s network.

But according to the plaintiffs, the plan to introduce meaningful competition did not work because each of the ILECs engaged in “parallel conduct” to “inhibit the growth of upstart CLECs.” Specifically, the plaintiffs alleged that the parallel conduct involved the ILECs “making unfair agreements with the CLECs for access to ILEC networks, providing inferior connections to the networks, overcharging, and billing in ways designed to sabotage the CLECs’ relations with their own customers.” In addition, the plaintiffs also claimed that the ILECs refrained from competing against one another as evidenced by their failure to do so when to do so would have given the ILECs “attractive business opportuni[ties].” In addition, the plaintiffs cited a statement from the chief executive officer of the ILEC Qwest that competing in the territory of another ILEC “might be a good way to turn a quick dollar but that doesn’t make it right.” The plaintiffs attempted to fit all of these allegations into the Sherman Act’s prohibition against “unreasonable restraints of trade … effected by a contract, combination, or conspiracy.” Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 775 (1984) (emphasis added).

In U.S. District Court for the Southern District of New York, the defendants filed a Rule 12(b)(6) motion to dismiss the complaint for failure to state a claim. The district court granted the motion. It acknowledged that a plaintiff may cite parallel conduct as evidence of a conspiracy but concluded that allegations of parallel business conduct, “taken alone, do not state a claim under § 1; plaintiffs must allege additional facts” besides “independent self-interested conduct as an explanation for defendants’ parallel behavior.” The U.S. Court of Appeals for the Second Circuit reversed, holding that the district court used the wrong standard to test the complaint. It stated that “plus factors are not required to be pleaded” for a parallel conduct-based antitrust claim to survive dismissal. Otherwise, a court “would have to conclude that there is no set of facts that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence” (emphasis added). On May 21, 2007, the Supreme Court disagreed with the court of appeals and reversed and remanded.

The single issue before the Court was “what must a plaintiff plead in order to state a claim under § 1 of the Sherman Act.” In answering the question, Justice Souter’s opinion may have changed the 50-year-old landscape of federal pleadings standards. It is a change that was met by strong resistance from Justice Stevens in a dissent that Justice Ginsburg joined, in part. The Court’s analysis began with Conley v. Gibson, 355 U.S. 41 (1957), and its requirement that a pleading “give fair notice” of the claims and the grounds upon which they rest, and that such notice must contain “[f]actual allegations [that] raise a right to relief above the speculative level.” The Court then ruled that to properly plead a claim for relief under Section 1, the complaint must have “enough factual matter (taken as true) to suggest that an agreement was made.” And those facts must raise “plausible grounds to infer an agreement … [that] calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of illegal agreements” (emphasis added). An “allegation of parallel conduct and a bare assertion of conspiracy will not suffice.” Such an allegation is “just shy of a plausible entitlement to relief. …” The majority reasoned that the additional factual allegations requirement is necessary in antitrust pleadings given that discovery, especially in antitrust class actions, can be expensive and “potentially massive.” Otherwise, just to avoid the incredible expense of complying with discovery, defendants might be compelled to settle complaints that are based on nothing but a plaintiff’s bare assertions stripped of any factual allegations at all.

Civil Procedure to protect the viability of claims brought by black railroad workers. The workers had sued their union for failing to protect them from discriminatory discharges and were facing motions to dismiss because the union claimed their complaint lacked sufficient specificity. Rule 8(a)(2) requires that a complaint contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). According to Justice Black, because of Rule 8(a)(2), a “complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle to him relief.” Conley, 355 U.S. at 45-46 (emphasis added). It’s the “no set of facts” phrase that the dissent in Bell Atlantic claims “permits outright dismissal only when proceeding to discovery or beyond would be futile.” So, according to Justice Stevens, as long as the plaintiff states a claim that “if true, would entitle him to relief,” then the claim should withstand dismissal and discovery should proceed. But Justice Souter rejected the use of the phrase “no set of facts” as conclusive of an appropriate pleading threshold and instead, after claiming the phrase has “puzzl[ed] the profession for 50 years,” concluded that the “phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard. …”

With that in mind, there is considerable debate already as to Bell Atlantic’s scope. See Dodson, 93 Va. L. Rev. In Brief at 124-25. Those wishing for some certainty might find solace in an opinion the Court issued two weeks after Bell Atlantic. In Erickson v. Pardus, 127 S.Ct. 2197 (2007), the Court upheld a pro se prison plaintiff’s civil rights complaint and in so doing cited Bell Atlantic for the proposition that the complaint does not need “specific facts” and only has to “give the defendant fair notice of what the … claim is and the grounds upon which it rests.” But Erickson is both distinguishable and unremarkable. First, it involved a pro se plaintiff, and according to the Erickson Court, a pro se complaint “must be held to less stringent standards than formal pleadings drafted by lawyers.” Second, although Erickson does state that “specific facts” are not needed, so does Bell Atlantic. At the end of its opinion, the Bell Atlantic Court affirmed that a pleading need not have “specific facts,” but “only enough facts to state a claim to relief that is plausible on its face.”

So, assuming that Erickson doesn’t answer much, there remain a number of questions that the lower courts will attempt to answer over the coming years. For example, does Bell Atlantic create a heightened pleading standard only for Section 1 claims, or does it create a heightened pleading standard for cases only involving massive and costly discovery? What facts are enough to nudge “claims across the line from conceivable to plausible”? And what does “plausible” mean? Does it mean, as Justice Stevens suggested, that the new pleading standard and the vagueness of the term “plausible” will only “invite lawyers’ debates over economic theory to conclusively resolve antitrust suits in the absence of any evidence”? Until these questions are answered, the only certainty is that Bell Atlantic will become part of the stock language of nearly every Rule 12(b)(6) motion to dismiss—it has been cited almost 400 times by courts in the 60 days following the decision—and it has probably found a home in the outlines of every first-year law student learning civil procedure.

CONCLUSION
Leegin, Weyerhaeuser, and Bell Atlantic represent the new Court’s view that plaintiffs must meet higher heightened standards than before when proving—or even in bringing—a case against defendants accused of certain anticompetitive conduct in violation of the Sherman Act. To protect their claims, antitrust plaintiffs now must effectively utilize economic analyses and work harder to plead “plausible” facts. Likewise, these decisions enable corporations to enter into RPMs with retailers or to aggressively bid for inputs with less fear of facing a costly antitrust action. And even if faced with a complaint, the target company might take refuge in the murky waters of “plausible” scenarios that don’t appear in a complaint.

Only time, and a lot of commentary from economists, law professors, and prolific judges, will tell whether the pendulum has swung too far away from the days of Dr. Miles. Let’s just hope we don’t have to wait another hundred years to find out.
Is the Partial Birth Abortion Ban Act of 2003 unconstitutional on its face in light of the lack of an explicit exception for the health of the mother?

No. Although the Court did not rule on the constitutionality of the Act “as-applied” to individual cases, the Court did rule that the individuals challenging the constitutionality of the Act on its face failed to show that the Act is void for vagueness, imposes an undue burden, or overreaches.

From the opinion by Justice Kennedy (joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito):
The Act provides doctors “of ordinary intelligence a reasonable opportunity to know what is prohibited.” Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). Indeed, it sets forth “relatively clear guidelines as to prohibited conduct” and provides “objective criteria” to evaluate whether a doctor has performed a prohibited procedure… [T]he Act defines the line between potentially criminal conduct on the one hand and lawful abortion on the other. … Doctors performing D&E will know that if they do not deliver a living fetus to an anatomical landmark they will not face criminal liability. This conclusion is buttressed by the intent that must be proved to impose liability. The Court has made clear that scienter requirements alleviate vagueness concerns. … Because a doctor performing a D&E will not face criminal liability if he or she delivers a fetus beyond the prohibited point by mistake, the Act cannot be described as “a trap for those who act in good faith.”… The Act prohibits a doctor from intentionally performing an intact D&E. The dual prohibitions of the Act, both of which are necessary for criminal liability, correspond with the steps generally undertaken during this type of procedure.

Concurring: Justice Thomas (joined by Justice Scalia)
Dissenting: Justice Ginsburg (joined by Justices Stevens, Souter, and Breyer)

Does the statute of limitations under 28 U.S.C. § 2415(a) that requires contract enforcement actions by the government be brought within 6 years apply to administrative orders issued by the Interior Department’s Minerals Management Service?

No. The Court ruled that the 6-year limitation of § 2415(a) applies only to court actions and therefore would not apply to the administrative orders being challenged.

From the unanimous opinion by Justice Alito:
The statute of limitations imposed by § 2415(a) applies when the Government commences any “action for money damages” by filing a “complaint” to enforce a contract. … The key terms in this provision—“action” and “complaint”—are ordinarily used in connection with judicial, not administrative, proceedings. … Nothing in the language of § 2415(a) suggests that Congress intended these terms to apply more broadly to administrative proceedings. On the contrary, § 2415(a) distinguishes between judicial and administrative proceedings. … Thus, Congress knew how to identify administrative proceedings and manifestly had two separate concepts in mind when it enacted § 2415(a).

Taking no part: Chief Justice Roberts and Justice Breyer
exchange carriers alleging that the regional companies violated Section 1 of the Sherman Act by engaging in a conspiracy in restraint of trade?

No. Stating a claim under Section 1 of the Sherman Act requires a complaint with enough factual matter when taken as true to suggest that an agreement was made. An allegation of parallel conduct and a bare assertion of conspiracy will not suffice.

From the opinion by Justice Souter (joined by Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, Breyer, and Alito):

[If] alleging parallel decisions to resist competition were enough to imply an antitrust conspiracy, pleading a § 1 violation against almost any group of competing businesses would be a sure thing.

Dissenting: Justice Stevens (joined by Justice Ginsburg, except as to Part IV)

Yes. The Court held that, given the level of complexity of such issues, the expertise held by the SEC, and the possibility of conflicting decisions from competing antitrust and securities rulings, federal securities laws implicitly preclude the application of antitrust law to this specific alleged conduct.

From the opinion by Justice Breyer (joined by Chief Justice Roberts and Justices Scalia, Souter, Ginsburg, and Alito):

The question before us is whether there is a “plain repugnancy” between these antitrust claims and the federal securities law. … We conclude that there is. Consequently we must interpret the securities laws as implicitly precluding the application of the antitrust laws to the conduct alleged in this case … the question before us concerns the third condition: Is there a conflict that rises to the level of incompatibility? Is an antitrust suit such as this likely to prove practically incompatible with the SEC’s administration of the Nation’s securities laws? … We believe it fair to conclude that, where conduct at the core of the marketing of new securities is at issue; where securities regulators proceed with great care to distinguish the encouraged and permissible from the forbidden; where the threat of antitrust lawsuits, through error and disincentive, could seriously alter underwriter conduct in undesirable ways, to allow an antitrust lawsuit would threaten serious harm to the efficient functioning of the securities markets.

Concurring in judgment: Justice Stevens
Dissenting: Justice Thomas
Taking no part: Justice Kennedy

ANTITRUST
Credit Suisse Securities (USA) LLC, fka Credit Suisse First Boston LLC et al. v. Billing et al.

Docket No. 05-1157
Reversed: The Second Circuit

Argued: March 27, 2007
Decided: June 18, 2007
For Case Analysis: See ABA PREVIEW 296

Do federal securities laws implicitly preclude the application of antitrust laws in this case in which the respondent-investors are challenging the actions of the petitioner-investment bankers who served as underwriters during the execution of several initial public offerings and required that buyers of those offerings conform with a set of requirements including buying additional shares at escalating prices, paying unusually high commissions, and purchasing other less desirable securities?

Yes. The Court ruled that the Dr. Miles holding that resale price maintenance agreements are per se illegal is no longer applicable in light of the Court’s rulings regarding other vertical pricing restraints and the evidence that it is possible for such price agreements to be either procompetitive or anti-competitive depending on how they are applied in individual cases.

From the opinion by Justice Kennedy (joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito):

The reasons upon which Dr. Miles relied do not justify a per se rule. As a consequence, it is necessary to examine, in the

ANTITRUST
Leegin Creative Leather Products, Inc. v. PSKS, Inc. dba Kay’s Kloset…Kay’s Shoes

Docket No. 06-480
Reversed: The Fifth Circuit

Should Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911), be overruled and resale price maintenance agreements be judged by “the rule of reason”?

Yes. The Court ruled that the Dr. Miles holding that resale price maintenance agreements are per se illegal is no longer applicable in light of the Court’s rulings regarding other vertical pricing restraints and the evidence that it is possible for such price agreements to be either procompetitive or anti-competitive depending on how they are applied in individual cases.

From the opinion by Justice Kennedy (joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito):

The reasons upon which Dr. Miles relied do not justify a per se rule. As a consequence, it is necessary to examine, in the

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first instance, the economic effects of vertical agreements to fix minimum resale prices, and to determine whether the per se rule is nonetheless appropriate. … Though each side of the debate can find sources to support its position, it suffices to say here that economics literature is replete with procompetitive justifications for a manufacturer's use of resale price maintenance … they may have anticompetitive effects in other cases; and unlawful price fixing, designed solely to obtain monopoly profits, is an ever present temptation. … Resale price maintenance, it is true, does have economic dangers. If the rule of reason were to apply to vertical price restraints, courts would have to be diligent in eliminating their anticompetitive uses from the market. This is a realistic objective.

Dissenting: Justice Breyer (joined by Justices Stevens, Souter, and Ginsburg)

No. Predatory-bidding and predatory-pricing claims are similar enough that the same legal standard should apply to both, such that a predatory-bidding plaintiff must first show that the bidding of the predator resulted in below-cost pricing, and second, that the predator has a dangerous probability of recouping any losses by raising bids once it has forced others out of the market.

From the unanimous opinion by Justice Thomas:
The general theoretical similarities of monopoly and monopsony combined with the theoretical and practical similarities of predatory pricing and predatory bidding convince us that our two-pronged Brooke Group test should apply to predatory-bidding claims. The first prong of Brooke Group's test requires little adaptation for the predatory-bidding context. A plaintiff must prove that the alleged predatory bidding led to below-cost pricing of the predator's outputs. That is, the predator's bidding on the buy side must have caused the cost of the relevant output to rise above the revenues generated in the sale of those outputs. A predatory-bidding plaintiff also must prove that the defendant has a dangerous probability of recouping the losses incurred in bidding up input prices through the exercise of monopsony power. Absent proof of likely recoupment, a strategy of predatory bidding makes no economic sense because it would involve short-term losses with no likelihood of offsetting long-term gains.

Was it correct for the district court to reject the petitioner's request that jury instructions in this predatory-bidding claim be the same as those required for predatory-pricing claims?

No. There exists no absolute right to convert a Chapter 7 bankruptcy to Chapter 13 and consequently a bankruptcy judge has the discretion to deny the petition of a Chapter 7 debtor who acts in bad faith to conceal or misrepresent assets and then attempts to proceed under Chapter 13 in an effort to protect those very same assets.

From the opinion by Justice Stevens (joined by Justices Kennedy, Souter, Ginsburg, and Breyer):
The class of honest but unfortunate debtors who do possess an absolute right to convert their cases from Chapter 7 to Chapter 13 includes the vast majority of the hundreds of thousands of individuals who file Chapter 7 petitions each year. Congress sought to give these individuals the chance to repay their debts should they acquire the means to do so. … Nothing in the text of either § 706 or § 1307(c) (or the legislative history of either provision) limits the authority of the court to take appropriate
action in response to fraudulent conduct by the atypical litigant who has demonstrated that he is not entitled to the relief available to the typical debtor. On the contrary, the broad authority granted to bankruptcy judges to take any action that is necessary or appropriate “to prevent an abuse of process” described in § 105(a) of the Code, is surely adequate to authorize an immediate denial of a motion to convert filed under § 706 in lieu of a conversion order that merely postpones the allowance of equivalent relief and may provide a debtor with an opportunity to take action prejudicial to creditors.

Dissenting: Justice Alito (joined by Chief Justice Roberts and Justices Scalia and Thomas)

Argued: January 16, 2007
Decided: March 20, 2007
For Case Analysis: See ABA PREVIEW 205

Was the Ninth Circuit correct in rejecting the petitioner’s claim for attorney fees related to bankruptcy proceedings when there was a contract between the parties allowing for such fees?

No. Federal bankruptcy law allows for contract-based attorney fee claims, assuming that the claim does not fall into one of nine exceptions outlined in the Bankruptcy Code. The Court ruled that a claim for attorney fees is not covered by any of these exceptions and therefore that the district court and Ninth Circuit were incorrect in rejecting the petitioner’s claim.

From the unanimous opinion by Justice Alito:
[Under the terms of the current Bankruptcy Code, it remains true that an otherwise enforceable contract allocating attorney’s fees (i.e., one that is enforceable under substantive, nonbankruptcy law) is allowable in bankruptcy except where the Bankruptcy Code provides otherwise. ... This case requires us to consider whether the Bankruptcy Code disallows contract-based claims for attorney’s fees based solely on the fact that the fees at issue were incurred litigating issues of bankruptcy law. We conclude that it does not. ... Travelers’ claim for attorney’s fees has nothing to do with property tax, child support or alimony, services provided by an attorney of the debtor, damages resulting from the termination of a lease or employment contract, or the late payment of any employment tax.

Opinion by Chief Justice Roberts with respect to Parts III and IV (joined by Justice Alito)

Concurring: Justice Alito
Concurring in part and in judgment: Justice Scalia (joined by Justices Kennedy and Thomas)

Argued: April 25, 2007
Decided: June 25, 2007
For Case Analysis: See ABA PREVIEW 402

Does Section 203 of the Bipartisan Campaign Reform Act of 2002 (BCRA) violate the Wisconsin Right to Life, Inc. (WRTL)’s First Amendment rights when it prohibits corporations from using general treasury funds on broadcasts that refer to federal candidates if they are aired within 30 days of federal primary elections or 60 days of federal general elections?

Yes. While the justices remained split on whether to overturn all restrictions on campaign speech, the Court ruled that Section 203 was an unreasonable limit on WRTL’s right to free speech because the section can prohibit speech that is not the functional equivalent of express campaign speech but instead constitutes issue advocacy.

From the opinion by Chief Justice Roberts with respect to Parts I and II (joined by Justices Scalia, Kennedy, Thomas, and Alito):

In drawing that line, the First Amendment requires us to err on the side of protecting political speech rather than suppressing it. We conclude that the speech at issue in this as-applied challenge is not the “functional equivalent” of express campaign speech. We further conclude that the interests held to justify restricting corporate campaign speech or its functional equivalent do not justify restricting issue advocacy, and accordingly we hold that BCRA § 203 is unconstitutional as applied to the advertisements at issue in these cases.

Opinion by Chief Justice Roberts with respect to Parts III and IV

(Continued on Page 468)
Must a district court first decide that there exists both subject-matter jurisdiction over a case and personal jurisdiction over a defendant before responding to a defendant's forum non conveniens claim?

No. It is within the discretion of a district court to decide any non-merits issues in any order before moving onto the merits of the case, and although in most cases district courts first decide subject-matter and personal jurisdiction before moving to any forum non conveniens claims, this is by no means a requirement.

From the unanimous opinion by Justice Ginsburg:
If, however, a court can readily determine that it lacks jurisdiction over the cause or the defendant, the proper course would be to dismiss on that ground. … Where subject-matter or personal jurisdiction is difficult to determine, and forum non conveniens considerations weigh heavily in favor of dismissal, the court properly takes the less burdensome course.

May a party who is first granted a preliminary injunction but eventually fails on the merits after a full hearing be considered a “prevailing party” eligible for attorney’s fees under 42 U.S.C. § 1983?

No. Because the preliminary injunction was effectively “undone” after a full hearing on the merits, the respondent was legally in the same position she was in before beginning the action and as such does not qualify as a “prevailing party” eligible for attorney fees.

From the unanimous opinion by Justice Ginsburg:
Prevailing party status, we hold, does not attend achievement of a preliminary injunction that is reversed, dissolved, or otherwise undone by the final decision in the same case. … In short, the provisional relief granted terminated only the parties’ opening engagement. Its tentative character, in view of the continuation of the litigation to definitively resolve the controversy, would have made a fee request at the initial stage premature. Of controlling importance to our decision, the eventual ruling on the merits for defendants, after both sides considered the case fit for final adjudication, superseded the preliminary ruling.

The final decision in Wyner’s case rejected the same claim she advanced in her preliminary injunction motion: that the state law banning nudity in parks was unconstitutional as applied to expressive, nonerotic nudity. At the end of the fray, Florida’s Bathing Suit Rule remained intact, and Wyner had gained no enduring “change in the legal relationship” between herself and the state officials she sued.
Roberts and Justices Kennedy, Thomas, and Alito:

[T]o determine the beginning of the limitations period in this case, we must determine when petitioner’s false imprisonment came to an end. Reflective of the fact that false imprisonment consists of detention without legal process, a false imprisonment ends once the victim becomes held pursuant to such process—when, for example, he is bound over by a magistrate or arraigned on charges. Thus, petitioner’s contention that his false imprisonment ended upon his release from custody, after the State dropped the charges against him, must be rejected. It ended much earlier, when legal process was initiated against him, and the statute would have begun to run from that date.]

Concurring: Justice Stevens (joined by Justice Souter)
Dissenting: Justice Breyer (joined by Justice Ginsburg)

Argued: January 8, 2007
Decided: April 30, 2007
For Case Analysis: See ABA PREVIEW 180

Does a state “flow control” ordinance requiring trash haulers for municipalities to obtain a permit from a central authority and to deliver solid waste to the authority’s sites rather than allowing the haulers to use cheaper out-of-state sites violate the Commerce Clause by discriminating against interstate commerce?

No. Compelling reasons justify treating these laws differently from laws favoring particular private businesses over their competitors.

From the opinion by Chief Justice Roberts (joined in full by Justices Souter, Ginsburg, and Breyer):
The flow control ordinances in this case benefit a clearly public facility, while treating all private companies exactly the same. Because the question is now squarely presented on the facts of the case before us, we decide that such flow control ordinances do not discriminate against interstate commerce for purposes of the dormant Commerce Clause.

Concurring in part: Justice Scalia
Concurring: Justice Thomas
Dissenting: Justice Alito (joined by Justices Stevens and Kennedy)

Argued: October 11, 2006
Decided: December 11, 2006
For Case Analysis: See ABA PREVIEW 20

Was the Ninth Circuit correct in ruling that federal law is clearly established such that in order to prevent prejudice during a murder trial, the trial court must stop spectators from wearing buttons displaying the victim’s image?

No. The Court ruled that there was no clear federal standard regarding private courtroom practices such as to justify the Ninth Circuit’s ruling that the California Court of Appeals decision was a contrary or unreasonable application of clearly established federal law.

From the opinion by Justice Thomas (joined by Chief Justice Roberts and Justices Scalia, Ginsburg, Breyer, and Alito):
In contrast to state-sponsored courtroom practices, the effect on a defendant’s fair-trial rights of the spectator conduct to which Musladin objects is an open question in our jurisprudence. This Court has never addressed a claim that such private-actor courtroom conduct was so inherently prejudicial that it deprived a defendant of a fair trial. And although the Court articulated the test for inherent prejudice that applies to state conduct in Williams and Flynn, we have never applied that test to spectators’ conduct. Indeed, part of the legal test of Williams and Flynn—asking whether the practices furthered an essential state interest—suggests that those cases apply only to state-sponsored practices.

Concurring: Justice Stevens
Concurring: Justice Kennedy
Concurring: Justice Souter

American Bar Association
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Is attempted burglary a “violent felony” that can be used for purposes of calculating whether a defendant has three prior violent felonies subjecting him or her to a mandatory minimum prison term under the Armed Career Criminal Act?

Yes. Attempted burglary—as defined by Florida law—falls within the Act’s residual provision for crimes that “otherwise involve[e] conduct that presents a serious potential risk of physical injury to another.” The text of the ACCA does not exclude attempt offenses from the residual provision’s scope.

From the opinion by Justice Alito (joined by Chief Justice Roberts and Justices Kennedy, Souter, and Breyer):

[T]he proper inquiry is whether the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another. One can always hypothesize unusual cases in which even a prototypically violent crime might not present a genuine risk of injury[.]. . . As long as an offense is of a type that, by its nature, presents a serious potential risk of injury to another, it satisfies the requirements of § 924(e)(2)(B)(ii)’s residual provision.

DEATH PENALTY
Abdul Kabir v. Quarterman
Docket No. 05-11284
Reversed and remanded: The Fifth Circuit

Was the Ninth Circuit correct in agreeing with the petitioner that the holding of Crawford v. Washington could be applied retroactively as a “watershed rule,” thereby putting into question the admissibility of testimony from the petitioner’s wife and a police detective as to out-of-court statements made by the petitioner’s 6-year-old stepdaughter about alleged sexual abuse?

No. The Court said that although the Crawford v. Washington holding that the Confrontation Clause barred most out-of-court statements made by unavailable witnesses established a new rule, it does not implicate the fundamental fairness and accuracy of the fact-finding process so as to qualify as a “watershed rule” such that retroactive application would be appropriate.

From the unanimous opinion by Justice Alito:

Guidance in answering this question is provided by Gideon v. Wainwright, 372 U.S. 335 (1963), to which we have repeatedly referred in discussing the meaning of the Teague [watershed] exception at issue here. . . . In Gideon, the only case that we have identified as qualifying under this exception, the Court held that counsel must be appointed for any indigent defendant charged with a felony. When a defendant who wishes to be represented by counsel is denied representation, Gideon held, the risk of an unreliable verdict is intolerably high. . . . The new rule announced in Gideon eliminated this risk. The Crawford rule is in no way comparable to the Gideon rule. The Crawford rule is much more limited in scope, and the relationship of that rule to the accuracy of the fact-finding process is far less direct and profound.
No. The trial court judge declined to give the defendant’s requested instructions, which would have authorized a negative answer to either of the special issues on the basis of any evidence the jury perceived of as mitigating. (The mitigating evidence of an unhappy childhood presented by the defendant went primarily to reducing his moral culpability by explaining his violent propensities as attributable to neurological damage and childhood neglect and abandonment.)

From the opinion by Justice Stevens (joined by Justices Kennedy, Souter, Ginsburg, and Breyer):
Our line of cases in this area has long recognized that before a jury can undertake the grave task of imposing a death sentence, it must be allowed to consider a defendant’s moral culpability and decide whether death is an appropriate punishment for that individual in light of his personal history and characteristics and the circumstances of the offense.

Dissenting: Chief Justice Roberts (joined by Justices Scalia, Thomas, and Alito)
Dissenting: Justice Scalia (joined by Justices Thomas and, in part, Alito)

DEATH PENALTY
Brewer v. Quarterman et al.
Docket No. 05-11287
Reversed: The Fifth Circuit

Argued: January 17, 2007
Decided: April 25, 2007
For Case Analysis: See ABA PREVIEW 223

Was a trial court judge’s instruction to a jury in the sentencing portion of a capital case to answer two special issues—whether the defendant deliber-ately committed the crime reasonably knowing the victim would die and whether it was probable the defendant would commit future violent acts—sufficient to sustain the imposition of the death penalty?

No. The trial court judge declined to give the defendant’s requested instructions, which would have authorized a negative answer to either of the special issues on the basis of the mitigating evidence offered by the defendant. (The mitigating evidence introduced included evidence of childhood abuse and the defendant’s own substance abuse.)

From the opinion by Justice Stevens (joined by Justices Kennedy, Souter, Ginsburg, and Breyer):
[The trial court judge’s] conclusions fail to heed the warnings that have repeatedly issued from this Court regarding the extent to which the jury must be allowed not only to consider such [mitigating] evidence, or to have such evidence before it, but to respond to it in a rea-soned, moral manner and to weigh such evidence in its calculus of deciding whether a defendant is truly deserving of death.

Dissenting: Chief Justice Roberts (joined by Justices Scalia, Thomas, and Alito)
Dissenting: Justice Scalia (joined by Justices Thomas and, in part, Alito)

DEATH PENALTY
Panetti v. Quarterman
Docket No. 06-6407
Reversed: The Fifth Circuit

Argued: April 18, 2007
Decided: June 28, 2007
For Case Analysis: See ABA PREVIEW 376

Did the Fifth Circuit properly uphold petitioner’s death penalty on the basis that he was aware of his pending execution?

No. After first asserting that jurisdiction existed and that the Texas State Court procedures to determine competency were inadequate in that they failed to provide a full hearing after a threshold showing of insanity, the Court ruled that the Fifth Circuit’s test to determine competency for execution was too restrictive and that a difference exists between a defendant who is aware of his possible execution and one who has a rational understanding of the reasons behind the execution.

From the opinion by Justice Kennedy (joined by Justices Stevens, Souter, Ginsburg, and Breyer):
The state court’s failure to provide the procedures mandated
by Ford constituted an unreasonable application of clearly established law as determined by this Court. It is uncontested that petitioner made a substantial showing of incompetency. This showing entitled him to, among other things, an adequate means by which to submit expert psychiatric evidence in response to the evidence that had been solicited by the state court. … In our view the Court of Appeals’ standard is too restrictive to afford a prisoner the protections granted by the Eighth Amendment. … A prisoner’s awareness of the State’s rationale for an execution is not the same as a rational understanding of it.

Dissenting: Justice Thomas (joined by Chief Justice Roberts and Justices Scalia and Alito)

No. The Court of Criminal Appeals of Texas misinterpreted a prior high court decision in this same case (Smith I) accepting the defendant’s challenge to the instruction, and a misinterpretation of federal law on remand cannot serve as the basis for the imposition of an adequate and independent state procedural bar.

From the opinion by Justice Kennedy (joined by Justices Stevens, Souter, Ginsburg, and Breyer):

A review of Smith’s post-trial proceedings shows that the central argument of his habeas petition, and the basis of this Court’s decision in Smith I, is the same constitutional error asserted at trial.

Concurring: Justice Souter
Dissenting: Justice Alito (joined by Chief Justice Roberts and Justices Scalia and Thomas)

No. The Court ruled that when the entire voir dire record is reviewed it becomes clear that the trial court and state supreme court both acted within their discretion in finding that Juror Z was impaired and unable to correctly consider the death penalty.

From the opinion by Justice Kennedy (joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito):

We reject the conclusion of the Court of Appeals that the excusal of Juror Z entitles Brown to federal habeas relief. The need to defer to the trial court’s ability to perceive jurors’ demeanor does not foreclose the possibility that a reviewing court may reverse the trial court’s decision where the record discloses no basis for a finding of substantial impairment. But where, as here, there is lengthy questioning of a prospective juror and the trial court has supervised a diligent and thoughtful voir dire, the trial court has broad discretion. The record does not show the trial court exceeded this discretion in excusing Juror Z; indeed the transcript shows considerable confusion on the part of the juror, amounting to substantial impairment. The Supreme Court of Washington recognized the deference owed to the trial court and, contrary to the Court of Appeals’ misreading of the state court’s opinion, identified the correct standard required by federal law and found it satisfied. That decision, like the trial court’s, was not contrary to, or an unreasonable application of, clearly established federal law.

Dissenting: Justice Stevens (joined by Justices Souter, Ginsburg, and Breyer)
Dissenting: Justice Breyer (joined by Justice Souter)

Argued: April 17, 2007
Decided: June 4, 2007
For Case Analysis: See ABA PREVIEW 336

Was the Ninth Circuit correct in determining that the Washington State Supreme Court’s decision was either contrary to or an unreasonable application of established federal law when the state supreme court upheld the trial court’s decision to excuse “Juror Z” for cause on the basis that he could not be impartial in deciding whether to impose a death sentence?
Is the formula in use by the Secretary of Education to calculate whether a state “equalizes expenditures” among its school districts and is eligible to reduce local funding to take into account the payment of certain federal funds under the federal Impact Aid Act reasonable and statutorily authorized?

Yes. The Act sets out a general formula for determining if expenditure equalization exists, and the interpretation of that formula used by the Secretary for the last 30 years is both reasonable and authorized.

From the opinion by Justice Breyer (joined by Justices Stevens, Kennedy, Ginsburg, and Alito):
The upshot is that the language of the statute is broad enough to permit the Secretary’s reading. That fact requires us to look beyond the language to determine whether the Secretary’s interpretation is a reasonable, hence permissible, implementation of the statute. … [W]e conclude that the Secretary’s reading is a reasonable reading. We consequently find the Secretary’s method of calculation lawful.

Did the “factor (k) instruction” under the California sentencing statute that instructed the jury to take into consideration any factors that extenuate the gravity of the crime violate the Eighth Amendment by preventing the jury from considering possible future evidence of the defendant’s good behavior before sentencing him to death?

No. According to the Court the proper level of review is whether there is a reasonable likelihood that the jury applied the contested instruction in such a way that they were prevented from considering the evidence in violation of the Eighth Amendment. Since the challenged instruction allowed the jury to consider any positive evidence, which the Court has previously ruled can include both past and likely future behavior, as well as the fact that so much time and consideration were given to this future behavior during the presentation of evidence and during arguments, there was a likelihood that the jury could have considered this factor during sentencing.

From the opinion by Justice Kennedy (joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito):
It is implausible that the jury supposed that past deeds pointing to a constructive future could not “extenuat[e] the gravity of the crime,” as required by factor (k), much less that such evidence could not be considered at all. … In jury deliberations “common sense understanding of the instructions in the light of all that has taken place at the trial [is] likely to prevail over technical hairsplitting.” Here, far from encouraging the jury to ignore the defense’s central evidence, the instructions supported giving it due weight.

Concurring: Justice Scalia (joined by Justice Thomas)
Dissenting: Justice Stevens (joined by Justices Souter, Ginsburg, Breyer)
to grant en banc review before the district court issued any findings of law or fact?

Yes. While making no determination about the validity of the proposed voter identification procedures, the Court ruled that since the Ninth Circuit provided no justification or explanation for overturning the decision of the district court as should be required for rulings impacting voting procedures, the decision of the Ninth Circuit should be vacated and the case be remanded.

From the per curiam opinion:
By failing to provide any factual findings or indeed any reasoning of its own the Court of Appeals left this Court in the position of evaluating the Court of Appeals' bare order in light of the District Court's ultimate findings. There has been no explanation given by the Court of Appeals showing the ruling and findings of the District Court to be incorrect. In view of the impending election, the necessity for clear guidance to the State of Arizona, and our conclusion regarding the Court of Appeals' issuance of the order we vacate the order of the Court of Appeals.

Concurred: Justice Stevens

Must the Environmental Protection Agency interpret the term “modification” in the same way for the purposes of determining whether a permit is necessary under the New Source Performance Standards (NSPS) and the Prevention of Significant Deterioration (PSD) schemes—both of which Congress added to the Clean Air Act in the 1970s?

No. It was permissible for the EPA to put a different regulatory interpretation on the common statutory core of “modification” by measuring increased emission differently under the NSPS and PSD schemes.

From the opinion by Justice Souter (joined by Chief Justice Roberts and Justices Stevens, Scalia, Kennedy, Ginsburg, Breyer, and Alito):
Absent any iron rule to ignore the reasons for regulating PSD and NSPS “modifications” differently, EPA’s construction need do no more than fall within the limits of what is reasonable, as set by the Act’s common definition.

Concurred in part: Justice Thomas

Did the Environmental Protection Agency (EPA) properly deny a petition asking the EPA to begin to regulate “greenhouse gases” when that petition was based on the theory that under the Clean Air Act the EPA is obligated to prescribe motor vehicle emissions standards involving air pollutants?

No. After first determining that the petitioners had the necessary standing to bring such a claim, the Court ruled that since greenhouse gases qualified as an air pollutant, the EPA has the authority to regulate their emissions and should do so unless the EPA determines that such gases are not a contributing factor to climate change or provides another explanation for not exercising this discretion not based simply on policy judgments or uncertainty surrounding various aspects of climate change.

From the opinion by Justice Stevens (joined by Justices Kennedy, Souter, Ginsburg, and Breyer):
The Clean Air Act’s sweeping definition of “air pollutant” includes “any air pollution agent or combination of such agents, including any physical,
chemical ... substance or mat-
ter which is emitted into or
otherwise enters the ambient
air. ...” § 7602(g) (emphasis
added). On its face, the defini-
tion embraces all airborne
compounds of what ever stripe,
and underscores that intent
through the repeated use of the
word “any.” ...The statute is
unambiguous ...The broad lan-
guage of § 202(a)(1) reflects an
intentional effort to confer the
flexibility necessary to forestall
such obsolescence. ... If EPA
makes a finding of endanger-
ment, the Clean Air Act
requires the agency to regulate
emissions of the deleterious
pollutant from new motor vehi-
cles. ... EPA no doubt has sig-
ificant latitude as to the man-
ner, timing, content, and coor-
dination of its regulations with
those of other agencies. But
once EPA has responded to a
petition for rulemaking, its rea-
sons for action or inaction
must conform to the authoriz-
ing statute. Under the clear
terms of the Clean Air Act, EPA
can avoid taking further action
only if it determines that green-
house gases do not contribute
to climate change or if it pro-
vides some reasonable explana-
tion as to why it cannot or will
not exercise its discretion to
determine whether they do. Ibid.
To the extent that this
constrains agency discretion to
pursue other priorities of the
Administrator or the President,
this is the congressional design.

Dissenting: Chief Justice
Roberts (joined by Justices
Scalia, Thomas, and Alito)
Dissenting: Justice Scalia
(joined by Chief Justice
Roberts and Justices Thomas
and Alito)

From the opinion by Justice
Alito (joined by Chief Justice
Roberts and Justices Scalia,
Kennedy, and Thomas):
By its terms, the statutory lan-
guage is mandatory and the list
exclusive; if the nine specified
criteria are satisfied, the EPA
does not have the discretion to
deny a transfer application. ... The
agencies charged with
implementing the ESA have
attempted to resolve this ten-
sion through regulations imple-
menting § 7(a)(2). The NMFS
and FWS, acting jointly on
behalf of the Secretaries of
Commerce and the Interior and
following notice-and-comment
rulemaking procedures, have
promulgated a regulation stating
that “Section 7 and the require-
ments of this part apply to all
actions in which there is disre-
c tionary Federal involvement or
control.” 50 CFR § 402.03
(emphasis added). ... [T]he
ESA's requirements would come
into play only when an action
results from the exercise of
agency discretion. This inter-
pretation harmonizes the
statutes by giving effect to the
ESA's no-jeopardy mandate
whenever an agency has discre-
tion to do so, but not when the
agency is forbidden from con-
sidering such extrastatutory
factors.

Dissenting: Justice Thomas
(joined by Justices Souter,
Ginsburg, and Breyer)
Dissenting: Justice Breyer

Argued: April 17, 2007
Decided: June 25, 2007
For Case Analysis: See ABA
PREVIEW 408

Was the Environmental
Protection Agency (EPA)'s
application of both the Clean
Water Act (CWA) requirement
that the EPA "shall approve"
the transfer of regulatory
authority over pollution-
discharge elimination systems
to a state after the state shows
compliance with nine criteria
and the Endangered Species
Act (ESA) requirement that
agencies must consult with
either the Fish and Wildlife
Service or the National Marine
Fisheries Service to ensure that
proposed actions will not jeop-
ardize endangered animals
arbitrary and capricious?

No. The Court ruled, first, that
the EPA's application of the
ESA in conjunction with the
CWA was not arbitrary because
the EPA was relying on the fac-
tors and guidelines laid out by
Congress; and second, that
based on the language used in
the statute and the intent
behind its enactment, the ESA
no-jeopardy requirement
should only be applied to cases
of discretionary approval—and
since the CWA's requirement
that the EPA approve transfers
is statutorily mandated, the no-
jeopardy clause does not apply
to this case.
Can one potentially responsible party (PRP) under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) sue another PRP for costs associated with the cleanup of contaminated sites?

Yes. Based upon a plain reading of the statute, the Court ruled that the relevant sections of CERCLA together mandate that one PRP can sue another PRP for costs associated with contamination cleanup, thereby allowing Atlantic Research Corp. to sue the government for cleanup costs.

From the unanimous opinion by Justice Thomas:
Statutes must “be read as a whole.” King v. St. Vincent’s Hospital, 502 U.S. 215, 221 (1991). Applying that maxim, the language of subparagraph (B) can be understood only with reference to subparagraph (A). The provisions are adjacent and have remarkably similar structures. Each concerns certain costs that have been incurred by certain entities and that bear a specified relationship to the national contingency plan. Bolstering the structural link, the text also denotes a relationship between the two provisions. By using the phrase “other necessary costs,” subparagraph (B) refers to and differentiates the relevant costs from those listed in subparagraph (A). In light of the relationship between the subparagraphs, it is natural to read the phrase “any other person” by referring to the immediately preceding subparagraph (A), which permits suit only by the United States, a State, or an Indian tribe. The phrase “any other person” therefore means any person other than those three. See 42 U.S.C. § 9601(21) (defining “person” to include the United States and the various States). Consequently, the plain language of subparagraph (B) authorizes cost-recovery actions by any private party, including PRPs.

Do the voluntary student assignment programs used by the respondent-school districts that take into account race when determining the students’ school placement violate the students’ Equal Protection rights under the Fourteenth Amendment?

Yes. The Court ruled that the school districts’ had failed to justify the extreme measures being used and that further, the assignment programs’ use of race-based classifications were subject to strict scrutiny. Under this level of review, the programs did not meet the “compelling interest” threshold because neither of the school districts were under desegregation orders that would have possibly justified such programs.

From the opinion by Chief Justice Roberts (joined in part by Justices Scalia, Kennedy, Thomas, and Alito): Without attempting in these cases to set forth all the interests a school district might assert, it suffices to note that our prior cases, in evaluating the use of racial classifications in the school context, have recognized two interests that qualify as compelling. The first is the compelling interest of remedying the effects of past intentional discrimination. … The second government interest we have recognized as compelling for purposes of strict scrutiny is the interest in diversity in higher education upheld in Grutter v. Bollinger, 539 U.S. 306, 326 (2003). The specific interest found compelling in Grutter was student body diversity “in the context of higher education.” The diversity interest was not focused on race alone but encompassed “all factors that may contribute to student body diversity.” The districts assert, as they must, that the way in which they have employed individual racial classifications is necessary to achieve their stated ends. The minimal effect these classifications have on student assignments, however, suggests that other means would be effective. … While we do not suggest that greater use of race would be preferable, the minimal impact of the districts’ racial classifications on school
enrollment casts doubt on the necessity of using racial classifications.

**Opinion by Chief Justice Roberts** (joined in part by Justices Scalia, Thomas, and Alito)

Concurring: Justice Thomas
Concurring in part and in the judgment: Justice Kennedy
Dissenting: Justice Stevens
Dissenting: Justice Breyer (joined by Justices Stevens, Souter, and Ginsburg)

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**ERISA**
Beck et al. v. PACE Int'l Union et al.
Docket No. 05-1448
Reversed: The Ninth Circuit

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**FAIR CREDIT REPORTING ACT**
Safeco Ins. Co. of America et al. v. Burr et al.
Docket No. 06-84
Reversed: The Ninth Circuit

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**Did the Ninth Circuit properly rule that the directors of Crown breached a fiduciary duty to their employees under the Employee Retirement Income Security Act of 1974 (ERISA) when they rejected the respondents' suggestion that during the termination of Crown's defined-pension program, rather than buying an annuity with the pension funds as Crown planned to do, Crown instead merged the funds with other existing programs run by the respondent-union?**

**No.** As determined by the Pension Benefit Guaranty Corporation (PBGC), the entity that is charged with insuring federal programs to protect benefits, the merger plan proposed by the respondent is not a permissible form of termination under ERISA and, therefore, it is not possible to conclude that the Crown directors breached any fiduciary duty required by ERISA.

**From the unanimous opinion by Justice Scalia:**
Crown did not breach its fiduciary obligations in failing to consider PACE's merger proposal because merger is not a permissible form of termination. Even from a policy standpoint, the PBGC's choice is an eminently reasonable one, since termination by merger could have detrimental consequences for plan beneficiaries and plan sponsors alike. When a single-employer plan is merged into a multiemployer plan, the original participants and beneficiaries become dependent upon the financial well-being of the multiemployer plan and its contributing members. Assets of the single-employer plan (which in this case were capable of fully funding plan liabilities) may be used to satisfy commitments owed to other participants and beneficiaries of the (possibly underfunded) multiemployer plan. The PBGC believes that this arrangement creates added risk for participants and beneficiaries of the original plan ... for employers, the ill effects are demonstrated by the facts of this very case: by diligently funding its pension plans, Crown became the bait for a union bent on obtaining a surplus that was rightfully Crown's. All this after Crown purchased an annuity that none dispute was sufficient to satisfy its commitments to plan participants and beneficiaries.

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**Did the Fair Credit Reporting Act (FCRA) require an insurance company to notify a consumer that an “adverse action” had been taken when the consumer's credit score was taken into account during the issuance of a policy even though the same policy would have been issued if the consumer had had a neutral score?**

**No.** The Court ruled that because the consumer was getting the same policy he would have been offered if his score had never been taken into account, no “adverse action” occurred and consequently no disclosure or notice was required.

**From the opinion by Justice Souter** (joined by Chief Justice Roberts and Justices Kennedy and Breyer, and joined in part by Justice Scalia and by Justices Thomas and Alito, and by Justices Stevens and Ginsburg):
Since the statute does not explicitly call for notice when a business acts adversely merely after consulting a report, conditioning the requirement on action “based ... on” a report suggests that the duty to report arises from some practical con-
sequence of reading the report, not merely some subsequent adverse occurrence that would have happened anyway. If the credit report has no identifiable effect on the rate, the consumer has no immediately practical reason to worry about it … both the company and the consumer are just where they would have been if the company had never seen the report. … In GEICO’s case, the initial rate offered to Edo was the one he would have received if his credit score had not been taken into account, and GEICO owed him no adverse action notice under § 1681m(a) … There being no indication that Congress had something different in mind, we have no reason to deviate from the common law understanding in applying the statute. … Thus, a company subject to FCRA does not act in reckless disregard of it unless the action is not only a violation under a reasonable reading of the statute’s terms, but shows that the company ran a risk of violating the law substantially greater than the risk associated with a reading that was merely careless. … While we disagree with Safeco’s analysis, we recognize that its reading has a foundation in the statutory text[.]

Concurring in part and concurring in the judgment: Justice Stevens (joined by Justice Ginsburg)  
Concurring: Justice Thomas (joined by Justice Alito)
Does federal telecommunication law allow a payphone operator to bring a damage action in federal court against a long distance carrier for failing to reimburse the operator for certain charges in violation of a Federal Communications Commission regulation?

Yes. Section 201(b) of the Communications Act authorized the FCC to declare a carrier's practice or charge to be "unjust and unreasonable," and Sec. 207 authorizes the aggrieved party to bring a lawsuit over the practice or charge in federal court.

From the opinion by Justice Breyer (joined by Chief Justice Roberts and Justices Stevens, Kennedy, Souter, Ginsburg, and Alito):

Nor do we suggest that every violation of FCC regulations is an unjust and unreasonable practice. Here there is an explicit statutory scheme, and compensation of payphone operators is necessary to the proper implementation of that scheme. Under these circumstances, the FCC’s finding that the failure to follow the order is an unreasonable practice is well within its authority.

Does a district court have the ability to remand a tort claim against a federal employee back to state court when the Attorney General has certified that the employee was acting under the scope of his employment even in light of the fact that both the employee and Attorney General claim that the act never even happened?

No. The Attorney General's certification that a federal employee being sued for wrongful or negligent conduct was acting within the scope of his employment is dispositive, and the case must remain in the federal court regardless of whether the employee claims that the act never occurred so long as the employee was acting within the scope of his employment during the time of the alleged conduct.

From the opinion of Justice Ginsburg (joined by Chief Justice Roberts and Justices Stevens, Kennedy, and Alito, and joined in part by Justice Souter and in part by Justice Breyer):

[T]he Act grants the Attorney General authority to certify that a federal employee named [a] defendant in a tort action was acting within the scope of his or her employment at the time in question. § 2679(d)(1), (2). If the action is commenced in a federal court, and the Attorney General certifies that the employee “was acting within the scope of his office or employment at the [relevant] time,” the United States must be substituted as the defendant. § 2679(d)(1). If the action is launched in a state court, and the Attorney General makes the same certification, the action “shall be removed” to the appropriate federal district court, and again the United States must be substituted as the defendant. § 2679(d)(2). Of prime importance to our decision, § 2679(d)(2) concludes with the command: “The certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.” (Emphasis added.) … For purposes of establishing a forum to adjudicate the case, however, § 2679(d)(2) renders the Attorney General's certification dispositive. … In sum, given the purpose of the Westfall Act to shield covered employees not only from liability but from suit, it is altogether appropriate to afford protection to a “negligent … employee … as a matter of course.” Wood v. United States, 995 F. 2d 1122, 1135 (CA1 1993) … But it would make scant sense to read the Act as leaving an employee charged with an intentional tort to fend for himself when he denies wrongdoing and asserts he “engaged only in proper behavior occurring wholly within the scope of his office or employment.” Ibid.

Concurring in part and dissenting in part: Justice Souter

Concurring in part and dissenting...
Does the Federal Employers’ Liability Act (FELA) require that a jury apply the same causation standards to railroad negligence and employee contributory negligence when determining the amount by which to reduce a railroad employee’s award stemming from a negligence action?

Yes. It is clear based on the language used by the FELA and the common-law practices in use at the time of the FELA’s enactment that the same causation standards are to apply to both the railroad’s negligence as well as the employee’s contributory negligence.

From the opinion of Chief Justice Roberts (joined by Justices Stevens, Scalia, Kennedy, Souter, Thomas, Breyer, and Alito):

We have explained that “although common-law principles are not necessarily dispositive of questions arising under FELA, unless they are expressly rejected in the text of the statute, they are entitled to great weight in our analysis. … The fact that the common law applied the same causation standard to defendant and plaintiff negligence, and FELA did not expressly depart from that approach, is strong evidence against Missouri’s disparate standards.

Concurring: Justice Souter (joined by Justices Scalia and Alito)

Concurring: Justice Ginsburg

Dissenting: Justice Souter (joined by Justices Stevens, Ginsburg, and Breyer)

Did the Sixth Circuit have jurisdiction to hear the petitioner’s appeal when the district court extended the appeal deadline for 17 days, which was longer than the 14-day period prescribed by the statute, and the petitioner, relying on this order, filed his notice after 14 days but before 17 days?

No. The Court ruled that because Congress can define and limit federal appellate jurisdiction over civil cases, it was completely within Congress’s power to create time limits for filing notices of appeal. The Court therefore ruled that such time limits are jurisdictional in nature and cannot be waived by a court.

From the opinion by Justice Thomas (joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Alito):

Jurisdictional treatment of statutory time limits makes good sense. Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider. Because Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them.

Dissenting: Justice Souter (joined by Justices Stevens, Ginsburg, and Breyer)

Does Section 412 of the Congressional Accountability Act of 1995—which authorizes U.S. Supreme Court review of “any judgment … upon the constitutionality of any provision” of the Act—confer jurisdiction on the high court to hear an appeal from the denial of a motion to dismiss a claim brought under the Act when the dismissal motion was based on a senator’s assertion of immunity under the U.S. Constitution’s Speech or Debate Clause?

No. Neither the circuit court’s rejection of the senator’s argument that forcing him to defend against the plaintiff’s
allegations would necessarily contravene the Speech or Debate Clause, nor the circuit court’s leaving open the possibility that the clause may limit the proceedings’ scope in some respects, qualifies as a ruling on the Act’s validity. Thus, the U.S. Supreme Court lacks jurisdiction under Section 412.

From the opinion by Justice Stevens (joined by Justices Scalia, Kennedy, Alito, Souter, Ginsburg, Breyer, and Thomas):
The provision for appellate review is best understood as responding to a congressional concern that if a provision of the statute is declared invalid there is an interest in prompt adjudication by this Court. To extend that review to instances in which the statute itself has not been called into question, giving litigants under the Act preference to litigants in other cases, does not accord with that rationale.

Taking no part: Chief Justice Roberts

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Did the court of appeals have jurisdiction to review the district court’s order denying the petitioner’s claim for foreign sovereign immunity and remanding the case to state court?

No. The Court held that because the district court had determined it lacked subject-matter jurisdiction in this case even though the case had been properly removed, statutorily there existed no authority for the Court of Appeals to review the order remanding the case to state court.

From the opinion by Justice Scalia (joined by Chief Justice Roberts and Justices Kennedy, Souter, Thomas, Ginsburg, and Alito):
The authority of appellate courts to review district-court orders remanding removed cases to state court is substantially limited by statute. … There is only one plausible explanation of what legal ground the District Court actually relied upon for its remand in the present case. As contended by plaintiffs-respondents, it was the court’s lack of power to adjudicate the claims against petitioner once it concluded both that petitioner was not a foreign state capable of independently removing and that the claims against the other removing cross-defendants were barred by sovereign immunity. … We hold that when, as here, the District Court relied upon a ground that is colorably characterized as subject-matter jurisdiction, appellate review is barred by § 1447(d).

Concurring: Justice Kennedy (joined by Justice Alito)
Dissenting: Justice Breyer (joined by Justice Stevens)

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Argued: April 25, 2007
Decided: June 11, 2007
For Case Analysis: See ABA PREVIEW 361

Was removal under the federal officer removal statute correct on the theory that since the underlying “unfair business practices” claim in this case focused on the alleged manipulation by Philip Morris of federal testing results, the company was “acting under” the Federal Trade Commission, the agency responsible for the testing, and therefore qualified as a “person acting under a government officer”?

No. After looking at the plain language of the statute and its original intent, which was to protect government agents from being prosecuted by biased state courts, the Court ruled that although the Federal Trade Commission directs, supervises, and monitors the actions of Philip Morris, and although Philip Morris complies with this regulation, those actions do rise to the level of “acting under” the direction of the government so as to justify removal.

From the unanimous opinion by Justice Breyer:
[B]road language is not limitless. And a liberal construction nonetheless can find limits in a text’s language, context, history, and purposes. … The relevant relationship is that of a
private person “acting under” a federal “officer” or “agency.” 28 U.S.C. § 1442(a)(1) (emphasis added). In this context, the word “under” must refer to what has been described as a relationship that involves “acting in a certain capacity, considered in relation to one holding a superior position or office.” 18 Oxford English Dictionary 948 (2d ed. 1989). That relationship typically involves “subjection, guidance, or control.”… In our view, the help or assistance necessary to bring a private person within the scope of the statute does not include simply complying with the law. We recognize that sometimes an English speaker might say that one who complies with the law “helps” or “assists” governmental law enforcement. … But that is not the sense of “help” or “assist” that can bring a private action within the scope of this statute.

**FEDERALISM**

***Watters v. Wachovia Bank, N.A. et al.***

Docket No. 05-1342
Affirmed: The Sixth Circuit

**FIRST AMENDMENT**

***Davenport et al. v. Washington Ed. Assn.***

Docket No. 05-1589
Vacated: The Supreme Court of Washington

Can a state regulate a mortgage business when it is a wholly owned subsidiary of a national bank?

No. Whether conducted through the bank itself or its subsidiary, the mortgage business is subject to the Office of the Comptroller of Currency’s superintendence under the National Banking Act, and not to the licensing, reporting, and visitatorial regimes of the several states in which the subsidiary operates.

**From the opinion by Justice Ginsburg** (joined by Justices Kennedy, Souter, Breyer, and Alito): We have never held that the preemptive reach of the NBA extends only to a national bank itself. Rather, in analyzing whether state law hampers the federally permitted activities of a national bank, we have focused on the exercise of a national bank’s powers, not on its corporate structure. And we have treated operating subsidiaries as equivalent to national banks with respect to powers exercised under federal law (except where federal law provides otherwise.)

Dissenting: Justice Stevens (joined by Chief Justice Roberts and Justice Scalia) Taking no part in the consideration or decision of the case: Justice Thomas

- **Argued: November 29, 2006**
- **Decided: April 17, 2007**
- For Case Analysis: See ABA PREVIEW 143

- **Argued: January 10, 2007**
- **Decided: June 14, 2007**
- For Case Analysis: See ABA PREVIEW 219

Does a state regulation violate the First Amendment if it requires a public-sector union to get affirmative authorization from employees who are not union members before spending the nonmembers’ agency fees on election-related expenses?

No. The Court ruled that the authority for a public-sector union to levy fees on employees is quite limited and an affirmative authorization regulation such as the one the state of Washington put into place was by no means so restrictive as to rise to the level of a constitutional violation.

**From the opinion by Justice Scalia** (joined by Justices Stevens, Kennedy, Souter, Thomas, and Ginsburg): The mere fact that Washington required more than the Hudson minimum [notifying nonmembers of the spending] does not trigger First Amendment scrutiny. The constitutional floor for unions’ collection and spending of agency fees is not also a constitutional ceiling for state-imposed restrictions. … The question that must be asked, therefore, is whether § 760 [the affirmative authorization requirement] is a constitutional condition on the authorization that public-sector unions enjoy to charge government employees agency fees. Respondent essentially answers that the statute unconstitutionally draws distinctions based on the content of the union’s speech, requiring affirmative consent only for election-related expenditures while permitting expenditures for the rest of the purposes not chargeable under Abood unless the nonmember objects. The contention that this amounts to unconstitutional content-based discrimination is off the mark. … We do not believe that the voters of Washington impermissibly distorted the marketplace of ideas when they placed a reasonable, viewpoint-neutral limitation on the State’s general authorization allowing public-sector unions to acquire
and spend the money of government employees ... we uphold § 760 only as applied to public-sector unions such as respondent.

Concurring in part and in judgment: Justice Breyer (joined by Chief Justice Roberts and Justice Alito)

**FIRST AMENDMENT**

Hein et al. v. Freedom from Religion Foundation, Inc. et al.

Docket No. 06-157

Reversed: The Seventh Circuit

Argued: February 28, 2007
Decided: June 25, 2007
For Case Analysis: See ABA PREVIEW 263

Did the respondent taxpayers have standing to raise an Establishment Clause challenge to the actions of the executive branch in creating a faith-based initiative when no prior or subsequent act of Congress authorized such programs?

**No.** While not completely overturning Flast v. Cohen, 392 U.S. 83 (1968), the precedent allowing taxpayer Establishment Clause actions, the Court ruled that federal taxpayers can only challenge government spending when the taxpayer is asserting a statutory violation of the Establishment Clause.

Concurring: Justice Kennedy
Concurring in judgment: Justice Scalia (joined by Justice Thomas)
Dissenting: Justice Souter (joined by Justices Stevens, Ginsburg, and Breyer)

From the opinion by Chief Justice Roberts (joined by Justices Scalia, Kennedy, Thomas, and Alito):

[W]e agree with the superintendent that Frederick cannot “stand in the midst of his fellow students, during school hours, at a school-sanctioned activity and claim he is not at school.” … There is some uncertainty at

**FIRST AMENDMENT**

Morse et al. v. Frederick

Docket No. 06-278

Reversed: The Ninth Circuit

Argued: March 19, 2007
Decided: June 25, 2007
For Case Analysis: See ABA PREVIEW 282

Did the actions by a high school principal in suspending the petitioner-student for unfurling a banner saying “BONG Hits 4 Jesus” at a school-sponsored and school-sanctioned event violate the student’s First Amendment freedom of speech rights?

**No.** Basing its decision on the duty of schools to safeguard students from speech that could be reasonably regarded as encouraging drug use, the Court ruled that the actions of the principal did not violate the First Amendment. The event during which the banner was unfurled clearly made the words school-speech given its occurrence during school hours and the supervision by school officials. A reasonable reader of the banner would have interpreted it as encouraging drug use and the principal’s actions were necessary to further the school’s compelling interest in deterring drug use.

From the opinion by Chief Justice Roberts:

[...]

(Continued on Page 484)
the outer boundaries as to when courts should apply school-speech precedents … but not on these facts. … Principal Morse thought the banner would be interpreted by those viewing it as promoting illegal drug use, and that interpretation is plainly a reasonable one. … Drawing on the principles applied in our student-speech cases, we have held in the Fourth Amendment context that “while children assuredly do not ‘shed their constitutional rights … at the schoolhouse gate,’ … the nature of those rights is what is appropriate for children in school.” Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 655–656 (1995). … Even more to the point, these cases also recognize that deterring drug use by schoolchildren is an “important—indeed, perhaps compelling” interest.

Concurring: Justice Thomas
Concurring: Justice Alito
(joined by Justice Kennedy)
Concurring in judgment and dissenting in part: Justice Breyer
Dissenting: Justice Stevens
(joined by Justices Souter and Ginsburg)

FIRST AMENDMENT
Tennessee Secondary School Athletic Assn. v. Brentwood Academy
Docket No. 06-427
Reversed: The Sixth Circuit

Argued: April 18, 2007
Decided: June 21, 2007
For Case Analysis: See ABA PREVIEW 370
Does the Tennessee Secondary School Athletic Association (TSSAA)’s enforcement of its restrictions on member schools’ recruitment of middle school students violate the member schools’ First and Fourteenth Amendment rights?

No. Noting that TSSAA membership is voluntary, the Court ruled that the TSSAA has an interest in efficient and effective running of the league and that restrictions on certain recruiting-oriented speech serve this interest thereby negating any First Amendment claims; moreover, the TSSAA investigation and hearings on this matter were conducted in an open and fair manner such that the respondent’s Fourteenth Amendment due process rights were protected.

From the opinion by Justice Stevens (joined in part by Chief Justice Roberts and Justices Scalia, Kennedy, Souter, Ginsburg, and Breyer):

Brentwood made a voluntary decision to join TSSAA and to abide by its antirecruiting rule … Just as the government's interest in running an effective workplace can in some circumstances outweigh employee speech rights … so too can an athletic league's interest in enforcing its rules sometimes warrant curtailing the speech of its voluntary participants, … This is not to say that TSSAA has unbounded authority to condition membership on the relinquishment of any and all constitutional rights. … Assuming, without deciding, that the coach in this case was “speaking as [a] citizen[s] about matters of public concern,” … TSSAA can similarly impose only those conditions on such speech that are necessary to managing an efficient and effective state-sponsored high school athletic league. That necessity is obviously present here. We need no empirical data to credit TSSAA’s common-sense conclusion that hard-sell tactics directed at middle school students could lead to exploitation, distort competition between high school teams, and foster an environment in which athletics are prized more highly than academics. … For that reason, the First Amendment does not excuse Brentwood from abiding by the same antirecruiting rule that governs the conduct of its sister schools.

Concurring in part and in judgment: Justice Kennedy (joined by Chief Justice Roberts and Justices Scalia and Alito)
Concurring in judgment: Justice Thomas

FOREIGN SOVEREIGN IMMUNITY
Permanent Mission of India to the United Nations et al. v. City of New York
Docket No. 06-134
Affirmed: The Second Circuit

Argued: April 24, 2007
Decided: June 14, 2007
For Case Analysis: See ABA PREVIEW 345
Does the Foreign Sovereign Immunity Act of 1976 (FSIA) create immunity for the Permanent Mission of India against an attempt by the respondent-City to assert its right under tax liens for unpaid taxes assessed to property owned by the Mission?
No. Although the FSIA immunizes many actions of foreign sovereigns, certain specific exceptions exist which when satisfied leave the sovereign liable. In this case the Court ruled that based on the specific statutory language and the intent behind its enactment, the exception for cases involving rights in immovable property located in the United States applies, thereby exposing the Mission to possible liability.

From the opinion by Justice Thomas (joined by Chief Justice Roberts and Justices Scalia, Kennedy, Souter, Ginsburg, and Alito):
We begin, as always, with the text of the statute. … [The U.S. property exception] does not expressly limit itself to cases in which the specific right at issue is title, ownership, or possession. Neither does it specifically exclude cases in which the validity of a lien is at issue. Rather, the exception focuses more broadly on “rights in” property. … A tax lien thus inhibits one of the quintessential rights of property ownership—the right to convey. It is therefore plain that a suit to establish the validity of a lien implicates “rights in immovable property.”

Dissenting: Justice Stevens (joined by Justice Breyer)

Argued: April 16, 2007
Decided: June 18, 2007
For Case Analysis: See ABA PREVIEW 332

Should a passenger in a car that has been stopped by police be considered “seized” for Fourth Amendment purposes and therefore able to challenge the constitutionality of the stop and ask for the suppression of evidence obtained as a result?

Yes. The Court ruled that because a reasonable person in the passenger’s position would not have felt free to leave during the traffic stop, the passenger should be considered “seized” for Fourth Amendment purposes and consequently has the ability to challenge the stop’s constitutionality and the admissibility of any resulting evidence.

From the unanimous opinion by Justice Souter:
And although we have not, until today, squarely answered the question whether a passenger is also seized, we have said over and over in dicta that during a traffic stop an officer seizes everyone in the vehicle, not just the driver. … We resolve this question by asking whether a reasonable person in Brendlin’s position when the car stopped would have believed himself free to “terminate the encounter” between the police and himself. Florida v. Bostick, 501 U.S. 429, 436 (1991). We think that in these circumstances any reasonable passenger would have understood the police officers to be exercising control to the point that no one in the car was free to depart without police permission. A traffic stop necessarily curtails the travel a passenger has chosen just as much as it halts the driver, diverting both from the stream of traffic to the side of the road, and the police activity that normally amounts to intrusion on “privacy and personal security” does not normally (and did not here) distinguish between passenger and driver.

Argued: N/A
Decided: May 21, 2007
For Case Analysis: N/A

Can an innocent Caucasian couple roused from their bed and forced to stand naked for a few minutes by police executing a valid warrant searching for three armed African American suspects bring suit under 42 U.S.C. § 1983 alleging a violation of their Fourth Amendment right to be free of unreasonable searches and seizures?

No. The orders by the police to the couple, in the context of the lawful search, were permissible, and perhaps necessary, to protect the safety of the officers.

From the per curiam opinion: Officers executing search war-
rants on occasion enter a house when residents are engaged in private activity; and the resulting frustration, embarrassment, and humiliation may be real, as was the case here. When officers execute a valid warrant and act in a reasonable manner to protect themselves from harm, however, the Fourth Amendment is not violated.

Concurring: Justice Stevens (joined by Justice Ginsburg) Justice Souter would deny the petition for certiorari.

**FOURTH AMENDMENT**  
*Scott v. Harris*  
Docket No. 05-1631  
Reversed: The Eleventh Circuit

Argued: February 26, 2007  
Decided: April 30, 2007  
For Case Analysis: See ABA PREVIEW 251

Can a man rendered a quadriplegic after a police officer forced his vehicle off the road to terminate a high-speed chase sue the officer under 42 U.S.C. § 1983 for using excessive force in violation of the Fourth Amendment right against unreasonable search and seizures?

**No.** Because the car chase that the plaintiff initiated posed a substantial and immediate risk of serious physical injury to others, the officer’s attempt to terminate the chase by forcing the plaintiff off the road was reasonable, and the officer is entitled to summary judgment.

**From the opinion by Justice Scalia** (joined by Chief Justice Roberts and Justices Kennedy, Souter, Thomas Ginsburg, Breyer, and Alito):

A police officer’s attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment even when it places the fleeing motorist at risk of serious injury or death.

Concurring: Justice Ginsburg  
Concurring: Justice Breyer  
Dissenting: Justice Stevens

**HABEAS CORPUS**  
*Burton v. Stewart*  
Docket No. 05-9222  
Vacated: The Ninth Circuit

**FOURTH AMENDMENT**  
*Scott v. Harris*  
Docket No. 05-1631  
Reversed: The Eleventh Circuit

Argued: N/A  
Decided: January 9, 2007  
For Case Analysis: See ABA PREVIEW 92

Was the Ninth Circuit correct in ruling on the merits of the petitioner’s second habeas corpus claim for the same custodial order?

**No.** The Court ruled that because the petitioner was challenging the same custody order for a second time he had to comply with gate keeping requirements of 28 U.S.C. § 2244(b) that required him to obtain authorization from the district court to file a second or successive petition, and his failure to do so removed the case from the district court’s jurisdiction.

**From the per curiam opinion:** Burton’s 2002 petition was a “second or successive” habeas application for which he did not seek, much less obtain, authorization to file. When Burton filed his first petition, the 1998 petition, he was being held in custody pursuant to the 1998 judgment, which had been entered some nine months earlier. When he filed his second petition, the 2002 petition, he was still being held in custody pursuant to the same 1998 judgment. In short, Burton twice brought claims contesting the same custody imposed by the same judgment of a state court. As a result, under AEDPA, he was required to receive authorization from the Court of Appeals before filing his second challenge. Because he did not do so, the District Court was without jurisdiction to entertain it.

**HABEAS CORPUS**  
*Fry v. Pliler*  
Docket No. 06-5247  
Affirmed: The Ninth Circuit

Argued: March 20, 2007  
Decided: June 11, 2007  
For Case Analysis: See ABA PREVIEW 315

Did the federal habeas court properly review the constitutional error of the trial judge’s exclusion of certain testimony when the state appellate court failed to find any error and therefore did not review the constitutionality of the alleged error under the “harmless error” standard?

**Yes.** In federal habeas corpus decisions, it is correct for the reviewing court to apply the “substantial and injurious effect” standard when reviewing the alleged error even if the state appellate court failed to
find or apply the “harmless error” standard.

From the unanimous opinion by Justice Scalia (joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito, and joined by Justices Stevens, Souter, and Ginsburg in part, and joined by Justice Breyer in part):

The opinion in *Brecht* clearly assumed that the *Kotteakos* standard [substantial and injurious effect standard] would apply in virtually all § 2254 cases. It suggested an exception only for the “unusual case” … The concurring and dissenting opinions shared the assumption that *Kotteakos* would almost always be the standard on collateral review. The former stated in categorical terms that the “*Kotteakos* standard” “will now apply on collateral review” of state convictions, [*Brecht v. Abrahamson*, 507 U.S. 619, 643 (1993) (STEVENS, J., concurring)]. … Later cases also assumed that *Brecht*’s applicability does not turn on whether the state appellate court recognized the constitutional error and reached the *Chapman* question.

Concurring in part and dissenting in part: Justice Stevens (joined by Justices Souter and Ginsburg and joined in part by Justice Breyer)

Concurring in part and dissenting in part: Justice Breyer

**HABEAS CORPUS**

**Lawrence v. Florida**

Docket No. 05-8820

Affirmed: The Eleventh Circuit

Argued: October 31, 2006

Decided: February 20, 2007

For Case Analysis: See ABA PREVIEW 98

Is the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)’s 1-year statute of limitations for filing federal habeas corpus relief from state-court judgments considered tolled while this Court considers a certiorari petition?

No. A state review is no longer “pending” after the state supreme court has entered a final order even though a certiorari petition is before this Court because at that time no other state relief remained.

**Dissenting: Justice Ginsburg**

(joined by Justices Stevens, Souter, and Breyer)

**HABEAS CORPUS**

**Roper v. Weaver**

Docket No. 06-313

Certiorari dismissed as improvidently granted: The Eighth Circuit

Argued: N/A

Decided: May 21, 2007

For Case Analysis: See ABA PREVIEW 276

Was a federal district court judge correct in giving a prisoner sentenced to death a choice to either proceed with a certiorari petition or to drop that petition in order to pursue federal habeas relief?

No. Even when a prisoner files a petition for certiorari, state review ends for purposes of exhausting state remedies for a federal habeas petition when the state courts have finally resolved an application for state postconviction relief.

**From the per curiam opinion:**

Our recent decision in *Lawrence v. Florida*, 549 U.S. __ (2007), conclusively establishes that the District Court was wrong to conclude that, if respondent chose to seek certiorari, he had to exhaust that remedy before filing a federal habeas petition. … Thus, respondent’s habeas petition,
which was fully exhausted when filed, did not become unexhausted upon his decision to seek certiorari.

Concurring: Chief Justice Roberts
Dissenting: Justice Scalia (joined by Justices Thomas and Alito)

Argued: January 9, 2007
Decided: May 14, 2007
For Case Analysis: See ABA PREVIEW 200

Is a defendant who was sentenced to death after preventing his lawyer from offering evidence of mitigating circumstances entitled to an evidentiary hearing on his federal habeas petition after the state’s courts rejected his postconviction ineffective-assistance-of-counsel claim?

No. The federal district court was well within its discretion to determine that, even with the benefit of an evidentiary hearing, the defendant could not develop a record entitling him to federal habeas relief.

From the opinion by Justice Thomas (joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Alito): If district courts were required to allow federal habeas applicants to develop even the most insubstantial factual allegations in evidentiary hearings, district courts would be forced to reopen factual disputes that were conclusively resolved in the state courts.

Dissenting: Justice Stevens (joined by Justices Souter, Ginsburg, and Breyer)

Argued: December 5, 2006
Decided: January 17, 2007
For Case Analysis: See ABA PREVIEW 154

Was the Ninth Circuit correct in holding that “aiding and abetting” a theft offense does not qualify as the generic crime “theft” such that a conviction for aiding and abetting alone would not justify deportation?

No. The Court ruled that the California Vehicle Code provision, which allows an aider and abettor to be criminally responsible for both the crime intended and for any crime that naturally and probably results from the intended crime, does not reach beyond the generic definition of theft and therefore the Respondent's aiding and abetting in a theft falls under generic theft making him eligible for deportation.

From the opinion of Justice Breyer (joined by Chief Justice Roberts and Justices Scalia, Kennedy, Souter, Thomas, Ginsburg, and Alito and joined as to Parts I, II and III-B by Justice Stevens): [I]n our view, to find that a state statute creates a crime outside the generic definition of a listed crime in a federal statute requires more than the application of legal imagination to a state statute’s language. It requires a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime. To show that realistic possibility, an offender, of course, may show that the statute was so applied in his own case. But he must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues.

Concurring in part and dissenting in part: Justice Stevens

Argued: October 3, 2006
Decided: December 5, 2006
For Case Analysis: See ABA PREVIEW 26

Does the possession of a controlled substance, which qualifies as a felony under state law but only as a misdemeanor under the Controlled Substances Act, equate to the aggregated felony of “illicit trafficking” under the Immigration and Nationality Act so as to justify deportation proceedings?

No. The Immigration and Nationality Act’s aggravated felony category includes only conduct that is a felony punishable under the Controlled Substance Act, not merely...
punishable as a felony under state law.

**From the opinion by Justice Souter** (joined by Chief Justice Roberts and Justices Stevens, Scalia, Kennedy, Ginsburg, Breyer, and Alito):

If we want to know what felonies might qualify, the place to go is to the definitions of crimes punishable as felonies under the [Immigration and Nationality] Act; where else would one naturally look? Although the Government would have us look to state law, we suspect that if Congress had meant us to do that it would have found a much less misleading way to make its point.

Dissenting: Justice Thomas

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Yes. Federal jurisdiction was established in this case when the licensee properly raised a contract claim and further, the Court ruled that it has long been established that federal and state court jurisdiction will not be eliminated when a plaintiff takes self-protecting measures to avoid imminent injuries created by the defendant’s threatened enforcement of the challenged license.

**From the opinion of Justice Scalia** (joined by Chief Justice Roberts and Justices Stevens, Kennedy, Souter, Ginsburg, Breyer, and Alito):

Although the Government would have us look to state law, we suspect that if Congress had meant us to do that it would have found a much less misleading way to make its point.

Dissenting: Justice Thomas

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Does Article III create jurisdiction for a federal court to enter a ruling in a request for a declaratory judgment by a patent licensee claiming that the underlying patient is invalid, unenforceable, or not infringed when the only other options available to the licensee are to either terminate the license or be in breach, which would create possible liability for treble damages and attorney fees?

**IMMIGRATION LAW**

**MedImmune, Inc. v. Genentech, Inc. et al.**

Docket No. 05-608
Reversed: The Federal Circuit

Argued: October 4, 2006
Decided: January 9, 2007
For Case Analysis: See ABA PREVIEW 36

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Yes. “Attempted” reentry, when coupled with a specific date and location of the attempt, qualifies as an overt act under the statute so as to satisfy the requirement that an indictment inform the defendant of the crime he is being accused of and allow the defendant to properly respond.

**From the opinion of Justice Stevens** (joined by Chief Justice Roberts and Justices Kennedy, Souter, Thomas, Ginsburg, Breyer, and Alito):

Not only does the word “attempt” as used in common parlance connote action rather than mere intent, but more importantly, as used in the law for centuries, it encompasses both the overt act and intent elements. Consequently, an indictment alleging attempted illegal reentry under § 1326(a) need not specifically allege a particular overt act or any other “component part” of the offense. … It was enough for the indictment in this case to point to the relevant criminal statute and allege that “[o]n or about June 1, 2003,” respondent “attempted to enter the United States.”

Dissenting: Justice Thomas

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**IMMIGRATION LAW**

**Toledo-Flores v. United States**

Docket No. 05-7664
Dismissed: The Writ of Certiorari

Argued: N/A
Decided: December 5, 2006
For Case Analysis: N/A

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Is an indictment for illegal reentry into the United States after deportation under 8 U.S.C. § 1326(a) valid when the only overt act alleged is the attempted reentry?

**IMMIGRATION LAW**

**United States v. Resendiz-Ponce**

Docket No. 05-998
Reversed: The Ninth Circuit

Argued: October 10, 2006
Decided: January 9, 2007
For Case Analysis: See ABA PREVIEW 10

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The writ of certiorari was dismissed as improvidently granted.
United States of America at or near San Luis in the District of Arizona.” … Indeed, the time-and-place information provided respondent with more adequate notice than would an indictment describing particular overt acts. After all, a given defendant may have approached the border or lied to a border-patrol agent in the course of countless attempts on innumerable occasions. For the same reason, the time-and-date specification in respondent’s indictment provided ample protection against the risk of multiple prosecutions for the same crime.

Dissenting: Justice Scalia

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### LABOR LAW

*Long Island Care at Home, Ltd. et al. v. Coke*

Docket No. 06-593
Reversed: The Second Circuit

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### PATENT LAW

*KSR International Co. v. Teleflex, Inc. et al.*

Docket No. 04-1350
Reversed and remanded: The D.C. Circuit

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**Is the regulation that interprets the “companionship workers” exemption under the Fair Labor Standards Act (FLSA) as excluding a certain category of third-party companionship workers from minimum-wage and maximum-hour rules valid and binding?**

Yes. The Court ruled that the Department of Labor regulation excluding third-party companionship workers was valid in that it served to fill a gap left by the statute, and did not exceed the authority granted to the agency.

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**From the unanimous opinion by Justice Breyer:**

All parties assume for present purposes that the FLSA entitles Coke to the payments if, but only if, the statutory exemption for “companionship services” does not apply to companionship workers paid by third-party agencies. … When an agency fills such a [statutory] “gap” reasonably, and in accordance with other applicable (e.g., procedural) requirements, the courts accept the result as legally binding. … The statutory language refers broadly to “domestic service employment” and to “companionship services.” It expressly instructs the agency to work out the details of those broad definitions. And whether to include workers paid by third parties within the scope of the definitions is one of those details.

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**From the opinion by Justice Kennedy (for a unanimous Court):**

Common sense teaches … that familiar items may have obvious uses beyond their primary purposes, and in many cases a person of ordinary skill will be able to fit the teachings of multiple patents together like pieces of a puzzle.

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**Does section 271(f) of the Patent Act (which says a patent violation occurs when one “supplies,” from the United States, for “combination” abroad, the components of a patented invention) allow the holder of a patented voice-recognition system to bring an infringement action against a software company for distributing abroad software that has similar voice recognition technology?**

No. When a software company distributes a master disk with the software, the software is not a component, but is information that has to be copied
onto the computer in the foreign country.

From the opinion by Justice Ginsburg (joined in part by Justices Scalia, Kennedy, and Souter):

Because it is so easy to encode software’s instructions onto a medium that can be read by a computer, [the patent holder] intimates, that extra step should not play a decisive role under § 271(f). But the extra step is what renders the software a useable, combinable part of a computer; easy or not, the copy-producing step is essential. … Congress, of course, might have included within § 271(f)’s compass, for example, not only combinable “components” of a patented invention, but also “information, instructions, or tools from which those components readily may be generated.” It did not.

Concurring, except as to footnote 14: Justice Alito (joined by Justices Thomas and Breyer)

Dissenting: Justice Stevens

Taking no part in the consideration or decision of the case: Chief Justice Roberts

require that a prisoner specifically plead exhaustion of all prison grievance procedures before filing a complaint under 42 U.S.C. § 1983?

No. Although exhaustion is required under PLRA, in light of the pleading requirements under the Federal Rules of Civil Procedure, failure to exhaust should be viewed as an affirmative defense and further, failure on behalf of a prisoner to exhaust some of his claims should not necessarily result in a dismissal of the entire complaint.

From the unanimous opinion by Chief Justice Roberts:

The PLRA dealt extensively with the subject of exhaustion, see 42 U.S.C. §§ 1997e(a), (c)(2), but is silent on the issue whether exhaustion must be pleaded by the plaintiff or is an affirmative defense. This is strong evidence that the usual practice should be followed, and the usual practice under the Federal Rules is to regard exhaustion as an affirmative defense.

Argued: March 19, 2007
Decided: June 25, 2007
For Case Analysis: See ABA PREVIEW 287

Can the respondent Robbins bring a private action under Bivens v. Six Unknown Fed. Narcotics Agents against federal agents for damages resulting from the alleged harassment?
and intimidation of Robbins by government officers in connection with a prolonged dispute over negotiations for an easement the government once had on Robbins's property?

No. The Court ruled that the acts alleged by Robbins did not create a Bivens claim as there existed other legal remedies for Robbins should he have chosen to pursue them and further ruled that allowing such claims to exist under Bivens would create a dangerous precedent allowing virtually anyone who resisted government actions on their property to bring a suit for damages under Bivens.

Was it correct for the district court to dismiss Robbins's claim under the Racketeer Influenced and Corrupt Organizations Act (RICO) for the same acts discussed above on the basis that the government agents had qualified immunity?

Yes. Because Robbins based his RICO claim on the underlying allegation of extortion by the government officials in violation of the Hobbs Act, the Court ruled that dismissal of the RICO claim was correct because the Hobbs Act does not apply when the allegation is that the government is to be the beneficiary of the supposed extortion.

From the opinion by Justice Souter (joined by Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, Breyer, and Alito, and joined as to Part III by Justices Stevens and Ginsburg):

[W]e have also held that any freestanding damages remedy for a claimed constitutional violation has to represent a judgment about the best way to implement a constitutional guarantee; it is not an automat-
of the punitive damages constitutional equation, namely, reprehensibility. That is to say, harm to others shows more reprehensible conduct. Philip Morris, in turn, does not deny that a plaintiff may show harm to others in order to demonstrate reprehensibility. Nor do we. Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible. …Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties.

Dissenting: Justice Stevens
Dissenting: Justice Thomas
Dissenting: Justice Ginsburg (joined by Justices Scalia and Thomas)

From the opinion by Justice Ginsburg (joined by Chief Justice Roberts and Justices Kennedy, Souter, Thomas, and Breyer):
That formulation [the Seventh Circuit’s application of the requirement], we conclude, does not capture the stricter demand Congress sought to convey in § 21D(b)(2). It does not suffice that a reasonable factfinder plausibly could infer from the complaint’s allegations the requisite state of mind. Rather, to determine whether a complaint’s scienter allegations can survive threshold inspection for sufficiency, a court governed by § 21D(b)(2) must engage in a comparative evaluation; it must consider, not only inferences urged by the plaintiff, as the Seventh Circuit did, but also competing inferences rationally drawn from the facts alleged. An inference of fraudulent intent may be plausible, yet less cogent than other, nonculpable explanations for the defendant’s conduct. To qualify as “strong” within the intention of § 21D(b)(2), we hold, an inference of scienter must be more than merely plausible or reasonable—it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent.

Concurring in judgment: Justice Scalia
Concurring in judgment: Justice Alito
Dissenting: Justice Stevens

Argued: N/A
Decided: June 4, 2007
For Case Analysis: See ABA PREVIEW 240

Was the district court’s choice of a below-guidelines sentence reasonable, and in making that determination, is it consistent with United States v. Booker, 543 U.S. 220 (2005), to require that a sentence that constitutes a substantial variance from the guidelines be justified by extraordinary circumstances?

The Court vacated the case without ruling on the merits.

From the per curiam:
The Court is advised that the petitioner died in St. Louis, Missouri, on May 30, 2007. The judgment of the United States Court of Appeals for the Eighth Circuit is therefore vacated as moot.

Argued: March 28, 2007
Decided: June 21, 2007
For Case Analysis: See ABA PREVIEW 309

Are the pleading requirements under the Private Securities Litigation Reform Act of 1995 (PSLRA) requiring a “strong inference” of scienter, or mental state, satisfied when the respondent-shareholders plead in such a manner that a reasonable person would infer from the entire complaint that the petitioner had acted with the requisite state of mind?

No. The Court ruled that the Seventh Circuit’s holding was too lenient in light of the intent behind the enactment of the PSLRA to stop frivolous litigation. The Court determined that in order to satisfy the “strong inference” pleading requirement, a claimant must show scienter by more than a “reasonable inference”; the claimant must make such a conclusion cogent and compelling.

From the opinion by Justice Ginsburg (joined by Chief Justice Roberts and Justices Kennedy, Souter, Thomas, and Breyer):

From the per curiam:
The Court is advised that the petitioner died in St. Louis, Missouri, on May 30, 2007. The judgment of the United States Court of Appeals for the Eighth Circuit is therefore vacated as moot.

American Bar Association
Was the Fourth Circuit correct in determining that on review a sentence imposed by a district court judge will be considered presumptively reasonable if it is within the federal sentencing guidelines?

Yes. The Court ruled that such a presumption of reasonableness is legally permitted when the sentence is within the federal sentencing guidelines because the guidelines have multiple indicia of reliability and reflect the congressional desire to provide certainty and fairness in sentencing.

From the opinion by Justice Breyer (joined by Chief Justice Roberts and Justices Stevens, Kennedy, Ginsburg, and Alito and joined in part by Justices Scalia and Thomas):

An individual judge who imposes a sentence within the range recommended by the Guidelines thus makes a decision that is fully consistent with the Commission’s judgment in general. … [T]he courts of appeals’ “reasonableness” presumption, rather than having independent legal effect, simply recognizes the real-world circumstance that when the judge’s discretionary decision accords with the Commission’s view of the appropriate application of § 3553(a) in the mine run of cases, it is probable that the sentence is reasonable.

Concurring: Justice Stevens (joined by Justice Ginsburg as to all but Part II)
Concurring in part and in judgment: Justice Scalia (joined by Justice Thomas)
Dissenting: Justice Souter

Does California’s Determining Sentencing Law (DSL), which imposes a lower, middle, and upper term sentence and then instructs the judge to start with the middle term and if appropriate find by a preponderance of the evidence that there exists one or more factors to justify the upper term, violate a defendant’s right to a trial by jury?

Yes. By assigning a fact-finding role necessary to a sentence determination to the trial judge, the DSL violates Apprendi’s bright-line rule: Except for a prior conviction, “any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” Apprendi v. New Jersey, 530 U.S. 466, 490.

Dissenting: Justice Kennedy (joined by Justice Breyer)
Dissenting: Justice Alito (joined by Justices Kennedy and Breyer)
Can the parents of a child receiving an individualized educational program under the Individuals with Disabilities Education Act (IDEA) pursue a pro se action in federal court alleging that the child’s program is deficient?

Yes. Because parents enjoy rights under the IDEA, they are entitled to prosecute IDEA claims on their own behalf and do not have to hire a lawyer.

From the opinion by Justice Kennedy (joined by Chief Justice Roberts and Justices Stevens, Souter, Ginsburg, Breyer, and Alito):

The parents enjoy enforceable rights at the administrative stage, and it would be inconsistent with the statutory scheme to bar them from continuing to assert these rights in federal court.

Concurring in part, dissenting in part: Justice Scalia (joined by Justice Thomas)

Can a taxpayer that misses the 9 month deadline for filing a third-party wrongful levy claim under 26 U.S.C. § 7426(a)(1) recast the claim as a refund action under section 1346(a)(1), which has a longer limitations period?

No. Section 7426(a)(1) provides the exclusive remedy for third-party wrongful levy claims.

From the opinion by Justice Souter (for a unanimous Court):

We simply cannot reconcile the 9-month limitations period for a wrongful levy claim under section 7426(a)(1) with the notion that the same challenge would be open under section 1346(a)(1) for up to four years.

Can a taxpayer that misses the 9 month deadline for filing a third-party wrongful levy claim under 26 U.S.C. § 7426(a)(1) recast the claim as a refund action under section 1346(a)(1), which has a longer limitations period?

No. Section 7426(a)(1) provides the exclusive remedy for third-party wrongful levy claims.

From the per curiam opinion:

The only injury plaintiffs allege is that the law—specifically the Elections Clause—has not been followed. This injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past. It is quite different from the sorts of injuries alleged by plaintiffs in voting rights cases where we have found standing. ...Because plaintiffs assert no particularized stake in the litigation, we hold that they lack standing to bring their Elections Clause claim.
Does 26 U.S.C. § 6404(h)—which authorizes qualified taxpayers to seek Tax Court review of the denial of certain abatements made by the IRS—also allow taxpayers to file suit in the Court of Federal Claims for review of a decision not to abate?

No. The Tax Court provides the exclusive forum for judicial review of a failure to abate interest under Sec. 6404(e)(1).

From the opinion by Chief Justice Roberts (for a unanimous Court):
We find nothing tellingly awkward about channeling such discrete and specialized questions of administrative operations to one particular court, even if in some respects it “may not appear to be efficient” as a police matter to separate refund and interest abatement claims.

Did the Guam Supreme Court correctly rule that the Guam Organic Act’s debt-limitation provision, which provided that the Territory’s public indebtedness could not exceed 10% of the “aggregate tax valuation of the property in Guam,” should base calculations on the “appraised value” of property?

No. The Court ruled that an “appraised value” refers to the market value of property, which has nothing to do with tax assessment and, as a result, the Organic Act required that the necessary debt-limitation be based on the “assessed value” of the property within Guam.

From the opinion by Justice Thomas (unanimous in part and joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Breyer in part):
In 2003, the Court of Appeals appropriately exercised discretionary jurisdiction over the attorney general’s appeal. See 48 U.S.C. § 1424–2. By granting the petition for certiorari, the Ninth Circuit raised the possibility that it might “modify the judgment” or “alter the parties’ rights.” Hibbs v. Winn, 542 U.S. 88, 98 (2004). Thus, the Court of Appeals’ grant of certiorari suspended the finality of the Guam Supreme Court’s judgment and prevented the 90-day clock from running while the case was pending before the Court of Appeals. And until the Ninth Circuit issued its order dismissing the case, the appeal remained pending, and the finality of the judgment remained suspended. … Though it has no established definition, the term “tax valuation” most naturally means the value to which the tax rate is applied. Were it otherwise, the modifier “tax” would have almost no meaning or a meaning inconsistent with ordinary usage. “Tax valuation” therefore means “assessed valuation”—a term consistently defined as a valuation of property for purposes of taxation. … One would not normally refer to a property’s appraised valuation as its “tax valuation.” Appraised valuation is simply market value. And market value may or may not relate to taxation. Usually market value becomes relevant to taxation only because a specified percentage of market value is the assessed value to which taxing authorities apply the tax rate. It would strain the text to conclude that “tax valuation” means a valuation a step removed from taxation.
Can a plaintiff who waits until the end of a lengthy career with an employer before filing a pay-discrimination charge with the Equal Employment Opportunity Commission recover damages under Title VII despite the statutory requirement that an EEOC charge be made within 180 days of the discriminatory act?

No. The Court rejected the plaintiff’s argument that every paycheck she received constituted a new discriminatory act triggering a new EEOC filing period because her pay was less than it should have been due to the effects of past discrimination.
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In law, damages means a sum of money given to a party whose legal interests have been injured. While there are several types of damages that can be given to an injured party, two of the most prominent types are compensatory damages and punitive damages.

**Burdens/standards of proof**

As a general matter, the party in a lawsuit asserting a claim or defense has the burden of presenting evidence that establishes the claim or defense. This is known as the burden of proof.

There are three burdens of proof. From the least to the most demanding, they are the preponderance-of-the-evidence burden of proof; the clear-and-convincing burden of proof; and the beyond-a-reasonable-doubt burden of proof. The first two burdens can apply in either criminal or civil cases, while the third applies only in criminal cases and then only to the prosecution.

There are no ready definitions for these burdens. There are, however, working definitions. Under the preponderance standard, the party with the burden of proof is required to come forward with credible evidence establishing that a claim or defense is more likely true than not. Under the clear-and-convincing standard, the party with the burden of proof is expected to present evidence establishing that the claim or defense is quite likely true. Under the beyond-a-reasonable-doubt standard, the prosecution must present such evidence of the defendant's guilt that a reasonable person would not hesitate to find the defendant guilty. See Victor v. Nebraska, 114 S. Ct. 1239 (1994).

**Class action lawsuit**

As a general rule, a class action lawsuit is one in which one or several named individuals sue for themselves and others believed to have sustained injuries or losses similar to those sustained by the named plaintiffs, but who, at the time the case is filed, are unknown both as to their identities and their actual numbers. In order for a plaintiff's lawsuit to be given class action status, the named plaintiff must show that (1) the class is so large as to make it impracticable to specify each and every plaintiff by name, (2) there exist questions of law or fact common to all members of the plaintiff class, (3) the claims of the named plaintiffs are representative of the claims of the unnamed plaintiffs, and (4) the named plaintiffs can fairly and adequately represent the interests of the entire plaintiff class. (Note: Less common is the class action lawsuit in which the class is composed of named and unnamed defendants or in which both the plaintiff's and the defendant's side of the case constitute a class.)

**Collateral review** (see also habeas corpus) — Collateral review is the criminal law's fail-safe mechanism. It is intended to ensure that a conviction and sentence satisfy the requirements imposed by law, constitutional and statutory. As its name suggests, collateral review looks at a convicted defendant's trial and in some cases the sentencing proceeding; it is not, however, a second trial. As a general rule, collateral review is limited to issues of law.

To be eligible for collateral review, the petitioning party must be in custody at the time the process begins. Typically but not necessarily, custody means imprisonment. For those convicted of state-law crimes, collateral review is available under state law and federal law, the latter in the form of a petition for a writ of habeas corpus. As a general rule, state-law petitioners must exhaust all avenues of collateral review under state law before filing a federal habeas corpus petition. For federal-law petitioners, federal habeas corpus review is available after certain post-conviction avenues such as a motion to vacate a conviction or sentence have been exhausted.

For both state-law and federal-law petitioners, federal habeas corpus review begins in a trial-level court but, in the collateral-review context, the trial court functions as a reviewing court. However, if the federal habeas corpus petitioner is unsuccessful in habeas court, he or she is permitted, within limiting procedural rules, to seek further review of the habeas court's decision in the appropriate intermediate federal appeals court and, if unsuccessful there, in the Supreme Court.

**Damages**

In law, damages means money given to a party whose legal interests have been injured. While there are several types of damages that can be given to an injured party, two of the most prominent types are compensatory damages and punitive damages.

An award of **compensatory damages** is a sum of money intended to make the injured party whole, insofar as this is possible. An award of **punitive damages** is intended to punish the wrongdoer in order to deter future wrongdoing. Usually, punitive damages go to the injured party and are over and above any award of compensatory damages. However, in some states, a portion of any punitive damages award goes to the state treasury.

**Direct review** — In American criminal law, a defendant is tried once, but the trial itself can be reviewed many times by many appellate courts. One channel of review is called direct review because it is initiated by a first appeal as a matter of statutory right. Direct review also is wide-ranging review because the convicted defendant is permitted to raise all procedurally proper issues regarding the trial court's disposition of his or her case — including issues of law, issues of fact, and issues concerning the trial judge's use of discretion.

If the first appeal is resolved against the convicted defendant, appellate rules permit the defendant to seek discretionary review by still higher courts, generally by the highest court of the convicting state and then by the United States Supreme Court. (In federal criminal cases, the convicted defendant's initial appeal as a matter of right is to a circuit court of appeals and then as a matter of discretion to the Supreme Court.) If these courts
decline to hear the defendant’s case or hear the case but decide against the defendant, or if the defendant defaults on his or her right to seek discretionary review, the direct review process ends and it is said that the defendant’s conviction and sentence are final. At this point, the only avenue of relief from a conviction or sentence — retrial, resentencing, or outright release — is collateral review, defined above.

**Discovery** — Discovery is a pretrial device in which each party to a lawsuit seeks information from the other party as well as from non-parties believed to have knowledge relevant to the issues in the case. The plaintiff seeks information through discovery to make his or her case; the defendant seeks information to support any defenses that may be available.

**Diversity** — This term is used whenever a federal court has jurisdiction over a case that does not involve a question of federal law. While there are several types of diversity jurisdiction, the most common type has two requirements: (1) the plaintiff and the defendant are residents of different states; (2) the dollar amount of the dispute between the parties is at least $75,000, exclusive of interest and costs.

**En banc** — The term literally means “full bench.” Cases in the federal circuit courts of appeals are typically heard and decided by panels of three judges who are drawn from all the judges in that circuit. In rare instances, the court may subsequently agree to have the case reargued, this time in front of more or all of the judges from that circuit.

**Habeas corpus** — Under the federal habeas corpus statute, 28 U.S.C. § 2254 (1994), a person held in state/local custody who believes that his or her custody violates federal law — typically, the Constitution — may challenge that custody by filing a petition for a writ (i.e., an order) of habeas corpus in federal district court. If the petitioner wins, he or she must be released or retried, at the option of the prosecuting authority.

**Per curiam opinion** — This term literally means “the opinion of the court,” the Supreme Court or any appellate court. Because the opinion is the court’s opinion, there is no indication of which justice/judge wrote it.

**Plurality opinion** — This term denotes an opinion of the United States Supreme Court in which there is no majority opinion; that is, fewer than a bare majority of five justices were able to agree on the legal basis for the Court’s action in affirming, reversing, or vacating a lower court decision.

In some cases, the Court’s opinion can be a partial plurality opinion. A partial plurality opinion is one in which at least one part of the opinion represents the views of four or fewer Justices. For an example of a partial plurality opinion, see Hubbard v. United States, 115 S. Ct. 1754 (1995) (Parts IV and V, a plurality of three Justices; Parts I, II, III, and VI, a majority of six Justices).

**Preemption** — Under the Supremacy Clause, U.S. Const. art. VI, § 2, federal law — whether based on the Constitution, a statute, or a treaty — takes precedence over state or local law on the same matter. In other words, if federal law addresses a matter, either expressly or by implication, it trumps and renders unenforceable any state or local law on the matter.

**Qualified immunity** — Qualified immunity is a defense that can be raised by a government employee whenever there is uncertainty about the lawfulness or unlawfulness of certain actions taken by the employee, actions claimed by the plaintiff to be unlawful. A government employee can avoid a trial under this defense if the employee can show that, at the time of the complained-of action, he or she could not have known that it violated the law.

**Strict scrutiny** — Strict scrutiny is a searching level of judicial review applied to governmental actions — federal, state, and local — challenged as unconstitutional. Strict scrutiny requires the governmental actor to show that it had a compelling reason to take the challenged action and that the action taken goes no further than necessary — is narrowly tailored — to advance the cited compelling reason.

**Summary judgment** — This is the name of a procedural device available to either party to a civil lawsuit that enables one or the other party to win without a trial. A party seeking summary judgment is entitled to a judgment in its favor if there is no genuine dispute about the pertinent facts, and, based on those undisputed facts, the law compels a judgment for the party who has asked for a favorable ruling.
Contributing Editors

Alternative Dispute Resolution
Jay E. Grenig
Marquette University
Law School
Milwaukee, WI
(414) 288-5377

Constitutional Law
Thomas E. Baker
Florida International University
College of Law
Miami, FL
(305) 348-8342

Douglas W. Kmiec
Pepperdine University
School of Law
Malibu, CA
(310) 506-4255

Bankruptcy
John P. Henning Jr.
St. John’s University
School of Law
Jamaica, NY
(718) 990-6613

Copyrights/Trademarks
Hugh C. Hansen
Fordham University
School of Law
New York, NY
(212) 636-6854

Civil Procedure/Federal Courts
Linda Mullenix
University of Texas
School of Law
Austin, TX
(512) 471-0179

First Amendment
David Hudson
First Amendment Center
Vanderbilt University
Nashville, TN
(615) 727-1342

Fourth Amendment
John Nussbaumer
Thomas M. Cooley Law School
Lansing, MI
(517) 371-5140 (ext. 701)

Commercial Law
Ralph C. Anzivino
Marquette University
Law School
Milwaukee, WI
(414) 288-5365

First Amendment
Bernard James
Pepperdine University
School of Law
Malibu, CA
(310) 456-4611

Fourth Amendment
John Nussbaumer
Thomas M. Cooley Law School
Lansing, MI
(517) 371-5140 (ext. 701)

Criminal Procedure
Alan Raphael
Loyola University Chicago
School of Law
Chicago, IL
(312) 915-7140

Health Law
Elliott B. Pollack
Pullman & Comley, LLC
Hartford, CT
(860) 424-4340

Death Penalty
Kathy Swedlow
Thomas M. Cooley Law School
Lansing, MI
(517) 371-5140

Immigration Law
Michael G. Heyman
The John Marshall Law School
Chicago, IL
(312) 427-2737 (ext. 382)

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