ANALYZING THE COURT’S DECISIONS FOR THE 2007–08 TERM, INCLUDING ...

HAS ORIGINALISM STRUCK OUT?
Douglas Kmiec examines the Court’s tactic of upholding statutes as being merely not unconstitutional “on their face” in order to garner greater than five-justice majorities. He then critiques the majority’s application of the “original understanding” method of interpretation in District of Columbia v. Heller—and disagrees with the outcome.

THE SECOND AMENDMENT AND ORIGINALISM
Nelson Lund devotes his essay to the Court’s first attempt to assess the meaning of the Second Amendment in over sixty years. He agrees with the outcome in Heller but strongly disagrees with its employment of a “half-hearted originalism.”

STATISTICS
Supreme Court litigator Tom 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 2007 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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© 2008 American Bar Association ISSN 0363-0048

A one-year subscription to PREVIEW of U.S. Supreme Court Cases consists of seven issues, mailed September through April, that concisely and clearly analyze all cases given plenary review by the Court during the present Term. A special eighth issue offers a perspective on the newly complete Term.

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The Court often defied ideological expectations in the 2007–2008 term. No longer could Justice Kennedy be pigeonholed as the sole swing vote between reliably conservative and liberal blocs. As Tom Goldstein’s annual statistical analysis makes clear, although Justice Kennedy was still in the majority in more 5-4 decisions than any other justice, this term saw a great variety of different and unexpected coalitions of 5-4 majorities.

Prof. Kmiec observes that the early part of this term was dominated by cases that were decided by a majority of more than five justices—but only after the Court elected to decide many of these cases with a narrow ruling that the statute in question was merely not unconstitutional “on its face,” thus leaving the door open for future plaintiffs to bring lawsuits claiming that the statute is unconstitutional “as applied” to them. That strategy, Prof. Kmiec notes, can make the Court appear to have reached a greater consensus on controversial issues than it really did.

On the other hand, in perhaps the most high-profile case of the term, District of Columbia v. Heller, the Court returned to its old look by splitting 5-4 along traditional ideological lines. Yet even here the impact of the Court’s first review of the Second Amendment in over 60 years is by no means clear. In separate essays, Professors Douglas Kmiec and Nelson Lund, both of whom have expressed their respect for the originalist theory of constitutional interpretation, disagree on both the result and the method employed by the majority in striking down the District of Columbia’s handgun ban.

Prof. Kmiec concludes that the Heller analysis went astray, reached the wrong result, and exposed the need for a new “coherent, consistent method of constitutional interpretation that pays responsible attention to text, history, original purpose and understanding, fidelity to precedent, and modern consequence in some discernible and predictable order of operations and authority that does not depend upon the idiosyncratic choices of one justice or another.”

Prof. Lund, on the other hand, concludes that Heller should be viewed as “an important victory for the Constitution, if one regards the Constitution as a law that means what its words meant when its various provisions were adopted.” But although he thinks the Court rightly struck down the D.C. handgun ban, he too faults the majority—for its “half-hearted originalism” and for its endorsement of several kinds of gun control (disarming of convicted felons, enforcement of “gun-free zones,” and bans on short-barreled shotguns) that were not at issue in the case.

Then, as always, this issue concludes with PREVIEW’s Case Highlights. These short reviews of the Court’s decisions give you a picture of the outcome in every one of the cases we previewed prior to oral argument in Issues 1–7.

The Editors
Charles F. Williams
Catherine E. Hawke
END OF TERM STATISTICAL ANALYSIS

by Thomas C. Goldstein

The justices issued 67 merits opinions after argument this term, the lowest number since the 1953–54 term. The numbers of decisions after argument for previous terms are 68 for the 2006 term, 71 for the 2005 term, 76 for the 2004 term, and 74 for 2003.

Including two summary reversals and two affirmances by an equally divided Court, the justices decided 71 cases in total this term, the lowest number of decisions in recent memory. The numbers for previous terms are 72 for the 2006 term, 82 for the 2005 term, 80 for the 2004 term, and 79 in 2003.

The Court reversed or vacated the lower courts in 46 of 70 cases (66 percent) and affirmed in the remaining 24 (34 percent). It is important to note that one case decided was an original action, so there was no lower court decision to either affirm or reverse. These figures are slightly different from those of the previous term, when the Court reversed or vacated the lower court decisions in 73 percent of cases and affirmed the lower courts 25 percent of the time (with two affirmed in part or reversed or vacated in part).

The Court again considered more cases from the Ninth Circuit—10 of 71 cases (14.1 percent)—than any other court, but that proportion was far down from the 2006 term, when the Ninth Circuit supplied 29 percent of the Court's docket. This year, the Court vacated or reversed the Ninth Circuit in eight of ten cases (80 percent), which is in line with the 86 percent and 83 percent reversal rate for the previous two terms.

The Second Circuit came next with 7 of 71 cases on the docket (9.9 percent) but was reversed only twice, or 29 percent of the time. The Seventh and Eleventh Circuits each had six of 71 cases (8.5 percent) but fared much differently: the Seventh was reversed or vacated only once while the Eleventh was overturned four times.

The Court again resolved four cases (5.6 percent) from the Federal Circuit, reversing three of its decisions, though it heard only one patent case from that court this term. State courts accounted for 11 cases this session, up from seven in the 2006 term.

The number of 5-4 decisions this term depends (as it often does) on how you count them. Eleven cases were clearly 5-4. A twelfth (Stoneridge) was 5-3, with the left of the Court in dissent and Justice Breyer recused, suggesting that it would have been 5-4 if he had participated. Two others (Tom F. and Warner-Lambert) were 4-4, almost by definition meaning that the case would have been 5-4 absent a recusal. So between 15 percent and 20 percent of the docket was 5-4. We ultimately believe that the fairest count includes Stoneridge and ignores the 4-4 cases in which no opinion was ultimately issued—in other words, 12 cases, or 17 percent of opinions.

That number falls between those of the previous two terms of the Roberts Court: it is significantly lower than last year's 33 percent, while the 2005 Term saw only 13 percent of cases decided by a 5-4 margin. More detailed breakdowns from past years are available in the statistics section of SCOTUSwiki.com (www.scotuswiki.com/index.php?title=Supreme_Court_Statistics).

Somewhat surprisingly, the drop in the number of 5-4 decisions did not go hand in hand with a corresponding increase in either 5-3, 4-4 or 4-5. The proportion of 5-3 and 4-4 decisions was actually lower than last year, while 4-5 decisions were the same. Overall, the Court decided 71 cases in a 5-4, 5-3, 4-4, 4-5 or 4-4 margin, 12 cases in a 5-4 or 5-3 margin, and 56 cases in a 4-4, 4-5 or 4-4 margin.

Thomas C. Goldstein heads the Supreme Court practice at Akin Gump Strauss Hauer & Feld in Washington, D.C. He also teaches Supreme Court litigation at both Stanford Law School and Harvard Law School. Since 2003 he has been principally responsible for SCOTUSblog (www.scotusblog.com), which is devoted to coverage of the Court and is widely recognised as one of the nation’s leading legal blogs. He can be reached at tgoldstein@akingump.com or (202) 887-4060.
hand with a commensurate increase in unanimous decisions. This term, fully unanimous decisions (i.e., decisions with no dissent or concurrence) decreased to only 14 of 71 cases (20 percent), and there was no dissenting vote in a total of 30 percent of the decisions. Last term, which was considered very divisive, the Court issued fully unanimous decisions in 18 cases (25 percent), with a total of 38 percent of the decisions coming without a dissenting vote.

This lack of unanimity meant that, despite the drop in 5-4 decisions this term from last, the overall number of dissenting votes remained high. An average decision by the Court this term found 1.85 justices in dissent, exceeding last term’s 1.81 dissents per case and making decisions this term the most divided in recent history.

This year, ideology was a less accurate predictor of the distribution of justices in 5-4 decisions than it was in 2006. In eight out of the 12 cases (67 percent) we count as 5-4, the “left” (Justices Stevens, Souter, Breyer, and Ginsburg) and the “right” (Chief Justice Roberts with Justices Scalia, Thomas, and Alito) held, and Justice Kennedy cast the decisive vote. (Though Justice Breyer was recused, we count Stoneridge in this group.) In 2006, that happened 19 out of 24 times (79 percent).

After going 24-for-24 in last term’s most divisive cases, this term Justice Kennedy was only in the majority in those cases which broke along ideological lines. Nonetheless, those eight splits were enough to put Justice Kennedy in the majority in as many 5-4 cases as any other justice. Among the Court’s other members, Justice Thomas tied with Kennedy, voting with the majority eight times (67 percent), while Chief Justice Roberts and Justice Stevens prevailed seven times (58 percent); Justices Scalia, Souter, Ginsburg, and Alito six times (50 percent); and Justice Breyer had the fewest, with five majority votes (42 percent).

Of the eight decisions in which the voting blocs “held,” the left and right split the outcome four to four. This is a shift from last term, when 68 percent of the ideological 5-4s were won by the conservative-plus-Kennedy quintet. For the second straight term, the left of the court did not prevail in a 5-4 case by getting the vote of a member of the Court other than Justice Kennedy. Conversely, this term, the majority opinions in Irizarry and Ali were made up of the conservative bloc but did not include Justice Kennedy; instead Justices Stevens and Ginsburg, respectively, made up the fifth votes.

Among the 5-4 cases not decided along liberal-conservative lines, one featured a majority comprised of the chief justice and Justices Stevens, Souter, Thomas, and Breyer in the majority (Kentucky Retirement); one featured the chief justice and Justices Stevens, Scalia, Thomas, and Alito (Irizarry); one featured the chief justice and Justices Scalia, Thomas, Ginsburg, and Alito (Ali v. BOP); and one featured Justices Stevens, Scalia, Souter, Thomas, and Ginsburg (Santos). Though Justice Kennedy was not “perfect” in 5-4s as he was last term, he still exerted more than considerable influence. He wrote the opinion for the Court in four (of the 12) 5-4 merits opinions; all four of those opinions were in ideologically divided cases. Justice Stevens assigned him the opinion in three of the four 5-4s in which the left prevailed by getting Justice Kennedy’s vote: Boumediene, Dada, and Kennedy v. Louisiana, while the chief justice assigned him the opinion in Stoneridge.

No other justice wrote more than two 5-4 opinions. Justices Scalia and Breyer wrote two, and Chief Justice Roberts and Justices Stevens, Thomas, and Alito each wrote one. Justices Souter and Ginsburg did not author a 5-4 opinion this term.

By a nose, the chief justice and Justice Scalia were the two justices whose agreement rates were the highest this term. They agreed in whole, part, or the judgment in 60 of the 68 cases (88 percent) in which they both participated, outpacing the chief
justice and Justice Alito, who agreed in one fewer case overall, due to recusals. The Chief Justice and Justice Scalia agreed in full only 68 percent of the time, however, giving Roberts and Alito the most similar voting patterns; they found themselves in full agreement in 81 percent of the cases they participated in together. On the other side of the ideological spectrum, Justices Souter and Ginsburg were the most aligned justices this term, agreeing in at least one aspect of 87 percent of the cases and agreeing in full in 80 percent of the cases.

Overall, the most notable difference from last term is that Justice Kennedy agreed more frequently with some of the liberal members of the Court and less frequently with the conservatives. His agreement rate (in full, part, or judgment) was 77 percent this term with Justice Stevens and 85 percent with Justice Breyer; those are noticeably up from last term’s agreement rates of 66 percent and 74 percent, respectively. On the opposite side of the judicial spectrum, Justice Kennedy and Justice Thomas agreed 62 percent of the time as opposed to 79 percent last term, while Justice Kennedy and Justice Alito agreed 82 percent of the time this term, down from 90 percent last year.

Justice Thomas may win the “iconoclast” award this term, as he enjoyed the lowest rates of agreement with other members of the Court; he was also a solo dissenter in four cases, the most of any justice. Justice Thomas agreed in at least the judgment with each of the four most liberal members of the Court less than 60 percent of the time and, as previously mentioned, with Justice Kennedy in only 62 percent of the cases. Nor did his votes fall in lockstep with any of the more conservative members: he agreed with Justice Scalia 87 percent of the time (as opposed to 93 percent last term) and with the chief justice 79 percent of the time, as opposed to 88 percent last term.

At the beginning of the term, conventional wisdom held that the Court would pick up where it left off the previous term: with Justice Anthony Kennedy in the driver’s seat. As Court watchers will recall, Justice Kennedy ended last term having joined the majority in a remarkable 97 percent of cases and, even more astonishingly, voted with the majority in all 24 cases decided by five-vote majorities. On the heels of a term in which he dissented only twice, it was possible to imagine that Justice Kennedy would finish this term with a perfect record. But it was not to be. Justice Kennedy cast his third dissenting vote before the start of spring and by term’s end had joined the minority 10 times.

Into Justice Kennedy’s place atop the standings slipped, quietly, Chief Justice Roberts. He ended the winter with only one dissenting vote and was not again in the minority until late May. The chief ended the term impressively, having dissented in only seven cases, for a frequency-in-the-majority percentage of 90 percent. He was followed in the standings by Justices Kennedy (86 percent), Alito (82 percent), Scalia (81 percent), Breyer (79 percent), Souter (77 percent), and Stevens, Ginsburg, and Thomas, all at 75 percent.

After factoring out cases in which all justices agreed on the judgment, Chief Justice Roberts voted with the majority in a similarly impressive 84 percent of cases, followed by Justices Kennedy (79 percent), Alito (74 percent), Scalia (73 percent), Breyer (68 percent), Souter (67 percent), and then the trio of Stevens, Ginsburg, and Thomas at 65 percent.

If the Court bestowed a “most improved” award on the Justice joining the highest share of majority opinions over the previous term, Justice Stevens would be the clear winner. During the 2006 term, Justice Stevens joined the smallest share of majority opinions in divided cases (37 percent). This term, by contrast, the longest-serving sitting justice joined the majority 65 percent of the time in divided cases—jumping 28 percentage points.

Though he voted with the majority more often than anyone but the chief justice, Justice Kennedy ended the term, by contrast, with the biggest decline. Compared to a majority rate of 95 percent for divided cases in the 2006 term, Justice Kennedy’s rate for this term declined 16 percentage points to 79 percent.
SPLITS IN DECISIONS

- Unanimous or 9-0 (21 cases)
- 8-1 or 7-1 (6 cases)
- 7-2 or 6-2 (20 cases)
- 6-3 (10 cases)
- 5-4 (14 cases)

OPINION AUTHORSHIP: SUMMARY

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Total Majority Plurality or Number of Opinions Plurality-Like Concurring Dissenting

Roberts 17 7 1 5 4
Stevens 23 6 1 8 8
Scalia 23 7 1 10 5
Kennedy 12 7 0 1 4
Souter 15 7 0 4 4
Thomas 24 7 0 7 10
Ginsburg 16 8 0 3 5
Breyer 21 8 0 2 11
Alito 18 7 0 3 8
Per Curiam 2 0
**FIVE-TO-FOUR CASES: ALIGNMENTS**

- Roberts, Stevens, Souter, Thomas, Breyer – 4 cases
- Stevens, Kennedy, Souter, Ginsburg, Breyer – 4 cases
- Roberts, Scalia, Thomas, Alito – 1 case
- Roberts, Stevens, Scalia, Thomas, Alito – 1 case
- Roberts, Scalia, Thomas, Ginsburg, Alito – 1 case
- Roberts, Scalia, Kennedy, Thomas, Alito – 4 cases
- Stevens, Scalia, Souter, Thomas, Ginsburg – 1 case
- Stevens, Scalia, Souter, Thomas, Ginsburg – 1 case

**CIRCUIT SCORECARD—FEDERAL COURTS AND STATE COURTS**

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John Roberts became chief justice of the United States saying he wanted to be an umpire that no one noticed. It’s hard not to notice John Roberts, however; he is intelligent, affable, photogenic, and articulate. He’s probably “trustworthy, loyal, thrifty, and brave” too; I just don’t know whether he had any occasion to be a Boy Scout in his youth.

In his first term as chief justice, he was “rookie—err, umpire—of the year,” having close to 50 percent of his cases resolved unanimously. That proved to be something of a honeymoon, as the number of 5-4 cases in the October 2006 term skyrocketed to over one-third. Even worse, at the end of the term, the justices seemed to be throwing their bats and barely on speaking terms, spewing forth acrimony in a 178-page opinion rejecting the use of race as a basis for deciding eligibility for oversubscribed public secondary schools in Parents Involved in Community v. Seattle School District No. 1, 127 S.Ct. 2738 (2007).

This year things are different, yet again. The Court decided 67 cases on their merits, the lowest number of cases decided since 1953 when the New York Yankees defeated the Brooklyn Dodgers and won the World Series for the fifth consecutive time. Someone told me the Dodgers are in Los Angeles now. How about that? In other breaking news during the past term, there were no cases about abortion, affirmative action, or religion, and there wasn’t even any attention-seeking high school student mumbling something about bong hitting for, well, you know who. No, most of the cases were statutory, addressing such stadium-fillers as ERISA and the ADEA. Except for the headliners of the final week, it was all quiet in the Supreme Court dugout, with scarcely much to do but chew and spit, chew and spit.

However, the teams charged the mound with the contentious 5-4 resolution of the meaning of the Second Amendment in District of Columbia v. Heller, 554 U.S. ___ (2008); and there was plenty of judicial angst over the appropriateness of the death penalty as the Court rejected it as a punishment for child rape in Kennedy v. Louisiana, 554 U.S. ___ (2008). Unhappy with the incumbent administration’s handling of terror-related cases, the justices have made rebuking presidential decision-making something of a sport all to itself. Boumediene v. Bush, 553 U.S. ___ (2008). This time, however, Congress was given part of the blame and ejected for denying what previously had always been denied to noncitizens outside U.S. sovereign territory—see, e.g., Johnson v. Eisentrager, 339 U.S. 763 (1950)—the constitutional writ of habeas corpus. The Boumediene decision judicially extended the writ. There was also another run-down of the McCain-Feingold campaign finance laws, as the Court invalidated contribution and disclosure provisions designed to even the playing field with self-financing millionaire candidates. Davis v. FEC, 554 U.S. ___ (2008).

In brief, this term really was a doubleheader. One was lawyerly, quiescent, down to business, and usually produced agreement of six or more justices. The other took on some of the most contentious issues of the day and (as was typically reported with great fanfare in the media) divided the justices 5-4 along ideological lines, with Justice Kennedy capable of going easily to his right or left.
Let’s turn to the less contentious side of the Court first. How did the chief justice seek to lower the profile of the men and women calling the legal balls and strikes? Here’s the winning strategy for restraint: take fewer cases, especially fewer controversial ones, and urge fellow justices to resolve matters on the narrowest possible grounds. When the deliberation score among the justices is close, call in an interpretive methodology from the bull pen to get the save for the democratic process by giving the benefit of the doubt to the legislative handiwork. Find the statute to be facially valid (that is, not necessarily unconstitutional in every instance), while leaving open the possibility of a closer review in a later “as-applied” challenge in the play-offs.

The Court occasionally pursued this strategy. Chief Justice Roberts took up his position behind home plate. The practice received some mild criticism from those of us in the cheap seats—the academics. For example, Professor Michael Dorf argued back in the 1990s that all persons have a right to be judged by a valid law, and that the Court’s facial challenge doctrine can only be reconciled with this right if the Court employs a presumption of severability—presumes that unconstitutional aspects of a statute can be severed from constitutional ones by a process of judicial interpretation. Professor Dorf, however, doubted that this much statutory surgery is permissible for judges. Michael Dorf, Facial Challenges to State and Federal Statutes, 46 Stan. L. Rev. 235 (1994). While it is the lower courts that will confront the severability problem Professor Dorf references, pointing out the issue at the High Court level has also encouraged deference to the democratic process among the chief justice and his colleagues.

Take, for example, the Court’s decision in Crawford v. Marion County Election Board, 128 S.Ct. 1610 (2008). Indiana had enacted an election law requiring citizens voting in person to present government-issued photo identification. This was alleged to impose an unconstitutional burden, especially on the elderly and the less affluent, and to the extent that there is a correlation between those groups and the Democratic Party, a disadvantage drawn along party lines.

All very interesting, but as Justice Stevens wrote for the majority, the state interests for requiring government-issued photo identification to vote were sufficiently weighty to justify any limitation imposed on voters. Indiana had a valid interest in deterring and detecting voter fraud. That interest existed even though there wasn’t a lot of fraud in Indiana, and Indiana was largely worried about voter impersonation and similar practices that had been uncovered in states other than Indiana. Although Indiana’s identification cards are free, the Court noted that obtaining them nevertheless involves both some inconvenience and going down to the Bureau of Motor Vehicles—which most people rank with visiting the dentist. Moreover, the Court accepted the speculation that the burden of this requirement would fall mostly on elderly persons, born out of state, who may have difficulty obtaining the necessary birth certificates and other proof of identification that one needs to get an official photo identification card. While it would be easy to imagine someone within the category of the poor or the elderly being overly burdened, the Court took the position that the statute is presumptively valid, and that “given the fact that petitioners have advanced a broad attack on the constitutionality of [the statute], seeking relief that would invalidate the statute in all its applications, they bear a heavy burden of persuasion.” The challengers couldn’t meet that standard in Crawford. The Court reasoned that on the basis of the evidence in the record, it wasn’t possible to quantify the magnitude of the burden on the narrow class of voters—the elderly and the indigent—for whom the photo identification requirement would be burdensome and that even if quantified, there would be difficulty measuring it against the importance of the law’s antifraud justification. According to the Court, the record said virtually nothing about the difficulties faced by either indigent voters or, say, voters with religious objections to being photographed. And, said the Court, even if a particular burden was shown, the remedy still in all likelihood would not be to invalidate the entire statute. As for the suspicion that Republicans had imposed the photo identification requirement in an effort to dampen Democratic turnout, the Court said, “if a nondiscriminatory law is supported by valid neutral justifications, those justifications should not be disregarded simply because partisan interest may have provided one motivation for the votes of individual legislators.”

In another case, Washington State Grange v. Washington State Republican Party, 128 S.Ct. 1184 (2008), the Republican Party sought injunctive relief against the state’s modified “blanket pri-
mary.” Washington law allowed candidates to self-identify their party preference in a primary that was open to voters of any party. The Republican Party challenged the law, arguing that it violated the party’s associational rights and usurped its authority to nominate its own candidates. Again, the Supreme Court escaped through the side door marked “Facially Constitutional Statutes Proceed.” In an earlier case, the Supreme Court had invalidated a similar primary in California Democratic Party v. Jones, 530 U.S. 567 (2000). There, voters also could vote in any party primary regardless of registration, but the highest vote getters went into the general election as “the nominees” of their party. The Jones Court held that such a system violated the political parties’ right of association.

The result was different in Washington State. Picking up the distinction between facial and as-applied challenges, Justice Thomas distinguished the earlier California decision by pointing out on behalf of a 7-2 majority that the Washington law never refers to the top two candidates who move on to the general election as being the parties’ “nominees.” Rather, the Washington primary merely winnows the number of candidates to two for the general election. Moreover, Washington law allows the parties to nominate their own candidates outside the state-run primary, differing from Jones in that respect as well. The Court was unwilling to say that the self-identification by the candidates of their preferred party was a nomination “in effect” and premised on confusion. Such confusion, argued the Republican Party, was a form of compelled and unconstitutional association. That conclusion was all speculation according to Justice Thomas, who noted that Court precedent assumes a reasonably well-informed electorate and that there was no evidentiary record demonstrating confusion sufficient to permit the Court to invalidate the statute in all of its applications.

Justice Scalia supplied yet another example of the facial/as-applied distinction in United States v. Williams, 128 S.Ct. 1830 (2008), which upheld a congressional statute criminalizing the “pandering” or solicitation of child pornography. This decision addressed a First Amendment challenge to the law on the basis that it was facially invalid. Traditionally, facial invalidity is somewhat easier to prove in the First Amendment area than elsewhere because the law permits challengers whose speech is unprotected to claim that the statute is overbroad and affects the protected speech of others. True, said Justice Scalia, but for the facial challenge to prevail, there still must be proof of the statute’s substantial overbreadth.

Congress had been trying for a decade or more to limit sexually explicit material on the Internet that exploits children. The current legislation, the so-called PROTECT Act, targets not the underlying material but only the collateral speech (pandering) that effectively introduces child pornography into child pornography distribution networks. Within the reach of the statute is an Internet user who solicits child pornography even if that solicitation is aimed at an undercover officer who actually has none to offer. Similarly, the statute covers individuals who falsely advertise digitally created “virtual child pornography” or pornography featuring young-looking adults as depicting actual children engaging in actual sex acts. The lower courts had found the statute to be both overbroad and impermissibly vague.

The Supreme Court upheld the statute as not being facially invalid on the grounds that it did not prohibit a substantial amount of protected speech. The Court highlighted the statute’s scienter (knowledge) requirement and emphasized the Act’s operative verbs that penalize speech associated with a child pornography transfer even if noncommercial, and then construed the statute as requiring the state to prove the defendant had both the subjective and objective belief that the material or purported material involved was actual child pornography. For similar reasons, the Court found the statute not to be unconstitutionally vague since, as construed, it conveyed to a person of ordinary intelligence fair notice as to what was prohibited.

In a separate concurring opinion joined by Justice Breyer, Justice Stevens emphasized the kinds of considerations that distinguish facial from as-applied challenges. Justice Stevens wrote that the result in United States v. Williams was compelled by the principle that every reasonable construction of a statute must be resorted to in order to save a statute from unconstitutionality and that, to the extent the statutory text is unclear, it is always the duty of the Court to avoid constitutional objections by construing ambiguous provisions consistently with the intent of the legislative drafters.
A final example illustrating the Court’s use of the facial/as-applied distinction to reach at least nominal results beyond a 5-4 division is *Base v. Rees*, 128 S.Ct. 1520 (2008). *Base* concerned a high-profile challenge to Kentucky’s three-drug lethal injection protocol for capital punishment. In the case, convicted murderers who had been sentenced to death asserted that Kentucky’s lethal injection method of execution violated the Eighth Amendment’s ban on cruel and unusual punishments. This yielded yet another variant of the facial/as-applied distinction, as a plurality of the Court rejected the prisoners’ challenge. Writing for the plurality, Chief Justice Roberts reasoned that in order to succeed on their claim of cruel and unusual punishment, the convicts would need to bring forth evidence that the execution protocol calling for the use of three separate drugs presented a substantial or objectively intolerable risk of unnecessary pain. Mere speculation that the procedure might be maladministered would not be enough. The convicts argued for a one-drug protocol but were unable to draw upon any study showing that the single drug—in application—was as effective as the three-drug procedure. It was not enough, the chief justice wrote, for the convicts merely to show that there was a slightly or marginally safer alternative to the current procedures. Accepting that argument would embroil the courts in ongoing scientific controversies beyond their expertise and substantially intrude on the role of state legislatures in implementing their execution procedures. The bottom line after *Base*: a state execution procedure will be facially valid so long as there is no substantial risk of serious pain, and it’s up to the challengers to show that there is an alternative procedure that is feasible, readily implemented, and capable of significantly reducing substantial risk of severe pain—a point underscored by Justice Alito’s separate concurrence.

*Base* was a 7-2 decision, but among the seven justices who voted to uphold the Kentucky law, there were disparate—and heated—views. Justices Scalia and Thomas rejected the plurality’s formulation of the governing standard in favor of construing the Eighth Amendment as protecting only against procedures that are deliberately designed to inflict pain. Justice Stevens concurred in the Court’s judgment, but also took the occasion to pronounce his opposition to the death penalty. Wrote Justice Stevens: “… the imposition of the death penalty represents ‘the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State [is] patently excessive and cruel and unusual punishment violative of the Eighth Amendment.’”

Justice Stevens’s pronouncement provoked Justice Scalia, who (joined by Justice Thomas) called Justice Stevens’s conclusion “insupportable as an interpretation of the Constitution, which generally leaves it to democratically elected legislatures rather than courts to decide what makes significant contribution to social or public purposes.” Justice Scalia, mincing no words for the sake of collegiality, proclaimed that a “[p]urger expression cannot be found of the principle of rule by judicial fiat. In the face of Justice Stevens’s experience, the experience of all others is, it appears, of little consequence. The experience of the state legislatures and the Congress—who retain the death penalty as a form of punishment—is dismissed as ‘the product of habit and inattention rather than an acceptable deliberative process.’” Obviously, the facial/as-applied distinction may sometimes advance stronger numerical consensus without engendering any real judicial bonding among the justices.

The facial/as-applied distinction will test the relationship between high and lower courts. Consider one prominent example: the Supreme Court’s decision last term upholding the federal partial-birth abortion ban on facial grounds in *Gonzales v. Carhart*, 127 S.Ct. 1610 (2007). That constitutional imprimatur might have suggested to some that the lower courts would interpret the ruling as “here, go and do likewise.” This did not prove true. In *Richmond Medical Center v. Herring*, No. 04-1255 (May 20, 2008), on remand in light of *Carhart*, a 2-1 panel of the U.S. Court of Appeals for the Fourth Court invalidated the Virginia partial-birth infanticide act on its face.

Pursuing a facial challenge in the lower court may seem contrary to the Supreme Court’s preference for as-applied challenges, but the two-judge majority in the court of appeals reasoned that the Supreme Court’s preference for as-applied adjudication in the partial-birth abortion context exists only with respect to the need for a health exception and not for any consideration of the definitional scope of a statute. That is debatable, but dicing the jurisprudence in this way, the two-judge majority believed the Virginia act overbroad because they asserted it would impose criminal lia-

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bility on a doctor for accidentally performing a partial-birth procedure when a more typical dissection procedure had been intended. Judge Niemeyer vigorously dissented on this point of statutory construction pointing to a mens rea (intent) requirement in the state law that was identical to that in the federal statute and most assuredly preclusive of accidental criminal liability.

Putting aside the statutory interpretation question and assuming the Fourth Circuit denies a petition for en banc review and the litigants pursue a petition for certiorari, it will be interesting to see whether the High Court will view the lower court’s decision as defiance of its judgment in Carhart and wade back into this contentious subject. If the justices take a pass on such a petition, the case would illustrate how thin the consensus achieved by the facial/as-applied distinction can sometimes be. Of course, the Scalia-Stevens exchange in Baze may already have made that point.

In the meantime, even assuming a facial challenge was appropriately considered by the Fourth Circuit, it should be noted that the panel was doubly defiant in rejecting the traditional Salerno standard for facial challenges. That standard is a rigorous one, requiring a showing by the challenger of no conceivable constitutional application of the statute. By contrast, the specially crafted “abortion facial challenge standard” fashioned in Casey, but seemingly frowned upon in Carhart, requires a challenger to an abortion statute merely to show that a significant fraction of women would be unduly burdened and is so easily met that virtually no abortion restriction is capable of meeting it and being sustained as valid.

Well, that’s a portion of the noncontroversial side of the Court from the term. Going just briefly into the thicket where there was sharper 5-4 disagreement, just a few words about the gun-control case. This case benefited from strong advocacy on each side—Alan Gura for the gun rights advocates and Walter Dellinger for the District of Columbia. In addition, the views of the now former solicitor general, Paul Clement, were intellectually sound and helpful to the Court. (Mr. Clement will be missed!) As an under-interpreted constitutional provision, the Second Amendment provided an opportunity to test the “original understanding” method of interpretation. The theory of original understanding posits that constitutional provisions should not be interpreted in light of their modern consequence, but rather in light of their ratified meaning, with words being interpreted in reference to their understanding at the time of ratification rather than the specific intent of any particular drafter. Justice Scalia, who wrote the majority in Heller, is the strongest proponent of this methodology. It is meant to check judicial abuse and to allow cases to be decided as much as possible in accordance with the law as written and independent of the predilections of particular justices. The theory may still have promise, but it did not resolve Heller, since both Justice Scalia for the majority and Justice Stevens for the dissent employed a careful historical examination of the amendment and reached exactly opposite conclusions.

The language to be construed: “A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.” Prior to Heller, it was reasonably thought that the text of the Constitution should be construed in reference to all of its words. In Heller, Justice Scalia concludes that the first 13 words of the amendment are “a purpose,” but not the purpose; meaning that the need for a regulated militia is one of the reasons people have a right to keep and bear arms, but it is not the only reason. Possible, I suppose, except that the concern about having a militia as a counterpoint to government tyranny fits both the history and the text. As for “the right of the people” language, both the majority and dissent agree that this suggests an individually enforceable right, but tells us nothing about its scope, which if one were an originalist, one would think had to do with a militia—either individually or state-organized, since they both existed at the founding. That is what the Supreme Court thought as well in U.S. v. Miller in 1939, 307 U.S. 174, a precedent followed by virtually every lower federal court since. Justice Scalia says Miller holds only that a short-barreled shotgun was not “ordinary military equipment” because it was not the type of weapon that men “bearing arms” would be expected to bring when called to militia service.

Fair enough, but that hardly expands the right to bear arms to include any person bearing weapons unrelated to militia service. As Justice Stevens noted in dissent, quoting Miller: “The signification attributed to the term Militia appears from the debates in the Convention, the history and legislation of Colonies and States, and the writings of
Justice Stevens concluded: “Until today, it has been understood that legislatures may regulate the civilian use and misuse of firearms so long as they do not interfere with the preservation of a well-regulated militia. The Court’s announcement of a new constitutional right to own and use firearms for private purposes upsets that settled understanding, but leaves for future cases the formidable task of defining the scope of permissible regulations.”

Fleshing out the contours of the newly minted Second Amendment right will indeed take up considerable judicial time, especially if this textual protection for well-regulated militias in the states is turned against the states themselves by judicial incorporation. But there is an even more important task, and it is the fashioning of a coherent, consistent method of constitutional interpretation that pays responsible attention to text, history, original purpose, and understanding, fidelity to precedent, and modern consequence in some discernible and predictable order of operations and authority—and that does not depend upon the idiosyncratic choices of one justice or another.

A Third Way?
It is unclear to this constitutional law professor whether such methodology is capable of being fashioned. It hasn’t yet. But perhaps there is a way in which the temptation to see in history one’s desired outcome can at least be moderated. It would require a modification of internal Court process, however. Today, when the justices assemble around the table in the Chief’s outer office to decide cases following oral arguments, they follow the practice of voting on the outcome first and only then doing the research that they will employ to justify and explain the outcome. With due respect to the Court’s tradition, that methodology is backwards. It is also subversive of public confidence in the Court. In a difficult case, such as Heller, where the historical materials, linguistic analysis, and constitutional considerations are plentiful and largely being examined conscientiously for the first time, it is all the more important for the Court to follow the scientific method and researching and writing before deliberating and voting.

Reversing the traditional process would have the benefit of avoiding the appearance of elevating politics over law by actually avoiding the temptation to substitute politics for law. By engaging in the difficult work of legal research and analysis of existing text, history, and precedent before any of the members of the Court are asked to reach an ultimate determination, the Court can increase the odds of writing coherently and with greater unity. Those witnessing Heller’s superb, but complex, oral argument know that task will be difficult. The analytical strands and possibilities from the meaning of the English Bill of Rights of 1689 to Mr. Madison’s expectations of draftsmanship to the deficiency (or not) of precedent, to the nature of trigger locks, required Herculean effort to assemble into a proper answer. If they were fully candid, I venture the justices would concede that following the oral presentation in Heller, they possessed at best a tentative conclusion. Voting before a full examination of the law is premature. It also psychologically biases the writer who must constantly worry about holding his majority coalition together, rather than about providing a fully honest exposition and his or her best judgment.

Who would write the opinion if a preliminary vote were not taken first for purposes of assignment? Quite simply, the justice next in line for a writing assignment who is fully up to date with his or her work. There are costs to this system institutionally and individually. Institutionally, it might produce an opinion that would satisfy less than the majority, and the answering opinion might thus delay an outcome. It may be worth the wait. In any case, prudence would recommend the suggested approach be incrementally introduced—perhaps with a simple statutory matter at first, but always with the aim of ultimately bringing it to bear on the most difficult cases—that is, those in which the constitutional terms are opaque and there is the greatest chance of judicial willfulness. Individually, the proffered methodology would deprive either the chief justice or the senior associate justice (most often, Justice Stevens) of the right of assignment, but that deprivation would be in pursuit of a higher-order good to which I venture both the chief justice and Justice Stevens would subscribe: the elevation of the rule of law and the strengthening of the respect for the Court as an institution.

The litigants who achieved victory in Heller managed to swing for the fences. It would be unfortunate if, in stealing home past the words and history and structure of the Constitution that stood helplessly positioned at the bases, the once-mighty originalism ended up permanently on the disabled list.
District of Columbia v. Heller was a test case, brought by a group of libertarian lawyers on behalf of plaintiffs with respectable backgrounds and appealing reasons for seeking relief from the District of Columbia’s extremely restrictive gun-control laws. It turned out to be a test case in a different sense as well. With almost no relevant precedent to constrain its analysis, the Supreme Court was given the opportunity to apply a jurisprudence of original meaning to an obviously puzzling text. The chief justice ensured that this would be a pretty fair test when he assigned the majority opinion to Justice Scalia.

The challenged statute forbade almost all residents of the District of Columbia from possessing a handgun, and required that all firearms be kept in an inoperable condition. This effort to disarm the citizenry had been in place for over 30 years, and was the most restrictive gun-control law in the country. By a vote of 5-4, the Court held that both the handgun ban and the safe-storage regulation violated the Second Amendment, which protects at least the right to keep a handgun in one’s own home and to make it operable for purposes of immediate self-defense.

Now that the Court has finally spoken on this issue, there is going to be intense interest in the inevitable follow-up litigation. Test cases have already been filed in several jurisdictions, and criminal defense attorneys will be raising Second Amendment defenses in a wide variety of cases. This will generate considerable debate in which

Heller will be taken as “the law.” Naturally, courts and litigants will become preoccupied with interpreting Justice Scalia’s majority opinion. That is both inevitable and appropriate. Before the world moves on to these pressing questions, however, it is fitting to pause for a moment to ask what the decision tells us about originalism as a judicial philosophy.

For the first time in its history, the Court took up the fundamental question of the basic meaning of the Second Amendment’s initially puzzling text. That text provides: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” The preambular reference to the importance of a “well regulated Militia” forces one to ask what this could have to do with the “right of the people” to keep and bear arms. One usually thinks of constitutional rights as obstacles, not spurs, to regulation.

Congress did not begin to enact gun-control statutes until the 1930s. For more than half a century thereafter, the lower federal courts uniformly interpreted the constitutional language to mean that the right to arms belonged to the state governments or that individual citizens had a right to arms only while serving in a military organization established by a state government. Under this interpretation, virtually all gun-control laws, including D.C.’s civilian disarmament scheme, would be constitutionally permissible.

In 2001, the U.S. Court of Appeals for the Fifth Circuit departed from this judicial consensus. According to the Fifth Circuit, the Second Amendment protects a personal right of individuals to have weapons for self-defense, as well as for contributing to the common defense. In Heller, the D.C. Circuit joined the Fifth Circuit in accepting this individual-right interpretation. Although

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this may have seemed novel, it was actually a revival of the interpretation that had been well accepted throughout the nineteenth century.

Thus, the threshold question for the Supreme Court in *Heller* concerned the nature of the relationship between the preamble’s reference to a well-regulated militia and the Amendment’s operative reference to a right of the people to keep and bear arms. All nine justices agreed that this question can be resolved by reference to the original meaning of the constitutional text. In one sense, this agreement signifies a shared commitment to original meaning jurisprudence, at least in the absence of relevant Supreme Court precedent or other overriding judicial concerns. In another sense, however, the *Heller* decision casts doubt on the practical significance of this commitment, for the Court divided 5-4 between the utterly different interpretations of the text that were reflected in the circuit split that arose in 2001.

Happily, the better arguments about the original meaning of the Second Amendment prevailed, and by a wide margin on the merits (if only by one vote among the justices). Justice Scalia’s majority opinion provides a detailed analysis of the key terms in the text, and of the initially puzzling relationship between the Amendment’s preamble and its operative clause. Justice Scalia supports that analysis with abundant historical evidence, showing how the terms used in the constitutional text would have been understood when it was adopted, and how the Amendment as a whole was in fact generally understood for a very long time thereafter.

Even if one might reasonably question some of Justice Scalia’s arguments and the weight that he gives to some of the evidence, the cumulative force of his argument as a whole is overwhelming, especially in comparison with the arguments offered by Justice Stevens’s opinion for himself and the three other dissenters.

Reduced to the simplest possible summary, Justice Scalia’s argument is as follows. The term “the right of the people” in the operative clause presumptively implies an individual and private right, just as it does in the First and Fourth Amendments. The terms used in the other key phrase in that clause, “keep and bear arms,” were frequently used in nonmilitary senses, so the operative clause does not imply that the right to arms is confined to military purposes. The right to keep and bear arms, moreover, was already well established before the Bill of Rights was adopted, and had never been restricted to military contexts. The Second Amendment’s preface, according to Justice Scalia, explains why this preexisting right was codified in the Constitution, but does not change the nature of the right that was thus codified.

Stripped to similarly concise essentials, Justice Stevens’s argument is that the Second Amendment’s operative clause suggests a military purpose, especially through its use of the term “bear arms,” and certainly does not unequivocally identify a right of individuals to have and use weapons for private purposes such as self-defense. The exclusively military purpose of the Amendment is confirmed, according to Justice Stevens, by the preface and the legislative history, which establish that the Amendment was meant to protect only “the right of the people of each of the several States to maintain a well-regulated militia.”

One needs to work through all the arguments and counterarguments in the justices’ very lengthy opinions to appreciate how much stronger Justice Scalia’s position is. The core difficulty with Justice Stevens’s position, however, might be described as follows. His interpretation of the text effectively converts a “right of the people” into a right of the state governments (because he understands a “well regulated” militia to be a military organization controlled by the state governments). Not only is this an unnatural reading of the “right of the people” language, but the Constitution nowhere else conflates “the people” with their governments. Whatever plausibility this forced reading of the text may have depends on giving the Amendment’s prefatory language more weight than the operative command of the constitutional text. Justice Scalia’s reading, by way of contrast, treats the preface as a preface, and shows that it is not inconsistent with the natural reading of the operative command (a reading that was well accepted for more than a century after the adoption of the Bill of Rights).

Had Justice Stevens’s approach attracted one more vote, the result would have been a judicial repeal of the Second Amendment. The *Heller* decision should thus be viewed as an important victory for the Constitution, if one regards the

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Constitution as a law that means what its words meant when its various provisions were adopted.

If Justice Scalia's originalist approach proved able, as I think it did, to resolve the basic puzzle presented by the text of the Second Amendment, was it also able to decide the actual case before the Court and provide a framework for the resolution of future cases? This is quite a different question, and one to which the answer is much less clear.

Once it is settled that Americans have an individual right to keep and bear arms for private purposes such as self-defense, D.C.'s safe-storage law, which forbade possession of any operable firearm, presents an easy case. To uphold the law would hardly be different from adopting Justice Stevens's claim that there is no private right to arms at all. D.C.'s ban on handguns, however, requires more analysis. Justice Scalia's majority opinion indicates that questions about the scope of Second Amendment rights—or in other words, questions about the validity of various restrictions and exceptions that curtail people's liberty to keep and bear arms—should be resolved on the basis of an historical analysis. Justice Scalia's explanation of the nature of this historical analysis, however, is both vague and ambiguous.

An historical inquiry could take a number of different forms. One might, for example, ask whether specific regulations would have violated what Scalia calls the “pre-existing” right to keep and bear arms (i.e., the right that existed before the Bill of Rights was adopted). This would seem to be, at least on its face, the most obviously originalist approach to the Second Amendment. If one took this approach, one would then have to ask further questions. Would the preexisting and now constitutionalized right be violated by any regulation that had never been imposed by common law or statute before the Bill of Rights was adopted? Or does the Second Amendment permit all regulations except those that were or would have been considered beyond the power of the state legislatures prior to the Bill of Rights?

Justice Scalia’s opinion does not seem to choose either of these alternatives. Instead, when evaluating D.C.’s handgun ban, he says—using the present tense: “The handgun ban amounts to a prohibition of an entire class of ‘arms’ that is overwhelmingly chosen by American society for [the] lawful purpose [of self-defense].” He then goes on to explain why people might prefer handguns over long guns and concludes (again using the present tense) by saying that “[w]hatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.” If this is meant to be an historical or originalist argument, it would seem to need a more detailed explanation.

Another question is raised by Justice Scalia’s discussion of the reasons people prefer handguns to long guns such as rifles or shotguns for self-defense in the home (for example, that one can dial the police with one hand while holding a pistol in the other). All four dissenters joined an opinion by Justice Breyer that assumes, for the sake of argument, the validity of the majority’s conclusion that there is some right to have weapons for self-defense. Even on that assumption, Justice Breyer argues, D.C.’s handgun ban is valid. According to the dissent, the public benefits of any given regulation should be compared with the costs of the imposition on the individual’s interest in self-protection. When this interest-balancing inquiry is performed with appropriate deference to the judgment of elected officials, Justice Breyer maintains, strict gun-control laws in a high-crime, urban area such as D.C. should be upheld.

Scalia dismisses this entire form of analysis on the ground that the relevant interest-balancing has already been done by the Constitution. This sounds like a thoroughly originalist approach. But then one wonders why Justice Scalia explained the advantages of handguns over long guns for purposes of self-defense in the home, and what the relationship is between this discussion and the purportedly controlling historical inquiry. There may be a good answer to this question, but Justice Scalia does not provide one in the majority opinion. More significantly, perhaps, one cannot help but wonder whether it will really prove possible for courts to resolve the myriad Second Amendment issues that are bound to arise in the future without engaging in some form of interest-balancing analysis, either overtly or covertly.

Perhaps even more troubling, as a matter of originalism, is a series of dicta in which the Heller majority endorses several kinds of gun control that were not at issue in the case. Little analysis of any
kind is provided, and Justice Scalia says that the historical justifications for these exceptions to the right to keep and bear arms will be provided if and when the Court reviews a case in which they are at issue. The lower courts can probably be counted on to treat these statements as though they were holdings, and the Supreme Court will of course be free to deny the ensuing petitions for certiorari. So with regard to these exceptions to the right to arms, we may be witnessing a case of verdict first and trial later (if at all).

Some of the Second Amendment exceptions listed by the majority, moreover, are manifestly problematic. Consider just three examples.

First, the Court says convicted felons may be disarmed, which sounds perfectly reasonable at first. But is it truly consistent with the original meaning of the Second Amendment to leave American citizens defenseless in their own homes for the rest of their lives on the basis of nothing more than a nonviolent felony such as tax evasion or insider trading? It would make more sense to say that these felons can be silenced for the rest of their lives; these crimes, after all, involve an abuse of speech (such as making false statements to the government or negotiating contracts that the government forbids), but they don’t have anything at all to do with firearms or violence. Could it possibly be right that Congress has unlimited discretion to cut into the core inherent right of self-defense by defining ever more regulatory offenses as felonies, including even those that are defined as strict liability crimes (such as failing to keep proper records of livestock transactions (7 U.S.C. § 221))?“

Next, the Court approves “gun free zones” in what Scalia calls “sensitive places such as schools and government buildings.” On what basis will courts decide whether particular places are sufficiently “sensitive” to justify disarming citizens who go there? Is a university campus more “sensitive” than a shopping mall across the street? Did the whole city of New Orleans become a “sensitive” place after Hurricane Katrina, thus allowing the government to confiscate weapons from law-abiding citizens whom the government could not protect from roving bands of looters and criminals?

Finally, the Court endorses bans on weapons that are not in “common use,” including short-barreled shotguns. These shotguns can be very useful for self-defense and in some circumstances are superior to handguns. It’s true that they are not in common use, which is unsurprising given the fact that Congress put severe restrictions on them beginning in 1934. Is that historical fact sufficient to resolve the Second Amendment issue? If so, the right to arms is largely at the mercy of congressional whims.

This example is troublesome for an additional reason. Justice Scalia seems to have discussed it because short-barreled shotguns were at issue in the Court’s only previous case interpreting the Second Amendment, United States v. Miller, 307 U.S. 174 (1939). Unfortunately, Justice Scalia misread (or failed to read) the case. Contrary to his glaring factual misstatement, Miller did not uphold federal convictions for illegal transportation of a short-barreled shotgun and cannot possibly be interpreted to have done so. There simply were no convictions in the case. The court below had dismissed the indictments on Second Amendment grounds without further explanation, and the Supreme Court reversed and remanded without either holding or saying that short-barreled shotguns are outside the scope of the Second Amendment. Instead, the Court remarked that it was “not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.” On remand, the defendants would have had the opportunity (though they did not take it) to provide evidence of the uses to which such weapons have been and can be put. But that never happened, and the Supreme Court therefore never had occasion to decide whether short-barreled shotguns are or are not covered by the Second Amendment. It is hardly consistent with a jurisprudence of originalism to misread precedents so as to manufacture exceptions to the plain meaning of a term, such as “arms,” that is in the Constitution.

Notwithstanding the doubts raised by some of the lacunae, dicta, and errors in Justice Scalia’s majority opinion, perhaps Heller is the first step toward a Second Amendment jurisprudence that will faithfully elaborate its original meaning. Heller’s actual holding is certainly consistent with that meaning. The next major decision in this area, however, is likely to arise from a very different issue.

(Continued on Page 396)
Most provisions of the Bill of Rights have been made applicable to the state governments through the doctrine of Fourteenth Amendment “incorporation,” and the Supreme Court has decided that a very few are not so incorporated or do not apply to the federal and state governments in quite the same way. After Heller, the Court will likely feel obliged before too long to grant certiorari in a gun case that presents the incorporation issue.

If the Supreme Court follows its well-established tradition of selective incorporation, it will decide that question under the doctrine of “substantive due process.” Substantive due process is perhaps the most antioriginalist and even anticonstitutional doctrine in all of constitutional law. If Second Amendment incorporation were to be considered on originalist grounds, the Court would look instead at the Fourteenth Amendment’s Privileges or Immunities Clause, which states that “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.” The outcome might be the same as that derived by substantive due process analysis, but it would be refreshing to see the Court conduct a genuine originalist inquiry. After Heller, that may not be too much to hope for. But Heller’s half-hearted originalism hardly provides a reason to expect anything so unconventional.
Does the presumption that the rate set out in a freely negotiated wholesale-energy contract meets the "just and reasonable" requirement imposed by law apply only when the Federal Energy Regulatory Commission (FERC) first had an initial opportunity to review the contracts without applying the presumption?

No. Contracts negotiated in the free market are generally presumed reasonable, and this presumption is applied to both those contracts argued to be too low and too high. On the other hand, the Commission should not presume a contract is just and reasonable if unlawful market activity directly affected the contract negotiations.

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

In wholesale markets, the party charging the rate and the party charged are often sophisticated businesses enjoying presumptively equal bargaining power, who could be expected to negotiate a "just and reasonable" rate as between the two of them. Therefore, only when the mutually agreed-upon contract rate seriously harms the consuming public, [either by unequivocal public necessity or extraordinary circumstances,] may the Commission declare it not to be just and reasonable. … However[,] if the dysfunctional market conditions under which the contract was formed were caused by illegal action of one of the parties, FERC should not apply the presumption. But the mere fact that the market is imperfect, or even chaotic, is no reason to undermine the stabilizing force of contracts that the [Federal Power Act] embraced.

Concurring: Justice Ginsburg

From the dissent by Justice Stevens (joined by Justice Souter):

If Congress had intended to impose such detailed constraints on the FERC's authority to review contracts, it would have done so itself in the [Federal Power Act]. Congress instead used the general words "just and reasonable" because it wanted to give FERC, not the courts, wide latitude in setting policy.

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

From the dissent by Chief Justice Roberts (joined in part by Justices Scalia and Thomas):

In my view, the statutory language and structure, as well as the fact that Congress has always protected federal employees from retaliation through the established civil service process, confirm that Congress did not intend those employees to have a separate judicial remedy for retaliation under the ADEA.

Dissenting: Justice Thomas (joined by Justice Scalia)

Does discrimination prohibited by the Age Discrimination in Employment Act's federal-sector provision include retaliation against an employee for the filing of an age discrimination complaint?

Yes. Following the reasoning of two prior cases that held retaliation was prohibited by statutes using similar language to the ADEA, the Court found that the ADEA prohibits retaliation.

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

Following the reasoning of [two prior cases], we interpret the ADEA federal-sector provision's prohibition of "discrimination based on age" as likewise proscribing retaliation. The statutory language at issue here ("discrimination based on age") is not materially different. … And the context in which the statutory language appears is the same in all three cases; that is, all three cases involve remedial provisions aimed at prohibiting discrimination.

From the dissent by Chief Justice Roberts (joined in part by Justices Scalia and Thomas):

In my view, the statutory language and structure, as well as the fact that Congress has always protected federal employees from retaliation through the established civil service process, confirm that Congress did not intend those employees to have a separate judicial remedy for retaliation under the ADEA.

Dissenting: Justice Thomas (joined by Justice Scalia)
In an age discrimination (ADEA) claim, once the employee has established a disparate impact, does the employer then bear the burden of proof to show that its challenged policy was actually based on reasonable factors other than age (RFOA)?

Yes. The employer bears the burden of proof when asserting the affirmative defense of RFOA after a disparate impact has been established in an ADEA claim.

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

With [basic claim] principles and prior cases in mind, we find it impossible to look at the text and structure of the ADEA and imagine that the RFOA clause works differently from the [bona fide occupational qualifications] clause next to it. Both exempt otherwise illegal conduct by reference to a further item of proof, thereby creating an [affirmative] defense for which the burden of persuasion falls on the one who claims its benefits. ... The RFOA defense in a disparate-impact case is not focused on the asserted fact that a non-age factor was at work; we assume it was. The focus of the defense is that the factor relied upon was a reasonable one for the employer to be using.

From the concurring opinion by Justice Scalia:
The Court answers for itself two questions that Congress has left to the sound judgment of the Equal Employment Opportunity Commission. ... The Commission takes the position that the RFOA provision is an affirmative defense on which the employer bears the burden of proof, and that ... [the] provision replaces the business necessity test.

From the opinion by Justice Thomas (concursing in part and dissenting in part):

I continue to believe that disparate-impact claims are not cognizable under the ADEA.

Taking no part in the decision or consideration of this case: Justice Breyer

No. Sections 10 and 11 are exclusive and no agreement of the parties may expand the explicit instances permitting vacatur and modification set forth by the Act.

From the opinion by Justice Souter (joined by Chief Justice Roberts and Justices Thomas, Ginsburg, and Alito, and by Justice Scalia who joins in all but footnote 7 of the opinion):

Instead of fighting the text, it makes more sense to see the three provisions, §§ 9–11, as substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightforward. Any other reading opens the door to the full-bore legal and evidentiary appeals that can ‘rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process.”

From the dissent by Justice Stevens (joined by Justice Kennedy):

[T]he interests favoring enforceability of parties’ arbitration agreements are stronger today than before the FAA was enacted. As such, there is more—and certainly not less—reason to give effect to parties’ fairly negotiated decisions to provide for judicial review of arbitration awards for errors of law.

Dissenting: Justice Breyer

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(Continued on Page 400)
Does the Federal Arbitration Act (FAA) preempt state laws that refer primary jurisdiction of state-law controversies to a judicial forum or administrative agency?

Yes. The Court’s decision upheld Congress’s rationale in passing FAA, to establish the national policy of favoring arbitration agreements when the parties have selected arbitration as the forum for settling their disputes. Relying on Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006), the Court reiterated that, “when parties agree to arbitrate all questions arising under a contract, the FAA supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative.

Dissenting: Justice Thomas

From the opinion by Justice Ginsburg (joined by Chief Justice Roberts and Justices Stevens, Scalia, Kennedy, Souter, Breyer, and Alito):
Ferrer relinquishes no substantive rights the [California Talent Agencies Act] or other California law may accord him. But under the contract he signed, he cannot escape resolu-
From the opinion by Justice Alito (joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas, and joined by Justices Stevens, Souter, Ginsburg, and Breyer in part):

We have never upheld the constitutionality of a law that imposes different contribution limits for candidates who are competing against each other, and we agree with Davis that this scheme impermissibly burdens his First Amendment right to spend his own money for campaign speech.

From the opinion by Justice Stevens, concurring in part and dissenting in part (joined by Justices Souter and Ginsburg, and joined by Justice Breyer in part):

The Millionaire’s Amendment quiets no speech at all. On the contrary, it does no more than assist the opponent of a self-funding candidate in his attempts to make his voice heard; this amplification in no way mutes the voice of the millionaire, who remains able to speak as loud and as long as he likes in support of his campaign. Enhancing the speech of the millionaire’s opponent, far from contravening the First Amendment, actually advances its core principles. If only one candidate can make himself heard, the voter’s ability to make an informed choice is impaired.

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

Does Kentucky’s method of lethal injection, which uses a combination of three drugs to induce unconsciousness, then paralysis, then death, violate the Eighth Amendment’s ban on cruel and unusual punishment due to some risk of pain if the drugs are not administered properly, and the existence of some possibly less risky alternative?

No. The Supreme Court has held capital punishment constitutional, and states must have some means of carrying it out; the risk of pain in the method in question is not substantial, and no feasible alternative has been presented; therefore the method does not violate the Eighth Amendment.

From the dissent by Justice Ginsburg (joined by Justice Souter):

Recognizing the importance of a window between the first and second drugs, other States have adopted safeguards not contained in Kentucky’s protocol … These checks provide a degree of assurance—missing from Kentucky’s protocol—that the first drug has been properly administered. They are simple and essentially costless to employ, yet work to lower the risk that the inmate will be subjected to the agony of conscious suffocation caused by pancuronium bormide and the searing pain caused by potassium chloride. The record contains no explanation why Kentucky does not take any of these elementary measures.

Concurring: Justice Alito

Concurring in the judgment: Justice Stevens

Concurring in the judgment: Justice Scalia (joined by Justice Thomas)

Concurring in the judgment: Justice Thomas (joined by Justice Scalia)

Concurring in the judgment: Justice Breyer

must certainly comply with the Eighth Amendment, but what that Amendment prohibits is wanton exposure to “objectively intolerable risk,” … not simply the possibility of pain. Kentucky has adopted a method of execution believed to be the most humane available, one it shares with 35 other States.
Is the express consent of counsel alone, absent an express assent or objection from the defendant, sufficient to permit a magistrate judge to preside over voir dire and jury selection for a felony trial?

Yes. Counsel can consent on behalf of his or her client to allow a magistrate to oversee voir dire and jury selection in a felony case.

From the opinion by Justice Kennedy (joined by Chief Justice Roberts and Justices Stevens, Souter, Ginsburg, Breyer and Alito):
Acceptance of a magistrate judge at the jury selection phase is a tactical decision that is well suited for the attorney’s own decision. … As with other tactical decisions, requiring personal, on-the-record approval from the client could necessitate a lengthy explanation the client might not understand at the moment and that might distract from more pressing matters as the attorney seeks to prepare the best defense.

From the concurring opinion by Justice Scalia:
I agree with the Court’s conclusion, but not with the tactical vs. fundamental test. … I would adopt the rule that, as a constitutional matter, all waivable rights (except, of course, the right to counsel) can be waived by counsel. There is no basis in the Constitution, or as far as I am aware in common-law practice, for distinguishing in this regard between a criminal defendant and his authorized representative. In fact, the very notion of representative litigation suggests that the Constitution draws no distinction between them.

From the dissent by Justice Thomas:
The Court proceeds from the premise that the Federal Magistrates Act authorizes magistrate judges to preside over felony jury selection if the parties consent. I reject that premise, would overrule [Peretz v. United States], and hold that the delegation of voir dire in this case was statutory error.

Does 18 U.S.C § 844(h)(2), which makes it a felony to carry explosives during the commission of any felony, require that the explosives be carried in relation to the underlying felony?

No. The term “during” as used in § 844(h)(2) only requires a temporal relationship between the carrying of explosives and the felony.

From the opinion by Justice Stevens (joined by Chief Justice Roberts and Justices Kennedy, Souter, Ginsburg, and Alito, and joined in part by Justices Thomas and Scalia): Congress did not intend to introduce a relational requirement into the explosives provision, but rather intended us to accept the more straightforward reading. Since respondent was carrying explosives when he [committed the felony of making a false statement to a customs official], he was carrying them “during” the commission of that felony. The statute as presently written requires nothing further.

Concurring in part and concurring in the judgment: Justice Thomas (joined by Justice Scalia)

From the dissent by Justice Breyer:
My problem with the Court’s interpretation is that it would permit conviction of any individual who legally carries explosives at the time that he engages in a totally unrelated felony. … Further, the statute applies to the carrying of explosives during “any” federal felony, a category that ranges from murder to mail fraud. … Consequently, the Court’s opinion brings within the statute’s scope (and would impose an additional mandatory 10-year prison term upon), for example, a farmer lawfully transporting a load of fertilizer who intentionally mails an unauthorized lottery ticket to a friend. … Here, the statute’s context makes clear that the statutory statement does not cover a carrying of explosives that is totally unrelated to the felony. … Congress sought to criminalize and impose harsh penalties in respect to the intentional misuse of explosives.
Was the Seventh Circuit correct in finding that the term “proceeds” in the federal money-laundering statute, which prohibits transactions with criminal proceeds, refers to transactions using criminal profits rather than criminal receipts?

Yes. The term “proceeds” is not defined in the statute, and its common usage can mean either receipts or profits. When a statutory term is ambiguous, the rule of lenity applies, meaning the ambiguity must be resolved in the manner more favorable to the criminal defendant.

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

From the face of the statute, there is no more reason to think that “proceeds” means “receipts” than there is to think that “proceeds” means “profits.” Under a long line of our decisions, the tie must go to the defendant. The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them. This venerable rule ... vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed.

From the dissent by Justice Alito (joined by Chief Justice Roberts and Justices Kennedy and Breyer):

Ignoring the context in which the term is used, the problems that the money-laundering statute was enacted to address, and the obvious practical considerations that those responsible for drafting the statute almost certainly had in mind, th[e] opinion is quick to pronounce the term hopelessly ambiguous and thus to invoke the rule of lenity. Concluding that “proceeds” means “profits,” the plurality opinion’s interpretation would frustrate Congress’s intent and maim a statute that was enacted as an important defense against organized criminal enterprises.

Concurring in the judgment: Justice Stevens
Dissenting: Justice Breyer

CRIMINAL PROCEDURE
Arave v. Hoffman
Docket No. 07-110
Vacated: The Ninth Circuit

Argued: N/A
Decided: January 7, 2008
For Case Analysis: N/A

May a party move to dismiss with prejudice his claim of ineffective counsel during plea bargaining if he has abandoned this claim and wishes to proceed with a lower court’s ruling that he was entitled to a new sentence on his second claim of ineffective counsel during sentencing?

Yes. The Court found that since Hoffman had abandoned his claim of ineffective counsel during plea bargaining and wished to proceed with the district court’s ruling that he had received ineffective counsel “receipt-in-trade” based upon 18 U.S.C. § 924(d) (which provides that a person in the reversed bargaining scenario “uses” a gun when trading that gun to receive drugs, a concept established in Smith v. United States) was rejected. The Court establishes that a buyer cannot “use” a seller’s consideration in a bargain in relation to § 924(c)(1)(A) because that is not the manner in which the verb “uses” regularly operates in English.

From the unanimous opinion by Justice Souter:
The Government may say that a person “uses” a firearm simply by receiving it in a barter transaction, but no one else would.

Concurring: Justice Ginsburg

CRIMINAL LAW
Watson v. United States
Docket No. 06-571
Reversed and remanded: The Fifth Circuit

Argued: October 9, 2007
Decided: December 10, 2007
For Case Analysis: See ABA PREVIEW 4

Does a person who trades drugs for a gun “use” a firearm “during and in relation to ... [a] drug trafficking crime” within the meaning of 18 U.S.C. § 924(c)(1)(A)?

No. The government’s argument that “use” equals
During the sentencing phase and was therefore entitled to a new sentence, his claim for ineffective assistance of counsel during pretrial plea bargaining claim is moot.

From the per curium opinion: Because his claim for ineffective assistance of counsel during pretrial plea bargaining is moot, we vacate the judgment of the Court of Appeals to the extent that it addressed that claim. The case is remanded to the United States Court of Appeals for the Ninth Circuit with directions that it instruct the United States District Court for the District of Idaho to dismiss the relevant claim with prejudice.

From the unanimous opinion by Justice Thomas: The provision of the money-laundering statute under which petitioner was convicted requires proof that the transportation was “designed in whole or in part to conceal or disguise the nature, the location, the source, the ownership, or the control” of the funds. Although this element does not require proof that the defendant attempted to create the appearance of legitimate wealth, neither can it be satisfied solely by evidence that a defendant concealed the funds during their transport. In this case, the only evidence introduced to prove this element showed that petitioner engaged in extensive efforts to conceal the funds en route to Mexico, and thus his conviction cannot stand.

Does the Fifth Circuit correctly interpret the provision of the federal money-laundering statute that prohibits the transportation of illicit funds in order to conceal some attribute of them when it found that the extensive efforts to conceal a large sum of money during transport were enough to convict Regalado Cuellar?

No. Hiding funds during transportation does not mean an individual meant to make the money appear legitimate, it is the purpose of concealing, not the concealment itself, that is relevant for statutory purposes.

From the dissent by Chief Justice Roberts (joined by Justice Kennedy): “When this Court decides that a particular right shall not be applied retroactively, but a state court finds that it should, it is at least in part because of a different assessment by the state court of the nature of the underlying federal right—something on which the Constitution gives this Court the final say. The nature and scope of the new rules we announce directly determines whether they will be applied retroactively on collateral review. Today’s opinion stands for the unfounded proposition that while we alone have the final say in expounding the former, we have no control over the latter.”

Does the Teague Rule (which established a general standard for determining the retroactive applications for “new rules” developed by the Court) prohibit state courts from granting broader retroactivity standards to “new rules” of criminal procedure than is required by Teague?

No. States must provide the minimum standard of retroactive effect established by Teague for “new rules” for federal constitutional violations, but are permitted to exercise broader standards if they see fit.
Argued: December 4, 2007
Decided: March 19, 2008
For Case Analysis: See ABA PREVIEW 103

Did the trial judge err in not granting relief to Snyder on the basis that during his capital murder trial, the prosecutor used a peremptory challenge to eliminate a prospective black juror?

Yes. The judge committed clear error in rejecting the objection to the striking of the juror for racial motivation. The Court found that the justification for striking the juror—his student-teaching obligations—was insufficient to overcome a Batson challenge.

From the opinion by Justice Alito (joined by Chief Justice Roberts and Justices Stevens, Kennedy, Souter, Ginsburg, and Breyer):
The implausibility of this explanation is reinforced by the prosecutor’s acceptance of white jurors who disclosed conflicting obligations that appear to have been at least as serious as Mr. Brooks’. We recognize that a retrospective comparison of jurors based on a cold appellate record may be very misleading when alleged similarities were not raised at trial. In that situation, an appellate court must be mindful that an exploration of the alleged similarities at the time of trial might have shown that the jurors in question were not really comparable. In this case, however, the shared characteristic, i.e., concern about serving on the jury due to conflicting obligations, was thoroughly explored by the trial court when the relevant jurors asked to be excused for cause.

From the dissent by Justice Thomas (joined by Justice Scalia):
Because the trial court’s determination was a permissible view of the evidence, I would affirm the judgment. The Court second-guesses the trial court’s determinations in this case merely because the judge did not clarify which of the prosecutor’s neutral bases for striking Mr. Brooks was dispositive. But we have never suggested that a reviewing court should defer to a trial court’s resolution of a Batson challenge only if the trial court made specific findings with respect to each of the prosecutor’s proffered race-neutral reasons. … We have no business overturning a conviction, years after the fact and after extensive intervening litigation, based on arguments not presented to the courts below.

DEATH PENALTY
Kennedy v. Louisiana
Docket No. 07-343
Reversed and remanded: Supreme Court of Louisiana

Argued: April 16, 2008
Decided: June 25, 2008
For Case Analysis: See ABA PREVIEW 357

Is a state statute authorizing the death penalty for the rape of a child constitutional under the Eighth Amendment?

No. The Court decided, in the same vein as Coker v. Georgia (which found rape of an adult woman to be a crime incapable of capital punishment under the Eighth Amendment), that child rape cannot be punishable by death due to the Eighth Amendment protection against cruel and unusual punishment. The Court reasoned that despite the gravity of rape, it cannot be a capital crime because the “seriousness and irrevocability” of the death penalty are disproportionate to the offense, according to national consensus and the independent determination of the Court, to the harm inflicted upon society.

From the opinion by Justice Kennedy (joined by Justices Stevens, Souter, Ginsburg, and Breyer):
Evolving standards of decency that mark the progress of a maturing society counsel us to be most hesitant before interpreting the Eighth Amendment to allow the extension of the death penalty, a hesitation that has special force where no life was taken in the commission of the crime. It is an established principle that decency, in its essence, presumes respect for the individual and thus moderation or restraint in the application of capital punishment.

From the dissent by Justice Alito (joined by Chief Justice Roberts and Justices Scalia and Thomas):
The Court is willing to block the potential emergence of a national consensus in favor of permitting the death penalty for child rape because, in the end, what matters is the Court’s “own judgment” regarding “the acceptability of the death penalty.” Although the Court has much to say on this issue, most of the Court’s discussion is not pertinent to the Eighth Amendment question at
hand. And once all of the Court’s irrelevant arguments are put aside, it is apparent that the Court has provided no coherent explanation for today’s decision.

Argued: March 24, 2008  
Decided: May 27, 2008  
For Case Analysis: See ABA PREVIEW 280

For purposes of the Section 5 Voting Rights Act of 1965, does a covered jurisdiction need preclearance (an approval for a voting procedure change from the District Court for the District of Columbia or Department of Justice to ensure nondiscriminatory practice) to return to a prior precleared election practice after a revised practice was struck down by the state judiciary?

No. Hearing this appeal directly from the District Court pursuant to Section 5 statutory mandate, the Court held the state of Alabama’s action in reverting to the pre-1987 election procedure, gubernatorial appointment for a state commission, was not a “change” in voting practice because the invalidated 1985 law which required a special election never took “force or effect,” despite being used in one election. Therefore, no new preclearance was required as the state was merely returning to the baseline practice of gubernatorial appointment.

From the opinion by Justice Ginsburg (joined by Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, Breyer, and Alito):  
The majority holds, relying on Young v. Fordice (1997) that “A practice best characterized as nothing more than a “temporary misapplication of state law,” ... is not in “force or effect,” even if actually implemented by state election officials.”

From the dissent by Justice Stevens (joined by Justice Souter):  
Because the 1985 Act was precleared and put in effect during the 1987 election, the practice of special elections serves as the relevant baseline. With the correct baseline in mind, it is obvious that the gubernatorial appointment ... is a practice “different from” the baseline. Because gubernatorial appointment represents a change, it must be precleared, as the three-judge District Court correctly held.

From the opinion by Chief Justice Roberts concurring in part and concurring in the judgment:  
I would instead consider the conflict of interest on review only where there is evidence that the benefits denial was motivated or affected by the administrator’s conflict. ... The mere existence of a conflict, however, is not justification for heightening the level of scrutiny.

From the opinion by Justice Kennedy concurring in part and dissenting in part:  
The Court sets forth an important [and correct] framework. ... [However] the Court affirms the judgment, without giving MetLife a chance to defend its decision under the standards the Court articulates today.

Argued: April 23, 2008  
Decided: June 19, 2008  
For Case Analysis: See ABA PREVIEW 343

When reviewing a denial of benefits claim for abuse of discretion under the Employee Retirement Income Security Act (ERISA), should the reviewing court consider the plan administrator’s conflict of interest in both evaluating and paying benefits claims?

Yes. Because the appropriate standard of review for benefit determinations by plan administrators is guided by principles of trust law, conflict of interest is to be weighed as a factor in determining abuse of discretion.

From the opinion by Justice Breyer (joined by Chief Justice Roberts in part and by Justices Stevens, Souter, Ginsburg, and Alito):  
[This is not a] change in the standard of review, say, from deferential to de novo review. Trust law continues to apply a deferential standard of review to the discretionary decision making of a conflicted trustee, while at the same time requiring the reviewing judge to take account of the conflict when determining whether the trustee, substantively or procedurally, has abused his discretion.

From the opinion by Chief Justice Roberts concurring in part and concurring in the judgment:  
I would instead consider the conflict of interest on review only where there is evidence that the benefits denial was motivated or affected by the administrator’s conflict. ... The mere existence of a conflict, however, is not justification for heightening the level of scrutiny.

From the opinion by Justice Kennedy concurring in part and dissenting in part:  
The Court sets forth an important [and correct] framework. ... [However] the Court affirms the judgment, without giving MetLife a chance to defend its decision under the standards the Court articulates today.
From the dissent by Justice Scalia (joined by Justice Thomas):
I would not adopt the Court’s totality-of-the-circumstances (so-called) test. … This makes each case unique, and hence the outcome of each case unpredictable—not a reasonable position in which to place the administrator that has been explicitly given discretion by the creator of the plan. … More importantly, under [trust] law, a fiduciary with a conflict does not abuse its discretion unless the conflict actually and improperly motivates the decision. There is no evidence of that here.

From the opinion by Justice Breyer (joined by Chief Justice Roberts and Justices Stevens, Kennedy, Souter, Ginsburg, and Alito):
Sullivan, as interpreted and relied upon by [Jackson v. Birmingham Bd. of Ed., 544 U.S. 167 (2005)] as well as the long line of related cases where we construe §§ 1981 and 1982 similarly, lead us to conclude that the view that § 1981 encompasses retaliation claims is indeed well embedded in the law.

From the dissent by Justice Thomas (joined by Justice Scalia):
Retaliation is not discrimination based on race. When an individual is subjected to reprisal because he has complained about racial discrimination, the injury he suffers is not on account of his race; rather, it is the result of his conduct. … Because the employer treats all employees—black and white—the same, he does not deny any employee ‘the same right … to make and enforce contracts … as is enjoyed by white citizens.”

Argued: February 20, 2008
Decided: May 27, 2008
For Case Analysis: See ABA PREVIEW 204

Does 42 U.S.C. § 1981(a) (a civil rights law to protect against unequal treatment in contracts) encompass retaliatory action against a person complaining about a violation of another person’s contract-related “right”?

Yes. The Court advises that § 1981 and § 1982, as sister-statutes, are to be construed similarly due to their “common derivation.” In Sullivan v. Little Hunting Park, 396 U.S. 229, the Court first ruled that § 1982 included retaliatory actions. Jackson v. Birmingham Bd. of Ed., 544 U.S. 167.

From the opinion by Justice Kennedy (joined by Chief Justice Roberts and Justices Stevens, Souter, Ginsburg, Breyer, and Alito):
The agency’s interpretive position—the request-to-act requirement—provides a reasonable alternative that is consistent with the statutory framework. No clearer alternatives are within our authority or expertise to adopt; and so deference to the agency is appropriate. … We conclude as follows: In addition to the information required by the regulations, i.e., an allegation and the name of the charged party, if a filing is to be deemed a charge it must be reasonably construed as a request for the agency to take remedial action to protect the employee’s rights or otherwise settle a dispute between the employer and the employee.

From the dissent by Justice Thomas (joined by Justice Scalia):
Because there is nothing to suggest that Congress used “charge” as a term of art, we must construe it “in accordance with its ordinary or natural meaning.” … In legal parlance, a “charge” is generally a

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formal allegation of wrongdoing that initiates legal proceedings against an alleged wrongdoer … in this context, a “charge” is a formal accusation of discrimination that objectively manifests an intent to initiate enforcement proceedings against the employer … a document that merely describes the alleged discrimination and requests the EEOC’s assistance, but does not objectively manifest an intent to initiate enforcement proceedings, is not a “charge” within the meaning of the ADEA.

Argued: January 9, 2008
Decided: June 19, 2008
For Case Analysis: See ABA PREVIEW 186

Does Kentucky’s pension plan discriminate against workers who become disabled after becoming eligible for retirement based on age?

No. An Age Retirement eligibility is a common and valid consideration when creating a pension plan and the differences in treatment in this particular instance were not “actually motivated” by age.

From the opinion by Justice Breyer (joined by Chief Justice Roberts and Justices Stevens, Souter, and Thomas):
As a matter of pure logic, age and pension status remain analytically distinct concepts. … [Pensions are] a benefit that the ADEA treats somewhat more flexibly and leniently in respect to age. … Furthermore, Congress has otherwise approved of programs that calculate permanent disability benefits using a formula that expressly takes account of age. … The Plan at issue in this case simply seeks to treat disabled employees as if they had worked until the point at which they would be eligible for a normal pension. The disparity turns upon pension eligibility and nothing more.

From the dissent by Justice Kennedy (joined by Justices Scalia, Ginsburg, and Alito):
For these employees, pension status and age are not “analytically distinct” in any meaningful sense. … When it treats these employees differently on the basis of pension eligibility, Kentucky facially discriminates on the basis of age.

Argued: December 3, 2007
Decided: February 26, 2008
For Case Analysis: See ABA PREVIEW 134

If a court of appeals believes a district court has improperly used a broad or general rule to determine the admissibility of evidence in a particular case, and it is unclear whether the district court has used such a rule, may the court of appeals make its own determination on the admissibility of the evidence in question?

No. Because it was unclear whether the district court had applied a blanket rule to determine the admissibility of evidence in this case, the court of appeals should have remanded the case to the district court to allow it to clarify its ruling.

From the unanimous opinion by Justice Thomas:
But questions of relevance and prejudice are for the District Court to determine in the first instance. … Rather than assess the relevance of the evidence itself and conduct its own balancing of the probative value and potential prejudicial effect the Court of Appeals should have allowed the District Court to make these determinations in the first instance, explicitly and on the record. … With respect to evidentiary questions in general and Rule 403 in particular, a district court virtually always is in the better position to assess the admissibility of the evidence in the context of the particular case before it.

Argued: April 21, 2008
Decided: June 9, 2008
For Case Analysis: See ABA PREVIEW 353

Can a public employee bring a class-of-one discrimination claim under the Equal Protection Clause?

No. The “class-of-one” theory of equal protection has no
place in the public employment context.

**From the opinion by Chief Justice Roberts** (joined by Justices Scalia, Kennedy, Thomas, Breyer, and Alito): The class-of-one theory of equal protection—which presupposes that like individuals should be treated alike, and that to treat them differently is to classify them in a way that must survive at least rationality review—is simply a poor fit in the public employment context. To treat employees differently is not to classify them in a way that raises equal protection concerns. Rather, it is simply to exercise the broad discretion that typically characterizes the employer-employee relationship. … The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. Public employees typically have a variety of protections from just the sort of personnel actions about which Engquist complains, but the Equal Protection Clause is not one of them.

**From the dissent by Justice Stevens** (joined by Justices Souter and Ginsburg): There is a clear distinction between an exercise of discretion and an arbitrary decision. … Moreover, the Equal Protection Clause proscribes arbitrary decisions—decisions unsupported by any rational basis—not unwise ones. Accordingly, a discretionary decision with any “reasonably conceivable” rational justification will not support an equal protection claim; only a truly arbitrary one will. There is therefore no need to create an exception for the public-employment context in order to prevent these discretionary decisions from giving rise to equal protection claims.

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**Argued: November 26, 2007**

**Decided: February 20, 2008**

For Case Analysis: See ABA PREVIEW 122

Does § 502(a)(2) of the Employee Retirement Income Security Act of 1974 (ERISA) permit a participant in a defined contribution pension plan to sue a fiduciary whose alleged misconduct impaired the value of plan assets in the participant's individual account, in spite of the holding in *Massachusetts Mut. Life Ins. Co. v. Russell*, which interpreted § 502(a)(2) as prohibiting civil actions for personal injuries separate from plan assets under defined benefit plans?

**Yes.** The Court agreed with *Russell*’s interpretation of § 502(a)(2), but found error in the Fourth Circuit’s application of *Russell* to the present action. Because LaRue’s action alleges an individual loss due to a breach of fiduciary duty that did not impact the plan as a whole, the lower courts ruled that *Russell* barred such an action. The Court however found that, unlike the situation in *Russell*, LaRue’s claim was based on the fiduciary duty owed to him as a holder of a defined contribution plan (where participants are promised the value of an individual account related to the value of their contributions and the performance of those contributions). As the sole partici-

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**From the opinion by Justice Stevens** (joined by Justices Souter, Ginsburg, Breyer, and Alito): Other sections of ERISA confirm that the “entire plan” language from *Russell*, which appears nowhere in § 409 or § 502(a)(2), does not apply to defined contribution plans. … We therefore hold that although § 502(a)(2) does not provide a remedy for individual injuries distinct from plan injuries, that provision does authorize recovery for fiduciary breaches that impair the value of plan assets in a participant’s individual account.

**Concurring in part and concurring in the judgment: Chief Justice Roberts (joined by Justice Kennedy)**

**Concurring in part and concurring in the judgment: Justice Thomas (joined by Justice Scalia)**

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American Bar Association
Is proof of an intent to cause a false claim to be paid by a private entity using government funds sufficient to support a claim for damages under the False Claims Act (FCA)?

No. It is insufficient under the FCA for a plaintiff to show merely that the false statement’s use resulted in payment or approval of the claim or that government money was used to pay the false or fraudulent claim. Instead, such a plaintiff must prove that the defendant intended that the false statement be material to the government’s decision to pay or approve the false claim.

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

A subcontractor violates § 3729(a)(2) if the subcontractor submits a false statement to the prime contractor intending for the statement to be used by the prime contractor to get the Government to pay its claim. Recognizing a cause of action under the FCA for fraud directed at private entities [instead of the government] would threaten to transform the FCA into an all-purpose antifraud statute. … [Similarly,] under § 3729(a)(3), it is not enough for a plaintiff to show that the alleged conspirators agreed upon a fraud scheme that had the effect of causing a private entity to make payments using money obtained from the Government. Instead, it must be shown that the conspirators intended to defraud the Government, … that the conspirators had the purpose of getting the false record or statement to bring about the Government’s payment of a false or fraudulent claim, … [and] that they agreed that the false record or statement would have a material effect on the Government’s decision to pay the false or fraudulent claim.

From the dissent by Justice Stevens (joined by Justice Ginsburg):

If the doctrine of stare decisis supplied a clear answer to the question posed by this case … I would join the Court’s judgment, despite its unwisdom. But I do not agree with the majority’s reading of our cases.

From the dissent by Justice Ginsburg:

Stare decisis is an important, but not an inflexible, doctrine in our law. The policies underlying the doctrine—stability and predictability—are at their strongest when the Court is asked to change its mind, though nothing else of significance has changed.
Does an assignee of a legal claim for money owed have standing to pursue that claim in federal court when the assignee has promised to give the proceeds of litigation back to the assignor?

Yes. The Court decided that the three standing requirements of Article III (injury in fact, redressability, and causation) were met by assignees pursuing the assignors' claims for money owed because they have a legal title to the claimed funds and as such are not exercising claims for third-parties, despite the fact they have also privately agreed to remit the litigation proceeds once awarded.

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

[W]e have discovered that history and precedent are clear on the question before us: Assignees of a claim, including assignees for collection, have long been permitted to bring suit. A clear historical answer at least demands reasons for change. We can find no such reasons here, and accordingly we conclude that the aggregators have standing.

FEDERAL INDIAN LAW
Docket No. 07-411
Reversed: Eighth Circuit

Does a tribal court have jurisdiction to hear a discrimination claim concerning the sale of non-Indian fee land by a non-Indian entity to non-Indians?

No. The Court cited Montana v. United States, which established the general rule that Indian tribes lack authority over nonmembers, except in two special circumstances, which came to be known as the Montana exceptions. The Court decided that the Tribal Court lacked jurisdiction to adjudicate the Longs' discrimination claim, and to order its principal judgment, monetary relief.

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

Although the Tribal Court overstepped in its supplemental judgment ordering the Bank to give the Longs an option to purchase land third parties had contracted to buy, it scarcely follows that the Tribal Court lacked jurisdiction to adjudicate the Longs' discrimination claim.

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

The Court goes awry when it asserts that the standing inquiry focuses on whether the injury is likely to be redressed, not whether the complaining party's injury is likely to be redressed. That could not be more wrong. We have never approved federal-court jurisdiction over a claim where the entire relief requested will run to a party not before the court. Never.
Do New York’s election laws governing party nominations for its state supreme court violate the potential candidates’ First Amendment rights by allowing party leadership significant power over conventions and by sustaining an alleged one-part dominant (uncompetitive) election process? 

No. The First Amendment does not prohibit state laws that prescribe a convention process for parties to nominate their candidates. Rather, the First Amendment allows parties to nominate whatever candidate they think will best represent their interests, so long as the parties follow reasonable state mandated requirements. Further, the Court held that the First Amendment does not guarantee every candidate a “fair shot” at winning the nomination.

From the concurring opinion by Justice Stevens (joined by Justice Souter): I recall my esteemed former colleague, Thurgood Marshall, remarking on numerous occasions: “The Constitution does not prohibit legislatures from enacting stupid laws.”

From the concurring opinion by Justice Stevens (joined by Justice Souter in part): Respondents’ real complaint is not that they cannot vote in the election for delegates, nor even that they cannot run in that election, but that the convention process that follows the delegate election does not give them a realistic chance to secure the party’s nomination. ... To say that the State can require [a fair shot in conventions] is a fair cry from saying that the Constitution demands it. Selection by convention has never been thought unconstitutional. ... Respondents [also] put forward ... that party loyalty in New York’s judicial districts renders the general-election ballot “uncompetitive.” It makes no difference ... whether the party is a contender in the general election, an underdog, or the favorite. We have held that [competitiveness] interests are well enough protected so long as all candidates have an adequate opportunity to appear on the general-election ballot. A political party has a First Amendment right to limit its membership as it wishes, and to choose a candidate-selection process that will in its view produce the nominee who best represents its political platform. If New York wishes to [change the primary system] it is free to do so; but the First Amendment does not compel that.

Does 18 U.S.C. § 2252(a)(3)(B), violate either the First or Fifth Amendments?

No. Congress’s latest attempt to combat child pornography with it is neither overbroad under the First Amendment nor impermissibly vague under the Due Process Clause.

From the opinion by Justice Scalia (joined by Chief Justice Roberts and Justices Stevens, Kennedy, Thomas, Breyer, and Alito): Offers to provide or requests to obtain unlawful material ... are undeserving of First Amendment protection. ... The Act before us does not prohibit advocacy of child pornography, but only offers to provide or requests to obtain it. ... The [First Amendment] defect we found in the pandering provision at issue in [the 2002 case....]
Ashcroft v. Free Speech Coalition] was that it went beyond pandering to prohibit possession of material that could not otherwise be prescribed. … [In regards to the Fifth Amendment,] the statute requires that the defendant hold … the belief that the material is child pornography. … Those are clear questions of fact … not a subjective judgment such as whether conduct is annoying or indecent.

From the concurring opinion by Justice Stevens (joined by Justice Breyer): I believe the result to be compelled by the principle that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality. Second, to the extent the statutory text alone is unclear, our duty to avoid constitutional objections makes it especially appropriate to look beyond the text in order to ascertain the intent of its drafters.

From the dissent by Justice Souter (joined by Justice Ginsburg): Eliminating the line between protected and unprotected speech … [is] a heavy price, not to be paid without a substantial offset, which is missing from this case. … We should hold that a transaction in what turns out to be fake pornography is better understood, not as an incomplete attempt to commit a crime, but as a completed series of intended acts that simply do not add up to a crime, owing to the privileged character of the material the parties were in fact about to deal in.

Argued: October 1, 2007
Decided: March 18, 2008
For Case Analysis: See ABA PREVIEW 18

Does Washington’s Initiative 872, which allows candidates to designate their party “preference” and provides a primary in which only the top two candidates advance to the general election, regardless of party preference, violate the political parties’ First Amendment right of association?

No. Since this is a facial challenge, a plaintiff can only succeed by establishing that no set of circumstances exist under which the Act would be valid. The Court found that there are several ways that Washington could proceed that would make the ballot constitutionally acceptable. Thus, there is no First Amendment violation.

From the opinion by Justice Thomas (joined by Chief Justice Roberts and Justices Stevens, Souter, Ginsburg, and Alito): [The Court has previously struck] down the blanket primary as inconsistent with the First Amendment. A party’s right to exclude is central to its freedom of association, and is never more important than in the process of selecting its nominee. [However,] the First Amendment does not give political parties a right to have their nominees designated as such on the ballot. … There is simply no basis to presume that a well-informed electorate will interpret a candidate’s party-preference designation to mean that the candidate is the party’s chosen nominee or representative or that the party associates with or approves of the candidate. … Without the specter of widespread voter confusion, arguments about forced association and compelled speech fall flat.

From the concurring opinion by Chief Justice Roberts (joined by Justice Alito): There is no general right to stop an individual from saying, “I prefer this party,” even if the party would rather he not. Normally, the party protects its message in such a case through responsive speech of its own.

From the dissent by Justice Scalia (joined by Justice Kennedy): Washington seeks to reduce the effectiveness of the endorsement by allowing any candidate to use the ballot for drawing upon the goodwill that a party has developed, while preventing the party from using the ballot to reject the claimed association or to identify the genuine candidate of its choice. … The organization is understood to embrace, or at the very least tolerate, the views of the persons linked with them. [This is similar to Boy Scouts of America v. Dale, 530 U.S. 640 (2000) when] a State severely burdened the right of expressive association when it required the Boy Scouts to accept an openly gay scoutmaster.
Were Moore’s Fourth Amendment rights violated when he was arrested on probable cause and searched in violation of state laws that are stricter than Fourth Amendment search and seizure standards?

No. The Fourth Amendment does not incorporate state statutes, and the fact that a state chooses to protect individual rights at a higher level than the Constitution does not mean the Fourth Amendment has been violated when a relevant state law has been violated; whether an arrest should have been made or not under state law is irrelevant; if an arrest has been made a search is reasonable under the Constitution.

From the opinion by Justice Scalia (joined by Chief Justice Roberts and Justices Stevens, Kennedy, Souter, Thomas, Breyer, and Alito):
In a long line of cases, we have said that when an officer has probable cause to believe a person committed even a minor crime in his presence, the balancing of private and public interests is not in doubt. The arrest is constitutionally reasonable. … Our decisions counsel against changing this calculus when a State chooses to protect privacy beyond the level that the Fourth Amendment requires. We have treated additional protections exclusively as matters of state law.

Concurring in the judgment: Justice Ginsburg

Is Taylor barred from making a claim seeking certain documents under the Freedom of Information Act because a court finds he has been “virtually represented” in a judgment against another individual in a claim seeking the same documents?

No. There are limited occasions upon which a nonrepresented party’s claim may be precluded. Federal common law recognizes six exceptions to the rule against preclusion, and “virtual representation” is not one of them, and is too broad to be included as an exception.

From the unanimous opinion by Justice Ginsburg:
Some lower courts have recognized a “virtual representation” exception to the rule against nonparty preclusion. Decisions of these courts, however, have been far from consistent. Circuits use the label, but define “virtual representation” so that it is no broader than the recognized exception for adequate representation. But other courts … apply multifactor tests for virtual representation that permit nonparty preclusion in cases that do not fit within any of the established exceptions. Arguments [have been presented] in support of an expansive doctrine of virtual representation. We find none of them persuasive.

Was the Eleventh Circuit Court of Appeals correct in deciding that the one-year statute of limitations for a federal habeas corpus petition, which is tolled when a proper application for state post-conviction review is proceeding, was tolled because although the state application for post-conviction relief was not timely filed, the state statute of limitations acts as an affirmative defense which may be waived?

No. The state relief petition was not properly filed. The state “filing condition” makes a petition for relief improper if in violation of the requirements, regardless of whether the state views its statute of limitations as an affirmative defense.

From the per curiam opinion: Under the Court of Appeals’ approach, federal habeas courts would have to delve into...
Yes and Yes. In a consolidation of habeas proceedings, the Court held that the Detainee Treatment Act of 2005 (DTA), which amended the habeas procedure through the creation of Combatant Status Review Tribunals (CSRTs) to determine “enemy combatant” status, was facially an inadequate substitute for habeas proceedings for lack of procedural safeguards, principally including inability of prisoners to present rebuttal evidence regarding their enemy combatant status. The Court also held that MCA § 7 was an unconstitutional suspension of the writ of habeas corpus for violation of the Suspension Clause, Art. 1, § 9, cl. 2. The majority decision interprets the Constitution’s Suspension Clause as effective at Guantanamo Bay, rejecting the government’s bright-line test that the Suspension Clause is only in effect on de jure U.S. sovereign territory, and instead institutes a three-part objective and practical concerns (“functional”) test for the reach of the writ. The Court holds that alien-detainees are to be afforded the privilege of seeking writs of habeas corpus, and further, that the petitioners in the present case are not required to complete a DTA review proceeding before filing for habeas writs due to the possibility of further injury from improper detention.

From the dissent by Justice Stevens (joined by Justice Ginsburg): There is an obvious distinction between time limits that go to the very initiation of a petition, and time limits that create an affirmative defense that can be waived. ... The time limit at issue in this case is of the latter, distinguishable kind—as the Court of Appeals correctly stated.

Habeas Corpus

Boumediene et al. v.
Bush et al.

Docket No. 06-1195
Reversed and remanded: Court of Appeals for the District of Columbia

Argued: December 5, 2007
Decided: June 12, 2008
For Case Analysis: See ABA PREVIEW 126

If the Suspension Clause is still applicable at the United States Naval Station at Guantanamo Bay, Cuba, a sovereign Cuban territory under plenary U.S. control, do alien-detainees have the Constitutional privilege of habeas corpus? If so, does the Military Commission Act (MCA) of 2006 unconstitutionally abridge this privilege?

From the concurrence by Justice Souter (joined by Justices Ginsburg and Breyer): After six years of sustained executive detentions in Guantanamo, subject to habeas jurisdiction but without any actual habeas scrutiny, today’s decision is no judicial victory, but an act of perseverance in trying to make habeas review, and the obligation of the courts to provide it, mean something of value both to prisoners and to the Nation.

From the dissent by Chief Justice Roberts (joined by Justices Scalia, Thomas, and Alito): How the detainees’ claims will be decided now that the DTA is gone is anybody’s guess. But the habeas process the Court mandates will most likely end up looking a lot like the DTA system it replaces, as the district court judges shaping it will have to reconcile review of the prisoners’ detention with the undoubted need to protect the American people from the terrorist threat—precisely the challenge Congress undertook in drafting the DTA. All that today’s opinion has done is shift responsibility for those sensitive foreign policy and national security decisions from the elected branches to the Federal Judiciary.

From the dissent by Justice Scalia (joined by Chief Justice Roberts and Justices Thomas and Alito): The writ of habeas corpus does not, and never has, run in favor of aliens abroad; the Suspension Clause thus has no application, and the Court’s intervention in this military matter is entirely ultra vires ... [The Court is] invoking judiciarily brainstormed separation-of-powers principles to establish a manipulable “functional” test for the extraterritorial reach of habeas corpus (and,
no doubt, for the extraterritorial reach of other constitutional protections as well). It blatantly misdescribes important precedents, most conspicuously Justice Jackson's opinion for the Court in Johnson v. Eisentrager. It breaks a chain of precedent as old as the common law that prohibits judicial inquiry into detentions of aliens abroad absent statutory authorization. And, most tragically, it sets our military commanders the impossible task of proving to a civilian court, under whatever standards this Court devises in the future, that evidence supports the confinement of each and every enemy prisoner.

The Nation will live to regret what the Court has done today. I dissent.

No. The Court ultimately decided to prohibit any habeas action in the present case because any habeas action would conflict with the ruling in Wilson v. Girard, 354 U.S. 524, 529 (1957) which held that a “sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders.” The Court did not decide the question of whether habeas relief would be available in the extreme case of the Executive transferring a prisoner to a foreign sovereign when it is expected that the prisoner will be tortured.

From the unanimous opinion by Chief Justice Roberts:
In the present cases, the habeas petitioners concede that Iraq has the sovereign authority to prosecute them for alleged violations of its law, yet nonetheless request an injunction prohibiting the United States from transferring them to Iraqi custody. But as the foregoing cases make clear, habeas is not a means of compelling the United States to harbor fugitives from the criminal justice system of a sovereign with undoubted authority to prosecute them.

Concurring: Justice Souter (joined by Justices Ginsburg and Breyer)

No. Nothing in the relevant statute prevents an alien from filing a motion to reopen, and the text plainly grants each alien one such motion. Since the voluntary departure requirement and the motion to reopen provision may conflict, it seems clear that as there is no text to the contrary, it was intended that aliens be able to delay deportation if their motion to reopen has not yet been ruled on.

From the opinion by Justice Kennedy (joined by Justices Stevens, Souter, Ginsburg, and Breyer):
Reading the Act as a whole, and considering the statutory scheme governing voluntary departure alongside the statutory right granted to the alien … to pursue “one motion to reopen proceedings,” the Government's position that the alien is not entitled to pursue a motion to reopen if the alien agrees to voluntarily depart is unsustainable. It would render the statutory right to seek reopening a nullity in most
cases of voluntary departure. It is foreseeable, and quite likely, that the time allowed for voluntary departure will expire long before the BIA issues a decision on a timely filed motion to reopen. These practical limitations must be taken into account.

From the dissent by Justice Scalia (joined by Chief Justice Roberts and Justice Thomas): Petitioner requested and accepted the above described deal, but now—to put the point bluntly but entirely accurately—he wants to back out. The case is as simple as that. Two days before the deadline for his promised voluntary departure, he filed a motion asking the Board of Immigration Appeals (BIA) to reopen his removal proceedings and remand his case to the Immigration Judge for adjustment of status based on his wife’s pending visa petition.

Dissenting: Justice Alito

INTERNATIONAL LAW
Medellín v. Texas
Docket No. 06-984
Affirmed: The Court of Criminal Appeals of Texas

Argued: October 10, 2007
Decided: March 25, 2008
For Case Analysis: See ABA PREVIEW 13

Is Texas required to enforce the judgment of the International Court of Justice (ICJ) after the president issued a Presidential Memorandum stating that the United States state courts would give effect to the decision?

No. Neither the ICJ ruling nor the Presidential Memorandum creates a federal law that preempts state law and would require Texas to grant a writ of habeas corpus.

From the opinion by Chief Justice Roberts (joined by Justices Scalia, Kennedy, Thomas, and Alito): Because none of these treaty sources creates binding federal law in the absence of implementing legislation, and because it is uncontested that no such legislation exists, we conclude that the [ICJ] judgment is not automatically binding domestic law. The point of a non-self-executing treaty is that it “addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.” … The President has an array of political and diplomatic means available to enforce international obligations, but unilaterally converting a non-self-executing treaty into a self-executing one is not among them. The responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress.

Concurring: Justice Stevens

INTERNATIONAL LAW
Republic of Philippines v. Pimentel
Docket No. 06-1204
Reversed and remanded: The Ninth Circuit

Argued: March 17, 2008
Decided: June 12, 2008
For Case Analysis: See ABA PREVIEW 267

Is a foreign sovereign, claiming foreign sovereign immunity and a required party under Rule 19(a), prejudiced by a continuation of court proceedings in its absence?

Yes. The Ninth Circuit erred both in not granting proper weight to the Republic of the Philippines’s and the Commission’s foreign sovereign statuses and in discounting the merits of the sovereigns’ claims, and therefore the case should be dismissed.

From the opinion by Justice Kennedy (joined by Chief Justice Roberts and Justices Scalia, Ginsburg, Breyer, and Alito, and joined in part by Justices Souter and Stevens): A case may not proceed when a required-entity sovereign is not amenable to suit. These cases instruct us that where sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign.

Concurring in part and dissenting in part: Justice Stevens
Concurring in part and dissenting in part: Justice Souter

(Continued on Page 418)
By operation of Article VII of the 1905 Compact (an interstate compact between New Jersey and Delaware regarding jurisdictional boundaries along the Delaware River) granting “riparian jurisdiction” to each state on its side of the river, does Delaware have exclusive jurisdiction over riparian structures and operations of extraordinary character extending beyond New Jersey’s territory along the Delaware river into Delaware’s sovereign territory?

Yes. The Court concludes that New Jersey and Delaware have overlapping authority to regulate the construction and implementation of the riparian structures of “ordinary or usual character” which extend beyond their sovereign territories, but that structures of “extraordinary” character are governed by each state’s police powers independent of the other state’s interest.

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

Given the authority over riparian rights that the 1905 Compact preserves for New Jersey, Delaware may not impede ordinary and usual exercises of the right of riparian owners to wharf out from New Jersey’s shore. The Crown Landing project, however, goes well beyond the ordinary or usual. Delaware’s classification of the proposed [liquid natural gas] unloading terminal as a “heavy industry use” and a “bulk product transfer facilit[y],” has not been, and hardly could be, challenged as inaccurate. Consistent with the scope of its retained police power to regulate certain riparian uses, it was within Delaware’s authority to prohibit construction of the facility within its domain.

Concurring in part and dissenting in part: Justice Stevens

Dissenting: Justice Scalia (joined by Justice Alito)

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

There are three issues in this case: (1) Does maritime law allow for corporate liability for punitive damages on the basis of acts by its managerial agents? (2) Does the Clean Water Act (CWA) preempt any punitive damages from violation of maritime law? (3) Were the punitive damages in this case excessive as a matter of maritime law?

(1) The justices were equally divided on the first issue and so did not disturb the Ninth Circuit’s opinion, which upheld the trial court’s jury instructions that a corporation is responsible for the reckless acts of employees acting in a managerial capacity in the scope of their employment. (2) No, the CWA does not prohibit punitive damages awards in maritime spill cases. (3) Yes, the punitive damages in this case were excessive. The Court determined that in the circumstances of this case, the award should be limited to an amount equal to compensatory damages.

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

We find it too hard to conclude that a statute expressly geared to protecting water, shorelines, and natural resources was intended to eliminate sub silentio oil companies’ common law duties to refrain from injuring the bodies and livelihoods of private individuals. … Nor for that matter do we perceive that punitive damages for private harms will have any frustrating effect on the CWA remedial scheme. … A median ratio of punitive to compensatory damages of about 0.65:1 probably marks the line near which cases like this one largely should be grouped. Accordingly, given the need to protect against the possibility of awards that are unpredictable and unnecessary, either for deterrence or for measured retribution, we consider that a 1:1 ratio, which is above the median award, is a fair upper limit in such maritime cases.
From the concurring opinion by Justice Scalia (joined by Justice Thomas):

While I agree with the argumentation based upon those prior holdings [that place limits on punitive damages], I continue to believe the holdings were in error.

From the opinion by Justice Stevens concurring in part and dissenting in part:

I believe that Congress, rather than this Court, should make the empirical judgments expressed in [the 1:1 ratio]. While maritime law is judge-made law to a great extent, it is also statutory law to a great extent; indeed, maritime tort law is now dominated by federal statute. ... Until Congress orders us to impose a rigid formula to govern the award of punitive damages in maritime cases, I would employ our familiar abuse-of-discretion standard.

From the opinion by Justice Ginsburg concurring in part and dissenting in part:

The issue is whether the Court, though competent to act, should nevertheless leave the matter to Congress. ... While recognizing that the question is close, Congress is the better equipped decision maker.

From the opinion by Justice Breyer concurring in part and dissenting in part:

In my view, a limited exception to the Court’s 1:1 ratio is warranted here. ... I can find no reasoned basis to disagree with the Court of Appeals’ conclusion that this is a special case, justifying an exception from strict application of the majority’s numerical rule.

Taking no part in the consideration or decision in this case: Justice Alito

Argued: December 4, 2007
Decided: February 20, 2008
For Case Analysis: See ABA PREVIEW 113

Does the preemption clause in the Medical Device Amendments of 1976 (MDA), 21 U.S.C. § 360k (which prohibits states from enacting “requirements different from, or in addition to” requirements imposed by federal law), bar common-law claims challenging the safety and effectiveness of a medical device given premarket approval by the Food and Drug Administration?

Yes. The Court holds that common-law claims established by court decisions are “requirements” under the MDA, just as are state-law duties established by statute, ordinance, or regulation. However, state requirements are preempted under the MDA only to the extent that they are “different from, or in addition to” the requirements imposed by federal law; therefore, parallel claims are not preempted.

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

Absent other indication, reference to a State’s “requirements” includes its common-law duties. As the plurality opinion said in [Cipollone v. Liggett Group, Inc., 505 U.S. 504, 522 (1992)], common-law liability is “premised on the existence of a legal duty,” and a tort judgment therefore establishes that the defendant has violated a state-law obligation. And while the common-law remedy is limited to damages, a liability award “can be, indeed is designed to be, a potent method of governing conduct and controlling policy.”

Concurring in part and concurring in the judgment: Justice Stevens

From the dissent by Justice Ginsburg:

Asserting MDA’s central purpose was consumer protection, “Congress, in my view, did not intend § 360k to effect a radical curtailment of state common-law suits seeking compensation for injuries caused by defectively designed or labeled medical devices. ... It is “difficult to believe that Congress would, without comment, remove all means of judicial recourse” [Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 251 (1984)] for large numbers of consumers injured by defective medical devices.”

Argued: November 28, 2007
Decided: February 20, 2008
For Case Analysis: See ABA PREVIEW 110

Does a federal law prohibiting states from enacting any law “related to” a motor carrier “price, route, or service” preempt provisions of a Maine law
aiming to regulate tobacco delivery, despite the state law’s public health goals?

Yes. The federal law used the same language as a law the Court had, in *Morales v. Trans World Airlines, Inc.*, interpreted as preempting state law. Applying that interpretation to this case, the court held the Maine laws created a direct connection to motor carrier services, and interfered with the market by regulating carriers and requiring them to offer services they didn’t currently supply, working against the federal law which sought to prevent states from substituting their laws for competitive market forces.

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

In this case, the state law is not general, it does not affect truckers solely in their capacity as members of the general public, the impact is significant, and the connection with trucking is not tenuous, remote, or peripheral. The state statutes aim directly at the carriage of goods, a commercial field where carriage by commercial motor vehicles plays a major role.

Concurring: Justice Ginsburg Concurring in part: Justice Scalia

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**PATENT LAW**

*Quanta Computer, Inc. v. LG Electronics, Inc.*

Docket No. 06-937

Reversed: The Federal Circuit

Does the doctrine of patent exhaustion apply to the sale of components of a patented system that must be combined with additional components in order to practice the patented methods?

Yes. Patent exhaustion applies to method claims, and Quanta, the patentee, does not evade patent exhaustion through the provisions in its licensing agreement.

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

By characterizing [Quanta’s] claims as method instead of apparatus claims, or including a method claim for the machine’s patented method of performing its task, a patent drafter could shield practically any patented item from exhaustion. ... Such a result would violate the longstanding principle that, when a patented item is once lawfully made and sold, there is no restriction on its use to be implied for the benefit of the patentee. ... The [LGE-Intel] license agreement authorized Intel to sell products that practiced the LGE Patents. No conditions limited Intel’s authority to sell products substantially embodying the patents. Because Intel was authorized to sell its products to Quanta, the doctrine of patent exhaustion prevents LGE from further asserting its patent rights with respect to the patents substantially embodied by those products.

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**PREEMPTION**

*Chamber of Commerce of United States et al. v. Brown et al.*

Docket No. 06-939

Reversed and remanded: The Ninth Circuit

Are provisions of a California law that prohibit an employer who receives public funds from using the funds to “assist, promote, or deter” union organizing preempted by the National Labor Relations Act (NLRA), a federal law that aims to protect free debate on such issues?

Yes. Free debate on the topic of unionization is desirable, and the provisions in question attempt to regulate in an area Congress intended to be reserved for market freedom.

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

Although the NLRA itself contains no express preemption provision, we have held that Congress implicitly mandated two types of preemption as necessary to implement federal labor policy...[t]he second ... forbids both the National Labor Relations Board (NLRB) and States to regulate conduct that Congress intended “be unregulated because left ‘to be con-
trolled by the free play of economic forces.” [This] preemption is based on the premise that “Congress struck a balance of protection, prohibition, and laissez-faire in respect to union organization, collective bargaining, and labor disputes.” Today we hold that [the California provisions] are preempted under [Machinists] because they regulate within “a zone protected and reserved for market freedom.”

From the dissent by Justice Breyer (joined by Justice Ginsburg):
Although I agree the congressional policy favors “free debate,” I do not believe the operative provisions of the California statute amount to impermissible regulation that interferes with that policy as Congress intended it.

Thus, the BOP is exempt from Ali’s FTCA claim.

From the opinion by Justice Thomas (joined by Chief Justice Roberts and Justices Scalia, Ginsburg, and Alito):
The FTCA provides a waiver of sovereign immunity to … “[a]ny claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer.” … The word “any” is repeated four times. … Congress inserted the word “any” immediately before “other law enforcement officer,” leaving no doubt that it modifies that phrase. … The phrase is disjunctive, with one specific and one general category, not a list of specific items separated by commas and followed by a general or collective term.

From the dissent by Kennedy (joined by Justices Stevens, Souter, and Breyer):
The FTCA allows those who allege injury from governmental actions over a vast sphere to seek damages for tortious conduct. … The plain words of the statute indicate that the exception is concerned only with customs and taxes. … Had Congress intended otherwise, it would have drafted the section to apply to “any law enforcement officer, including officers of customs and excise.” … [Further], a prisoner’s voluntary decision to deliver property for transfer to another facility, for example, bears a greater similarity to a “bailment” than to a “detention.”

From the dissent by Breyer (joined by Justice Stevens):
When I call out to my wife, “There isn’t any butter,” I do not mean, “There isn’t any butter in town.” The context makes clear to her that I am talking about the contents of our refrigerator. It is context, not a dictionary, that sets the boundaries of time, place, and circumstance within which words such as “any” apply. … In this case, not only the immediately surrounding words but also every other contextual feature supports Justice Kennedy’s conclusion.

Argued: February 25, 2008
Decided: March 3, 2008
For Case Analysis: See ABA PREVIEW 232

Are all agency fraud claims, whatever their context, preempted by Buckman Co. v. Plaintiffs’ Legal Committee, 531 U.S. 341 (2001)?
No. An equally divided Court affirmed without opinion the Second Circuit’s judgment limiting Buckman to specifically pleaded administrative fraud claims.

Taking no part in the decision or consideration of this case: Chief Justice Roberts
Does a plaintiff asserting a RICO claim based on mail fraud have to plead and prove that it relied on the defendant’s alleged misrepresentation?

No. Reliance on a RICO mail fraud may help prove causation, but first-party reliance is not necessary to establish a RICO mail-fraud claim.

From the opinion by Justice Thomas (for a unanimous Court):
No showing of reliance is required to establish that a person has violated [RICO] by conducting the affairs of an enterprise through a pattern of racketeering activity consisting of acts of mail fraud. … RICO’s text provides no basis for imposing a first-party reliance requirement. If the absence of such a requirement leads to the undue proliferation of RICO suits, the correction must lie with Congress. It is not for the judiciary to eliminate the private action in situations where Congress has provided it.

Does the District of Columbia’s prohibition on handguns, effected through a ban on carrying an unregistered gun, combined with a ban on registering guns, a license requirement for certain exceptions to the ban, and a requirement that trigger locks be placed on licensed guns in the homes, violate the Second Amendment?

Yes. The Court determined that a reading of the Second Amendment as protecting the right to keep and bear arms only for purposes of a militia is inconsistent with history and precedent. Therefore, the Court held that the Second Amendment should be interpreted as allowing individuals to keep and bear arms for their own purposes rather than just for maintaining a militia, and as such, the District of Columbia ban violates the right when applied to self-defense.

From the dissent by Justice Stevens (joined by Justices Souter, Ginsburg, and Breyer):
The Second Amendment was adopted to protect the right of the people of each of the several States to maintain a well-regulated militia. It was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing army posed an intolerable threat to the sovereignty of the several States. Neither the text of the Amendment nor the arguments advanced by its proponents evidenced the slightest interest in limiting any legislature’s authority to regulate private civilian uses of firearms.

From the dissent by Justice Breyer (joined by Justices Stevens, Souter, and Ginsburg):
The majority’s conclusion is wrong for two independent reasons. The first reason is that set forth by Justice Stevens—namely, that the Second Amendment protects militia-related, not self-defense-related, interests … The second independent reason is that the
protection the Amendment provides is not absolute. The Amendment permits government to regulate the interests that it serves. Thus, irrespective of what those interests are—whether they do or do not include an independent interest in self-defense—the majority’s view cannot be correct unless it can show that the District’s regulation is unreasonable or inappropriate in Second Amendment terms. This the majority cannot do.

SECURITIES LAW

Docket No. 06-43
Affirmed and remanded: The Eighth Circuit

Argued: October 9, 2007
Decided: January 15, 2008
For Case Analysis: See ABA PREVIEW 38

Does § 10(b) of the Securities and Exchange Act give rise to an implied private cause of action against aiders and abettors of securities fraud?

No. § 10(b) only allows for implied causes of action against perpetrators of the fraud, not aiders and abettors. The Court determined that because the investors did not rely on statements or representations made by the respondents, there is no basis for a private cause of action.

From the opinion by Justice Kennedy (joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito): [Our limiting] decision in First Interstate Bank of Denver (1993) led to calls for Congress to create an express cause of action for aiding and abetting within the Securities Exchange Act. … Congress did not follow this course. … The alleged fraud took place in the marketplace for goods and services, not in the investment sphere. … In these circumstances the investors cannot be said to have relied upon any of respondents’ deceptive acts in the decision to purchase or sell securities. … The causation is too remote for liability. …

Further, [such causes of action] allow plaintiffs to extort settlements from innocent companies, … expose a new class of defendants to these risks, … [and this would] raise the costs of doing business. Overseas firms could be deterred from doing business here. This, in turn, may raise the cost of being a publicly traded company and shift securities offerings away from domestic capital markets. The decision to extend the implied cause of action is for Congress, not for us.

From the dissent by Justice Stevens (joined by Justices Souter and Ginsburg):
Charter inflated its revenues by $17. It could not have done so absent the knowingly fraudulent actions of Scientific-Atlanta, Inc., and Motorola, Inc. Investors relied on Charter’s revenue statements in deciding whether to invest in Charter and in doing so relied on respondents’ fraud. … We believe that the integrity of our securities markets is their strength. Investors, both domestic and foreign, trust that fraud is not tolerated in our nation’s securities markets.

Taking no part in the consideration or decision in this case: Justice Breyer

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Taking no part in the consideration or decision in this case: Justice Breyer

Sentencing
Begay v. United States

Docket No. 06-11543
Reversed and remanded: The Tenth Circuit

Argued: January 15, 2008
Decided: April 16, 2008
For Case Analysis: See ABA PREVIEW 194

Was Begay’s driving under the influence of alcohol when he had twelve prior DUI convictions, making the act a felony under State law, a “violent crime” for purposes of the Armed Career Criminal Act which imposes a mandatory minimum sentence of 15 years for felony gun possession by individuals with a history of violent felony offenses?

No. Examining the statute, the Court concluded that because Congress had included examples of the kinds of acts which constitute a “violent crime” (burglary, arson, extortion, or crimes using explosives), and DUI was of a different nature than these, Congress had not meant for the statute to include DUI. If Congress had intended for all potentially dangerous crimes to be covered, it would not have included examples of the kind of activities that constitute a “violent crime.”

From the opinion by Justice Breyer (joined by Chief Justice Roberts and Justices Stevens, Kennedy, and Ginsburg): [F]or purposes of the particular statutory provision before us, a prior record of DUI, a strict liability crime, differs from a prior record of violent and aggressive crimes committed intentionally such as arson, burglary, extortion, or crimes involving the
use of explosives. The latter are associated with a likelihood of future violent, aggressive, and purposeful “armed career criminal” behavior in a way the former are not.

From the dissent by Justice Alito (joined by Justices Souter and Thomas):
Unfortunately, the Court’s interpretation simply cannot be reconciled with the statutory text. … Unlike the Court, I cannot say that persons with these characteristics are less likely to use a gun illegally than are persons convicted of other qualifying felonies.

Concurring in the judgment:
Justice Scalia

Is a state drug offense, punishable by more than one year in prison.

From the unanimous opinion by Justice Ginsburg:
The language and structure of the statute indicate that Congress used the phrase “felony drug offense” as a term of art defined by § 802(44) without reference to § 802(13). First, Congress stated that “[t]he term ‘felony drug offense’ means an offense that is punishable by imprisonment of more than one year … Second, the term “felony” is commonly defined to mean a crime punishable by imprisonment for more than one year.

From the opinion by Justice Stevens (joined by Chief Justice Roberts and Justices Scalia, Kennedy, Souter, Ginsburg, and Breyer):
Regardless of whether the sentence imposed is inside or outside the Guidelines range, the appellate court must review the sentence under an abuse-of-discretion standard. … If the sentence is within the Guidelines range, the appellate court may, but is not required to, apply a presumption of reasonableness. But if the sentence is outside the Guidelines range, the court may not apply a presumption of unreasonableness. It may consider the extent of the deviation, but must give due deference to the district court’s decision that the § 3553(a) factors, on a whole, justify the extent of the variance. The fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court.

Concurring:
Justice Scalia
Concurring: Justice Souter
Dissenting: Justice Thomas

Is the “proportionality test” established in United States v. Claiborne the proper standard for courts of appeal to apply when reviewing the reasonableness of sentences imposed by district judges?

No. All sentences, whether below, within, or above the Federal Sentencing Guidelines are to be reviewed with a deferential abuse-of-discretion standard, as established by United States v. Booker. This decision overturns the Claiborne decision supporting the “proportionality test.”

From the dissent by Justice Alito:
Appellate review for abuse of discretion is not an empty formality. A decision calling for the exercise of judicial discretion “hardly means that it is unfettered by meaningful standards or shielded from thorough appellate review.” And when a trial court is required by statute to take specified factors into account in making a discretionary decision, the trial court must be reversed if it “ignored or slighted a factor that Congress has deemed pertinent.”
When a trial judge commits plain error, can a U.S. Court of Appeals act on its own initiative to increase a defendant’s sentence?

No. Absent a government appeal or cross appeal, the appellate court cannot increase a defendant's sentence.

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

In our adversary system, we follow the principle of party presentation. … Parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief. … Courts do not, nor should not, sally forth each day looking for wrongs to right. … The cross-appeal rule, pivotal in this case, is both informed by, and illustrative of, the party presentation principle. Under that unwritten but longstanding rule, an appellate court may not alter a judgment to benefit a non-appealing party.

From the dissent by Justice Alito (joined by Justice Stevens, and joined in part by Justice Breyer):

I view the cross-appeal requirement as a rule of appellate practice [not affecting subject matter jurisdiction]. It is akin to the rule that courts invoke when they decline to consider arguments that the parties have not raised. Both rules rest on premises about the efficient use of judicial resources and the proper role of the tribunal in an adversary system. … I do not understand why a reviewing court should enjoy less discretion to correct an error sua sponte than it enjoys to raise and address an argument sua sponte. … We should entrust the decision to initiate error correction to the sound discretion of the courts of appeals.

From the concurring opinion by Justice Breyer:

Our precedent precludes the creation of an exception to the cross-appeal requirement based solely on the obviousness of the lower court’s error.

From the dissent by Justice Alito (joined by Justice Stevens, and joined in part by Justice Breyer):

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From the majority decision by Justice Stevens (joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito):

Although the Guidelines, as the “starting point and the initial benchmark,” continue to play a role in the sentencing determination, there is no longer a limit comparable to the one at issue in Burns on the variances from Guidelines ranges that a District Court may find justified under the sentencing factors set forth in 18 U.S.C. § 3553(a).

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

To deprive the parties of notice of previously unidentified grounds for a variance would today “render[r] meaningless” the parties’ right to comment on “matters relating to [an] appropriate sentence.” Burns, 501 U.S., at 136 (internal quotation marks omitted). To deprive the parties of notice would today subvert Rule 32’s purpose of “promoting focused, adversarial resolution” of sentencing issues. In a word, it is not fair. Id., at 137.
Did the Fourth Circuit err in finding that a sentence below the guidelines given by the Sentencing Commission, which uses a 100-to-1 ratio for sentencing crack cocaine offenders versus powder cocaine offenders, was per se unreasonable?

**Yes.** The Court ruled that under *United States v. Booker*, the guidelines are advisory only, and are but one among several considerations a court may use when determining a sentence for a drug offense.

**From the opinion by Justice Ginsburg** (joined by Chief Justice Roberts and Justices Stevens, Scalia, Kennedy, Souter, and Breyer): Indeed, the Commission itself has reported that the crack/powder disparity produces disproportionately harsh sanctions, i.e., sentences for crack cocaine offenses “greater than necessary” in light of the purposes of sentencing set forth in § 3553(a). Given all this, it would not be an abuse of discretion for a district court to conclude when sentencing a particular defendant that the crack/powder disparity yields a sentence “greater than necessary” to achieve § 3553(a)’s purposes. …

**From the dissent by Justice Thomas:** I continue to disagree with the remedy fashioned in *United States v. Booker*, 543 U.S. 220, 258-265 (2005). The Court’s post-*Booker* sentencing cases illustrate why the remedial majority in *Booker* was mistaken to craft a remedy far broader than necessary to correct constitutional error. The Court is now confronted with a host of questions about how to administer a sentencing scheme that has no basis in the statute. Because the Court’s decisions in this area are necessarily grounded in policy considerations rather than law, I respectfully dissent.

**Concurring: Justice Scalia**

**Dissenting: Justice Alito**

Should the recidivist enhancements (stricter penalties for repeat offenses) affixed to a defendant’s past drug sentences count toward the threshold of “serious drug offenses” (those with a “maximum term of imprisonment of ten years or more”) pursuant to the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(A)(ii)?

**Yes.** The Supreme Court agreed with the government that the “maximum term of imprisonment … prescribed by law” for a “serious drug offense” under the ACCA includes recidivist enhancements.

**From the opinion by Justice Alito** (joined by Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Breyer): When a defendant is given a higher sentence under a recidivism statute—or for that matter, when a sentencing judge, under a guidelines regime or a discretionary sentencing system, increases a sentence based on the defendant’s criminal history—100% of the punishment is for the offense of...
conviction. None is for the prior convictions or the defendant’s “status as a recidivist.” The sentence “is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because [it is] a repetitive one.”

**From the dissent by Justice Souter** (joined by Justices Stevens and Ginsburg): [I]t may have been natural for Congress to think of state recidivism schemes, but it may well not have been. If there is anything strange about ignoring enhanced penalties, there is something at least as strange about a federal recidivist statute that piles enhancement on enhancement, magnifying the severity of state laws severe to begin with.

**SIXTH AMENDMENT**  
**Giles v. California**  
Docket No. 07-6053  
Vacated and remanded: Supreme Court of California

Argued: April 22, 2008  
Decided: June 25, 2008  
For Case Analysis: See ABA PREVIEW 364

Does a defendant forfeit his Sixth Amendment right to confront a witness against him when a judge has determined that a wrongful act by the defendant made the witness unavailable to testify at trial?

No. The forfeiture exception is only available when the defendant had the purpose or design to prevent the witness from testifying. Therefore, because intent was not considered by the courts below, the Supreme Court remanded this case so that they might investigate whether the defendant had the purpose to prevent his ex-girlfriend from testifying against him when she was murdered.

**From the opinion by Justice Scalia** (joined in full by Chief Justice Roberts and by Justices Thomas and Alito, and joined in part by Justices Souter and Ginsburg): The guarantee of confrontation is no guarantee at all if it is subject to whatever exceptions courts from time to time consider “fair.” It is not the role of courts to extrapolate from the words of the Sixth Amendment to the values behind it, and then to enforce its guarantees only to the extent they serve (in the courts’ views) those underlying values. The Sixth Amendment seeks fairness indeed—but seeks it through very specific means (one of which is confrontation) that were the trial rights of Englishmen. It “does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts.”

Concurring: Justice Thomas  
Concurring: Justice Alito  
Concurring in part: Justice Souter (joined by Justice Ginsburg)

**From the dissent by Justice Breyer** (joined by Chief Justice Roberts and Justices Stevens, Kennedy, Souter, Ginsburg, and Alito):  
The Constitution permits judges to take realistic account of the particular defendant’s mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so. That is to say, the Constitution permits States to insist upon representation by counsel for those who are competent enough to stand trial but suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.

**SIXTH AMENDMENT**  
**Indiana v. Edwards**  
Docket No. 07-208  
Vacated and remanded: The Supreme Court of Indiana

Argued: March 26, 2008  
Decided: June 19, 2008  
For Case Analysis: See ABA PREVIEW 257

Does every defendant who has been found mentally competent to stand trial have a Sixth Amendment right to represent himself at trial without an attorney?

No. The Constitution does not forbid states from insisting upon representation by counsel for those who are competent enough to stand trial but suffer from severe mental illness to the point where they

(Continued on Page 428)
are not competent to conduct trial proceedings by themselves.

From the dissent by Justice Scalia (joined by Justice Thomas):
The Court today concludes that a State may strip a mentally ill defendant of the right to represent himself when that would be fairer. In my view, the Constitution does not permit a State to substitute its own perception of fairness for the defendant’s right to make his own case before the jury—a specific right long understood as essential to a fair trial. … A defendant who is competent to stand trial, and who is capable of knowing and voluntary waiver of assistance of counsel, has a Constitutional right to conduct his own defense.

SIXTH AMENDMENT
Rothgery v. Gillespie County, Texas
Docket No. 07-440
Vacated and remanded:
The Fifth Circuit

Argued: March 17, 2008
Decided: June 23, 2008
For Case Analysis: See ABA PREVIEW 286

Does the Sixth Amendment right to counsel, which has been held to attach at the first appearance before a judicial officer, require that a prosecutor be aware of or involved in the proceedings?

No. The right to counsel exists as soon as the State’s role against the accused becomes adversarial, and this is at a first appearance before a judicial officer, whether or not a public prosecutor knows of the appearance or is involved in the proceedings.

From the opinion by Justice Souter (joined by Chief Justice Roberts and Justices Stevens, Scalia, Kennedy, Ginsburg, Breyer, and Alito):
We merely reaffirm what we have held before and what an overwhelming majority of American jurisdictions understand in practice: a criminal defendant’s initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel.

Concurring: Chief Justice Roberts, joined by Justice Scalia
Concurring: Justice Alito, joined by Chief Justice Roberts and Justice Scalia
Dissenting: Justice Thomas

SPECIAL EDUCATION
Board of Education of the City School District of New York v. Tom F.
Docket No. 06-637
Affirmed: The Second Circuit

Argued: October 1, 2007
Decided: October 10, 2007
For Case Analysis: See ABA PREVIEW 8

Do the 1997 amendments to the Individuals with Disabilities Act bar children who have not previously attended a public school from receiving tuition reimbursement for the cost of private schooling?

May a defendant assert a violation of his Sixth Amendment right to counsel if his attorney participates in a plea hearing by speaker phone, without any showing it has led to injustice or that counsel’s performance was otherwise deficient?

No. The Court held that for counsel’s performance to be assumed ineffective, it must be so clear that no attorney could have performed adequately under the circumstances that an inquiry into whether or not counsel was effective would not be necessary. This was not the case, and nothing in the record indicates lack of performance by counsel.

From the per curiam opinion:
Even if we agree with Van Patten that a lawyer physically present will tend to perform better than one on the phone, it does not necessarily follow that mere telephone contact amounted to total absence or “prevented [counsel] from assisting the accused,” so as to entail the application of [United States v. Cronic, 466 U.S. 648 (1984)]. The question is not whether counsel in those circumstances will perform less well than he otherwise would, but whether the circumstances are likely to result in such poor performance that an inquiry into its effects would not be worth the time.
The Court, with no written opinion, affirmed the Second Circuit’s decision to remand the case for further proceedings in light of the Second Circuit’s decision in Frank G. v. Board of Education of Hyde Park, 459 F.3d 356 (2d Cir. 2006).

Taking no part in the decision: Justice Kennedy

May the accused in a criminal tax evasion case claim non-taxable return of capital status for distributions made from a corporation without providing evidence that the return of capital was the intent of either the corporation or the recipient?

Yes. Determining tax liability depends upon economic realities; whether the corporation made a profit is the decisive fact in determining tax consequences for what a recipient claims is return of capital, and this is independent of intent. Willfulness is still an element of criminal tax evasion that must be proven; it is not relevant, however, for determining whether a distribution is a capital return or dividend.

From the unanimous opinion by Justice Souter:
A corporation may make a deliberate distribution to a shareholder, with everyone expecting a profitable year and considering the distribution to be a dividend, only to have the shareholder end up liable for no tax if the company closes out its tax year in the red (so long as the shareholder’s basis covers the distribution); when such facts are clear at the time the reporting forms and returns are filed, the shareholder does not violate § 7201 by paying no tax on the moneys received, intent being beside the point. And since intent to make a distribution a taxable one cannot control, it would be odd to condition nontaxable return-of-capital treatment on contemporaneous intent, when the statute says nothing about intent at all.

Argued: January 8, 2008
Decided: March 3, 2008
For Case Analysis: See ABA PREVIEW 156

May railroads challenge state methods of property valuation for tax assessment in order to show a discriminatory determination of fair market value under the Railroad Revitalization and Regulatory Reform Act (4-R Act)?

Yes. The Court concludes that the 4-R Act’s prohibition on a state’s disproportionate tax assessment of railroad property, established by noting at least a 5% higher assessment to true market value ratio when compared with other commercial and industrial property in the tax district, allows courts to investigate valuation methodology because otherwise, the courts would be forced to accept the state’s choice of a tax valuation method and would only have the power to ensure mathematical precision in that method.

From the unanimous opinion by Chief Justice Roberts:
Given the extent to which the chosen methods can affect the determination of value, preventing courts from scrutinizing state valuation methodologies would render [the 4-R Act] a largely empty command. It would force district courts to accept as “true” the market value estimated by the State, one of the parties to the litigation. States, in turn, would be free to employ appraisal techniques that routinely overestimate the market worth of railroad assets. By then levying taxes based on those overestimates, States could implement the very discriminatory taxation Congress sought to eradicate. On Georgia’s reading of the statute, courts would be powerless to stop them, and the Act would ultimately guarantee railroads nothing more than mathematically accurate discriminatory taxation.

Argued: November 5, 2007
Decided: December 4, 2007
For Case Analysis: See ABA PREVIEW 64

(Continued on Page 430)
Can a state enforce a differential tax scheme that imposes state income tax on interest from out-of-state municipal bonds (bonds financing public works) but exempts from income tax its own bonds’ interest without offending the Commerce Clause?

Yes. The Court rejected the argument that Kentucky’s differential taxation violates the dormant Commerce Clause (which prohibits economic protectionism).

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

It follows a fortiori from United Haulers that Kentucky must prevail. In United Haulers, we explained that a government function is not susceptible to standard dormant Commerce Clause scrutiny owing to its likely motivation by legitimate objectives distinct from the simple economic protectionism the Clause abhors … This logic applies with even greater force to laws favoring a State’s municipal bonds, given that the issuance of debt securities to pay for public projects is a quintessentially public function … Bonds place the cost of a project on the citizens who benefit from it over the years, and they allow for public work beyond what current revenues could support. Bond proceeds are thus the way to shoulder the cardinal civic responsibilities listed in United Haulers: protecting the health, safety, and welfare of citizens.

Concurring: Justice Stevens
Concurring in part: Chief Justice Roberts and Justice Scalia
Concurring in the judgment: Justice Thomas

From the dissent by Justice Kennedy (joined by Justice Alito):

In the only part of the Court’s opinion that commands a majority the main point is that validation of Kentucky’s tax exemption follows from the Court’s opinion last Term in United Haulers. But that overlooks the argument that was central to the entire holding of United Haulers. There the Court concluded the ordinance applied equally to interstate and in-state commerce—and so it applied without differentiation between in-state and out-state commerce—because the government had monopolized the waste processing industry. See United Haulers, 550 U.S., at ___ (slip op., at 1). Nondiscrimination, not just state involvement, was central to the rationale. That justification cannot be invoked here, for discrimination against out-of-state bonds is the whole purpose of the law in question.

Dissenting: Justice Alito

Does the stamp-tax exemption statute (§ 1146(a)), which usually applies to transactions that occur under bankruptcy settlements, apply to transactions that occur prior to court confirmation of a settlement?

No. Although the text of the statute could be seen as somewhat ambiguous, the natural reading of the language and canons of interpretations lead to the conclusion that tax-exempt status may only apply to those transfers that have been confirmed by a bankruptcy court.

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

The most natural reading of § 1146(a)’s text, the provision’s placement within the Code, and applicable substantive canons all lead to the same conclusion: Section 1146(a) affords a stamp-tax exemption only to transfers made pursuant to a Chapter 11 plan that has been confirmed. Because Piccadilly transferred its assets before its Chapter 11 plan was confirmed by the Bankruptcy Court, it may not rely on § 1146(a) to avoid Florida’s
stamp taxes. Accordingly, we reverse the judgment below and remand the case for further proceedings consistent with this opinion.

**From the dissent by Justice Breyer (joined by Justice Stevens):**

The Bankruptcy Code provides that the “transfer” of an asset “under a plan confirmed under section 1129 of this title, may not be taxed under any law imposing a stamp tax or similar tax.” In this case, the debtor’s reorganization “plan” provides for the “transfer” of assets. But the “plan” itself was not “confirmed under section 1129 of this title” until after the “transfer” of assets took place. Hence we must ask whether the time of transfer matters ... In my view ... the statutory phrase applies “under a plan” that at the time of transfer either already has been or subsequently is “confirmed.”

**TAXATION**

Knight, Trustee of William L. Rudkin Testamentary Trust v. Commissioner of Internal Revenue

Docket No. 06-1286
Affirmed: The Second Circuit

Argued: November 27, 2007
Decided: January 16, 2008
For Case Analysis: See ABA PREVIEW 100

Are advisory fees incurred in the administration of a trust or an estate subject to a 2 percent floor required for itemizing deductions under § 67(e) of the Tax Code?

**Yes.** In general, advisory fees for trusts are subject to the 2 percent floor. The Court rejected the claim that the test should be whether the cost could not have been incurred if the property were not held in trust and instead held that the only costs which are not subject to the 2 percent floor are those which would not have been incurred if the property were not held in such trust.

**From the unanimous opinion by Chief Justice Roberts:**

§ 67(e) sets forth the general rule “Trusts can ordinarily deduct costs subject to the same 2% floor that applies to individuals’ deductions. ... [Except when,] the relevant cost must be “paid or incurred in connection with the administration of the ... trust. And the cost must be one “which would not have been incurred if the property were not held in such trust.” ... It is conceivable that a trust may have an unusual investment objective, or may require a specialized balancing of the interests of various parties, such that a reasonable comparison with individual investors would be improper. In such a case, the incremental cost of expert advice beyond what would normally be required for the ordinary taxpayer would not be subject to the 2% floor. Here, however, the Trust has not asserted that its investment objective or its requisite balancing of competing interests was distinctive. Accordingly, the investment advisory fees incurred by the Trust are subject to the 2% floor.

Are Mead and Lexis sufficiently integrated to constitute a “unitary business” susceptible to apportioned taxation of the multistate business?

**No.** The Court determined that Lexis, before its sale to a third-party creating the purportedly taxable capital gains claimed by Illinois, was not a unitary part of Mead’s multistate business because it lacked the “hallmarks of a unitary relationship ... functional integration, centralized management, and economies of scale,” established in Mobil Oil Corp. v. Commissioner of Taxes of Vt., 445 U.S. 425.

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

The conclusion that the asset served an operational function was merely instrumental to the constitutionally relevant conclusion that the asset was a unitary part of the business being conducted in the taxing State rather than a discrete asset to which the State had no claim. Our decisions in Container Corp. and Allied-Signal did not announce a new ground for the constitutional apportionment of extrastate values in the absence of a unitary business. Because the Appellate Court of Illinois
interpreted those decisions to the contrary, it erred.

Concurring: Justice Thomas

TAXATION
United States v. Clintwood Elkhorn Mining Co. et al.
Docket No. 07-308
Reversed: The Federal Circuit

Argued: March 24, 2008
Decided: April 15, 2008
For Case Analysis: See ABA PREVIEW 248

May taxpayers suing for a refund of taxes collected in violation of the Export Clause of the Constitution proceed under the Tucker Act when the Internal Revenue Code statute of limitations for their claim for a refund action has run?

No. The Supreme Court reaffirmed its stance that (1) the Code has a broad sweep, encompassing constitutional claims, (2) Congress may disallow suit against the government until administrative procedures are exhausted, even in the case of constitutional claims and (3) constitutional claims, just as any others, may be time-barred.

From the unanimous opinion by Chief Justice Roberts:
“The outcome here is clear given the language of the pertinent statutory provisions. Title 26 U.S.C. § 7422(a) states that ‘[n]o suit … shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund … has been duly filed with’ the IRS. Here the companies did not file a refund claim with the IRS for the 1994–1996 taxes, and therefore may bring ‘[n]o suit’ in ‘any court’ to recover ‘any internal revenue tax’ or ‘any sum’ alleged to have been wrongfully collected ‘in any manner.’”

Argued: January 9, 2008
Decided: April 28, 2008
For Case Analysis: See ABA PREVIEW 149

Does Indiana’s voter ID law facially violate the Constitution?

No. A balancing test between the State’s interests in deterring and detecting voter fraud and in protecting public confidence in elections and the burdens placed on individual voters favors Indiana being allowed to require citizens voting in person to present photo identification.

From the opinion by Justice Stevens (joined by Chief Justice Roberts and Justice Kennedy):
A facial challenge must fail where the statute has a plainly legitimate sweep. When we consider only the statute’s broad application to all Indiana voters we conclude that it imposes only a limited burden on voters’ rights. The precise interests advanced by the State [of protecting the integrity and the reliability of the electoral process] are therefore sufficient to defeat petitioners’ facial challenge.

From the concurring opinion by Justice Scalia (joined by Justices Thomas and Alito): Strict scrutiny is appropriate only if the burden is severe. … [These] burdens are no more than the different impacts of the single burden that the law uniformly imposes on all voters. To vote in person in Indiana, everyone must have and present a photo identification that can be obtained for free. The State draws no classifications, let alone discriminatory ones, except to establish optional absentee and provisional balloting for certain poor, elderly, and institutionalized voters and for religious objectors. … A case-by-case approach … [requires] detailed judicial supervision of the election process [and] would flout the Constitution’s express commitment of the task to the States.

From the dissent by Justice Souter (joined by Justice Ginsburg):
Indiana’s law does no more than assure that any in-person voter fraud will take place with fake IDs. … The State’s requirements here, that people without cars travel to a motor vehicle registry and that the poor who fail to do that get to their county seats within 10 days of every election, translate into unjustified economic burdens uncomfortably close to the outright $1.50 fee we struck down 42 years ago [in Harper v. Virginia Bd. of Elections,]. Like that fee, the onus of the Indiana law is
illegitimate just because it correlates with no state interest so well as it does with the object of deterring poorer residents from exercising the franchise.

From the dissent by Justice Breyer:
While the Constitution does not in general forbid Indiana from enacting a photo ID requirement, this statute imposes a disproportionate burden upon those without valid photo IDs.
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Burden/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, constitutionsal 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.
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Funding for this issue has been provided by the American Bar Association Fund for Justice and Education; we are grateful for its support. The views expressed in this document are those of the authors and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association, the Fund for Justice and Education, or the Standing Committee on Public Education.

ISSN 0363-0048

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