ANALYZING THE COURT’S DECISIONS FOR THE 2008–09 TERM, INCLUDING ...

THE ROBERTS COURT AS UNNOTICED THRILLER
As always, constitutional scholar Douglas W. Kmiec brings a lot to the plate. In this issue he surveys the largely low-profile 2008 term and finds much vigor on the bench. He touches upon all the term’s big issues—the Voting Rights Act, Title VII, age discrimination, questions of torture in the War on Terror, the Confrontation Clause, search and seizure, sentencing, DNA evidence, free speech, environmental law, and business law. He assesses Justice Souter’s legacy. He analyzes and offers an appreciation for Justice Roberts’s leadership. He previews the 2009 term. And he places it all in the context of the sweep of recent Supreme Court history.

FOREST GROVE: GOOD NEWS FOR THE PARENTS OF STUDENTS WITH SPECIAL NEEDS
For the each of the past three terms, the rights of an important and historically underrepresented population—students with special needs—have earned the Supreme Court spotlight. In 2006, the Court held that a non-attorney expert witness’s fees are not recoverable from the state under the act’s fee-shifting provision. In 2007, the justices declared that parents also enjoy rights under the act and thus are entitled to prosecute Individuals with Disabilities Education Act’s claims on their own behalf. Now Prof. Jay Grenig explains the history of the act and the Court’s 2009 decision interpreting the provisions regarding parents’ right to reimbursement for private education tuition.

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 2008 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 and dissent.
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Case highlights are arranged by topical area and include reports on the outcome of every case previewed prior to oral argument in PREVIEW Issues 1–7. In the interests of readability, most citations and internal quotes are omitted from the highlights, which can also be located via the alphabetical and subject indexes beginning on page 518. This term’s highlights were prepared by Jeanna Sather.
Despite the retirement of Justice Souter and the president’s nomination of Judge Sonia Sotomayor to replace him—and even despite the Court’s unusual decision to schedule a rare September (re)argu-
ment session—the 2008 term was perhaps most remarkable for its lack of fireworks.

In “The Roberts Court as Unnoticed Thriller,” PREVIEW contributing editor Douglas W. Kmiec attributes much of this calm to Chief Justice Roberts. According to Professor Kmiec, the Chief Justice has brought “new esteem and confidence to the work of the Court, and more largely, the judicial branch.”

Still, as Tom Goldstein’s statistical analysis shows, the Court remains as divided as ever—the average decision by the Court this term found 2.04 justices in dissent, exceeding last term’s 1.86 average. Mr. Goldstein notes that in light of Justice Souter’s retirement, two 5-4 splits were particularly telling: Vaden v. Discover Bank and Oregon v. Ice. In breaking down the votes in these cases (both of which were written by Justice Ginsburg) and examining all the other various voting blocs, Mr. Goldstein sheds light on the implications of a new Justice joining the Court this fall.

Professor Richard L. Hasen’s “Free Speech v. Campaign Finance Laws: The Reargument” addresses a surprising bridge to the 2009 term. Citizens United v. Federal Elections Commission is being reargued—and in September, well before the traditional first Monday in October. Professor Hasen was the author of our preview of the March arguments in Citizens United, a campaign finance case involving a documentary that attacked Hillary Rodham Clinton. Now he offers an update on the rearguments docketed for September 9. He concludes that the Court’s order for supplemental briefing indicates that it is at least seriously reconsidering the constitutionality of the McCain-Feingold limitations placed on corporate-funded election broadcasts in the period before elections.

Meanwhile, Professor Jay Grenig shows us how the Court has begun to define the education rights of children with special needs and their families. The Court’s most recent dip into special education law, Forest Grove School District v. T.A., clarified that the parents of children with special needs may seek reimbursement for private school tuition if their public school district has failed to provide the child with an individualized education plan and the necessary services. As Professor Grenig explains, the Court has used this opportunity to make some important distinctions and connections in the previously sparse history of special education case law.

As always, this summer issue features PREVIEW’s Case Highlights, which give you a quick picture of what happened in every one of the cases we previewed prior to oral argument in Issues 1–7 and include selected quotes from the majority and dissenting opinions. This year’s highlights were once again prepared by Jeanna Sather, a third-year law student at the University of St. Thomas School of Law in Minneapolis, Minnesota.

Before the next term begins, we urge you to visit the PREVIEW website, www.supremecourtpreview.org, and check out all of the new features we have added over the course of the 2008 term. This includes follow-up interviews with selected PRE-
VIEW authors responding to the events at oral argument and the sign-up for a weekly e-newsletter notifying you of new merits and amicus briefs as they become available on PREVIEW’s website.

Lastly, the editors would like to note that over the years the ABA Division for Public Education (in general) and PREVIEW (in particular) have had no better friend than Professor Douglas W. Kmiec. A professor of constitutional law and the Caruso Family Chair in Constitutional Law at Pepperdine University School of Law, Doug has served as PREVIEW’s contributing editor for constitutional law for two wonderful decades.

It is therefore with great pride and not a little sadness that with this issue we bid farewell to Doug, who upon Senate confirmation will be assuming his new post as this country’s ambassador to Malta. We wish Professor Kmiec the very best.

The Editors
The justices issued 75 merits opinions after argument this term, up from the three most recent terms. The number of decisions after argument for previous terms are 67 for the 2007 term, 68 for the 2006 term, and 71 for the 2005 term. For the 2004 term, the justices issued 76 opinions after argument.

The justices decided 79 cases in total this term, including four summary reversals. The numbers for previous terms are 71 for the 2007 term, 72 during the 2006 term, 82 during the 2005 term, and 80 during the 2004 term.

The Court reversed or vacated the lower court in 60 of 79 cases (75.9 percent) and affirmed in 16 (20.3 percent). It is important to note that one decided case was an original action, so there was no lower court decision to either affirm or reverse.

These figures are significantly different from the previous term, when the Court reversed or vacated the lower court decision in 66 percent of cases and affirmed the lower court in 34 percent of cases. But for the 2006 term, similarly, the Court reversed or vacated the lower court decision in 73 percent of cases and affirmed the lower court in 25 percent of cases.

The Court again considered more cases from the Ninth Circuit—16 of 79 cases (20.3 percent)—than any other Court, an increased proportion from the previous term, when the Ninth Circuit supplied 14.1 percent of the Court's docket. This year, the Court vacated or reversed the Ninth Circuit in 13 of 16 cases (81.3 percent), which is in line with the 80 percent and 86 percent reversal rates for the previous two terms.

State courts accounted for the second largest percentage of the docket (19 percent). Fifteen cases were considered this session, up from 11 in 2007 and seven in 2006. Eleven decisions from state courts of last resort were reversed, a rate of 73.3 percent.

The Second Circuit came next with nine cases on the docket (11.4 percent), up from seven the previous year. Only two Second Circuit cases were reversed during the 2007 term, or 28.6 percent; this term, seven were reversed, or 77.8 percent. This year, seven circuits had all of their decisions reversed: the Fourth (six cases), Sixth (five cases), Seventh (one case), Eighth (four cases), Tenth (two cases), the D.C. Circuit (one case), and the Federal Circuit (four cases). This is a radical change from last term, when the Tenth Circuit was the only circuit with a 100 percent reversal rate (two cases). The one case to come from district court this term—Northwest Austin Municipal Utility District No. 1 v. Holder—was reversed; in 2007, both cases that came from district court were also reversed.

The Eleventh Circuit, on the other hand, had a 100 percent affirmance rate, with the High Court upholding all three cases (Herring v. United States, Dean v. United States, and Atlantic Sounding Co. v. Townsend).

In 23 opinions this term (29.1 percent), the Court split 5-4 on a significant issue. As with the reversal rates, the Court's patterns this term are more analogous to 2006 than 2007. Last term, 17 percent of opinions were 5-4 (including a 5-3 vote and excluding the two equally divided opinions); in 2006, 33 percent of cases were divided by a 5-4 margin.

Thomas C. Goldstein co-heads the Supreme Court practice at Akin Gump Strauss Hauer & Feld in Washington, D.C. Since 2003, he has been principally responsible for SCOTUSblog (www.scotusblog.com), which is devoted to coverage of the Court and is widely recognized as one of the nation’s leading Supreme Court blogs. He can be reached at tgoldstein@akingump.com or (202) 887-4060.
The percentage of unanimous decisions increased slightly from last term, but was lower than many recent terms. This term, 15 of 79 opinions (19 percent) were fully unanimous decisions (i.e., decisions with no dissent or concurrence) and 26 (32.9 percent) had no dissenting vote. Last term, only 11 of 71 cases (15 percent) were fully unanimous and there was no dissenting vote in a total of 30 percent of the decisions. In the 2006 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.

With a low proportion of unanimity and an increased number of 6-3 decisions (13 cases, compared to 2007's 10 cases or 2006's three cases), the number of dissenting votes across all cases this term is particularly high. An average decision by the Court this term found 2.04 justices in dissent, far exceeding last term's 1.86 average.

Sixteen decisions (69.6 percent) in which voting split 5-4 were divided along ideological lines, with either the “left” (Justices Stevens, Souter, Breyer, and Ginsburg) or “right” (Chief Justice Roberts along with Justices Scalia, Thomas, and Alito) holding and Justice Kennedy casting the decisive vote. As there were twice as many 5-4 decisions this term than last, this rate has stayed consistent: in the 2007 term, eight of the 12 cases (67 percent) counted as 5-4 were divided ideologically. But this term, the right took Justice Kennedy in 11 cases and the left prevailed in only five. This is a major difference from last term, in which Justice Kennedy voted with the right and the left blocs four times each.

Justice Kennedy yet again cast the most majority votes in 5-4 cases (18), but both he and Justice Scalia wrote five 5-4 opinions. Justice Scalia had 16 votes in 5-4 majorities and Justice Thomas had 15. Justices Stevens and Thomas each authored three 5-4 opinions. Justice Breyer was left out of the most sharply divided cases this term: he cast the fewest votes in 5-4 majorities (nine) and wrote no 5-4 opinions.

The chief justice was the only member of the right to never break ideological lines in 5-4 cases; this stands in contrast to the 2007 term, during which he three times voted with mixed majorities. The Apprendi and Blakely Five (Justices Scalia, Thomas, Ginsburg, Stevens, and Souter) made up the majority in two 5-4 criminal justice cases this term, voting together in Melendez-Diaz v. Massachusetts and Arizona v. Gant.

Perhaps the two most unique 5-4 splits, with resonance for Justice Souter's retirement, were Vaden v. Discover Bank and Oregon v. Ice, both written by Justice Ginsburg. In Vaden, on federal courts' jurisdiction to compel arbitration, Justice Ginsburg's majority opinion was joined by Justices Souter, Kennedy, Scalia, and Thomas, with Chief Justice Roberts filing a partial dissent joined by Justices Stevens, Breyer, and Alito. In Oregon, Justices Ginsburg, Stevens, Breyer, Kennedy, and Alito voted to reverse and remand the lower court's ruling for the defendant, and Justice Scalia filed a dissenting opinion joined by Chief Justice Roberts and Justices Souter and Thomas.

Chief Justice Roberts and Justice Alito had a remarkable rate of agreement, voting together in whole, in part, or in the judgment in 73 of 79 cases, or 92 percent. Last term, the chief justice and Justice Alito had an 88 percent agreement rate. In contrast, the greatest level of agreement between any two justices on the left was 87 percent (Justices Stevens and Souter). In 86 percent of all cases, Justices Stevens and Ginsburg voted together, as did Justices Souter and Ginsburg. Looking at divided cases throws this difference in voting patterns between the right and left more into relief: of the 53 opinions with at least one dissenting vote, Justices Stevens and Souter voted together 81 percent of the time, but the chief justice and Justice Alito voted together 89 percent of the time.
This term, the chief justice and Justice Scalia voted together 87 percent of the time, as did Justices Scalia and Thomas, Justices Scalia and Alito, and Justices Kennedy and Alito. Justice Kennedy hewed much closer to the right than the left this term, as he also did last term. With an 86 percent agreement rate, Justice Kennedy and the chief justice voted together in only one fewer case (68) than Justice Scalia and the chief justice. In contrast, Justice Kennedy’s greatest rate of agreement with any justice on the left was 77 percent with Justice Breyer. He agreed with Justice Stevens in only 59 percent of all cases (and with Justice Souter in 66 percent and Justice Ginsburg in 67 percent).

Both this term and last, Justice Kennedy voted more frequently with Justice Alito and the chief justice than Justice Thomas did. This year, Justice Thomas agreed with Justice Alito in 85 percent of cases and the chief justice in 82 percent. Last term, Justice Thomas agreed with both Justice Alito and the chief justice in 79 percent of all cases, while Justice Kennedy agreed 88 percent and 84 percent, respectively.

Justice Stevens disagreed more than he agreed with Justice Thomas (agreeing in 46 percent in all cases and only 19 percent of divided cases), with Justice Alito (48 percent in all cases and only 23 percent in divided cases), and with Justice Scalia (the same). Justices Souter and Alito (51 percent) and the chief justice and Justice Stevens (51 percent) came close to that record. Justice Ginsburg voted with each the chief justice and Justices Thomas and Alito in 53 percent of cases.

Justice Breyer agreed with almost every justice less frequently this term than he did last, except for a 1 percent increase with Justice Thomas (58 percent) and Justice Ginsburg (81 percent).

With 73 out of 79 votes cast in the majority (92.4 percent), Justice Kennedy was the significant leader of this term. He also significantly outpaced his voting record from last term (85 percent).

Following Justice Kennedy’s lead was Justice Scalia (83.5 percent) and then Justices Thomas and Alito and Chief Justice Roberts, who each voted 81 percent with the majority. With Justice Ginsburg at 69.6 percent, Souter at 68.4 percent, and Stevens at 64.6 percent, the far left of the bench slipped even further out of the majority than last term, in which Justice Souter cast 76.8 percent votes in the majority and Justices Stevens and Ginsburg each cast 75.4 percent. But this percentage is still far greater than Justice Stevens’s 37 percent share of majority votes in 2006.
SPLITS IN DECISIONS

- **Unanimous or 9-0**: 26 cases (32.9%)
- **8-1**: 4 cases (5.1%)
- **7-2**: 13 cases (16.5%)
- **6-3**: 13 cases (16.5%)
- **5-4**: 23 cases (29.1%)

OPINION AUTHORSHIP: SUMMARY

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FIVE-TO-FOUR CASES: ALIGNMENTS

Ginsburg, Stevens, Breyer, Kennedy, Alito – 1 case (4.3%)
Ginsburg, Souter, Kennedy, Scalia, Thomas – 1 case (4.3%)
Ginsburg, Stevens, Souter, Breyer, Thomas – 1 case (4.3%)
Ginsburg, Stevens, Souter, Scalia, Thomas – 2 cases (8.6%)
Ginsburg, Stevens, Souter, Breyer, Scalia – 2 cases (8.6%)
Ginsburg, Stevens, Souter, Breyer, Kennedy – 5 cases (21.7%)
Ginsburg, Souter, Kennedy, Thomas, Alito – 11 cases (47.8%)

CIRCUIT SCORECARD—FEDERAL COURTS AND STATE COURTS

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* This list does not include cases that were dismissed after argument, were remanded with directions to dismiss, or will be reargued.
What to say of a Supreme Court term that ended largely unnoticed under the cover of Michael Jackson’s unexpected demise, a South Carolina governor gone wild—well, at least not hiking—and the end of Minnesota’s Senate race, all only seven months after the polls closed? The Court did its work and left town—no major blockbuster delivered. Not even the scheduling of a Supreme Court confirmation hearing to replace the retiring David Souter is sufficient to draw our attention. Too bad, because the Court did some nifty things.

Borrowing from Tom Goldstein, we know that the Court decided 75 opinions on the merits and four by summary disposition. Once again, the Ninth Circuit supplied the most work (about 20 percent of the docket), and in compensation received an 81 percent reversal rate. Those of you from other circuits who may be chuckling at this should refrain. Seven circuits had all of their decisions reversed—of course a 100 percent reversal rate of fewer cases under review still is a smaller absolute number of reversals.

Justice Kennedy remains the pivot point on this 4-1-4 divided Supreme Court—which, of course, is not breaking news. Ho hum, Kennedy was in the majority more than anyone else on the Court—in 73 of 79 cases—with Justices Stevens and Ginsburg in the majority the least, but they do not have to stand in the corner. The ideological differences shouldn’t be overstated since even Ginsburg and Stevens were in agreement with the majority 75.4 percent of the time. The chief justice and Justice Alito kept up their friendship, agreeing with each other in 92 percent of the cases. In a fitting correction of a public misperception, Mr. Goldstein indicates that while he often is in profound disagreement with Justice Thomas, “if you believe that Supreme Court decisionmaking should be a contest of ideas rather than power, so that the measure of a Justice’s greatness is his contribution of new and thoughtful perspectives that enlarge the debate, then Justice Thomas is now our greatest Justice.”

The compliment paid Justice Thomas by Mr. Goldstein is well-deserved, but there is a larger point: Chief Justice Roberts has brought new esteem and confidence to the work of the Court, and more largely, the judicial branch. Some of this may be merely a function of the intelligent confidence and clarity that he personally exudes, but it is reasonable to think that it is also at least a public acceptance of the chief’s umpire metaphor for the Court, no matter how much law professors such as myself insist that, in a given case, it understates the extent to which the indeterminacy of the law surpasses the infield fly rule. It is undeniable that prior to John Roberts there were persistent claims that the Court was beyond repair and needing to have its jurisdiction curtailed because of one incurable offense of activism or another. Senator John McCain made an effort to revive these complaints during the presidential campaign, but the effort fell flat. Presently, while claims of judicial overreach have been raised anew in the run-up to Judge Sotomayor’s confirmation hearing, they remain far less compelling than they once seemed.
At a point early in his service, the chief justice mentioned to me how he had been doing some serious study of his predecessors who sat in the center chair. How, he asked, would members of the academy and other serious scholars and practitioners of the law evaluate the success of a chief justice? This was then, and is now, a highly responsible and commendable inquiry, especially from someone whose national service is anticipated to be as extended as that of Chief Justice Roberts. Yet, as the chief justice learned, the inquiry was one not regularly explored in legal scholarship, except by indirection in the praise or criticism of the particular line of cases. The number of cases heard and the efficiency with which they were dispatched was a possible but problematic measure. Scholars would applaud the late Chief Justice Rehnquist for his attention to timeliness, but also complain of opaque or insufficient reasoning. We legal academics are natural complainers, but incomplete analysis does complicate later litigation and often invites it.

John Marshall is commonly described as “the great Chief Justice.” Few would begrudge Marshall that title in light of how much of the Court’s institutional place in our then embryonic constitutional scheme required his perceptive and formative hand. Marshall’s ability to have the Court speak with one voice especially caught the eye of Chief Justice Roberts. However, in terms of achieving consensus, Marshall had some advantage over his successor two centuries removed. By virtue of the difficulty of travel, the justices at the founding populated the same boarding house while they were in session, and whether by a friendship borne of these proximate quarters or the wine consumed at common table (conference?), Marshall got his way virtually the entire time of his 34-year service. Marshall did institutionalize the practice of having one exposition rather than a series of opinions speak for the majority, but that was no guarantee against concurrences, full or partial. While Marshall seldom found himself in dissent by virtue of the Federalist composition of the bench, Roberts obviously cannot count on this uniformity of view, and given the refined nature of the legal disputes encountered today, it is salutary that such agreement is not automatic.

Nevertheless, Chief Justice Roberts elected to adopt a variant of the Marshall approach as his self-imposed standard. In a speech given at the Georgetown Law School, he urged upon his fellow justices the obligation to speak as an institution and to avoid unnecessarily divided rulings. A few of Roberts’s colleagues less than cooperatively muttered privately—and sometimes publicly: “fat chance.” Moreover, Roberts did not have his brethren under lock and key in the same boarding house, and without Marshall’s habit of buying wine by the “pipe” (a barrel equivalent), the chief justice would need to soberly devise an alternative method. He did: the facial/as-applied distinction—upholding a law in general while leaving for another day possibly troubling applications. See, e.g., Gonzales v. Carhart, 550 U.S. 124, 127 S.Ct. 1610 (2007) (upholding the Partial-Birth Abortion Ban Act of 2003 on its face); Crawford v. Marion County Election Bd., 128 S.Ct. 1610, 170 L. Ed. 2d 574 (2008) (upholding Indiana statute requiring voters to show identification on its face). It is by this means that the chief justice secures harmony among a membership on the Court whose natural habitat is 5-4, with Justice Kennedy capable of bilocation.

The flourishing of this methodology took on a new wrinkle last term in Northwest Austin Municipal Utility District No. One (NAMUDNO) v. Holder, 77 U.S.L.W. 4539 (U.S. June 22, 2009), rev’g 573 F. Supp. 2d 221 (D.D.C. 2008) (testing the validity of the 25-year extension of the Voting Rights Act (VRA)). This was billed as the Court’s headliner case. Following the oral argument, the betting was that a 5-4 Court would find the impediments to minority access to the ballot a thing of the past and invalidate its 25 year extension. After all, judicial notice would be myopic if it ignored the strength of minority representation in Congress or the very popular man occupying the Oval Office, who arrived there with scarcely a mention of race, except to collectively pat ourselves on the national back for having traveled far.

Surprise! Only Justice Thomas boldly concluded in NAMUDNO that racial progress made the VRA unnecessary. Chief Justice Roberts may well have been nodding agreement with Thomas silently, but the lineup of the Court would not permit that sweeping result. The next best thing? Persuade seven justices to uphold the VRA as-applied to the small utility district and simply avoid the constitutional difficulty today by construing the statute as allowing the utility district’s possible exemption. At the same time, Roberts could insert the far more judicially deferential signal to Congress that absent some retooling—narrowing the geo-

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graphic scope of jurisdictions covered or giving more latitude for electoral changes without pre-clearance and certainly by updating the evidence or lack of evidence for discrimination—section 5 of the VRA would be blue-penciled—call it a case of prospective facial invalidity.

Of course, in any term—and the last one was no exception—when the chief justice is able to count to 5 for his view, he takes it. Some may question whether this is consistent with his design on unity, but every new clerk of the Supreme Court hears the story of Justice Brennan saying the most important thing to know about clerking is how to count to 5, and this is not a less an easily lost upon a former clerk returned as its chief member. In any event, no sense doing everything tomorrow, and a good example is the other supposed term highlight: *Ricci v. DeStefano*, 2009 WL 1835138, 09 Cal. Daily Op. Serv. 8212 (U.S. June 29, 2009), rev’g 530 F.3d 87 (2d Cir. 2008).

In *Ricci*, the city of New Haven said it feared statutory liability under Title VII of the Civil Rights Act for using an employment exam with a racially disparate impact. Justice Alito would doubt this fact in a separate concurrence, and since the case came up on summary judgment, arguably the other evidence of the city just caving into political pressure by influential minority politicians could not be disregarded. As the majority would see it, even if the city had some fear of being sued, they did not have a fear of liability sufficient to justify tossing out tests that the white firefighters generally passed. For the city not to rely on the test it would need a strong basis in the evidence that the test was adopted for discriminatory purpose or was otherwise flawed; otherwise the white firefighters who passed would be subjected to disparate treatment on the basis of race, which is also unlawful under the statute.

*Ricci* stands at that awkward dividing line between discrimination and preference. The disparate impact theory of liability that Congress enacted into the 1991 Civil Rights Act for using an employment exam with a racially disparate impact. Justice Alito would doubt this fact in a separate concurrence, and since the case came up on summary judgment, arguably the other evidence of the city just caving into political pressure by influential minority politicians could not be disregarded. As the majority would see it, even if the city had some fear of being sued, they did not have a fear of liability sufficient to justify tossing out tests that the white firefighters generally passed. For the city not to rely on the test it would need a strong basis in the evidence that the test was adopted for discriminatory purpose or was otherwise flawed; otherwise the white firefighters who passed would be subjected to disparate treatment on the basis of race, which is also unlawful under the statute.

Sotomayor has seen the matter differently and more akin to the dissent.

The intellectual difficulty posed by *Ricci* is real but also a bit stale in the sense that its recital never seems directed at compromise or common ground. The Equal Protection Clause forbids intentional discrimination on the basis of race. When an employer, public or private, intentionally changes an employment practice so as to have a consciously different racial outcome than the one that results from the administration of a test or some other employment practice, why, say conservatives, isn’t that an equal protection violation? In a separate concurring opinion, for example, Justice Scalia laid out this difficulty in detail and all but said that he would find the Constitution to be violated whenever disparate impact is relied upon to do anything other than to smoke out bad intent. He wrote:

> The difficulty is this: Whether or not Title VII’s disparate-treatment provisions forbid “remedial” race-based actions when a disparate-impact violation would not otherwise result—the question resolved by the Court today—it is clear that Title VII not only permits but affirmatively requires such actions when a disparate-impact violation could otherwise result. But if the Federal Government is prohibited from discriminating on the basis of race, *Bolling v. Sharpe*, 347 U. S. 497, 500 (1954), then surely it is also prohibited from enacting laws mandating that third parties—e.g., employers, whether private, State, or municipal—discriminate on the basis of race. Title VII’s disparate impact provisions place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes. That type of racial decision making is ... discriminatory.”

To the dissent, authored by Justice Ginsburg, what is missing from Justice Scalia’s concurring—and arguably from the majority’s reasoning in *Ricci* as well—is a sense of context. Specifically, Ginsburg and the dissenters point to a noticeable racial disparity between the population of African Americans and Hispanics in New Haven and the composition of the firefighting force. For example, when 30 percent of New Haven’s population was of minority race, the number of minority firefighters was less than 5 per-
cent. There were even fewer officers (at one point, 1 out of 107). The dissent believes that when an employment test entrenches these disparities, it was Congress’s intent in Title VII to supply the most logical remedy—the elimination of the test. Eliminating a test that severely limits minority opportunity may, in this zero-sum context, mean fewer openings for majority candidates, but the dissent reasons, why is it that majority citizens would think they had a constitutional entitlement to positions obtained under such racially suspicious circumstances? Except for counting noses, there the debate stalemates, with the two sides seeing different realities from the same facts.

The retiring Justice Souter—more about him below—was in the dissent, so having Judge Sotomayor replace him would hypothetically be numerically without effect. Moreover, while this essay is being penned prehearing, appellate Judge Sotomayor cannot fairly be faulted for siding with what turned out to be the Court’s dissenting view—though watch her opposition try to defeat her on this basis. This is a nonstarter: under Second Circuit precedent, “the intent to remedy the disparate impact of a promotional exam ‘is not equivalent to an intent to discriminate against nonminority applicants.’” Ricci, 2009 WL 1835138 at 38 (Ginsburg, J., dissenting) (quoting Ricci v. DeStefano, 554 F. Supp. 2d 142, 157 (D. Conn. 2006) (citing Hayden v. County of Nassau, 180 F.3d 42, 51 (2d Cir. 1999)). As Justice Ginsburg recounts, “had New Haven gone forward with certification and been sued by aggrieved minority test takers, the City would have been forced to defend tests that were presumptively invalid.” Id.

Is there some way beyond this typical conservative-liberal impasse? Arguably, yes, but it depends upon less formalism by both sides and a working appreciation for the real, not speculative, effects of the type of ongoing deprivation associated with racial disparities faced by minorities seeking a career as a firefighter in the city of New Haven. On the minority side, there must be a reasonable recognition of the limits of such effects such that neither side of the dispute feels entitled to a position. As in most cases of civil rights, the allocation of the burden of proof will frequently determine the outcome. Given the contextual disparities recited by Justice Ginsburg and Congress’s deliberate effort to expand civil rights protection in the face of earlier narrow interpretations by the Supreme Court in the late 1980s, it is questionable whether the greater burden of evidence was properly placed upon the excluded minority—or in this case—the city of New Haven that had taken up the minority firefighters’ interest.

President Obama seems to be striving for a similar balance in indicating that in cases where there is patent or long-standing racial disparity associated with a hiring practice, affirmative action is appropriate, but should be administered in a way less likely to give rise to reverse discrimination complaints. For example, while Obama did not directly contradict or criticize the majority in Ricci, he did suggest that the city could have been more proactive and selected testing mechanisms less likely to perpetuate racial entrenchment. Neighboring communities of New Haven, for example, had paid more attention to the oral and clinical examinations of prospective firefighters. Even apart from race, a written exam describing a course of action in an emergency may not be the best means of ascertaining who is more likely to be able to think on their feet in the event of an actual emergency.

The point is: the extreme conservative formalism of declaring equal protection to be an individual, rather than a group, right fails to take account of injuries that only manifest themselves across group data. By the same token, liberal formalism that claims the vestiges of past discrimination never to be exhausted transforms the Equal Protection Clause or similar statutory guarantee into an entitlement preference without limit. In nominating Judge Sotomayor, part of the president’s thinking is that a person whose direct personal experience and legal training has had to contend with that delicate balance is more likely to get it right—that is, satisfactory.

Other civil rights matters were also disposed of last term. Five justices made it more difficult to prove age discrimination. In most civil rights claims—those based on race or gender, for example—it is enough for a plaintiff to demonstrate that the prohibited factor motivated an employer’s action. In Gross v. FBL Financial Services, Inc., 129 S.Ct. 2343 (2009), the Court favored employers confronting an aging population, holding under the Age Discrimination in Employment Act (ADEA) that age must be shown by the plaintiff as the decisive factor. Another 5-4 opinion, authored

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by Justice Thomas, 14 Penn Plaza v. Pyett, 129 S.Ct. 1456 (2009), upheld a union mandate for the arbitration of statutory discrimination claims in a collective bargaining agreement. Previous decisions thinking ill of arbitration were said to be superseded.

In the “how quickly we forget” column, there were only a few war on terror-related cases that made it to judgment. Perhaps that’s because the terminology of “war on terror” has gone out of fashion, even if America’s determination to help allies and ourselves be free of the scourge of terrorism is undiminished. Most notably, civil rights claims failed, 5-4, against high-ranking government officials—the AG and the FBI director—when detainees of Arabic descent were said to have insufficient facts showing their direct participation in alleged torture and abuse following 9/11. Ashcroft v. Iqbal, 129 S.Ct. 1937 (2009). Mere knowledge of bad acts is not enough for civil rights damages, said Justice Kennedy.

In California seems to be waterboarding his way in the opposite direction, ruling that so-called dirty bomber José Padilla could keep a similar suit alive against Berkeley Law Prof. John Yoo, whose personal involvement is alleged to be greater than that of his superiors. Padilla v. Yoo, No. C 08-00035 J FIFTH SW, 2009 WL 1651273 (N.D. Cal. 2009).

Criminal defendants other than former attorneys general fared less well overall last term, and law enforcement cases remained a plentiful staple of the Court. The criminal defense bar, however, scored a major victory in the term’s final days when Justice Scalia split from the usual conservative five. The ruling in Melendez-Dias v. Massachusetts, 2009 WL 1789468, 09 Cal. Daily Op. Serv. 7994 (U.S. June 25, 2009), rev’g 870 N.E.2d 676 (Mass. App. Ct. 2007), will certainly complicate the work of state and federal prosecutors everywhere. In Melendez-Dias, the Court declared over a rare dissent authored by Kennedy and joined by Roberts, Alito, and Breyer that lab reports are “testimonial,” and as a consequence, defendants can demand that the technicians—often significantly more than one—who analyzed and handled the evidence be cross-examined in Court under the Sixth Amendment Confrontation Clause.

Illustrating further how criminal cases challenge ideological assumptions, Justice Ginsburg held for a unanimous bench that a passenger in a stopped vehicle may be ordered out for a pat-down if reasonably believed to be armed and dangerous. Arizona v. Johnson, 129 S.Ct. 781 (2009). But the more conservative five did have their way elsewhere. The exclusionary rule was trimmed, with the Court allowing for a negligent error by a police clerk who had wrongly confirmed the existence of an arrest warrant. Herring v. United States, 128 S.Ct. 1221 (2008). The mistake was said not to contaminate the evidence found since the error was “nonrecurring and attenuated” from the kind of conduct the rule is designed to deter.

If this qualifying language is removed, the significance of the Herring decision becomes much greater, as it seemingly allows for a good-faith exception for police error in the application of the exclusionary rule. In theory, Herring might come to be read as even allowing for officer mistakes in the factual assessment of probable cause. Should that come to pass, there would be little left for the exclusionary rule upon which to operate.

A majority decided not to extend the Apprendi rule—that facts other than a prior conviction be decided by juries—to a judge’s decision to have a sentence run separately, rather than concurrently. Oregon v. Ice, 129 S.Ct. 711 (2009). DNA may be capable of proving innocence, but 5-4, there is no constitutional right to gain access to such evidence, at least post-conviction. District Attorney’s Office v. Osborne, 129 S.Ct. 2308 (2009).

Finally, in keeping with the Roberts Court methodology of avoiding difficult issues that lack a consensus answer, consider the Court’s elaboration of the government speech doctrine to avoid having to grapple with the complex and fact-specific Establishment Clause cases. In Pleasant Grove v. Summum, 129 S.Ct. 1125 (2009), Justice Alito wrote for a unanimous Court finding that Pleasant Grove could refuse acceptance of a religious monument for the city’s park even as the park already included a Ten Commandments monument and close to a dozen other more secular displays. The offerors of the monument of the “Seven Aphorisms” (teachings of the Gnostic Christian Church) argued that the park was a public forum in which the city had to accept all comers, subject only to content-neutral time, place, and manner limits. Justice Alito did not deny that the park was a public forum, but thought that forum analysis did not apply since “the placement of a permanent monument in a public park is best viewed as a form of government speech.”
So, did the city even have to explain its refusal? It’s not clear, but the city did anyway, saying the other monuments—most of which were also privately donated—related to the city’s history or organizations that had longstanding ties to the community. These justifications received virtually no attention because, said Justice Alito, when the government is “engaging in its own expressive conduct, the Free Speech Clause has no application.” The government spoke here by dictating the terms of the acceptance of monuments.

But if that’s the case, isn’t there an Establishment Clause problem with accepting one religious monument, but not another? No, said the Court, because the fact that a monument is seen as religious by a particular viewer does not suggest that this is the meaning the government wants to convey. Said the justice, a city with an art museum doesn’t necessarily agree with the artist. Well, all right, but isn’t the museum then better understood as a public forum? If nebulous government expression frees the government from observing the many carefully constructed categories of protected speech, just about any claim of the government speaking would seem to prove far too much, would it not? In particular, what does the Court’s explanation do to the endorsement test for religious displays?

Justices Stevens and Ginsburg concurred in the Court’s opinion, calling it “persuasive,” but were hesitant about expanding the government speech doctrine, which they describe as of “doubtful merit.” Distinguishing Rust, these justices wrote that this case did not implicate an expansion of the government speech doctrine, which they said was limited by the Establishment Clause and, somewhat cryptically, the Equal Protection Clause as well.

Justices Scalia and Thomas also concurred in the Alito opinion, but wrote separately to suggest the Establishment Clause hurdle could be surmounted, pointing out the Van Orden case that allowed government speech in favor of the Ten Commandments for reasons of history or secular message (prevention of delinquency).

Justice Breyer wrote separately to express the view that the government speech doctrine be understood as a flexible rule of thumb that inquired into the purpose of free speech in the setting. He envisions a balancing test measuring the burden on speech against the government’s interest. In this particular case, Justice Breyer’s pragmatic balance favored the government since too many monumental things in a park spoil its recreational purpose.

Justice Souter concurred only in the judgment, noting that the Court’s analysis just papered over the Establishment Clause problems, which for him include improper endorsement or favoritism. Souter would call upon the reasonable objective observer to know where the limit to government speech immunity from the First Amendment may ultimately be.

Well, who will call upon the reasonable objective observer next term in the absence of Justice Souter? Since the highly subjective balancing nature of the reasonable objective observer’s observations have been regularly criticized by Justice Kennedy, it may be that the hypothetical observer will be following Justice Souter, who, as noted earlier, retired. The Court does have a fascinating religious display case next term in Buono v. Kempthorne, 527 F.3d 758 (9th Cir. 2008), cert. granted sub nom. Salazar v. Buono, 129 S.Ct. 1313 (Feb. 23, 2009) (No. 08-472), in which a Christian cross was displayed on National Preserve property as a war memorial and the National Park Service disallowed other religious symbols. That favoritism violated the Establishment Clause, concluded the Ninth Circuit, and it didn’t matter that there was a subsequent effort to sell the parcel underneath the memorial to a private entity—the intent behind the sale, said the lower court still favored religion.

The Roberts Court has hardly had an opportunity to say anything about the Establishment Clause, and Salazar may permit that. However, the plaintiff in the case is a former Park Service employee who had no personal objection to the cross and who no longer works in its vicinity—suggesting that the reason the Court may have taken the case is not to opine on the meaning of religion under the Constitution, but to further close the door to plaintiffs raising Establishment Clause cases, having already done so by narrowing taxpayer standing in Hein v. Freedom From Religion Foundation, Inc., 551 U.S. 587, 127 S.Ct. 2553 (2007).

The Court did reject an environmental case on standing grounds last term in Summers v. Earth

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Neither the individual nor the environmental group could show that in this case although both sought to come within the broad contours of environmental standing by suggesting that they intended to and had concrete plans to visit the area affected. That wasn’t good enough because the essence of the plaintiffs’ challenge was that the failure of the government to follow notice and comment procedure would lead to damage and their injury. The argument of harm derived from the failure of the Forest Service to have the benefit of the plaintiffs’ commentary was too remote to establish injury for the majority. And a denial to participate in a certain procedural practice was not enough either. Wrote Justice Scalia: “a procedural right in vacuo—is insufficient to create Article III standing. Only a person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy.” Id. at 1151 (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 562 (1992)).

There was more to the term, of course. The justices found a due process recusal obligation for elected judges who accept disproportionate campaign finance help from a party with cases before them, Caperton v. A.T. Massey Coal Co., Inc., 129 S.Ct. 2252 (2009), and reasoned that a strip search of a 13-year-old girl in the schoolhouse on suspicion of possession of painkillers violated her right to privacy under the Fourth Amendment. Safford Unified School Dist. No. 1 v. Redding, 2009 WL 1789472, 09 Cal. Daily Op. Serv. 7974 (U.S. June 25, 2009), aff’d in part & rev’d in part 531 F.3d 1071 (9th Cir. 2008). Both cases win the common sense award, but there still was disagreement over where exactly the recusal line falls and whether the school district might be liable for the search. Neither case seems destined to be the cornerstone of expansive, long-lasting jurisprudence.

In a similar way, the body of work associated with David Souter, who retired from the Court after 19 years of service, seldom seems destined to become a landmark, though like those children in nearby Lake Wobegon, it is polite to say that they’re all above average. Souter was appointed to the bench when an intra-conservative spat kept the seat from being occupied by Kenneth Starr, and Souter’s best friends just happened to be the close advisers to then President George H.W. Bush. Souter came to the Court with mostly state judicial experience, so he both surprised and disappointed his conservative patrons, who expected him to be a vote in favor of overturning Roe v. Wade. Instead, Justice Souter helped turn the mind of Justice Kennedy, and together with Justice O’Connor they fashioned a case that keeps most of the abortion litigation from returning to the Supreme Court, since the lower federal courts and state courts are fully capable of deciding what kind of regulation is and is not an undue burden of the abortion right.

David Souter was a particularly tenacious and insightful judge during oral argument. He will be especially missed in that setting. By contrast, his opinions were more prosaic, but they will need to be contended with in church-and-state cases, where he articulated a strong claim for securality, and should the Court decide to reexamine the closely decided Eleventh Amendment cases dealing with state sovereign immunity, Justice Souter’s comprehensive, historically accurate, and honest assessment that would limit such immunity to diversity cases would likely carry the day. How then is Chief Justice Roberts doing? From the judicially restrained standpoint of the president who appointed him: Quite well, actually. With consistent support from Justice Alito, he has lowered the profile of the Court using his influence on case selection and by concentrating his colleagues on lawyer’s work rather than policy making by implied right. In the area of racial preference, he has held a five-justice majority disfavoring it. Finally and strategically, by deciding cases in which a more conservative perspective was unlikely to hold five, he has steered the Court...
toward a higher level of generality or narrower rulings, leaving controversial applications to lower courts and thereby waiting to fight another day. In this way he has attracted the stronger allegiance of Justice Kennedy and achieved as much institutional unity as can be derived from a bench evenly divided between polar opposite inclinations.

While not discussed at any length here, Chief Justice Roberts is also a reliable friend to business. This year he expressed that by being part of five cases that narrowly construed environmental authority: in one case, Burlington Northern and Santa Fe Railway Co. v. U.S., 129 S.Ct. 1870 (2009), limiting liability for distributors of toxic materials; in another, Coeur Alaska, Inc. v. Southeast Alaska Conservation Council, 77 U.S.L.W. 4559 (U.S. June 22, 2009), rev’g 486 F.3d 638 (9th Cir. 2007), approving of the utilization of cost-benefit analysis in the regulation of water cooling structures and issuing permits for dumping dredge or fill in Alaska lakes without meeting the more stringent environmental documentation; as earlier discussed, limiting expansive claims of standing; and thus far he has refused to construct new substantive due process rights for business or nonbusiness alike.

The Roberts Court returns from summer vacation early on September 9 to hear Citizens United v. Federal Election Commission, No. 08-205 (U.S. cert. granted Nov. 14, 2008), a case nominally dealing with the issue of whether the movie Hillary is a political advertisement but as now scheduled to be reargued. The justices will also ponder whether the First Amendment is consistent with restricting certain corporate and labor campaign spending. By then, Judge Sotomayor will likely be the 111th justice of the United States.

There will be much to do in the new term. In addition to the cross display case already mentioned, Salazar, and campaign finance, Citizens United, the Court has already accepted—for the first time in the Roberts era—a claimed regulatory taking of private property, Walton County v. Stop Beach Renourishment, Inc., 998 So. 2d 1102 (Fla. 2008), cert. granted sub nom. Stop Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection, 77 U.S.L.W. 3544 (U.S. June 15, 2009) (No. 08-1151). Not yet granted are gun right and partial birth abortion petitions that will likely prove too hard to resist. Both issues have been before the Court before, but then, return business is a hallmark of the Roberts Court.

Like those signs in the corner store: “Thanks for your patronage; come back again.”
In recent years, and again during the past term, the Supreme Court has begun to look at the rights of an important population of children, those with disabilities. First, the Court considered two special education cases during the 2006 and 2007 terms. Declaring that Spending Clause legislation that attaches conditions to a state’s acceptance of federal funds must provide clear notice of conditions, the Court held, in a 5-4 decision, that a non-attorney expert’s fees for services rendered to prevailing parents in an Individuals with Disabilities Education Act (IDEA) action are not “costs” recoverable from the state under the IDEA’s fee-shifting provision. Arlington Central School District Board of Education v. Murphy, 548 U.S. 291 (2006). Later, in Winkelman ex rel. Winkelman v. Parma City School District, 550 U.S. 516 (2007), the Supreme Court held that because parents enjoy rights under IDEA, they are entitled to prosecute the IDEA claims on their own behalf. In the 2009 term, the Supreme Court decided a third special education case, this time regarding parents’ right to reimbursement for private education tuition under the IDEA (20 U.S.C. §§ 1400-1482).

The IDEA seeks to ensure that all disabled children have access to a free appropriate public education (FAPE). While the IDEA does not require public schools to maximize the potential of disabled children, they must provide such children with meaningful access to education. A FAPE under the IDEA must include special education and related services tailored to meet the unique needs of a particular child and must be reasonably calculated to enable the child to receive educational benefits.

The IDEA does not require a school district “to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency [usually the school district] made a free appropriate public publication available to the child and the parents elected to place the child in such private school or facility.” 20 U.S.C. § 1412(a)(1)(C)(i). However, if a public school fails in its obligation under the IDEA to provide a FAPE to a disabled child, the parents may enroll the child in a private school and seek reimbursement from the school district for the cost of the private school. This can be done without the consent of the public school if the child “previously received special education and related services under the authority of the district.” 20 U.S.C. § 1412(a)(1)(C)(ii).

Nevertheless, this wasn’t a settled issue, and up until this most recent Supreme Court term, remained in flux. Prior to 1997, the IDEA was silent with regard to private school reimbursement, but courts had granted such reimbursement as “appropriate” relief under principles of equity pursuant to 20 U.S.C. § 1415(i)(2)(C), which provides that a court “shall grant such relief as the court determines appropriate” for violation of the IDEA. See School Committee of Town of Burlington v. Dept. of Education, 471 U.S. 359 (1985); see also Florence County School Dist. 4 v. Carter ex rel. Carter, 510 U.S. 7 (1993). Congress amended the IDEA in 1997 to include a new section entitled “Payment for education of children...
enrolled in private schools without consent of or referral by the public agency.” 20 U.S.C. § 1412(a)(10)(C). Clause (ii) of the new statutory section states:

If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

Even with this new statutory language, the circuit courts of appeal have still been split regarding reimbursement for private school tuition. The Second Circuit ruled that, when a student’s enrollment in private school was appropriate for his needs, the IDEA did not preclude reimbursement although the student had not previously received special education and related services from public schools. Frank G. v. Board of Education of Hyde Park, 459 F.3d 356 (2d Cir. 2006). The Eleventh Circuit, in M.M. v. School Board of Miami-Dade County, 437 F.3d 1085 (11th Cir. 2006), held that a school district’s “[s]ole reliance on the fact that [a child] never attended public school was legally insufficient to deny reimbursement under § 1412(a)(10) (C)(ii)” because of the broad equitable powers of courts and hearing officers under 20 U.S.C. § 1415. The court stated that “even when a child has never enrolled in a public school, reimbursement is proper if the School Board [has] failed to offer a sufficient IEP and in turn, a FAPE.”

In Greenland School District v. Amy N., 358 F.3d 150, 159-60 (1st Cir. 2004), the U.S. Court of Appeals for the First Circuit observed that “tuition reimbursement is only available for children who have previously received ‘special education and related services’ while in the public school (or perhaps those who at least timely requested such services while the child is in public school.” However, in that case, the parents removed their daughter from public school and placed her in private school “without ever before raising with the school officials the issue of special education services for [their daughter].”

On the other hand, the Ninth Circuit took a different view. In Forest Grove School District v. T.A., 523 F.3d 1078 (9th Cir. 2008), the Ninth Circuit held that students who have not previously received special education services are nonetheless eligible for tuition reimbursement under an IDEA provision (20 U.S.C. § 1415(i) (2)(C)) authorizing appropriate relief.

The Supreme Court affirmed the Ninth Circuit in Forest Grove School District v. T.A., 2009 WL 1738644 (U.S. June 22, 2009). The Supreme Court had previously declined to grant certiorari in the Second Circuit’s Hyde Park decision even though it presented the same issue as Forest Grove. However, Justice Kennedy did not participate in the Hyde Park certiorari decision whereas he joined the majority in Forest Grove.

The case is a compelling story of a set of parents’ persistent efforts to deal with the myriad problems of an adolescent son. T.A. attended public schools in the Forest Grove School District (the District) from the time he was in kindergarten through the winter of his junior year of high school. From kindergarten through eighth grade, T.A.’s teachers observed he had trouble paying attention in class and completing his assignments. When T.A. entered high school, his difficulties increased.

In December 2000, during T.A.’s freshman year, his mother contacted the school counselor to discuss T.A.’s problems with his schoolwork. At the end of the school year, a school psychologist evaluated T.A. After interviewing T.A., examining his school records, and administering cognitive ability tests, the psychologist concluded T.A. did not need further testing for any learning disabilities or other health impairments, including attention deficit hyperactivity disorder (ADHD). The psychologist and two other school officials discussed the evaluation results with T.A.’s mother in June 2001, and all agreed T.A. did not qualify for special education services. T.A.’s parents did not seek review of that decision.

With extensive help from his family, T.A. completed his sophomore year at Forest Grove High School, but his problems worsened the following year. In February 2003, T.A.’s parents discussed with the school district the possibility of T.A.’s completing high school through a partnership program with the local community college. They also

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sought private professional advice, and in March 2003 T.A. was diagnosed with ADHD and a number of disabilities related to learning and memory. Advised by the private specialist that T.A. would do best in a structured, residential learning environment, T.A.’s parents enrolled him in a private academy focused on educating children with special needs.

Four days after enrolling T.A. in private school, T.A.’s parents hired a lawyer to determine their rights and to give the District written notice of T.A.’s private placement. A few weeks later, in April 2003, T.A.’s parents requested an administrative due process hearing regarding T.A.’s eligibility for special education services. In June 2003, the District engaged a school psychologist to assist in determining whether T.A. had a disability that significantly interfered with his educational performance. T.A.’s parents cooperated with the District during the evaluation process. In July 2003, a multidisciplinary team met to discuss whether T.A. satisfied the IDEA’s disability criteria and concluded he did not because his ADHD did not have a sufficiently significant adverse impact on his educational performance. The District maintained that T.A. was not eligible for special education services and therefore it declined to provide an individualized education program (IEP). (An IEP is an education plan tailored to a child’s unique needs that is designed by the school district in consultation with the child’s parents after the child is identified as eligible for special education services.)

T.A.’s parents consequently kept him enrolled at the private academy for his senior year.

The administrative review process resumed in September 2003, when T.A.’s parents brought the case before a hearing officer to challenge the District’s decision to classify T.A. as being ineligible for special education services and asking for reimbursement for the private school tuition. After considering the parties’ evidence, including the testimony of numerous experts, the hearing officer issued a decision in January 2004 finding that T.A.’s ADHD adversely affected his educational performance and that the District had failed to meet its obligations under the IDEA by not identifying T.A. as a student eligible for special education services. Because the District did not offer T.A. a FAPE and his private school placement was appropriate under IDEA, the hearing officer ordered the District to reimburse T.A.’s parents for the cost of the private school tuition.

The District in turn sought judicial review, arguing the hearing officer erred in granting reimbursement. The district court accepted the hearing officer’s findings of fact but set aside the reimbursement award after finding that the IDEA 1997 amendments categorically bar reimbursement of private school tuition for students who have not “previously received special education and related services under the authority of a public agency.” The district court further held that, “[e]ven assuming that tuition reimbursement may be ordered in an extreme case for a student not receiving special education services, under general principles of equity where the need for special education was obvious to school authorities,” the facts of this case do not support equitable relief.

T.A.’s parents appealed to the U.S. Court of Appeals for the Ninth Circuit. The Ninth Circuit reversed and remanded for further proceedings, noting that, prior to the 1997 Amendments, “IDEA was silent on the subject of private school reimbursement, but courts had granted such reimbursement as ‘appropriate’ relief under principles of equity pursuant to 20 U.S.C. § 1415(i)(2)(C).” Forest Grove School District v. T.A., 523 F.3d 1078 (9th Cir. 2008). The court then held that the amendments do not impose a categorical bar to reimbursement when a parent unilaterally places a child who has not previously received special education services through the public school. Rather, such students “are eligible for reimbursement, to the same extent as before the 1997 amendments, as ‘appropriate’ relief pursuant to § 1415(i)(2)(C).”

The court of appeals also rejected the district court’s analysis of the equities as resting on two legal errors. First, because the district court found that § 1412(a)(10)(C)(ii) generally bars relief in these circumstances, the court of appeals held that the district court was wrong when it stated that relief was appropriate only if the equities were sufficient to “override” that statutory limitation. According to the court of appeals, the district court also erred in asserting that reimbursement is limited to “extreme” cases. The court of appeals remanded the case to the district court with instructions to reexamine the equities, including the failure of T.A.’s parents to notify the District before removing T.A. from public school.
The U.S. Supreme Court granted the District’s petition for review. Reversing the Ninth Circuit, the Supreme Court, in a 6-3 vote, held that the 1997 amendments to the IDEA did not categorically bar reimbursement of private education tuition where a child had not previously received special education and related services.

The Court began by examining School Committee of Burlington v. Department of Educ. of Mass., 471 U.S. 359 (1996). In that case, a father challenged the appropriateness of the IEP developed for his child by public school officials. His child had previously received special education services through the public school. While administrative review was pending, private specialists advised the father that his child would do best in a specialized private educational setting. The father enrolled his child in private school without the school district’s consent. The hearing officer concluded the IEP was not adequate to meet the child’s educational needs and the school district had failed to provide the child a FAPE. Finding also that the private school placement was appropriate under IDEA, the hearing officer ordered the school district to reimburse the father for the cost of the private school tuition.

At that time, the IDEA made no express reference to the possibility of reimbursement, but instead authorized a court to “grant such relief as the court determines is appropriate.” In determining the scope of the relief authorized, the Court noted that “the ordinary meaning of these words confers broad discretion on the court” and that, absent any indication to the contrary, what relief is “appropriate” must be determined in light of the Act’s broad purpose of providing children with disabilities a FAPE, including through publicly funded private school placements when necessary. Accordingly, the Court held that the provision’s grant of authority includes “the power to order school authorities to reimburse parents for their expenditures on private special-education services if the court ultimately determines that such placement, rather than a proposed IEP, is proper under the Act.”

The Court in Forest Grove observed that its decision in Burlington rested in part on the fact that administrative and judicial review of a parent’s complaint often takes years. The Burlington Court concluded that, having mandated that participating states provide a FAPE for every student, Congress could not have intended to require parents to either accept an inadequate public school education pending adjudication of their claim or bear the cost of a private education if the court ultimately determined that the private placement was proper under the Act. See also Florence County School Dist. Four v. Carter, 510 U.S. 7 (1993) (holding that reimbursement may be appropriate even when a child is placed in a private school that has not been approved by the state).

The Forest Grove Court did contrast the present dispute from those in Burlington and Carter. According to the Court, Forest Grove concerned not the adequacy of a proposed IEP, but the District’s complete failure to provide an IEP to begin with. The Court noted that, unlike T.A., the children in the earlier cases had previously received public special education services. According to the Court, when a child requires special education services, a school district’s failure to propose an IEP of any kind is at least as serious a violation of its responsibilities under the IDEA as a failure to provide an adequate IEP. Because of this, the Court said it was clear that the reasoning of Burlington and Carter applies equally to this case—the only question being whether the 1997 amendments required a different result.

According to the Court, the 1997 amendments do not expressly prohibit reimbursement under the given circumstances, and the District offered no evidence that Congress intended to supersede the decisions in Burlington and Carter. The Court explained that the amendment explicitly bars reimbursement only when a school district makes a FAPE available by correctly identifying a child as having a disability and proposing an IEP adequate to meet the child’s needs. According to the Court, the amendments say nothing to prohibit reimbursement when a school district fails to make a FAPE available altogether.

The Court said its reading of § 1412(a)(10)(C) was necessary to avoid the conclusion that Congress abrogated sub silentio (without notice) the Court’s decisions in Burlington and Carter. In coming to its decision in Forest Grove, the Court pointed out that it construed the IDEA to authorize reimbursement when a school district fails to provide a FAPE and a child’s private school placement is appropriate, without regard to the child’s

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prior receipt of services in *Burlington* and *Carter*. The Court further declared that it would take more than Congress’s failure to comment on the category of cases in which a child has not previously received special education services for the Court to conclude that the amendments substantially superseded the Court’s decisions and in large part repealed § 1415(i)(2)(C)(iii).

The Court also pointed out that the Department of Education (the Department), the agency charged with implementing the IDEA, has adopted T.A.’s reading of the Act. The Court pointed out that, in commentary to regulations implementing the 1997 amendments, the Department stated that hearing officers and courts retain their authority, recognized in *Burlington* to award appropriate relief if a public agency has failed to provide a FAPE, including reimbursement in instances in which the child has not yet received special education and related services.

By immunizing a school district’s refusal to find a child eligible for special education services no matter how compelling the child’s need, the Court reasoned the District’s interpretation of § 1412(a)(10)(C) would produce a rule bordering on the irrational. According to the Court, it would be particularly strange for the Act to provide a remedy when a school district offers a child inadequate special education services but to leave parents without relief in the more egregious situation in which the school district unreasonably denies a child access to such services altogether.

The Court concluded that the IDEA authorizes reimbursement for the cost of private special education services when a school district fails to provide a FAPE and the private school placement is appropriate, regardless of whether the child previously received special education or related services through the public school. When a court or hearing officer concludes that a school district failed to provide a FAPE and the private placement was suitable, the Supreme Court said court or hearing officer must consider all relevant factors, including the notice provided by the parents and the school district’s opportunities for evaluating the child, in determining whether reimbursement for some or all of the cost of the child’s private education is warranted. The Court declared that the district court had not properly considered the equities in this case and will need to undertake that analysis on remand.

In response, the dissenting justices emphasized that the costs of special education can be incredibly expensive, amounting to tens of billions of dollars annually and as much as 20 percent of public schools’ general operating budgets. The more private placement there is, the higher a district’s special education bill.

The majority acknowledged the expense of special education, but stressed that parents are entitled to reimbursement only if a federal court concludes both that the public school placement violated IDEA and the private school placement was proper under the IDEA. The majority pointed out that the incidence of private school placement at public expense is quite small. And further, according to the majority, courts still retain discretion to reduce the amount of a reimbursement award if the equities so warrant—for instance, if the parents failed to give the school district adequate notice of their intent to enroll the child in private school. The Court said that, in considering the equities, courts should generally presume that public school officials are properly performing their obligations under the IDEA. The Court warned that, as a result of these criteria and the fact that parents who unilaterally change their child’s placement during the pendency of review proceedings, without the consent of state or local school officials, do so at their own financial risk.

Will *Forest Grove* result in numerous claims for private education costs? Possibly not. First, the parents must have the financial resources to pay the private school tuition to begin with. Second, the parents must be able to show (1) the public school placement violated the IDEA and (2) the private school placement was proper under the IDEA. If the parents are able to do this, a court or hearing officer must still consider all relevant factors, including (1) the notice provided by the parents and (2) the school district’s opportunities for evaluating the child, in determining whether reimbursement for some or all of the cost of the child’s private education is warranted. Whether the Court will continue to take an active role in defining the rules governing special education also remains to be seen.
Citizens United v. Federal Election Commission, No. 08-205, concerns the validity of the limitations placed on corporate-funded election broadcasts by the McCain-Feingold campaign finance law in the period before elections. The case, featuring a documentary attacking Hillary Rodham Clinton, was argued before the Supreme Court in March 2009, and media accounts confirm that the government’s case seemed threatened when the Deputy Solicitor General had trouble answering a hypothetical question about the regulation of books containing “the functional equivalent of express advocacy.” Adam Liptak, Justices Consider Interplay Between First Amendment and Campaign Finance Laws, N.Y. Times, Mar. 24, 2009, http://www.nytimes.com/2009/03/25/washington/25scotus.html (“A quirky case about a slashing documentary attacking Hillary Rodham Clinton would not seem to be the most obvious vehicle for a fundamental re-examination of the interplay between the First Amendment and campaign finance laws. But by the end of an exceptionally lively argument at the Supreme Court on Tuesday, it seemed at least possible that five justices were prepared to overturn or significantly limit parts of the court’s 2003 decision upholding the McCain-Feingold campaign finance law, which regulates the role of money in politics.”); Dahlia Lithwick, The Supreme Court Reviews Hillary: The Movie, Slate, Mar. 24, 2009, http://www.slate.com/id/2214514/ (“But it seems to me that all this talk of book banning and government regulation of signs in Lafayette Park is a pretty good way to get all five of them in the mood to run down yet more restrictions on political advertising. And maybe even back up and do it again.”).

Still, it was somewhat of a surprise when, on the last regular day of the Court’s term in June 2009, the Court announced it would reheat the case on September 9. More surprising, the Court asked for supplemental briefing on the following question: “For the proper disposition of this case, should the Court overrule either or both Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990), and the part of McConnell v. Federal Election Comm’n, 540 U.S. 93 (2003), which addresses the facial validity of Section 203 of the Bipartisan Campaign Reform Act of 2002, 2 U.S.C. §441b?” Citizens United v. FEC, Order, 2009 WL 1841614 (Jun. 29, 2009).

If the Court were going to decide the case on narrow statutory grounds, such as a ruling that video-on-demand is not properly classified as an electioneering communication, reargument on the constitutional question would be unnecessary. The order indicates a Court that is at least seriously considering the question. See Richard L. Hasen, The Supreme Court Gets Ready to Turn on the Fundraising Spigot, Slate, Jun. 29, 2009, http://www.slate.com/id/2221753/, and it stands in sharp contrast with the Court’s statement a week before the order in Northwest Austin Municipal Utility District Number One v. Holder, 129 S.Ct. 2504 (2009), that “[o]ur usual practice is to avoid the unnecessary resolution of constitutional questions.”

The simultaneous supplemental briefs were not available by PREVIEW’s deadline. The original case preview written before the March 2009 argument appears on page 473.

— Richard L. Hasen
An ideological corporation produced an anti-Hillary Clinton documentary. The corporation wanted to air the documentary during the presidential primary season through a cable television “video-on-demand” service and to advertise for it on television. McCain-Feingold bars certain corporate-funded television broadcasts, such as this documentary, in the period before the election and requires disclosure by the funders of election-related broadcast advertising, such as these ads. The question before the Court is whether these limits and disclosure rules are unconstitutional as applied to this case.
Court held that, to avoid vagueness and overbreadth problems within FECA, its provisions should be interpreted to reach only election-related activity containing “express advocacy,” such as “Vote for Smith.” Individuals, corporations, and unions began running “issue ads” that appeared aimed at influencing federal elections but that escaped FECA regulation through an avoidance of words of express advocacy. Thus, individuals and entities that spent money on “Vote against Jones” ads had to disclose the sources of payment and those ads could not be paid for with corporate or union treasury funds. In contrast, there were no such limitations on ads that appeared intended to influence federal elections but that avoided the magic words of “express advocacy.” These ads would include ones that said “Call Senator Jones and tell her what you think of her lousy vote on the stimulus bill.” Spending on such ads increased dramatically in the 1990s.

BCRA sought to close this issue advocacy “loophole” by creating new “electioneering communications” provisions. Electioneering communications are television or radio (not print or Internet) advertisements that feature a candidate for federal election and are capable of reaching 50,000 people in the relevant electorate 30 days before a primary or 60 days before a general election. Anyone making electioneering communications over a certain dollar threshold must disclose contributions funding the ads and spending related to the ads to the FEC (BCRA § 201). In addition, corporations and unions cannot spend general treasury funds on such ads (but could pay for the ads through their PACs) (BCRA § 203). In addition, anyone broadcasting an electioneering communication must disclose in the ad the person or committee funding the ad and whether or not it is authorized by any candidate (BCRA § 311).

The § 203 spending limit does not apply to nonprofit corporations that meet certain requirements, including that the nonprofit has a policy not to take for-profit corporate or union funding. These groups are referred to as MCFL groups (named after an FEC regulation defining “qualified nonprofit corporation”). MCFL groups still must comply with the disclosure provisions in BCRA § 201 and § 311.

A broad coalition of plaintiffs challenged each of these BCRA provisions (along with a number of others) in McConnell v. FEC, 540 U.S. 93 (2003). By a 5-4 vote, the Supreme Court upheld BCRA § 203 against facial challenge. It reaffirmed the Court’s controversial holding in Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990). Austin held that corporate spending on elections could be limited because of what the Court termed the “distorting and corrosive effects” of immense aggregations of wealth accomplished with the corporate form, which could be spent on elections despite the corporation’s ideas having little or no public support. Relying on Austin’s upholding of corporate limits on “express advocacy,” the McConnell Court held that the “issue ads” regulated by the electioneering communications provisions of BCRA could constitutionally be limited because most of them were the “functional equivalent of express advocacy.” By an 8-1 vote, the Court also upheld BCRA § 201 and § 311 against facial challenge. Five justices took the position the disclosure provisions were necessary to prevent Austin-style corruption, to enforce other campaign finance laws, and to provide information relevant to voters as they decide how to vote. Three other justices held the disclosure provisions were justified on information grounds only. Only Justice Thomas dissented, viewing the disclosure provisions as a violation of a First Amendment right to anonymous speech.

In Wisconsin Right to Life v. Federal Election Commission, 546 U.S. 410 (2006) (WRTL I), the Court held that McConnell did not preclude an “as applied” challenge to BCRA § 203 for a corporation or union whose ads were not the “functional equivalent of express advocacy.” WRTL I involved a corporate-funded broadcast advertising that mentioned Senator Feingold’s and Senator Kohl’s position on judicial filibusters, and was to be broadcast in Wisconsin during the period of Senator Feingold’s reelection campaign. After remand, in which the lower court found the ads were not entitled to an exemption because they were the functional equivalent of express advocacy, the case returned to the Supreme Court.

In Wisconsin Right to Life v. Federal Election Commission, 127 S.Ct. 2652 (2007), (WRTL II), the Court held, on a 5-4 vote, that BCRA § 203 could not be constitutionally applied to such ads. Three justices in the majority (Justices Kennedy, Scalia, and Thomas) held, consistent with their dissenting opinions in McConnell, that BCRA § 203 was unconstitutional as applied to any corporate advertising, stating that McConnell and Austin should be overruled. Chief Justice Roberts and Justice Alito, in a narrower controlling opinion, did not reach the question whether McConnell and Austin should be overruled. They held instead that

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the only corporate-funded advertisements that BCRA could bar constitutionally were those that were the “functional equivalent of express advocacy.” The controlling opinion held that in making the “functional equivalent” determination, the question the FEC or a court must consider is whether, without regard to context (such as the fact that the filibuster issue was one that conservatives were using to attack liberal Democrats) and without detailed discovery of the intentions of the advertisers, the advertisement was susceptible of no reasonable interpretation other than as an advertisement supporting or opposing a candidate for office. Unless the ad was susceptible to “no reasonable interpretation” other than as an advertisement supporting or opposing the candidate, it would be unconstitutional to apply BCRA § 203 to bar corporate funding for it. The controlling opinion then held that the ad at issue in WRTL II was susceptible to an interpretation as something other than an ad against Senator Feingold: it did not mention Senator Feingold’s character or fitness for office, and had no other clear indicia of the functional equivalent of express advocacy. Accordingly, WRTL was entitled to an as-applied exemption and could pay for the ads with corporate funds.

The case at bar is a follow-on case to WRTL II. Citizens United, a non-profit ideological corporation (but one that took some for-profit corporate funding) produced a feature-length documentary entitled Hillary: The Movie. The documentary appeared in theaters and was available to order via DVD during the 2008 primary season. Citizens United wished to distribute the movie as well through a cable television “video-on-demand” service. In exchange for a $1.2 million fee, a cable television operator consortium would have made the documentary available to be downloaded by cable subscribers for free “on demand” as part of an “Election 08” series. The documentary contained no express advocacy, but it did contain a great deal of negative statements about Hillary Clinton, including statements that she was a “European socialist” and not fit to be commander-in-chief. The FEC took the position that the documentary was the functional equivalent of express advocacy and therefore subject to BCRA § 201, meaning it was an electioneering communication that could not be paid for with corporate funds.

Citizens United also wished to broadcast some 10-second and 30-second advertisements promoting the documentary. The corporation wished to do so without complying with BCRA § 201 (requiring disclosure of funders) or § 311 (requiring the “disclaimer” stating who paid for the advertisement and that it was not approved by any candidate or committee). The FEC conceded that the advertisements (as opposed to the documentary itself) were not the “functional equivalent of express advocacy,” but it took the position that the rules of BCRA § 201 and § 311 still applied. According to the FEC, the disclosure rules were not eligible for the “as applied” exemption that the Court created for corporate spending in WRTL II.

Pursuant to a special jurisdictional provision of BCRA, Citizens United filed suit against the FEC before a three-judge court in the United States District Court for the District of Columbia (with direct appeal to the Supreme Court). Citizens United, at that point represented by James Bopp (who had successfully argued WRTL II), moved for a preliminary injunction barring enforcement of BCRA § 203 for its broadcast of the documentary through “video-on-demand” and barring enforcement of BCRA § 201 and § 311 disclosure requirements as to the advertisements.

The three-judge court unanimously rejected Citizens United’s arguments. As to the documentary itself, the court held that under WRTL II the documentary was the functional equivalent of express advocacy and was therefore not entitled to an as-applied exemption: the movie could not be paid for with for-profit corporate funds. As to the advertisements, the district court held that the WRTL II exemption did not apply to the disclosure rules, relying on language in McConnell broadly upholding these requirements. Citizens United appealed from the denial of the preliminary injunction to the Supreme Court, which dismissed the appeal. 128 S.Ct. 1732 (2008). The case returned to the trial court. The district court then granted summary judgment, relying on its earlier opinion on the preliminary judgment.

The Supreme Court noted probable jurisdiction and set the case for argument. Ted Olson, who had argued on the government’s side for the constitutionality of BCRA in the McConnell case, replaced Jim Bopp as counsel for Citizens United on the merits stage of the appeal. Bopp filed an amicus brief supporting Citizens United on behalf of a group that had wished to broadcast a documentary against Barack Obama under similar circumstances.

**Case Analysis**

The Documentary Broadcast over “Video-on-Demand”

Citizens United raises a number of arguments against the government’s position that this documentary could not be broadcast over cable television’s “video-on-demand” service because it constituted a corporate-funded “electioneering commu-

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First, Citizens United argues that, under a strict scrutiny standard, the government cannot demonstrate a compelling interest in regulating a feature-length documentary broadcast through a cable television “video-on-demand” service. There are two aspects to this argument. (A) Citizens United argues that the feature-length nature of the documentary is different from the short “issue ads” considered in McConnell. While the record demonstrated a potential corruption problem with these short ads, there is no evidence a feature-length documentary would raise the same sorts of problems. (B) The fact that this is a “video-on-demand” service makes it more akin to the distribution of a DVD to interested viewers than to a normal television broadcast. Because viewers must effectively “opt-in” to view the documentary, and viewers who opt in are likely to already be opponents of the candidate, the documentary does not have the same corruptive potential.

The FEC takes issue with both of these points. As to Point (A), if the concern is about disproportionate corporate influence on the political process, the government says corporations can have just as disproportionate influence through a long message as through a short one. As to Point (B), the government disputes the notion that only Clinton opponents would tune into such a documentary, and in any case the advertisement could still be useful in energizing the base of Clinton opponents and getting out the vote. The interests supporting the corporate limit on regular broadcasts apply equally to video-on-demand.

Citizens United also raises a second argument related to Point (B), that the FEC regulations should not be construed to apply to “video-on-demand” cable broadcasts. Citizens United concedes that it did not raise the issue below (see Brief of Appellants, footnote 2), but notes that the district court passed on it and that the canon of constitutional avoidance (construe a statute to avoid constitutional issues when possible) gave the Court a reason to reach the statutory question. The government disagrees that the Court should reach the question. However, the BCRA legislative sponsors (Sens. McCain and Feingold, and former Representatives Shays and Meehan) filed an amicus brief suggesting that if the Court is otherwise inclined to find for Citizens United in this case, it should do it on grounds that the FEC’s implementing regulations did not clearly apply to “video-on-demand” broadcasts.

Citizens United’s second set of arguments take on existing Supreme Court precedent. First, Citizens United argues that Austin was wrongly decided and should be overruled, with the result being that even express advocacy by corporations in federal elections could be paid for with corporate treasury funds. Second, Citizens United argues that MCFL should be expanded to include nonprofit corporations that take some corporate money, so long as funds from individuals are the predominant form of funding.

The FEC’s main argument against these points is that they were not properly presented below. As to the Austin argument, the FEC notes that Citizens United did not raise this point below, and that it expressly withdrew any facial challenges before the district court issued its summary judgment. On the merits, the FEC argues that Citizens United presented no special reasons to overcome stare decisis in this case. As to the MCFL argument, the FEC notes that Citizens United specifically pleaded the case as one that did not involve an MCFL corporation (Jim Bopp’s strategy at the time appeared to be to expand WRTL II for all corporations, not to expand the scope of the MCFL exemption). Moreover, the FEC argues that there is not enough evidence developed in the record as to the extent of corporate contributions either supporting the documentary in particular or supporting Citizens United more generally.

Finally, Citizens United argues that its documentary, considered as a whole, is not the “functional equivalent of express advocacy” under WRTL II. Citizens United concedes that its documentary includes portions questioning Clinton’s character and fitness for office, but contends that considered as a whole, the documentary could be seen as about issues, not about Clinton’s candidacy. The FEC disputes this characterization, pointing to numerous statements in the documentary questioning Clinton’s character and fitness for office.

The Disclosure and Disclaimer Provisions in the Advertisements

The issue in the second part of this case differs significantly from the first. The question here concerns advertisements that the FEC concedes are not the “functional equivalent of express advocacy” under the controlling WRTL II test.

Recall that BCRA § 201 requires anyone (not just corporations or unions) spending money on “electioneering communications” to disclose contributors and expenditures. Citizens United argues that the disclosure rules are subject to strict scrutiny. According to Citizens United, under this standard it is
unconstitutional to apply the disclosure rules to it. Citizens United further argues that because the advertisements are not the “functional equivalent of express advocacy,” information about contributors and expenditures would not be relevant to voters deciding how to vote, nor would disclosure serve an anti-corruption function. It says the disclosure rules chill political speech.

The FEC disagrees, stating that intermediate (or “exacting”) scrutiny applies, and that under this standard the disclosure rules are constitutional. The FEC notes that the Supreme Court in McConnell upheld the disclosure rules with very broad language, and that eight of the nine justices supported disclosure in McConnell to prevent corruption, enforce other campaign laws, and provide valuable information to voters. The FEC also argues that the First Amendment costs of the corporate workers. Finally, the FEC points to a number of earlier Supreme Court cases (including MCFL, First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978), and Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290 (1981)) containing holdings or dicta supporting disclosure requirements in cases in which the Court held spending limits unconstitutional.

Citizens United also takes issue with BCRA § 311’s requirement that include a disclaimer in its advertising, arguing that the disclaimer is compelled speech and that it is burdensome (using up 4 seconds in a 10-second advertisement). The FEC argues that the Court upheld § 311 in the McConnell case against a similar challenge, and that there is no reason to treat this case differently. It also argues that the disclaimer provides important information to voters.

**Significance**

This case has the potential to be a blockbuster if the Court overrules Austin and McConnell and holds that the Constitution bars limits on corporate spending in federal elections. The limit on corporate and union spending in federal elections has existed in some form since the early 20th century, and has been enforced strictly since at least the 1970s. Many states also limit corporate and union spending in candidate elections, and these limits too would be unconstitutional if the Court accepted Citizens United’s invitation to overrule these cases.

That said, it seems unlikely that a Court majority will be prepared to go this far in this case. Three justices (Justices Kennedy, Scalia, and Thomas) have voted repeatedly for Austin to be overruled, but Chief Justice Roberts and Justice Alito thus far have moved more cautiously in the campaign finance cases. In each of the campaign finance cases decided by the Roberts Court, the Court has sided with those challenging the law, but has done so in an incremental way. There are many ways for these two justices to side with Citizens United on the question of airing the documentary without overruling Austin, an issue which was not presented until the merits stage. Perhaps the easiest way to support Citizens United would be for the Court to construe the FEC regulations so as not to apply to “video-on-demand” broadcasts. Of course, these justices could also vote with the other justices generally supporting the constitutionality of campaign finance regulation (Justices Breyer, Ginsburg, Souter, and Stevens) to uphold application of BCRA § 203 to Citizens United’s documentary. Such an outcome would be notable as the first time the Roberts Court upholds a campaign finance regulation.

On the challenge to BCRA’s electioneering communications disclosure rules, a holding that WRTL II’s “no reasonable interpretation” test applies to the disclosure rules would also be significant, because it would seriously undermine the effectiveness of disclosure. Citizens United’s disclosure argument seems somewhat of a long shot, however. In McConnell, eight justices voted to uphold those disclosure laws broadly. Two of those justices (Chief Justice Rehnquist, and Justice O’Connor) are no longer on the Court, but six of them still are, including Justices Kennedy and Scalia, who view disclosure rules as a more narrowly tailored way than contribution and spending limits to accommodate the state’s interests in campaign finance regulation. So regardless of how Chief Justice Roberts and Justice Alito view this question, Citizens United will need to move at least two justices from their positions on disclosure in McConnell in order to prevail on this issue. A decision to uphold the disclosure rules would reaffirm the status quo and therefore be somewhat less significant.
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- Chamber of Commerce of the United States of America (Jan Witold Baran (202) 719-7000)
- Committee for Truth in Politics, Inc. (James Bopp Jr. (812) 232-2434)
- Foundation for Free Expression (Deborah Dewart (910) 326-4554)
- Institute for Justice (William R. Maurer (206) 341-9300)
- Reporters Committee for Freedom of the Press (Lucy A. Dalglish (703) 807-2100)
- Wyoming Liberty Group and the Goldwater Institute (Benjamin Barr (240) 863-8280)

In Support of Appellee Federal Election Commission

- Center for Political Accountability and the Carol and Lawrence Zicklin Center for Business Ethics Research (Karl J. Sandstrom (202) 628-6600)
- Senator John McCain, Senator Russell Feingold, Former Representative Christopher Shays, and Former Representative Martin Meehan (Scott L. Nelson (202) 588-1000)
May a seaman who has been injured on the job recover punitive damages if his employer willfully failed to provide “maintenance and cure” under a shipowner’s obligation to provide food, lodging, and medical services to a seaman injured while serving the ship?

Yes. No legal obstacle prevents the seaman from seeking punitive damages. Federal maritime law generally allows punitive damages, and the right to receive maintenance and cure has been recognized by the courts. Subsequent legislation has not changed this understanding.

From the opinion by Justice Thomas (joined by Justices Stevens, Souter, Ginsburg, and Breyer): Because punitive damages have long been an accepted remedy under general maritime law, and because nothing in the Jones Act altered this understanding, such damages for the willful and wanton disregard of the maintenance and cure obligation should remain available in the appropriate case as a matter of general maritime law. Limiting recovery for maintenance and cure to whatever is permitted by the Jones Act would give greater preemptive effect to the Act than is required by its text, Miles, or any of this Court’s other decisions interpreting the statute. For these reasons, we affirm the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

Dissenting: Justice Alito (joined by Chief Justice Roberts and Justices Scalia and Kennedy): In [a prior case], this Court provided a workable framework for analyzing the relief available on claims under general maritime law. Today, the Court abruptly changes course. I would apply the analytical framework adopted in Miles, and I therefore respectfully dissent.

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

Must a plaintiff bringing suit under the Age Discrimination in Employment Act (ADEA) provide direct evidence of age discrimination in order to obtain a “mixed motives” jury instruction?

No. Instead, the Court holds that a mixed motives jury instruction is never appropriate in a case brought under the ADEA. Congress did not intend for juries to be able to find for a plaintiff alleging their employer acted with both permissible and impermissible motives.

From the opinion by Justice Thomas (joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Alito): We cannot ignore Congress’ decision to amend Title VII’s relevant provisions but not make similar changes to the ADEA. When Congress amends one statutory provision but not another, it is presumed to have acted intentionally. … As a result, the Court’s interpretation of the ADEA is not governed by Title VII decisions[.]. Our inquiry therefore must focus on the text of the ADEA to decide whether it authorizes a mixed-motives age discrimination claim. It does not.

From the dissent by Justice Stevens (joined by Justices Souter, Ginsburg, and Breyer): I disagree not only with the Court’s interpretation of the statute, but also with its decision to engage in unnecessary lawmaking. I would simply answer the question presented by the certiorari petition and hold that a plaintiff need not present direct evidence of age discrimination to obtain a mixed-motives instruction.

Dissenting: Justice Breyer (joined by Justices Souter and Ginsburg)
If a firm sells, to its competitors, access to the inputs necessary to provide a final service and then raises the price of the inputs while keeping its own retail price for the service the same, resulting in a squeeze of its competitor’s profit margins, may a claim be brought for monopoly under antitrust law if the provider is not under an antitrust obligation to sell the inputs to its competitor in the first place?

No. A firm that is not required under antitrust law to deal with a competitor has no duty to provide a service to that other firm in the first place, so the provision of service at a high price cannot violate antitrust law. Additionally, providing a final product at a low retail price is the right of a competitive business; simply cutting prices is itself not a violation of antitrust law.

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

Plaintiffs’ price-squeeze claim, looking to the relation between retail and wholesale prices, is thus nothing more than an amalgamation of a meritless claim at the retail level and a meritless claim at the wholesale level. If there is no duty to deal at the wholesale level and no predatory pricing at the retail level, then a firm is certainly not required to price both of these services in a manner that preserves its rivals’ profit margins.

Concurring in the judgment: Justice Breyer (joined by Justices Stevens, Souter, and Ginsburg)
individuals whose unions do not pursue their claims under the ADEA, and this outcome is consistent with past judicial decisions.

From the opinion by Justice Thomas (joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Alito): In this instance, the Union and the RAB, negotiating on behalf of 14 Penn Plaza, collectively bargained in good faith and agreed that employment-related discrimination claims, including claims brought under the ADEA, would be resolved in arbitration. This freely negotiated term between the Union and the RAB easily qualifies as a “condition[n] of employment” that is subject to mandatory bargaining under §159(a). The decision to fashion a CBA to require arbitration of employment-discrimination claims is no different from the many other decisions made by parties in designing grievance machinery.

From the dissent by Justice Souter (joined by Justices Stevens, Ginsburg, and Breyer): The majority evades … precedent … as long as it can simply by ignoring it. … If this were a case of first impression, it would at least be possible to consider that conclusion, but the issue is settled and the time is too late by 35 years to make the bald assertion that “[n]othing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative.

Dissenting: Justice Stevens

ARGUMENTATION
Arthur Andersen LLP et al. v. Carlisle et al.
Docket No. 08-146
Reversed and Remanded: The Sixth Circuit

Argued: March 3, 2009
Decided: May 4, 2009
For Case Analysis: See ABA PREVIEW 313

Did the Sixth Circuit err when, citing lack of jurisdiction, it denied review of a district court’s denial of a motion to stay an action based on an arbitration clause in an agreement the petitioners were not actually a party to?

Yes. The appellate court incorrectly looked to the merits of the underlying motion. The Federal Arbitration Act allows appeal of any order denying a motion to stay under the act, regardless of the underlying claim’s merits.

From the opinion by Justice Scalia (joined by Justices Kennedy, Thomas, Ginsburg, Breyer, and Alito): The jurisdictional statute here unambiguously makes the underlying merits irrelevant, for even utter frivolousness of the underlying request for a stay cannot turn a denial into something other than “an order … refusing a stay of any action.”

From the dissent by Justice Souter (joined by Chief Justice Roberts and Justice Stevens): Based on the longstanding congressional policy limiting interlocutory appeals, I think the better reading of the statutory provisions disallows such an appeal, and I therefore respectfully dissent.

Does § 4 of the Federal Arbitration Act authorize a federal court to entertain a petition to compel arbitration based on the contents of a counterclaim when the whole controversy between the parties does not qualify for federal-court adjudication?

No. Courts may “look through” a petition to determine whether federal law controls, but a federal court may compel arbitration only when the entire case is based in federal law.

From the opinion by Justice Ginsburg (joined by Justices Scalia, Kennedy, Souter, and Thomas): Focusing on only a slice of the parties’ entire controversy, the court seized on Vaden’s counterclaims, held them completely preempted, and on that basis affirmed the District Court’s order compelling arbitration. Lost from sight was the triggering plea—Discover’s claim for the balance due on Vaden’s account. Given that entirely state-based plea and the established rule that federal-court jurisdiction cannot be invoked on the basis of a defense or counterclaim, the whole “controversy between the parties” does not qualify for federal court adjudication.

Argued: October 6, 2008
Decided: March 9, 2009
For Case Analysis: See ABA PREVIEW 37

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Issue No. 8
From the opinion by Chief Justice Roberts, concurring in part and dissenting in part
(joined by Justices Stevens, Breyer, and Alito):
The majority’s conclusion that this controversy “is not one qualifying for federal-court adjudication,” stems from its mistaken focus on the existing litigation. Rather than ask whether a court “would have” jurisdiction over the “subject matter” of “a” suit arising out of the “controversy,” the majority asks only whether the court does have jurisdiction over the subject matter of a particular complaint.

From the opinion by Justice Scalia (joined by Justices Stevens, Souter, Ginsburg, and Breyer):
In sum, the unmistakable and utterly consistent teaching of our jurisprudence, both before and after enactment of the National Bank Act, is that a sovereign’s “visitorial powers” and its power to enforce the law are two different things. There is not a credible argument to the contrary. And contrary to what the Comptroller’s regulation says, the National Bank Act pre-empts only the former.

From the opinion by Justice Thomas, concurring in part and dissenting in part (joined by Chief Justice Roberts and Justices Kennedy and Alito):
I would affirm the Court of Appeals’ determinations that the term “visitorial powers” is ambiguous and that it was reasonable for the Office of the Comptroller of the Currency (OCC) to interpret the term to encompass state efforts to obtain national bank records and to enforce state fair lending laws against national banks.

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

Does a Comptroller of the Currency regulation that limits a state’s “visitation” powers over national banks and that the Comptroller purports pre-empts state law enforcement actions against national banks represent a reasonable interpretation of the National Bank Act?

No. The National Bank Act has never been interpreted as barring state law enforcement actions against banks. “Visitation” has always been interpreted as a government’s supervisory power over the manner in which corporations conduct their business, and this power is different from the power of a state to enforce its laws.

Argued: N/A
Decided: June 9, 2009
For Case Analysis: N/A

Justice Ginsburg was presented with applications for a stay and referred them to the Court. Justice Ginsburg issued a temporary stay on June 8, which the Court vacated on June 9 when it denied the applications for a stay by the Indiana State Police Pension Trust.

From the per curiam opinion:
“A stay is not a matter of right, even if irreparable injury might otherwise result.” It is instead an exercise of judicial discretion, and the “party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion.” The applicants have not carried that burden.
Does an injunction barring suits against a company’s insurers as part of a bankruptcy court’s reorganization plan bar state law actions based on an insurer’s wrongdoing or misuse of information while acting as an insurer?

Yes. The order barred all suits “related” to the insurance company’s representation of the company and the insurer’s actions in this case arose out of their representation of the company.

From the opinion by Justice Souter (joined by Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, Breyer, and Alito):
The Bankruptcy Court’s uncontested factual findings drive the point home. In substance, the Bankruptcy Court found that the Direct Actions seek to recover from the bankruptcy estate for Manville’s misconduct, not those claims seeking to recover against the insurers for their own misconduct.

From the dissent by Justice Stevens (joined by Justice Ginsburg):
The Court holds that the plain terms of an injunction entered by the Bankruptcy Court as part of the 1986 reorganization of Johns-Manville Corporation (Manville) bar actions against Manville’s insurers for their own wrongdoing. I disagree. In my view, the injunction bars only those claims against Manville’s insurers seeking to recover from the bankruptcy estate for Manville’s misconduct, not those claims seeking to recover against the insurers for their own misconduct.

CIVIL PROCEDURE
Ashcroft et al. v. Iqbal et al.
Docket No. 07-1015
Reversed and Remanded: The Second Circuit

Argued: December 10, 2008
Decided: May 18, 2009
For Case Analysis: See ABA PREVIEW 204

Did a complaint by Iqbal, an individual detained on suspicion of his connection to al Qaeda, alleging constitutional violations based on discrimination based on his race, national origin, and religion, have sufficient pleading to establish a claim against Attorney General John Ashcroft and FBI Director Robert Mueller?

No. Past rulings hold that a plaintiff in such an action must plead that the defendant acted with discriminatory purpose, alleging facts that could make the claim not only conceivable but plausible. Here, the plaintiff’s complaint makes only conclusory allegations and the facts alleged do not plausibly establish that Ashcroft and Mueller acted with discriminatory purpose in detaining Iqbal.

From the dissent by Justice Souter (joined by Justices Stevens, Ginsburg, and Breyer):
First, Ashcroft and Mueller have, as noted, made the critical concession that a supervisor’s knowledge of a subordinate’s unconstitutional conduct and deliberate indifference to that conduct are grounds for ... liability. Iqbal seeks to recover on a theory that Ashcroft and Mueller at least knowingly acquiesced (and maybe more than acquiesced) in the discriminatory acts of their subordinates; if he can show this, he will satisfy Ashcroft and Mueller’s own test for supervisory liability. We do not normally override a party’s conces-
tion, and doing so is especially inappropriate when, as here, the issue is unnecessary to decide the case. I would therefore accept Ashcroft and Mueller's concession for purposes of this case and proceed to consider whether the complaint alleges at least knowledge and deliberate indifference.

Dissenting: Justice Breyer

Does a prosecutor’s absolute immunity from suit under § 1983 extend to a defendant’s claims that the prosecution failed to communicate necessary information to the defendant’s attorney as a result of failure to train prosecutors properly, failure to supervise prosecutors properly, or lack of an information system that would show that certain information needed to be revealed?

Yes. Although prosecutors typically are not granted immunity when engaged in administrative functions, when the function is directly related to conduct at trial, the purposes of immunity, which are aimed at allowing prosecutors to more effectively do their jobs without fear of suit, are served, and absolute immunity attaches.

From the unanimous opinion by Justice Breyer:

Moreover, because better training or supervision might prevent most, if not all, prosecutorial errors at trial, permission to bring such a suit here would grant permission to criminal defendants to bring claims in other similar instances, in effect claiming damages for (trial-related) training or supervisory failings. Further, given the complexity of the constitutional issues, inadequate training and supervision suits could ... “pose substantial danger of liability even to the honest prosecutor.” Finally ... defending prosecutorial decisions, often years after they were made, could impose “unique and intolerable burdens upon a prosecutor responsible annually for hundreds of indictments and trials.”

Argued: November 10, 2008
Decided: June 25, 2009
For Case Analysis: See ABA PREVIEW 76

Does a defendant have a Sixth Amendment right to confront, in court, the affiants of affidavits reporting results of a forensic analysis showing that a seized substance was cocaine on the basis that such reports are “testimonial”?

Yes. Under a straightforward application of the rule established in Crawford v. Washington, these statements are testimonial. They are signed statements confirming facts, made under conditions which would lead the affiants to believe the statements would be available for use at trial. Thus, the defendant's Sixth Amendment rights were violated when he was not allowed to confront these witnesses at trial.

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

Perhaps the best indication that the sky will not fall after today’s decision is that it has not done so already. Many States have already adopted the constitutional rule we announce today, while many others permit the defendant to assert (or forfeit by silence) his Confrontation Clause right
After receiving notice of the prosecution’s intent to use a forensic analyst’s report … (cataloging such state laws). Despite these widespread practices, there is no evidence that the criminal justice system has ground to a halt in the States that, one way or another, empower a defendant to insist upon the analyst’s appearance at trial.

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

The Court sweeps away an accepted rule governing the admission of scientific evidence. Until today, scientific analysis could be introduced into evidence without testimony from the “analyst” who produced it. This rule has been established for at least 90 years. It extends across at least 35 States and six Federal Courts of Appeals. Yet the Court undoes it based on two recent opinions that say nothing about forensic analysts.[1]

Dissenting: Justice Kennedy

(joined by Chief Justice Roberts and Justices Breyer and Alito)

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**Criminal Law**

*Abuelhawa v. United States*

Docket No. 08-192
Reversed and Remanded: The Fourth Circuit

Argued: March 4, 2009
Decided: May 26, 2009
For Case Analysis: See ABA *PREVIEW* 288

For purpose of the Controlled Substances Act (CSA), which makes it a felony to use a communication facility in committing or causing or facilitating felonies prohibited by the act, is the use of a cellular phone to make a misdemeanor drug purchase “facilitating” a felony?

**No.** In creating the CSA, Congress intended to target individuals who assisted another in the commission of a felony. The drug purchase here was a misdemeanor, while the sale was a felony. Congress clearly intended to punish sellers more severely than buyers, but ruling that using a device to contact a seller is committing a felony would make many ordinarily misdemeanor purchases felonies, and this is contrary to Congressional intent.

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

There is no question that Congress intended … to impede illicit drug transactions by penalizing the use of communication devices in coordinating illegal drug operations, and no doubt that its purpose will be served regardless of the outcome in this case. But it does not follow that Congress also meant a first-time buyer’s phone calls to get two small quantities of drugs for personal use to expose him to punishment 12 times more severe than a purchase by a recidivist offender and 8 times more severe than the unauthorized possession of a drug used by rapists. To the contrary, Congress used no language spelling out a purpose so improbable, but legislated against a background usage of terms such as “aid,” “abet,” and “assist” that points in the opposite direction and accords with the CSA’s choice to classify small purchases as misdemeanors.

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For a defendant’s failure to report for penal confinement a “violent felony” for purposes for the Armed Career Criminal Act, which imposes a 15-year mandatory prison term on a person convicted of being a felon in possession of a firearm if that individual has three previous violent felony convictions?

**No.** For purposes of the ACCA, in determining whether something constitutes a violent felony, a court should look at the crime in question generically to determine whether that crime categorically involves violent behavior. Failure to report does not itself generally involve violent behavior.

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

“While an offender who fails to report must of course be doing something at the relevant time, there is no reason to believe that the something poses a serious potential risk of physical injury. To the contrary, an individual who fails to report would seem unlikely, not likely, to call attention to his whereabouts by simultaneously engaging in additional violent and unlawful conduct.”
Under a federal criminal statute imposing a mandatory consecutive two-year prison term on an individual convicted of identity theft if, during the commission of the crime, the defendant used another person’s identification, must the prosecution prove the defendant knew the identification belonged to another person?

Yes. A natural reading of the statute and its use of the word “knowingly” can only reasonably lead to a conclusion that Congress intended that all elements of the crime must have been done with knowledge, and the government here makes no argument that can overcome the statute’s plain meaning.

From the opinion by Justice Breyer (joined by Chief Justice Roberts and Justices Kennedy, Thomas, Ginsburg, Breyer, and Alito):
The real question in this case is not whether plain-error review applies when a defendant fails to preserve a claim that the Government defaulted on its plea-agreement obligations, but rather what conceivable reason exists for disregarding its evident application. Such a breach is undoubtedly a violation of the defendant’s rights, but the defendant has the opportunity to seek vindication of those rights in district court; if he fails to do so, Rule 52(b) as clearly sets forth the consequences for that forfeiture as it does for all others.

From the dissent by Justice Souter (joined by Justice Stevens):
Agreements must therefore be kept by the Government as well as by the individual, and if the plain-error doctrine can ever rescue a defendant from the consequence of forfeiting rights by inattention, it should be used when the Government has induced an admission of criminality by making an agreement that it deliberately breaks after the defendant has satisfied his end of the bargain.

Does Federal Rule of Civil Procedure 52(b)’s plain-error test apply to a forfeited claim that the government failed to meet its obligations under a plea agreement?

Yes. A review for plain error is the standard required by the Federal Rules of Criminal Procedure when a defendant fails to raise an issue at trial. The Ninth Circuit correctly applied the standard in this case when it denied the defendant relief.

For purposes of the federal Gun Control Act, which prohibits
anyone convicted of a misdemeanor crime of domestic violence from owning a firearm, must the domestic violence statute under which the defendant was previously convicted designate the domestic relationship as an element of the crime?

No. The language and structure of the relevant statute shows Congress did not intend for the existence of a domestic relationship to be a separate element of the statute under which a defendant was previously charged. Furthermore, to require that a domestic relationship be an element of the underlying offense would frustrate the purposes of the statute, which are to protect the victims of domestic abuse.

From the opinion by Justice Ginsburg (joined by Justices Stevens, Kennedy, Souter, Breyer, and Alito, and Thomas as to all but Part III):
The text, context, purpose, and what little there is of drafting history all point in the same direction: Congress defined “misdemeanor crime of domestic violence” to include an offense “committed by” a person who had a specified domestic relationship with the victim, whether or not the misdemeanor statute itself designates the domestic relationship as an element of the crime.

From the dissent by Chief Justice Roberts (joined by Justice Scalia):
Invoking the sponsor’s objective as Congress’s manifest purpose, however, “ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action.” Legislative enactments are the result of negotiations between competing interests; “the final language of the legislation may reflect hard-fought compromises.”

Argued: October 15, 2008
Decided: January 21, 2009
For Case Analysis: See ABA PREVIEW 46

In an accomplice liability case in which the prosecutor used the phrase “in for a dime, in for a dollar” during closing argument, was there a reasonable likelihood the jury misapplied the instructions in a way that relieved the state of its burden of proof in the case?

No. Knowledge of the crime to be committed is necessary for a conviction of accomplice liability. The fact that the prosecutor stressed the defendant’s knowledge of the crime combined with the jury’s questions regarding intent show there was no reasonable likelihood the jury misapplied the instructions.

From the opinion by Justice Thomas (joined by Chief Justice Roberts and Justices Scalia, Kennedy, Breyer, and Alito):
Put simply, there was no evidence of ultimate juror confusion as to the test for accomplice liability under Washington law. Rather, the jury simply reached a unanimous decision that the State had proved Sarausad’s guilt beyond a reasonable doubt. Indeed, every state and federal appellate court that reviewed the verdict found that the evidence supporting Sarausad’s knowledge of a shooting was legally sufficient to convict him under Washington law.

Argued: January 21, 2009
Decided: April 6, 2009
For Case Analysis: See ABA PREVIEW 252

Does a statute enacted by Congress in response to the “McNabb-Mallory” Supreme Court rulings, which hold that a confession made by an arrested person is inadmissible if given after an unreasonable delay in taking the person before a judge, effectively nullify those rulings?

No. Congress only intended to limit the delay between the arrest and the time a defendant is brought before a judge to six hours. If Congress had intended otherwise, the inclusion of a section limiting the time period to six hours would be without meaning. The Legislative history further supports this reading of the statute.

From the dissent by Justice Souter (joined by Justices Stevens, Kennedy, Ginsburg, and Breyer):
In a world without McNabb-Mallory, federal agents would be free to question suspects for extended periods before

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From the dissent by Justice Souter (joined by Justices Stevens, Kennedy, Ginsburg, and Breyer):
In a world without McNabb-Mallory, federal agents would be free to question suspects for extended periods before
bringing them out in the open, and we have always known what custodial secrecy leads to. No one with any smattering of the history of 20th-century dictatorships needs a lecture on the subject, and we understand the need even within our own system to take care against going too far. “[C]ustodial police interrogation, by its very nature, isolates and pressures the individual, and there is mounting empirical evidence that these pressures can induce a frighteningly high percentage of people to confess to crimes they never committed.

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

As is true with most of the statutory interpretation questions that come before this Court, the question in this case is not like a jigsaw puzzle. There is simply no perfect solution to the problem before us.

No. The introduction of DNA testing cannot suddenly place every conviction in doubt; this would lead an overthrow of the criminal justice system. It is up to state legislatures, not the courts, to determine how DNA testing, a relatively new and powerful technology, will be handled in such situations.

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

Against this prompt and considered response, the respondent, William Osborne, proposes a different approach: the recognition of a freestanding and far-reaching constitutional right of access to this new type of evidence. The nature of what he seeks is confirmed by his decision to file this lawsuit in federal court under … § 1983, not within the state criminal justice system. This approach would take the development of rules and procedures in this area out of the hands of legislatures and state courts shaping policy in a focused manner and turn it over to federal courts applying the broad parameters of the Due Process Clause. There is no reason to constitutionalize the issue in this way.

From the dissent by Justice Stevens (joined by Justices Ginsburg and Breyer, and by Justice Souter as to Part I):

The DNA test Osborne seeks is a simple one, its cost modest, and its results uniquely precise. Yet for reasons the State has been unable or unwilling to articulate, it refuses to allow Osborne to test the evidence at his own expense and to thereby ascertain the truth once and for all. On two equally problematic grounds, the Court today blesses the State’s arbitrary denial of the evidence Osborne seeks.

Concurring: Justice Alito (joined by Justice Kennedy, and by Justice Thomas as Part II)

Dissenting: Justice Souter

CRIMINAL PROCEDURE
District Attorney's Office v. Osborne
Docket No. 08-6
Reversed and Remanded: The Ninth Circuit

Argued: March 2, 2009
Decided: June 18, 2009
For Case Analysis: See ABA PREVIEW 302

Does an individual who has been convicted of a crime have a constitutional right to obtain post-conviction access to the prosecution’s evidence for purposes of DNA testing?

Yes. A state cannot create a law to separate its system from a federal law that does not promote state policies. New York’s determination that corrections officers should not be sued for money damages for conduct arising in the scope of their employment runs contrary to the clear decision of Congress in enacting § 1983 that anyone who violates federal rights while acting under the color of law violate the Supremacy Clause of the United States Constitution.

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

We therefore hold that, having made the decision to create courts of general jurisdiction that regularly sit to entertain
analogous suits, New York is not at liberty to shut the courthouse door to federal claims that it considers at odds with its local policy. A State’s authority to organize its courts, while considerable, remains subject to the strictures of the Constitution. We have never treated a State’s invocation of “jurisdiction” as a trump that ends the Supremacy Clause inquiry, and we decline to do so in this case.

From the dissent by Justice Thomas (joined by Chief Justice Roberts and Justices Scalia and Alito as to Part III): “[I]n order to protect the delicate balance of power mandated by the Constitution, the Supremacy Clause must operate only in accordance with its terms.” By imposing on state courts a duty to accept subject-matter jurisdiction over federal § 1983 actions, the Court has stretched the Supremacy Clause beyond all reasonable bounds and upended a compromise struck by the Framers in Article III of the Constitution. Furthermore, by declaring unconstitutional even those laws that divest state courts of jurisdiction over federal claims on a non-discriminatory basis, the majority has silently overruled this Court’s unbroken line of decisions upholding state statutes that are materially indistinguishable from the New York law under review. And it has transformed a single exception to the rule of state judicial autonomy into a virtually ironclad obligation to entertain federal business.

Dissenting: Justice Thomas (joined by Chief Justice Roberts and Justices Scalia and Alito as to Part III)

CRIMINAL PROCEDURE
Kansas v. Ventris

Docket No. 07-1356
Reversed and Remanded: Supreme Court of Kansas

Argued: January 21, 2009
Decided: April 29, 2009
For Case Analysis: See ABA PREVIEW 234

Is an incriminating statement by a criminal defendant, made unknowingly to a jailhouse informant, admissible to show that the defendant’s court testimony was contradictory, even if the statement made to the informant was taken in violation of the defendant’s Sixth Amendment right to counsel?

Yes. The Sixth Amendment violation had already occurred, and to knowingly permit the defendant to commit perjury would be too grave a consequence to allow the remedy of complete exclusion of the evidence.

From the opinion by Justice Scalia (joined by Chief Justice Roberts and Justices Kennedy, Souter, Thomas, Breyer, and Alito): Our precedents make clear that the game of excluding tainted evidence for impeachment purposes is not worth the candle. The interests safeguarded by such exclusion are “outweighed by the need to prevent perjury and to assure the integrity of the trial process.” It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can … provide himself with a shield against contradiction of his untruths.

From the dissent by Justice Stevens (joined by Justice Ginsburg): Today’s decision is lamentable not only because of its flawed underpinnings, but also because it is another occasion in which the Court has privileged the prosecution at the expense of the Constitution. Permitting the State to cut corners in criminal proceedings taxes the legitimacy of the entire criminal process.

Dissenting: Justice Thomas (joined by Chief Justice Roberts and Justices Scalia, Kennedy, Breyer, and Alito, and by Justices Souter, Thomas, and Ginsburg as to all but Part II): It was not unreasonable for the state court to conclude that his
defense counsel’s performance was not deficient when he counseled Mirzayance to abandon a claim that stood almost no chance of success. [T]his Court has never required defense counsel to pursue every claim or defense, regardless of its merit, viability, or realistic chance for success.

From the unanimous opinion by Justice Ginsburg:
Because peremptory challenges are within the States’ province to grant or withhold, the mistaken denial of a state-provided peremptory challenge does not, without more, violate the Federal Constitution. “[A] mere error of state law,” we have noted, “is not a denial of due process.” The Due Process Clause, our decisions instruct, safeguards not the meticulous observance of state procedural prescriptions, but the fundamental elements of fairness in a criminal trial.

From the dissent by Justice Breyer (joined by Justice Stevens):
I can find no convincing reason to believe the Vermont Supreme Court made the error of constitutional law that the majority attributes to it. Rather than read ambiguities in its opinion against it, thereby assuming the presence of the error the Court finds, I would dismiss the writ as improvidently granted. As a majority nonetheless wishes to decide the case, I would note that the Vermont Supreme Court has considerable authority to supervise the appointment of public defenders.

From the opinion by Justice Ginsburg (joined by Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, Souter, and Alito):
An assigned counsel’s failure “to move the case forward” does not warrant attribution of delay to the State. Contrary to the Vermont Supreme Court’s analysis, assigned counsel generally are not state actors for purposes of a speedy-trial claim. While the Vermont Defender General’s office is indeed “part of the criminal justice system”, the individual counsel here acted only on behalf of Brillon, not the State. Most of the delay that the Vermont Supreme Court attributed to the State must therefore be attributed to Brillon as delays caused by his counsel.

Argued: February 23, 2009
Decided: March 31, 2009
For Case Analysis: See ABA PREVIEW 318

Does the Due Process Clause of the Fourteenth Amendment require reversal of a criminal conviction if the trial judge erroneously denied the defendant’s peremptory challenge to the seating of a juror, when all jurors were otherwise impartial and qualified to serve on the jury?

No. Constitutional due process requires a fair trial before an impartial jury. Provided that all jurors seated in a criminal case are qualified and unbiased, the Due Process Clause does not require automatic reversal of a conviction because of the trial court’s good-faith error in denying the defendant’s peremptory challenge to a juror.

From the opinion by Justice Ginsburg:
Because peremptory challenges are within the States’ province to grant or withhold, the mistaken denial of a state-provided peremptory challenge does not, without more, violate the Federal Constitution. “[A] mere error of state law,” we have noted, “is not a denial of due process.” The Due Process Clause, our decisions instruct, safeguards not the meticulous observance of state procedural prescriptions, but the fundamental elements of fairness in a criminal trial.

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Argued: January 13, 2009
Decided: March 9, 2009
For Case Analysis: See ABA PREVIEW 230

Can trial delays caused by a criminal defendant’s state-appointed attorney violate the defendant’s Sixth Amendment right to a speedy trial?

No. Because an attorney is obligated to act as his client’s agent, public defenders in their role as their client’s attorneys are not state actors and their actions in relation to their client cannot be imputed to the state.

From the opinion by Justice Ginsburg (joined by Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, Souter, and Alito):
An assigned counsel’s failure “to move the case forward” does not warrant attribution of delay to the State. Contrary to the Vermont Supreme Court’s analysis, assigned counsel generally are not state actors for purposes of a speedy-trial claim. While the Vermont Defender General’s office is indeed “part of the criminal justice system”, the individual counsel here acted only on behalf of Brillon, not the State. Most of the delay that the Vermont Supreme Court attributed to the State must therefore be attributed to Brillon as delays caused by his counsel.

Argued March 23, 2009
Decided: June 18, 2009
For Case Analysis: See ABA PREVIEW 344

In a case in which the use of insider information is an element of all charges against a defendant, and a jury returns a guilty verdict on some counts while unable to return a verdict on others in a manner that is apparently inconsistent, does
that inconsistency impact the defendant's right not to be retried for the charges for which he was acquitted?

No. The Double Jeopardy Clause is meant to protect individuals from repeated efforts by the state to convict them and to preserve the finality of judgment. The second consideration is important here, and the jury in this case, through its acquittal, had determined that the defendant did not possess insider information and the finality of this determination deserves protection.

From the opinion by Justice Stevens (joined by Chief Justice Roberts and Justices Souter, Ginsburg, and Breyer, and by Justice Kennedy as to Parts I–III and V):

To identify what a jury necessarily determined at trial, courts should scrutinize a jury's decisions, not its failures to decide. A jury's verdict of acquittal represents the community's collective judgment regarding all the evidence and arguments presented to it. Thus, if the possession of insider information was a critical issue of ultimate fact in all of the charges against petitioner, a jury verdict that necessarily decided that issue in his favor protects him from prosecution for any charge for which that is an essential element.

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

Today's holding ... interprets the Double Jeopardy Clause, for the first time, to have effect internally within a single prosecution, even though the "criminal proceedings against [the] accused have not run their full course." As a conceptual matter, it makes no sense to say that events occurring within a single prosecution can cause an accused to be "twice put in jeopardy." And our cases, until today, have acknowledged that.

Concurring in part and concurring in the judgment: Justice Kennedy

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

DEATH PENALTY
Bell v. Kelly
Docket No. 07-1223
Dismissed: Appeal from the Fourth Circuit

Argued: November 12, 2008
Decided: November 17, 2008
For Case Analysis: See ABA PREVIEW 93

“The writ of certiorari is dismissed as improvidently granted.”

DEATH PENALTY
Bobby v. Bies
Docket No. 08-598
Reversed and Remanded: The Sixth Circuit

Argued: April 27, 2009
Decided June 1, 2009
For Case Analysis: See ABA PREVIEW 425

In light of the Court's ruling that the Eighth Amendment bars the execution of a mentally retarded person, does the Double Jeopardy Clause prevent a new inquiry into a defendant's mental health sentence when the state's supreme court previously found the defendant to be mentally retarded?

No. The purpose of the Double Jeopardy Clause is to keep a defendant from being twice put into jeopardy by barring the relitigation of issues necessary to the outcome of a proceeding. Here, the issue being reconsidered was whether the defendant was mentally retarded, which was only a mitigating factor at the sentencing stage in the prior proceeding, and was not critical to at that time.

From the unanimous opinion by Justice Ginsburg:

Moreover, even if the core requirements for issue preclusion had been met, an exception to the doctrine's application would be warranted due to this Court's intervening decision in Atkins. Mental retardation as a mitigator and mental retardation under Atkins and Lott are discrete legal issues ... This reality explains why prosecutors, pre-Atkins, had little incentive vigorously to contest evidence of retardation. Because the change in law substantially altered the State's incentive to contest Bies' mental capacity, applying preclusion would not advance the equitable administration of the law.

Argued: December 9, 2008
Decided: April 28, 2009
For Case Analysis: See ABA PREVIEW 177

If a convicted defendant claims that a prosecutor withheld evidence that could have mitigated the finding of guilt or the
sentence and repeatedly raises the claim in state courts, which decline to review it on the grounds that it has already been adjudicated, is federal review of the claims barred?

No. A claim is not procedurally barred in federal court simply because a defendant’s state court remedies have been exhausted.

From the opinion by Justice Stevens (joined by Justices Kennedy, Souter, Ginsburg, and Breyer):
In the 27 years since Gary Cone was convicted of murder and sentenced to death, no Tennessee court has reached the merits of his claim that state prosecutors withheld evidence that would have bolstered his defense and rebutted the State’s attempts to cast doubt on his alleged drug addiction. Today we hold that the Tennessee courts’ procedural rejection of Cone’s Brady claim does not bar federal habeas review of the merits of that claim.

From the dissent by Justice Thomas (joined by Justice Scalia):
The Court’s willingness to return the sentencing issue to the District Court without any firm conviction that an error was committed by the Court of Appeals is inconsistent with our established practice and disrespectful to the lower courts that have considered this case. Worse still, the inevitable result will be years of additional delay in the execution of a death sentence lawfully imposed by a Tennessee jury.

Concurring in the judgment: Chief Justice Roberts
Concurring in part and dissenting in part: Justice Alito

Argued: January 12, 2009
Decided: April 1, 2009
For Case Analysis: See ABA PREVIEW 242

Are federally appointed public defenders authorized to represent defendants in later state clemency proceedings?

Yes. The relevant statute provides that federally appointed counsel should assist a defendant through all proceedings, including post-conviction efforts. There is no reason to believe Congress intended the statute only to apply to federal, and not state, clemency efforts. The plain language of the statute provides as such, and the legislative history supports this conclusion.

From the opinion by Justice Stevens (joined by Justices Kennedy, Souter, Ginsburg, and Breyer):
Harbison’s case underscores why it is “entirely plausible that Congress did not want condemned men and women to be abandoned by their counsel at the last moment and left to navigate the sometimes labyrinthine clemency process from their jail cells.” In authorizing federally funded counsel to represent their state clients in clemency proceedings, Congress ensured that no prisoner would be put to death without meaningful access to the “fail-safe” of our justice system.

From the opinion by Justice Scalia concurring in part and dissenting in part (joined by Justice Alito):
Because the statute is most naturally and coherently read to provide federally funded counsel to capital defendants appearing in a federal forum, I would affirm the decision of the Sixth Circuit and hold that Harbison was not entitled to federally funded counsel to pursue state clemency.

Concurring in the judgment: Chief Justice Roberts
Concurring in the judgment: Justice Thomas

Argued: March 3, 2009
Decided: June 8, 2009
For Case Analysis: See ABA PREVIEW 291

Was the Due Process Clause violated when a justice on the West Virginia Supreme Court of Appeals did not recuse himself from hearing an appeal of an award against a company after the company’s chairman and principal officer made extraordinary campaign contributions to that justice’s campaign to unseat an incumbent justice and win a seat on the court?

Yes. Judges must recuse themselves when they have a direct, personal, substantive, pecuniary interest in a matter, and under an objective determination of whether Due Process
was violated by the justice’s participation on the case it is clear there was a real risk of bias based on the influence of the campaign contributions and their clear impact on the final result of the election.

From the opinion by Justice Kennedy (joined by Justices Stevens, Souter, Ginsburg, and Breyer):
Although there is no allegation of a quid pro quo agreement, the fact remains that Blankenship’s extraordinary contributions were made at a time when he had a vested stake in the outcome. Just as no man is allowed to be a judge in his own cause, similar fears of bias can arise when—without the consent of the other parties—a man chooses the judge in his own cause. And applying this principle to the judicial election process, there was here a serious, objective risk of actual bias that required Justice Benjamin’s recusal.

From the dissent by Chief Justice Roberts (joined by Justices Scalia, Thomas, and Alito):
It is an old cliché, but sometimes the cure is worse than the disease. I am sure there are cases where a “probability of bias” should lead the prudent judge to step aside, but the judge fails to do so. Maybe this is one of them. But I believe that opening the door to recusal claims under the Due Process Clause, for an amorphous “probability of bias,” will itself bring our judicial system into undeserved disrepute, and diminish the confidence of the American people in the fairness and integrity of their courts. I hope I am wrong.

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

EDUCATION LAW
Horne v. Flores et al. and
Speaker of the Arizona House of Representatives et al. v. Flores et al.
Docket Nos. 08-289 and 08-294
Reversed and Remanded: The Ninth Circuit

Argued: April 20, 2009
Decided: June 25, 2009
For Case Analysis: See ABA PREVIEW 430

Was the Arizona State legislature and a school superintendent entitled to relief from a district court’s contempt ruling against them based on improper English Language Learner (ELL) programs in violation of the Equal Educational Opportunities Act (EEOA) under Rule 60(b)(5) on the basis that continuing to apply the past judgment is no longer equitable based on changed circumstances?

Yes. The circuit court’s analysis under Rule 60(b)(5) was too strict and narrow and failed to address important federalism concerns and focus on whether enforcement of the judgment was equitable. Since the state and school district took action that may have already remedied the original issue, and if this is the case, relief under 60(b)(5) should have been granted.

From the opinion by Justice Alito (joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas):
The Court of Appeals did not engage in the Rule 60(b)(5) analysis just described. Rather than applying a flexible standard that seeks to return control to state and local officials as soon as a violation of federal law has been remedied, the Court of Appeals used a heightened standard that paid insufficient attention to federalism concerns. And rather than inquiring broadly into whether changed conditions in Nogales provided evidence of an ELL program that complied with the EEOA, the Court of Appeals concerned itself only with determining whether increased ELL funding complied with the original declaratory judgment order. The court erred on both counts.

From the dissent by Justice Breyer (joined by Justices Stevens, Souter, and Ginsburg):
I disagree with the Court for several reasons. ‘Finally, my own review of the record convinces me that the Court is wrong regardless. The lower courts did “fairly consider” every change in circumstances that the parties called to their attention. The record more than adequately supports this conclusion. In a word, I fear that the Court misapplies an inappropriate procedural framework, reaching a result that neither the record nor the law adequately supports. In doing so, it risks denying schoolchildren the English-learning instruction necessary “to overcome language barriers that impede” their “equal participation.”

Dissenting: Justice Breyer (joined by Justices Stevens, Souter, and Ginsburg)
Is a small utility district with an elected board allowed the option of seeking a “bailout” from § 5 of the Voting Rights Act, which requires that all changes to state election procedure be suspended until they are approved by a panel of judges in federal district court in Washington or by the attorney general—and is § 5 constitutional?

Yes. The Court declines to reach the question of § 5’s constitutionality, as other grounds are present upon which the case may be decided. According to the language of the act and in consideration of its modern day application, all political subdivisions must have the option of seeking a bailout from the procedural requirements of § 5 of the Voting Rights Act.

Concurring in the judgment in part and dissenting in part: Justice Thomas

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

Bona fide seniority systems allow, among other things, for predictable financial consequences, both for the employer who pays the bill and for the employee who gets the benefit … Congress recognized the salience of these reliance interests and, where not based upon or resulting from an intention to discriminate, gave them protection. Because the seniority system run by AT&T is bona fide, the judgment of the Court of Appeals for the Ninth Circuit is reversed.

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

The plaintiffs (now respondents) in this action will receive, for the rest of their lives, lower pension benefits than colleagues who worked for AT&T no longer than they did. They will experience this discrimination not simply because of the adverse action to which they were subjected pre-PDA. Rather, they are harmed today because AT&T has refused fully to heed the PDA’s core command: Hereafter, for “all employment-related purposes,” disadvantageous treatment “on the basis of pregnancy, childbirth, or related medical conditions” must cease.

Concurring: Justice Stevens

American Bar Association 495

(Continued on Page 496)
Did the city of New Haven, Connecticut, violate Title VII of the Civil Rights Act, which protects against disparate treatment in employment decisions based on race, color, religion, sex, or national origin when it threw out the results of an exam serving as part of a merit-based promotions system used by the city's fire department?

Yes. Absent a valid defense, an employer's actions violate Title VII if they adversely impact an individual based on race. The city's defense that it sought to avoid liability due to the racially disproportionate results of the test is not a valid defense because the city did not have a strong basis in evidence for believing it would be subject to liability.

From the opinion by Justice Kennedy (joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito):
The problem, of course, is that after the tests were completed, the raw racial results became the predominant rationale for the City's refusal to certify the results. The injury arises in part from the high, and justified, expectations of the candidates who had participated in the testing process on the terms the City had established for the promotional process. Many of the candidates had studied for months, at considerable personal and financial expense, and thus the injury caused by the City's reliance on raw racial statistics at the end of the process was all the more severe. Confronted with arguments both for and against certifying the test results—and threats of a lawsuit either way—the City was required to make a difficult inquiry. But its hearings produced no strong evidence of a disparate-impact violation, and the City was not entitled to disregard the tests based solely on the racial disparity in the results.

From the dissent by Justice Ginsburg (joined by Justices Stevens, Souter, and Breyer):
The white firefighters who scored high on New Haven's promotional exams understandably attract this Court's sympathy. But they had no vested right to promotion. Nor have other persons received promotions in preference to them. New Haven maintains that it refused to certify the test results because it believed, for good cause, that it would be vulnerable to a Title VII disparate-impact suit if it relied on those results. The Court today holds that New Haven has not demonstrated "a strong basis in evidence" for its plea. In so holding, the Court pretends that "[t]he City rejected the test results solely because the higher scoring candidates were white." That pretension, essential to the Court's disposition, ignores substantial evidence of multiple flaws in the tests New Haven used.

Concurring: Justice Scalia
Concurring: Justice Alito
(joined by Justices Scalia and Thomas)
that its product will be leaked, spilled, dumped, or otherwise discarded may provide evidence of the entity’s intent to dispose of its hazardous wastes, knowledge alone is insufficient to prove that an entity “planned for” the disposal, particularly when the disposal occurs as a peripheral result of the legitimate sale of an unused, useful product.

From the dissent by Justice Ginsburg:
Relieving Shell of any obligation to pay for the cleanup undertaken by the United States and California is hardly commanded by CERCLA’s text, and is surely at odds with CERCLA’s objective—to place the cost of remediation on persons whose activities contributed to the contamination rather than on the taxpaying public.

From the dissent by Justice Ginsburg (joined by Justices Stevens and Souter):
The Court’s reading, in contrast, strains credulity. A discharge of a pollutant, otherwise prohibited by firm statutory command, becomes lawful if it contains sufficient solid matter to raise the bottom of a water body, transformed into a waste disposal facility. Whole categories of regulated industries can thereby gain immunity from a variety of pollution-control standards.

From the opinion by Justice Scalia (joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito): The “best” technology—that which is “most advantageous,” Webster’s New International Dictionary 258 (2d ed. 1953)—may well be the one that produces the most of some good, here a reduction in adverse environmental impact. But “best technology” may also describe the technology that
most efficiently produces some good. In common parlance one could certainly use the phrase “best technology” to refer to that which produces a good at the lowest per-unit cost, even if it produces a lesser quantity of that good than other available technologies.

From the dissent by Justice Stevens (joined by Justices Souter and Ginsburg): Unless costs are so high that the best technology is not “available,” Congress has decided that they are outweighed by the benefits of minimizing adverse environmental impact. [The statute] neither expressly nor implicitly authorizes the EPA to use cost-benefit analysis when setting regulatory standards; fairly read, it prohibits such use.

Concurring in part and dissenting in part: Justice Breyer

No. To have standing in a case such as this, a plaintiff must have suffered an actual injury caused by the lack of opportunity to provide input regarding the proposed project, and plaintiffs have shown no such injury here.

From the opinion by Justice Scalia (joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito): [H]ow is the court to assure itself that some of these members plan to make use of the specific sites upon which projects may take place? Or that these same individuals will find their recreation burdened by the Forest Service’s use of the challenged procedures? While it is certainly possible—perhaps even likely—that one individual will meet all of these criteria, that speculation does not suffice. “Standing,” we have said, “is not ‘an ingenious academic exercise in the conceivable’ … [but] requires … a factual showing of perceptible harm.”

From the dissent by Justice Breyer (joined by Justices Stevens, Souter, and Ginsburg): These allegations and affidavits more than adequately show a “realistic threat” of injury to plaintiffs brought about by reoccurrence of the challenged conduct—conduct that the Forest Service thinks lawful and admits will reoccur. Many years ago the Ninth Circuit warned that a court should not “be blind to what must be necessarily known to every intelligent person.” Applying that standard, I would find standing here.

Concurring: Justice Kennedy

Argued: October 8, 2008
Decided: November 12, 2008
For Case Analysis: See ABA PREVIEW 14

Did the district court abuse its discretion when it granted a preliminary injunction that restricted the Navy’s use of active sonar during training sessions because the court determined potential impacts to marine mammal life were possible?

Yes. To grant a preliminary injunction, a district court must find more than the possibility of harm but must find that the potential for irreparable harm is likely. Here, the potential harm was not shown to be substantial or likely, and any potential harm was outweighed by the public interest in naval training.

From the opinion by Chief Justice Roberts (joined by Justices Scalia, Kennedy, Thomas, and Alito): President Theodore Roosevelt explained that “the only way in which a navy can ever be made efficient is by practice at sea, under all the conditions which would have to be met if war existed.” We do not discount the importance of plaintiffs’ ecological, scientific, and recreational interests in marine mammals. Those interests, however, are plainly outweighed by the Navy’s need to
conduct realistic training exercises to ensure that it is able to neutralize the threat posed by enemy submarines.

From the dissent by Justice Ginsburg (joined by Justice Souter):
In my view, this likely harm … cannot be lightly dismissed, even in the face of an alleged risk to the effectiveness of the Navy’s 14 training exercises.

Concurring in part and dissenting in part: Justice Breyer (joined by Justice Stevens as to Part I)

From the unanimous opinion by Justice Souter:
The point is that by giving a plan participant a clear set of instructions for making his own instructions clear, ERISA forecloses any justification for enquiries into nice expressions of intent, in favor of the virtues of adhering to an uncomplicated rule: “simple administration, avoid[ing] double liability, and ensur[ing] that beneficiaries get what’s coming quickly, without the folderol essential under less-certain rules.”

Argued: April 21, 2009
Decided: June 8, 2009
For Case Analysis: See ABA PREVIEW 421

If the United States does not intervene as a party under a False Claims Act (FCA), which permits the United States to intervene as a party and consequently extends the deadline for a party to file an appeal to 60 days, does the original deadline of 30 days still apply?

Yes. The United States is only a party to a case under the FCA if it exercises its right to be a party, meaning it must choose to be part of the case; otherwise, there would be no reason for the act to even provide the option of intervening.

From the unanimous opinion by Justice Thomas:
Congress expressly gave the United States discretion to intervene in FCA actions—a decision that requires consideration of the costs and benefits of party status. The Court cannot disregard that congressional assignment of discretion by designating the United States a “party” even after it has declined to assume the rights and burdens attendant to full party status.

Argued: November 4, 2008
Decided: April 28, 2009
For Case Analysis: See ABA PREVIEW 139

Was the FCC’s decision to change its policy so as to ban “fleeting expletives” on television a violation of the Administrative Procedure Act, which requires that decisions made by federal agencies not be “arbitrary and capricious”? No. If a new policy is acceptable under law and has reasons to support it, and the agency finds it to be a better policy, a court must defer to agency discretion in enacting the policy.

The agency made an acceptable decision here because the “F word” and the “S word” are patently offensive, and changes in technology make it easier for broadcasters to “bleep” even fleeting uses of such words.

From the opinion by Justice Scalia with respect to Parts I, II, III-A through III-D, and IV
(joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito) and an opinion with respect to Part III-E (joined by Chief Justice Roberts and Justices Thomas and Alito):
The Commission could reasonably conclude that the pervasiveness of foul language, and the coarsening of public entertainment in other media such as cable, justify more stringent regulation of broadcast programs so as to give conscientious parents a relatively safe haven for their children. In the end, the Second Circuit and the broadcasters quibble with the Commission’s policy choices and not with the explanation it has given. We decline to “substitute [our] judgment for that of the agency,” and we find the Commission’s orders neither arbitrary nor capricious.

From the dissent by Justice Breyer (joined by Justices Stevens, Souter, and Ginsburg): And taken together they suggest that the FCC’s answer to the question, “Why change?” is, “We like the new policy better.” This kind of answer might be perfectly satisfactory were it given by an elected official. But when given by an agency, in respect to a major change of an important policy where much more might be said, it is not sufficient.

Concurring: Justice Thomas
Concurring in part and concurring in the judgment: Justice Kennedy
Dissenting: Justice Stevens
Dissenting: Justice Ginsburg

Under the First Amendment, can a local union charge the non-members it represents in bargaining a service fee for litigation expenses incurred by the national union the local unit belongs to?

Yes. When the subject matter of the litigation is of the kind that would be chargeable if the litigation was local, and the litigation charge is reciprocal, meaning that other locals would be required to similarly contribute to litigation on behalf of the local union who now contributes, the charge may be permitted.

From the unanimous opinion by Justice Breyer:
We reach this conclusion in part because logic suggests that the same standard should apply to national litigation expenses as to other national expenses. We can find no significant difference between litigation activities and other national activities the cost of which this Court has found chargeable. We can find no sound basis for holding that national social activities, national convention activities, and activities involved in producing the non-political portions of national union publications all are chargeable but national litigation activities are not.

Argued: October 6, 2008
Decided: January 21, 2009
For Case Analysis: See ABA PREVIEW 51

FIRST AMENDMENT
Loeke v. Karass
Docket No. 07-610
Affirmed: The First Circuit

Argued: November 12, 2008
Decided: February 25, 2009
For Case Analysis: See ABA PREVIEW 85

Does a city violate the Free Speech Clause of the First Amendment if it declines to display a donated religious monument in a city park where other donated religious monuments are displayed?

No. Government speech is not subject to scrutiny under the Free Speech Clause, and the display of a permanent monument in one of its parks is speech by a city government. The monuments displayed on government land send a message, and the government has a right to control that message by accepting or declining the monuments it does or does not wish to have displayed on its land.

From the opinion by Justice Alito (joined by Chief Justice Roberts and Justices Stevens, Scalia, Kennedy, Thomas, Ginsburg, and Breyer):
Speakers, no matter how long-winded, eventually come to the end of their remarks; persons distributing leaflets and carrying signs at some point tire and go home; monuments, however, endure. They monopolize the use of the land on which they stand and interfere permanently with other uses of public space. A public park, over the years, can provide a soapbox for a very large num-

For Case Analysis: See ABA PREVIEW 85

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ber of orators—often, for all who want to speak—but it is hard to imagine how a public park could be opened up for the installation of permanent monuments by every person or group wishing to engage in that form of expression.

Concurring: Justice Stevens
(joined by Justice Ginsburg)
Concurring: Justice Scalia
(joined by Justice Thomas)
Concurring: Justice Breyer
Concurring in judgment: Justice Souter

While publicly administered payroll deductions for political purposes can enhance the unions’ exercise of First Amendment rights, Idaho is under no obligation to aid the unions in their political activities. And the State’s decision not to do so is not an abridgment of the unions’ speech; they are free to engage in such speech as they see fit. They simply are barred from enlisting the State in support of that endeavor.

From the opinion by Chief Justice Roberts
(joined by Justices Scalia, Kennedy, Thomas, and Alito, and by Justice Ginsburg as to Parts I and III):

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

Because it is clear to me that the restriction was intended to make it more difficult for unions to finance political speech, I would hold it unconstitutional in all its applications.

Concurring in part and concurring in the judgment: Justice Ginsburg
Concurring in part and dissenting in part: Justice Breyer

From the dissent by Justice Alito
(joined by Chief Justice Roberts and Justice Kennedy, and Justice Breyer except as to Part II-E):

A rule that gives police the power to conduct such a search whenever an individual is caught committing a traffic offense, when there is no basis for believing evidence of the offense might be found in the vehicle, creates a serious and recurring threat to the privacy of countless individuals. Indeed, the character of that threat implicates the central concern underlying the Fourth Amendment—the concern about giving police officers unbridled discretion to rummage at will among a person’s private effects.

Concurring: Justice Scalia
Dissenting: Justice Breyer

Argued: November 3, 2008
Decided: February 24, 2009
For Case Analysis: See ABA PREVIEW 113

Does Idaho law, which allows payroll deductions for union fees, but disallows payroll deductions for a union’s political campaigns, violate the First Amendment?

No. Under the First Amendment, the government may not abridge freedom of speech. However, this does not create an affirmative right to use a government-provided mechanism to fund political speech.

From the opinion by Chief Justice Roberts
(joined by Justices Scalia, Kennedy, Thomas, and Alito, and by Justice Ginsburg as to Parts I and III):

Under the search incident to arrest exception to the Fourth Amendment’s warrant requirement, may an officer search an arrested person’s motor vehicle at any time during the arrest?

No. Officers may search the vehicle of its arrested occupant only if the occupant is unsecured and within reaching distance of the passenger compartment or if the officer reasonably believes evidence relevant to the crime for which the arrest was made may be found. This rule serves the narrow purposes for which exceptions to the warrant requirement are made, including officer safety and preservation of evidence.

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

A rule that gives police the power to conduct such a search whenever an individual is caught committing a traffic offense, when there is no basis for believing evidence of the offense might be found in the vehicle, creates a serious and recurring threat to the privacy of countless individuals. Indeed, the character of that threat implicates the central concern underlying the Fourth Amendment—the concern about giving police officers unbridled discretion to rummage at will among a person’s private effects.

Concurring: Justice Scalia
Dissenting: Justice Breyer

Argued: October 7, 2008
Decided: April 21, 2009
For Case Analysis: See ABA PREVIEW 54

Under the search incident to arrest exception to the Fourth Amendment’s warrant requirement, may an officer search an arrested person’s motor vehicle at any time during the arrest?

No. Officers may search the vehicle of its arrested occupant only if the occupant is unsecured and within reaching distance of the passenger compartment or if the officer reasonably believes evidence relevant to the crime for which the arrest was made may be found. This rule serves the narrow purposes for which exceptions to the warrant requirement are made, including officer safety and preservation of evidence.

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Under Supreme Court precedent allowing police officers to “pat down” an individual they have lawfully stopped and suspect is involved in criminal activity, may a police officer “stop and frisk” a passenger in a motor vehicle if the vehicle is stopped for a traffic infraction?

Yes. Traffic stops resemble the kind of lawful stops during which an officer may check an individual for weapons if that officer reasonably believe criminal activity is taking place.

From the unanimous opinion by Justice Ginsburg:
It is true … that in a lawful traffic stop, “[t]here is probable cause to believe that the driver has committed a minor vehicular offense,” but “there is no such reason to stop or detain the passengers.” On the other hand … the risk of a violent encounter in a traffic-stop setting “stems not from the ordinary reaction of a motorist stopped for a speeding violation, but from the fact that evidence of a more serious crime might be uncovered during the stop.”

When contraband is seized during what officers believe is a lawful search because of an outstanding warrant that was later found to be invalid due to negligence, must the evidence obtained be excluded from use by the prosecution?

No. When the error is a result of negligence not related to the arrest itself, the evidence does not need to be suppressed. No constitutional violation necessarily occurs if the searching officer reasonably believed probable cause existed for the search. An officer must have acted culpably in a way that could be deterred in the future for an exclusionary rule to apply.

From the opinion by Chief Justice Roberts (joined by Justices Scalia, Kennedy, Thomas, and Alito):
In light of our repeated holdings that the deterrent effect of suppression must be substantial and outweigh any harm to the justice system, we conclude that when police mistakes are the result of negligence such as that described here, rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence does not “pay its way.” In such a case, the criminal should not “go free because the constable has blundered.”

From the dissent by Justice Ginsburg (joined by Justices Stevens, Souter, and Breyer): The exclusionary rule provides redress for Fourth Amendment violations by placing the government in the position it would have been in had there been no unconstitutional arrest and search. The rule thus strongly encourages police compliance with the Fourth Amendment in the future. The Court, however, holds the rule inapplicable because careless record keeping by the police—not flagrant or deliberate misconduct—accounts for Herring’s arrest. I would not so constrict the domain of the exclusionary rule and would hold the rule dispositive of this case: “[i]f courts are to have any power to discourage [police] error of [the kind here at issue], it must be through the application of the exclusionary rule.”

Dissenting: Justice Breyer (joined by Justice Souter)
Yes. The procedure has proven unworkable, been criticized in other Supreme Court decisions, and imposed too great a burden on courts in determining questions of qualified immunity in individual cases.

From the unanimous opinion by Justice Alito:
On reconsidering the procedure required in [Saucier v. Katz, 533 U. S. 194 (2001)], we conclude that, while the sequence set forth there is often appropriate, it should no longer be regarded as mandatory. The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.

Yes. The degree of a search’s intrusiveness must meet the circumstances that justify it, and a search as invasive as this requires a reasonable suspicion of danger. This was not the case here, as the pills were non-dangerous contraband. A defense of qualified immunity is warranted because the law on this subject was not clearly established at the time of the search.

From the opinion by Justice Souter (joined by Chief Justice Roberts and Justices Scalia, Kennedy, Breyer, and Alito, and by Justices Stevens and Ginsburg as to Parts I–III): In sum, what was missing from the suspected facts that pointed to Savana was any indication of danger to the students from the power of the drugs or their quantity, and any reason to suppose that Savana was carrying pills in her underwear. We think that the combination of these deficiencies was fatal to finding the search reasonable.

From the opinion by Justice Thomas, concurring in the judgment in part and dissenting in part: Unlike the majority, however, I would hold that the search of Savana Redding did not violate the Fourth Amendment. The majority imposes a vague and amorphous standard on school administrators. It also grants judges sweeping authority to second-guess the measures that these officials take to maintain discipline in their schools and ensure the health and safety of the students in their charge.

Concurring in part and dissenting in part: Justice Ginsburg

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tion outweighs the interest in correcting a misnomer.

**HEALTH LAW**  
*Wyeth v. Levine*  
Docket No. 06-1249  
Affirmed: Supreme Court of Vermont

Argued: November 3, 2008  
Decided: March 4, 2009  
For Case Analysis: See ABA PREVIEW 80

If the Food and Drug Administration (FDA) has approved a drug’s labeling, does this approval at the federal level preempt state law product liability claims for failure to warn based on the labeling?

**Yes.** A judgment is final only when judgment has been entered and direct review by other courts has concluded or the time for such review has passed. The period of time that must occur before a judgment is considered final may be extended if a court grants an out-of-time appeal.

**From the unanimous opinion by Justice Thomas:**  
Finality is a concept that has been variously defined; like many legal terms, its precise meaning depends on context. But here, the finality of a state-court judgment is expressly defined by statute as “the conclusion of direct review or the expiration of the time for seeking such review” ... Under the statutory definition, therefore, once the Texas Court of Criminal Appeals reopened direct review of petitioner’s conviction ... petitioner’s conviction was no longer final.

**From the opinion by Justice Stevens** (joined by Justices Kennedy, Souter, Ginsburg, and Breyer):  
State tort suits uncover unknown drug hazards and provide incentives for drug manufacturers to disclose safety risks promptly. They also serve a distinct compensatory function that may motivate injured persons to come forward with information. Failure-to-warn actions, in particular, lend force to the FDCAs premise that manufacturers, not the FDA, bear primary responsibility for their drug labeling at all times.

**From the dissent by Justice Alito** (joined by Chief Justice Roberts and Justice Scalia):  
This case illustrates that tragic facts make bad law. The Court holds that a state tort jury, rather than the Food and Drug Administration (FDA), is ultimately responsible for regulating warning labels for prescription drugs. That result cannot be reconciled with [prior cases], or general principles of conflict pre-emption. I respectfully dissent.

**Concurring: Justice Breyer**  
**Concurring in the judgment:** Justice Thomas

**IMMIGRATION**  
*Negusie v. Holder*  
Docket No. 07-499  
Reversed and Remanded: The Fifth Circuit

Argued: November 5, 2008  
Decided: March 3, 2009  
For Case Analysis: See ABA PREVIEW 126

Did the Bureau of Immigration Appeals incorrectly interpret a statute when it determined that an individual could not be given asylum in the United States as a result of his persecution of others based on religion, race, nationality, group membership, or political views even though he had been coerced or forced into committing such persecution?

**Yes.** Although an agency’s interpretation of a statute should usually be given deference, in this instance the agency’s application of an ambiguous statute
involved mistakenly relying on an inapplicable case and not on its own interpretive authority. This made the interpretation potentially erroneous, so the agency must reinterpret the statute as it applies in this case.

From the opinion by Justice Kennedy (joined by Chief Justice Roberts and Justices Scalia, Souter, Ginsburg, and Alito):
The parties disagree over whether coercion or duress is relevant in determining if an alien assisted or otherwise participated in persecution. As there is substance to both contentions, we conclude that the statute has an ambiguity that the agency should address in the first instance.

From the dissent by Justice Thomas:
In sum, the INA's persecutor bar does not require that assistance or participation in persecution be voluntary or uncoerced to fall within the statute's reach. It instead “mandates precisely” what it says: “[A]n individual's service as a [prison] camp armed guard—whether voluntary or involuntary—makes him ineligible for asylum” or withholding of removal if the guard's service involved assistance or participation in the persecution of another person on account of a protected ground.

Concurring: Justice Scalia (joined by Justice Alito)
Concurring in part and dissenting in part: Justice Stevens (joined by Justice Breyer)

IMMIGRATION
Nken v. Holder
Docket No. 08-681
Vacated and Remanded: The Fourth Circuit

Argued: January 21, 2009
Decided: April 22, 2009
For Case Analysis: See ABA PREVIEW 266

Do changes in immigration procedure brought about by the Illegal Immigration Reform and Immigrant Responsibility Act, restricting the injunctive relief available to an alien whose removal has been ordered, apply to the granting of a stay of removal by a court of appeals while it decides an appeal of an order for removal?

No. The relevant statute refers to an injunction, which serves a different purpose from a stay; accordingly, the traditional standard governing a decision of whether to grant a stay applies.

From the opinion by Chief Justice Roberts (joined by Justices Stevens, Scalia, Kennedy, Souter, Ginsburg, and Breyer):
It takes time to decide a case on appeal. Sometimes a little; sometimes a lot. “No court can make time stand still” while it considers an appeal, and if a court takes the time it needs, the court's decision may in some cases come too late for the party seeking review. That is why it “has always been held, … that as part of its traditional equipment for the administration of justice, a federal court can stay the enforcement of a judgment pending the outcome of an appeal.” A stay does not make time stand still, but does hold a ruling in abeyance to allow an appellate court the time necessary to review it.

From the dissent by Justice Alito (joined by Justice Thomas):
We should not lightly conclude that Congress enacted a provision that serves no function, and the Court's hyper-technical distinction between an injunction and a stay does not provide a sufficient justification for adopting an interpretation that renders [the statute] meaningless.

IMMIGRATION LAW
Nijhawan v. Holder
Docket No. 08-495
Affirmed: The Third Circuit

Argued: April 27, 2009
Decided: June 15, 2009
For Case Analysis: See ABA PREVIEW 409

For purposes of determining whether an alien has committed an aggravated felony, resulting in deportation under federal immigration law, does the statute defining an aggravated felony's reference to a loss exceeding $10,000 in fraud cases require that a loss of this amount be an element of the particular felony for which the alien has been convicted?

No. The statute's reference to $10,000 is to the circumstances resulting from the felony, not to the elements of the crime itself. The statute's language points to this conclusion, and there are no widely applicable federal fraud statutes that require a loss of $10,000 as an element, so the reference
would have little meaning if its application was not circumstantial.

**From the unanimous opinion by Justice Breyer:**
We conclude that Congress did not intend [the statute]’s monetary threshold to be applied categorically, i.e., to only those fraud and deceit crimes generically defined to include that threshold. Rather, the monetary threshold applies to the specific circumstances surrounding an offender’s commission of a fraud and deceit crime on a specific occasion.

**From the opinion by Justice Thomas** (joined by Chief Justice Roberts and Justices Scalia, Kennedy, Breyer, and Alito):
We begin with the ordinary meaning of the word “now,” as understood when the IRA was enacted. At that time, the primary definition of “now” was “[a]t the present time; at this moment; at the time of speaking.” This definition is consistent with interpretations given to the word “now” by this Court, both before and after passage of the IRA, with respect to its use in other statutes.

**From the dissent by Justice Stevens:**
The consequences of the majority’s reading are both curious and harsh: curious because it turns “now” into the most important word in the IRA, limiting not only some individuals’ eligibility for federal benefits but also a tribe’s; harsh because it would result in the unsupportable conclusion that, despite its 1983 administrative recognition, the Narragansett Tribe is not an Indian tribe under the IRA.

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

**Does any source of law allow the Navajo Nation to bring a claim for the Secretary of the Interior’s alleged failure to approve an increase in royalty rates in a coal mining lease under the Indian Tucker Act?**

No. The Tucker Act waives the United States’s immunity from suits against it by Native American Tribes if the tribe can show a substantive source of law that establishes duties owed it, which have been breached, and mandates compensation for that breach. In a prior decision on this matter, the Supreme Court held that the sources of law that the Navajo Nation then argued created such a duty did not actually create one but left open the possibility that some other source of law may. In this litigation, they have failed to point to any such source of law, so their claim must fail.

**From the unanimous opinion by Justice Scalia:**
None of the sources of law cited by the Federal Circuit and relied upon by the Tribe provides any more sound a basis for its breach-of-trust lawsuit against the Federal Government than those we
analyzed in Navajo I. This case is at an end.

Concurring: Justice Souter (joined by Justice Stevens)

Argued: January 12, 2009
Decided: April 21, 2009
For Case Analysis: See ABA PREVIEW 225

Under the Terrorism Risk Insurance Act, which authorizes holders of terrorism-related judgments against Iran to attach Iranian assets the United States has not blocked, is a judgment Iran received against a California company relating to a business transaction for a weapons system a blocked asset?

No. The judgment for Iran against the company was confirmed after a 1981 order that authorized transactions in property in which Iran had an interest, and Iran’s interest only came about after its award against the company was confirmed in 1998. However, in this case Elahi waived his right to attach the asset by agreeing to accept partial payment from the United States for his claim, which the United States paid essentially in exchange for his promise to not attach property that it could potentially attach in claims it had against Iran.

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

Elahi could have chosen to forgo the Government’s compensation scheme, and he then could have attached the … judgment, as have other terrorist victims with judgments against Iran. But that course carried risks: Iran had challenged Elahi’s notice of lien and it was uncertain whether Elahi would prevail. In 2003, while litigation over his notice of lien was pending, Elahi chose to participate in the Government’s scheme. He thereby received the benefit of immediate, guaranteed partial compensation from the Government—in exchange for a promise not to interfere with property that the United States might need to satisfy potential liability to Iran. Having received $2.3 million in Government funds, there is nothing unfair about holding Elahi to the terms of his bargain.

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

Argued April 20, 2009
Decided: June 8, 2009
For Case Analysis: See ABA PREVIEW 400

Is Iraq, which was formerly subject to suit in U.S. courts under an exception to the Foreign Sovereign Immunities Act (FSIA) for state sponsors of terrorism, now immune from suits in American courts due to President Bush’s 2003 waiver of provisions of law applying to countries that have supported terrorism as they applied to Iraq?

Yes. A straightforward reading of the waiver leads to the conclusion that Iraq is now immune because the President waived all provisions of law applicable to states supportive of terrorism as they applied to Iraq, making the exception wholly inapplicable, regardless of when the actions giving rise to a cause of action occurred.

From the unanimous opinion by Justice Scalia:

To a layperson, the notion of the President’s suspending the operation of a valid law might seem strange. But the practice is well established, at least in the sphere of foreign affairs… It is entirely unremarkable that Congress, having taken upon itself in the FSIA to “free the Government” from the diplo-
matic pressures engendered by the case-by-case approach, would nonetheless think it prudent to afford the President some flexibility in unique circumstances such as these.

For purposes of a statute that imposes a tariff on certain underpriced foreign goods, but not on services, is the Commerce Department’s classification of enriched uranium purchased in exchange for cash and unenriched uranium as a “good” rather than a uranium enrichment “service” an appropriate interpretation?

Yes. The statute creating the tariff gives the Department of Commerce the power to determine whether something being sold is a good or service, and this interpretation of an ambiguity governs unless it is clearly unreasonable. This interpretation was not unreasonable in this case because something fungible was given in exchange for the cash and unenriched uranium.

From the unanimous opinion by Justice Souter:
The combination of these characteristics reasonably captures a common understanding of the sale of a good. Because an individual’s shirts are not fungible, they are tracked during the cleaning process and returned to the same customer who brought them in; there are no good reasons to treat them as owned for a time by the laundry, and no one does. And without any transfer of ownership, the salient feature of the transaction is the cleaning of the shirt, a service. Conversely, where a constituent material is untracked and fungible, ownership is usually seen as transferred, and the transaction is less likely to be a sale of services, as the Court explained years ago.

Did the Tennessee Court of Appeals err when it affirmed a verdict and jury award for damages related to fear of cancer stemming from asbestos exposure when the jury making the award had not been instructed on the legal standard for awarding such damages as requested by the defendant?

Yes. The lack of instruction was clear error because in a prior case the U.S. Supreme Court had plainly stated that a defendant may request jury instructions on what a plaintiff must prove to be awarded fear of cancer damages. Failing to give jury instructions on the legal standard makes the high bar a plaintiff must meet to receive such an award meaningless and creates too much risk that juries will make decisions based on emotion rather than careful regard for a court’s instructions.

From the per curiam opinion:
When this Court in Ayers held that certain Federal Employers’ Liability Act (FELA) plaintiffs can recover based on their fear of developing cancer, it struck a delicate balance between plaintiffs and defendants—and it did so against the backdrop of systemic difficulties posed by the “elephantine mass of asbestos cases.” Jury instructions stating the proper standard for fear-of-cancer damages were part of that balance and courts must give such instructions upon a defendant’s request. The ruling of the Tennessee Court of Appeals conflicts with Ayers. The trial court should have given the substance of the requested instructions.

From the dissent by Justice Stevens:
A proper reading of Ayers and an appropriate amount of respect for the jury in this case should have counseled the Court to stay its hand. Instead, it authorizes a fresh review of the jury’s damages award in response to the possibility that the jury decided to compensate Hensley for his fear of cancer without concluding that his fear was genuine and serious. Yet, as a practical matter, it is hard to believe the jury would have awarded any damages for Hensley’s fear of cancer if it did not believe that fear to be genuine and serious.

Dissenting: Justice Stevens
Dissenting: Justice Ginsburg
Does a military court, created by Congress through its power under Article I of the United States Constitution, have the same authority as Article III courts to hear a writ error coram nobis (to correct an error of fact) challenging an earlier decision affirming a criminal conviction?

Yes. Congress gave the military court the authority to hear cases of the kind the defendant originally was convicted of, and this petition, which is a request for the court to fix an error committed in the earlier proceeding, is an extension of that earlier case.

From the opinion by Justice Kennedy (joined by Justices Stevens, Souter, Ginsburg, and Breyer):
The military justice system relies upon courts that must take all appropriate means, consistent with their statutory jurisdiction, to ensure the neutrality and integrity of their judgments. Under the premises and statutes we have relied upon here, the jurisdiction and the responsibility of military courts to reexamine judgments in rare cases where a fundamental flaw is alleged and other judicial processes for correction are unavailable are consistent with the powers Congress has granted those courts under Article I and with the system Congress has designed.

Concurring in part and dissenting in part: Chief Justice Roberts (joined by Justices Scalia, Thomas, and Alito):
I agree with the majority that this Court has jurisdiction to review the decision below, but respectfully dissent from its holding that military courts have jurisdiction to issue writs of coram nobis.

Argued: March 25, 2009
Decided: June 8, 2009
For Case Analysis: See ABA PREVIEW 355

By issuing a joint resolution apologizing for the role the United States played in overthrowing the Hawaiian monarchy, did Congress strip the state of Hawaii of its ability to sell territory that native Hawaiians still claim?

No. The congressional resolution did not carry the force of law and should not have been interpreted as changing the state’s rights and obligations. Even if it were possible to read the resolution as barring the state from transferring its lands, it is better policy not to read the resolution as putting Hawaii’s ownership of its land into question so long after its admittance to the Union.

From the unanimous opinion by Justice Alito:
Here, the State Supreme Court incorrectly held that Congress, by adopting the Apology Resolution, took away from the citizens of Hawaii the authority to resolve an issue that is of great importance to the people of the State. Respondents defend that decision by arguing that they have both state-law property rights in the land in question and “broader moral and political claims for compensation for the wrongs of the past.” But we have no authority to decide questions of Hawaiian law or to provide redress for past wrongs except as provided for by federal law.

Argued: February 25, 2009
Decided: March 31, 2009
For Case Analysis: See ABA PREVIEW 328

Does the Labeling Act, which prohibits states from creating additional requirements or prohibitions based on smoking and health for cigarettes labeled in conformity with the act, preempt a state law cause of action for fraud through deceptive labeling on cigarette packages?

Argued: October 6, 2008
Decided: December 15, 2008
For Case Analysis: See ABA PREVIEW 8

Argued: March 25, 2009
Decided: June 8, 2009
For Case Analysis: See ABA PREVIEW 355

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Argued: October 6, 2008
Decided: December 15, 2008
For Case Analysis: See ABA PREVIEW 8

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No. The purpose of the preemption provisions of the Labeling Act is to prevent states from creating additional labeling requirements for cigarette packaging, not to prevent individuals from possibly having a remedy in court if the packaging is fraudulently deceptive.

From the opinion by Justice Stevens (joined by Justices Kennedy, Souter, Ginsburg, and Breyer):
Although both of the Act’s purposes are furthered by prohibiting States from supplementing the federally prescribed warning, neither would be served by limiting the States’ authority to prohibit deceptive statements in cigarette advertising. Petitioners acknowledge that “Congress had no intention of insulating tobacco companies from liability for inaccurate statements about the relationship between smoking and health.”

From the dissent by Justice Thomas (joined by Chief Justice Roberts and Justices Scalia and Alito):
The majority’s distorted interpretation … defeats this express congressional purpose, opening the door to an untold number of deceptive-practices lawsuits across the country. The question whether marketing a light cigarette is “misrepresentative” in light of compensatory behavior “would almost certainly be answered differently from State to State.”

Argued: January 14, 2009
Decided: June 8, 2009
For Case Analysis: See ABA PREVIEW 216

Are district court jury instructions in a Racketeer Influenced and Corrupt Organizations Act (RICO) case correct if those instructions indicate that the government must prove an ongoing organization with a framework, that various members and associates functioned as a continuous unit to achieve a common purpose, and that the jury could find an enterprise even if there was no structural hierarchy within the group?

Yes. The act uses the word “enterprise” to describe the kind of organizations that can be convicted under it. For RICO to apply, an organization must have some kind of structure, but a district court must necessarily use the word “structure” in its instructions as long as the instructions make the necessary points.

From the opinion by Justice Alito (joined by Chief Justice Roberts and Justices Scalia, Kennedy, Souter, Thomas, and Ginsburg):
We see no basis in the language of RICO for the structural requirements that petitioner asks us to recognize. [A]n association-in-fact enterprise is simply a continuing unit that functions with a common purpose. Such a group need not have a hierarchical structure or a “chain of command”[.]

While the group must function as a continuing unit and remain in existence long enough to pursue a course of conduct, nothing in RICO exempts an enterprise whose associates engage in spurts of activity punctuated by periods of quiescence. Nor is the statute limited to groups whose crimes are sophisticated, diverse, complex, or unique; for example, a group that does nothing but engage in extortion through old-fashioned, unsophisticated, and brutal means may fall squarely within the statute’s reach.

From the dissent by Justice Stevens (joined by Justice Breyer):
While I agree the word structure is not talismanic, I would hold that the instructions must convey the requirement that the alleged enterprise have an existence apart from the alleged pattern of predicate acts. The Court’s decision, by contrast, will allow juries to infer the existence of an enterprise in every case involving a pattern of racketeering activity undertaken by two or more associates.

Dissenting: Justice Stevens (joined by Justice Breyer)

Argued: March 4, 2009
Decided: April 29, 2009
For Case Analysis: See ABA PREVIEW 338

Under a United States law that imposes an additional manda-
No. The language and structure of the relevant statute indicate that an intent to fire the weapon is not required. Additionally, a defendant sentenced under this law has already committed unlawful conduct, so this law does not punish an innocent mistake.

From the opinion by Chief Justice Roberts (joined by Justices Scalia, Kennedy, Souter, Thomas, Ginsburg, and Alito):
An individual who brings a loaded weapon to commit a crime runs the risk that the gun will discharge accidentally. A gunshot in such circumstances—whether accidental or intended—increases the risk that others will be injured, that people will panic, or that violence (with its own danger to those nearby) will be used in response. Those criminals wishing to avoid the penalty for an inadvertent discharge can lock or unload the firearm, handle it with care during the underlying violent or drug trafficking crime, leave the gun at home, or—best yet—avoid committing the felony in the first place.

From the dissent by Justice Stevens:
Accidents happen, but they seldom give rise to criminal liability. Indeed, if they cause no harm they seldom give rise to any liability. The Court today nevertheless holds that petitioner is subject to a mandatory additional sentence—a species of criminal liability—for an accident that caused no harm.

Dissenting: Justice Breyer

American Bar Association

(Continued on Page 512)
May a district court disregard the Sentencing Guidelines ratio for crack and powder cocaine-related drug offenses and replace it with one of its own simply because the court disagrees with the Guidelines ratio?

**Yes.** The Supreme Court has previously held that sentencing courts may disregard the Sentencing Guidelines ratio.

**From the per curiam opinion:** [W]e now clarify that district courts are entitled to reject and vary categorically from the crack cocaine Guidelines based on a policy disagreement with those Guidelines. Here, the District Court’s choice of replacement ratio was based upon two well-reasoned decisions by other courts, which themselves reflected the Sentencing Commission’s expert judgment that a 20:1 ratio would be appropriate in a mine-run case.

**From the dissent by Chief Justice Roberts** (joined by Justice Alito):
But I do not think any error is so apparent as to warrant the bitter medicine of summary reversal, and I think there are good reasons not to address the question presented at this time.

Are suits for gender discrimination in schools under § 1983, which provides that a person who denies another’s constitutional rights, privileges, or immunities under the color of statute is subject to liability, precluded by Title IX, a statute meant to promote gender equality in schools?

**No.** Whether a statutory remedy bars a claim under § 1983 depends upon the intent of Congress in creating the statute, if it intended a statute to be the single mode for redress, it precludes a § 1983 claim. Here, Title IX provides only for withdrawal of funds from schools, so Congress clearly did not intend for it to preclude individuals’ claims under § 1983.

**From the unanimous opinion by Justice Alito:**
This conclusion is consistent with Title IX’s context and history. In enacting Title IX, Congress amended [another statute] to authorize the Attorney General to intervene in private suits alleging discrimination on the basis of sex in violation of the Equal Protection Clause. Accordingly, it appears that the Congress that enacted Title IX explicitly envisioned that private plaintiffs would bring constitutional claims to challenge gender discrimination; it must have recognized that plaintiffs would do so via 42 USC. § 1983.
From the dissent by Justice Stevens (joined by Justices Souter and Ginsburg and Justice Breyer except for n. 5): Today the Court properly concludes that the Louisiana Supreme Court’s parsimonious reading of our decision in Michigan v. Jackson is indefensible. Yet the Court does not reverse. Rather, on its own initiative and without any evidence that the longstanding Sixth Amendment protections established in Jackson have caused any harm to the workings of the criminal justice system, the Court rejects Jackson outright on the ground that it is “untenable as a theoretical and doctrinal matter.” That conclusion rests on a misinterpretation of Jackson’s rationale and a gross undervaluation of the rule of stare decisis.

Concurring: Justice Alito (joined by Justice Kennedy) Dissenting: Justice Stevens (joined by Justices Souter and Ginsburg, and Breyer except for n. 5) Dissenting: Justice Breyer

Argued: October 14, 2008 Decided: January 14, 2009 For Case Analysis: See ABA PREVIEW 42

Does the Sixth Amendment’s guarantee of trial by jury, as interpreted by case law holding that juries must find every fact that increases a defendant’s sentence beyond the maximum, bar judges from finding facts necessary to impose consecutive rather than concurrent sentences for multiple offenses?

No. States and their courts have authority over the administration of their own criminal justice systems, including how consecutive and concurrent sentences are imposed. Additionally, historical precedent shows that juries did not play a role in determining whether sentences should be served concurrently or consecutively.

From the opinion by Justice Ginsburg (joined by Justices Stevens, Kennedy, Breyer, and Alito): Members of this Court have warned against “wooden, unyielding insistence on expanding the … doctrine far beyond its necessary boundaries.” The jury-trial right is best honored through a “principled rationale” that applies the rule of the [past] cases “within the central sphere of their concern.” Our disposition today—upholding an Oregon statute that assigns to judges a decision that has not traditionally belonged to the jury—is faithful to that aim.

From the opinion by Justice Scalia (joined by Chief Justice Roberts and Justices Souter and Thomas): The decision to impose consecutive sentences alters the single consequence most important to convicted noncapital defendants: their date of release from prison. For many defendants, the difference between consecutive and concurrent sentences is more important than a jury verdict of innocence on any single count: Two consecutive 10-year sentences are in most circumstances a more severe punishment than any number of concurrent 10-year sentences.

SIXTH AMENDMENT Oregon v. Ice

Docket No. 07-901 Reversed and Remanded: Supreme Court of Oregon

Argued: April 28, 2009 Decided: June 22, 2009 For Case Analysis: See ABA PREVIEW 393

Under the Individuals with Disabilities Education Act (IDEA), as amended, which allows parents of a disabled child to be reimbursed for private school tuition if their public school has failed to provide a “free appropriate public education” (FAPE), is tuition reimbursement prohibited if the child has not previously received special education in the public school?

No. Prior to the amendments, the Court interpreted the act as not barring such reimbursement. Congress subsequently amended the act without specifically addressing the issue, so it is assumed the reimbursement continues to be authorized; such a reading is consistent with the purpose of the act.

From the dissent by Justice Stevens (joined by Chief Justice Roberts and Justices Kennedy, Ginsburg, Breyer, and Alito): The IDEA Amendments of 1997 did not modify the text of [the statute] and we do not read [the statute] to alter that provision’s meaning. Consistent with our [prior] decisions … we conclude that IDEA authorizes reimbursement for the cost of private special education services when a school district...
fails to provide a FAPE and the private-school placement is appropriate, regardless of whether the child previously received special education or related services through the public school.

From the dissent by Justice Souter (joined by Justices Scalia and Thomas):
Given the burden of private school placement, it makes good sense to require parents to try to devise a satisfactory alternative within the public schools, by taking part in the collaborative process of developing an IEP that is the “modus operandi” of the IDEA. And if some time, and some educational opportunity, is lost in consequence, this only shows what we have realized before, that no policy is ever pursued to the ultimate, single-minded limit, and that “[t]he IDEA obviously does not seek to promote [its] goals at the expense of all considerations, including fiscal considerations.”

TAXATION
Polar Tankers, Inc. v. City of Valdez, Alaska
Docket No. 08-310
Reversed and Remanded: Supreme Court of Alaska

Argued: April 1, 2009
Decided: June 15, 2009
For Case Analysis: See ABA PREVIEW 365

Does a Valdez, Alaska, city ordinance imposing a personal property tax on the value of large ships traveling to and from the city violate the Constitution’s Tonnage Clause, which forbids a state to lay a duty on tonnage without the consent of Congress?

Yes. The purpose of the Tonnage Clause is to prevent states from using their power to tax in a way that is injurious to other states and has been held to ban charges on the privilege of entering, trading in, or lying in a port. Here, the city taxes ships based on their value to obtain revenue for itself, which is the kind of tax the Clause forbids.

From the opinion by Justice Breyer, with respects to Parts I, II-A, and II-B-1 (joined by Justices Scalia, Kennedy, Ginsburg, and Alito, and Part II-B-2, joined by Justices Scalia, Kennedy, and Ginsburg):
This case lies at the heart of what the Tonnage Clause forbids. The ordinance applies almost exclusively to oil tankers. And a tax on the value of such vessels is closely correlated with cargo capacity. Because the imposition of the tax depends on a factor related to tonnage and that tonnage-based tax is not for services provided to the vessel, it is unconstitutional.

From the dissent by Justice Stevens (joined by Justice Souter):
The Tonnage Clause permits a State to levy a property tax on ships whether or not it taxes other property. Were that not the case, the challenged tax would still be permissible because Valdez also taxes mobile homes, trailers, and a wide variety of property used in producing oil. Because the tax in my view does not run afoul of the prohibitions of the Tonnage Clause, I respectfully dissent.

Concurring in part and concurring in judgment: Chief Justice Roberts (joined by Justice Thomas)
Concurring in part and concurring in judgment: Justice Alito
Dissenting: Justice Stevens (joined by Justice Souter)

Argued: October 8, 2008
Decided: January 26, 2009
For Case Analysis: See ABA PREVIEW 18

Does Title VII of the Civil Rights Act, which forbids retaliation against an employee who opposes race or gender discrimination in the workplace, extend protection to employees who report discrimination only after that inquiry is part of an investigation?

Yes. The statute applies to employees who voice concern over discriminatory behavior only after being asked about it because it bans retaliation against employees who “oppose” discrimination. Opposing discrimination does not necessarily require that an employee actually initiate action against such behavior.

From the opinion by Justice Souter (joined by Chief Justice Roberts and Justices Stevens, Scalia, Kennedy, Ginsburg, and Breyer):
“Oppose” goes beyond “active, consistent” behavior in ordinary discourse, where we would naturally use the word to speak of someone who has
taken no action at all to advance a position beyond disclosing it. Countless people were known to “oppose” slavery before Emancipation, or are said to “oppose” capital punishment today, without writing public letters, taking to the streets, or resisting the government. … There is, then, no reason to doubt that a person can “oppose” by responding to someone else’s question just as surely as by provoking the discussion, and nothing in the statute requires a freakish rule protecting an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when her boss asks a question.

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

ARGUED: December 8, 2008
DECIDED: April 21, 2009
FOR CASE ANALYSIS: See ABA PREVIEW

VETERANS’ BENEFITS
Shineski v. Sanders
Docket No. 07-1209
Reversed and Remanded and Vacated and Remanded: United States Court of Appeals for the Federal Circuit

ARGUED: October 14, 2008
DECIDED: March 9, 2009
FOR CASE ANALYSIS: See ABA PREVIEW

VOTING RIGHTS
Bartlett v. Strickland
Docket No. 07-689
Affirmed: Supreme Court of North Carolina

May North Carolina, in violation of its own state law which prohibits dividing counties when creating legislative district boundaries, divide a county and use § 2 of the Voting Rights Act, which aims to help minorities elect the candidate of their choice, as a defense?

No. In this case, the requirements for redrawing a legislative district under the Voting Rights Act have not been met. Even with the redrawing, the minority population of the district is below 50 percent, and the minority population in a potential district must constitute a majority of the population to mandate redrawing, a requirement that creates a clear and objective standard for courts to follow now and in the future.

From the opinion by Justice Kennedy (joined by Chief Justice Roberts and Justice Alito):
“Racial classifications with respect to voting carry particular dangers. Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to

(Continued on Page 516)
which the Nation continues to aspire. …” If § 2 were interpreted to require crossover districts throughout the Nation, “it would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions.”

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

In short, to the extent the plurality’s holding is taken to control future results, the plurality has eliminated the protection of § 2 for the districts that best vindicate the goals of the statute, and has done all it can to force the States to perpetuate racially concentrated districts, the quintessential manifestations of race consciousness in American politics.

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

Yes. Although it is questionable whether this statute was meant to apply to cases in which the Supreme Court has original jurisdiction, it is good policy to apply the statute to all federal cases to promote uniformity in the judicial system.

From the unanimous opinion by Justice Alito:

[W]e see no good reason why the rule regarding the recovery of expert witness fees should differ markedly depending on whether a case is originally brought in a district court or in this Court. Many cases brought in the district courts are no less complex than those brought originally in this Court. And while the parties in our original cases sometimes are required to incur very substantial expert costs, as happened in the present case, the same is frequently true in lower court litigation. Thus, assuming for the sake of argument that the matter is left entirely to our discretion, we conclude that the best approach is to have a uniform rule that applies in all federal cases.

ARGUED: December 1, 2008
DECIDED: March 9, 2009
FOR CASE ANALYSIS: See ABA PREVIEW 188

Does the federal statute setting the witness attendance fee for a proceeding in “any court of the United States” at $40 per day apply to cases within the Supreme Court’s original jurisdiction?
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Burdens/standards of proof — As a general matter, the party in a lawsuit asserting a claim or defense has the burden of presenting evidence that establishes the claim or defense. This is known as the burden of proof.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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