



PREVIEW

OF UNITED STATES SUPREME COURT CASES

Issue No. 8 | Volume 37 | August 13, 2010

Analyzing the Court's Decisions for the 2009–2010 Term, including ...

Statistics

SCOTUSblog provides a comprehensive statistical analysis of the entire term.

The Criminal Docket

Dean Erwin Chemerinsky examines the term's search and seizure cases decided under the Fourth Amendment, the adjustment of *Miranda* rights under the Fifth Amendment, and the fate of ineffective assistance of counsel claims under the Sixth.

The Labor and Employment Docket

Professors Jayne Zanglein and Bruce Berger team up to discuss the term's eight labor and employment decisions, including *City of Ontario v. Quon*, which involved the legality of a governmental employer's search of text messages sent and received by employees on an employer-issued pager.

The First Amendment Docket

Professor Vikram Amar analyzes the successful challenge to campaign reform in *Citizens United v. Federal Election Commission* and explains how the Court decided in *Doe v. Reed* that a court cannot prevent a state from releasing the names and addresses of anyone who signed a referendum seeking to repeal a domestic partnership law. Last but certainly not least, he illuminates *Christian Legal Society v. Martinez*, in which the Court by a 5-4 vote upheld a law school's right to refuse to recognize a student organization that excluded non-Christians and practicing gays.

Complete Case Highlights

PREVIEW highlights the bottom line in every case decided during the October 2009 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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A one-year subscription to *PREVIEW of United States Supreme Court Cases* consists of seven issues, mailed September through April, that concisely and clearly analyze all cases given plenary review by the Court during the present term, as well as briefly summarize decisions as they are reached. A special eighth issue offers a perspective on the newly completed term.

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The Term in Review

Last year we wrote in this space that “the 2008 term was perhaps most remarkable for its lack of fireworks.”

Not so this year! In addition to another changing of the guard with the retirement of Justice Stevens and the nomination of Elena Kagan, the 2009 term generated a great deal of controversy. In a number of instances, the public’s keen interest in the many significant cases before the Court was further piqued by the justices’ unexpected or wide-reaching decisions.

The topics before the Court were engaging and varied: juveniles sentenced to life in prison without parole, dogfighting videos, citizen funding and advising of alleged terrorist groups, international child custody disputes, and the Enron scandal, just to name a few.

From *McDonald v. Chicago* (successfully challenging a Chicago gun ban) to the reargument and decision in *Citizens United v. Federal Election Commission* (which became a hotter-than-hot-button issue when the president scolded the justices during his State of the Union Address), the Court occupied center stage in our national discussions and debates.

As always, our end of term wrap-up issue features a statistical analysis of the term by the team at SCOTUSblog.com. Their summary sheds light on the important role Justice Sotomayor played during her first term on the Court as well as on the key votes of Chief Justice Roberts and Justice Kennedy.

Erwin Chemerinsky, dean and distinguished professor of law at the University of California, Irvine, School of Law, reviews the Court’s criminal law docket. While the Court stuck mainly to its conservative alignment, there were a number of defendants who prevailed this term. On the other hand, Dean Chemerinsky notes, Justice Sotomayor, who many thought a potentially more conservative vote when it came to criminal justice matters, was largely a consistent liberal vote in this area as well.

In his article, Professor and Associate Dean Vikram Amar of the University of California, Davis, School of Law, tackles the Court’s First Amendment cases, focusing on the term’s three substantive First Amendment cases: *Citizens United v. Federal Election Commission*, *Doe v. Reed*, and *Christian Legal Society v. Martinez*. Professor Amar shows us how these seemingly disparate cases are actually intertwined and, in the larger sense, reflect the transcendent tools the Court uses to manage most constitutional cases.

Then Professors Jayne Zanglein and Bruce Berger of Western Carolina University walk us through the term’s varied labor and employment cases. The professors highlight how, on the one hand, the justices did not shy from calling into question 600 decisions by the National Labor Relations Board, but on the other hand refrained from clarifying legal precedents in other cases. An example of the latter occurred when, in the course of holding that government employees do not have a reasonable right to expectation of privacy when using a work-issued pager, the Court failed to establish a clear bright-line rule.

This summer issue again includes our annual Case Highlights, which give you a quick picture of what happened in every one of the cases we previewed prior to oral argument and how the justices voted.

Finally, as we look forward to the start of a new term in October, we are proud to announce some exciting changes you will be seeing in the coming months. First, behind the scenes, the *PREVIEW* website at www.supremecourtpreview.org is undergoing extensive restructuring and will soon debut a fully searchable database that archives all of the electronic Supreme Court merits and amicus briefs—as well as back issues of *PREVIEW*. Second, in addition to our previews of all cases set for plenary review, next term look for more comprehensive *post*-argument coverage and a robust review of trends within the Court as they emerge.

THE EDITORS

End of Term Statistical Analysis

by SCOTUSblog.com

The Court issued 72 merits opinions after argument this term. (This total, and all OT09 totals throughout this memorandum, excludes *Citizens United v. Federal Election Commission*, which was decided during OT09 but which SCOTUSblog classifies as an OT08 case because the Court agreed to hear it that term and it was argued and reargued prior to the regular October term 2009). The number of decisions after argument for previous terms are 76 for 2008, 67 in 2007, 68 for 2006, and 71 in 2005. For the 2004 Term, the Court issued 76 merits opinions after argument and 74 for the 2003 term.

The Court decided 86 merits cases in total this term, including—in addition to the 72 argued cases mentioned above—11 summary reversals, two cases decided before oral argument, and one certified question. The numbers for previous terms are 80 for 2008, 71 in 2007, and 72 in 2006.

The Court reversed or vacated the lower court in 59 of 83 cases (71 percent), affirmed in 17 (20 percent), and reversed in part and affirmed in part in seven (8 percent). Those figures are similar to those from the 2008 term, when the Court reversed or vacated the lower court in 77 percent of cases and affirmed in 20 percent of cases.

The Court again considered more cases from the Ninth Circuit—15 of 86 cases (18 percent)—than any other court. However, this number represents a lower proportion than in 2008, when the Ninth Circuit supplied 20 percent of the Court's docket. This year, the Court vacated or reversed the Ninth Circuit in 9 of 15 cases (60 percent), which is significantly less than the 81 percent and 80 percent reversal rates for the previous two terms (2008 and 2007), and in fact lower than the average reversal rate across circuits this term. For the upcoming year, the Court has already granted 16 cases from the Ninth Circuit out of a preliminary total of 37 cases (43 percent).

The Seventh Circuit accounted for the second-largest percentage of the docket (13 percent). Eleven cases were considered this term, up from just one case last term and six during the 2007 term. Ten decisions were reversed, a rate of 91 percent. The Eleventh Circuit came next with 10 cases on the docket (12 percent), up from three the previous term. No Eleventh Circuit cases were reversed last term; this term eight were reversed, or 80 percent.

This year, only one circuit had all of its decisions (seven) reversed: the Sixth Circuit. This is a radical change from last term, when seven circuits had all of their decisions reversed. It is more in line with the 2007 term, when the Tenth Circuit was the only circuit with a 100 percent reversal rate (with two cases).

The Tenth and Federal Circuits, on the other hand, had 100 percent affirmance rates, with the Supreme Court upholding two decisions from the former (*Dolan v. United States* and *Hamilton v. Lanning*) and one from the latter (*Bilski v. Kappos*).

Split and Unanimous Decisions

The number of 5-4 decisions this term depends (as it often does) on how you count them. In 14 cases, the Court clearly split 5-4 on a significant issue. In two additional cases with five-justice majorities, *Conkright v. Frommert* and *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, only eight justices participated. We regard these two cases as 5-4 decisions because it seems very likely that, had all nine justices participated, the vote would have split that way. Altogether, therefore, we conclude that 16 (19 percent) of the total 86 merits cases decided this term were effectively 5-4 splits. The Court's percentage of 5-4 splits this term is more reminiscent of 2007 than the 2008 term. Last term, 30 percent of decisions (24 of 80 total) were divided by a 5-4 margin; in OT07, 17 percent of decisions (12 of 71 total) were 5-4.

This term, 12 of 86 opinions (14 percent) were fully unanimous decisions (i.e., decisions with no dissent or concurrence) and 40 (47 percent), including the 11 summary reversals, had no dissenting vote.

The trend toward unanimity has increased dramatically over the last four terms, and this term surpassed the level of the 2005 term, the chief justice's first term on the Court. In 2008, a particularly divisive term, a similar proportion of cases—16 of 79 total (15 percent)—were fully unanimous (i.e., without even a concurrence) but a much smaller proportion were unanimous with some number of separate opinions—26 (33 percent).

The aberrant number of summary reversals this term may explain in part the dramatically higher rate of unanimity. This term the Court summarily reversed 11 cases, with a unanimous vote in six of them. In 2008, the total number of summary reversals was four.

With a high proportion of unanimity, the number of dissenting votes across all cases this term is low. An average justice voted with the majority 84 percent of the time this term; last term, that average was 77 percent, and in 2007 it was 80 percent. Put another way, in the average decision this term, 1.33 justices dissented.

Distribution of Justices

During the 2009 term, ideology was a good predictor of the distribution of justices in 5-4 decisions. Eleven of the 5-4 decisions (69 percent) 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) voting together and Justice Kennedy casting the decisive vote. Because there were roughly half as many 5-4 decisions this term compared to the 2008 term, this rate has stayed consistent since last term: in 2008, 17 of the 24 decisions counted as 5-4 (71 percent) were divided ideologically. This term Justice Kennedy voted with the right in eight cases, while voting with the left in only three. During the 2008 term, Justice Kennedy voted with the right in 12 cases, compared with only five with the left.

This term, Justices Scalia and Thomas cast the same number of majority votes in 5-4 cases (11) as Justice Kennedy. Since the beginning of the Roberts Court, Justice Kennedy's majority votes in 5-4 cases have surpassed those of all other justices (19 out of 24 cases in 2008 and 8 out of 12 cases during the 2007 term).

This term every member of the Court crossed ideological lines to create a 5-4 split in at least one case. Justice Ginsburg did so just once, in *Dolan v. United States*. Every other justice did so more than once. Justice Stevens did so the most often: four times. Last term Chief Justice Roberts never crossed ideological lines, while every member of the Court during the 2007 term crossed ideological lines in at least two cases, except for Justice Breyer (who broke with the left in one case).

Three of the most remarkable alignments in 5-4 decisions were in *Shady Grove Orthopedics Associates v. Allstate Insurance Company*, *Dolan v. United States*, and *Magwood v. Patterson*. In *Shady Grove*, the liberal Justices Stevens and Sotomayor joined three conservatives—Chief Justice Roberts and Justices Scalia and Thomas—in ruling that states cannot limit the right to file a class action lawsuit in federal court. In *Dolan*, the conservative Justices Thomas and Alito joined liberal Justices Ginsburg, Breyer, and Sotomayor in allowing a sentencing court to order a convicted defendant to pay restitution even after the court misses a statutory deadline. In *Magwood*, the conservative Justices Scalia and Thomas joined the liberal Justices Stevens, Breyer, and Sotomayor in holding that a prisoner may petition for a writ of habeas corpus, even if he has previously petitioned, so long as he is challenging a new judgment for the first time. In all of these cases, Justice Sotomayor voted with the majority.

Justice Alito wrote more 5-4 opinions this term than any other justice (four). Both Justices Scalia and Kennedy wrote two 5-4 opinions each, as did Chief Justice Roberts. Every other justice except Sotomayor wrote one opinion in a 5-4. Justice Sotomayor did not write a single opinion in a 5-4 split case.

Levels of Agreement Between Pairs of Justices

Agreement between justices in a case can be usefully measured by their full agreement (usually, joining the same opinion), or simply their agreement in the judgment (i.e., the outcome). Measuring by agreement in the judgment produces much higher rates. Counting agreement in all forms (even just the judgment), the justices with the highest degree of affinity this term were Justices Scalia and Thomas, who agreed at least in the judgment in 79 of 86 merits cases (92 percent). Nor is this term an anomaly for the Scalia-Thomas alignment: the pair agreed 88 percent during the 2008 term and 87 percent in 2007.

The pair of justices with the next-highest rate of agreement in the judgment is a tie. Justice Sotomayor voted the same as Justices Ginsburg and Breyer in 90 percent of cases, or 72 and 71 cases respectively.

Counting only full agreement (i.e., agreement in essentially every word of the ruling), the pair of justices who agreed most often were Justices Ginsburg and Sotomayor (85 percent), followed closely by Justices Breyer and Sotomayor (81 percent). Justices Breyer and Ginsburg were in third place (80 percent).

All eyes were on Justice Sotomayor during her first term on the Court. In addition to voting 90 percent of the time with Justices Ginsburg and Breyer, she voted in agreement with Justice Stevens 84 percent of the time. With the conservatives, she voted in agreement with Chief Justice Roberts and Justice Kennedy 78 percent of the time and 69 percent of the time with each of Justices Scalia, Thomas, and Alito.

Justice Stevens may win the “iconoclast” award this year, for he dissented in 22 cases—more than any other justice—and did not agree with any justice more than 84 percent of the time (with Justice Sotomayor).

Over all, Justice Stevens's average rates of agreement with both conservatives and liberals are lower than the averages other liberal justices display. This term, Justice Stevens's average rate of agreement with the five conservative justices was 65 percent. With the other three liberal justices, his average agreement was 81 percent. Justice Ginsburg's rates of agreement are 74 percent with the conservatives and 85 percent with the other liberals; Justice Breyer's are 70 percent with the conservatives and 86 percent with the other liberals; Justice Sotomayor's are 73 percent with conservatives and 88 percent with the other liberals.

Rates of agreement between pairs of justices are generally constant over the past two terms, fluctuating within a range of 5 percent. Two notable changes over time stand out. First, Chief Justice Roberts agreed more often this term with two of the liberal justices, Ginsburg and Breyer, than he has in the past. Chief Justice Roberts agreed with Justice Ginsburg 79 percent this term, compared to 53 percent during the 2008 term and 69 percent in 2007. He agreed with Justice Breyer 73 percent this term, compared to 65 percent during the 2008 term and 75 percent in 2007.

Second, Justice Ginsburg's rate of agreement with all five of the conservatives—not just Chief Justice Roberts—has climbed over the last couple of terms. This term, in addition to her 79 percent agreement with the chief justice, she agreed with Justice Scalia 67 percent, Justice Kennedy 80 percent, Justice Thomas 69 percent, and Justice Alito 74 percent of the time. For the past two terms, listed with the 2008 term first, the 2007 term second, her rates of agreement with the conservatives are: Roberts (53 percent, 69 percent), Scalia (55 percent, 65 percent), Kennedy (66 percent, 72 percent), Thomas (53 percent, 55 percent), and Alito (53 percent, 68 percent).

Frequency in the Majority

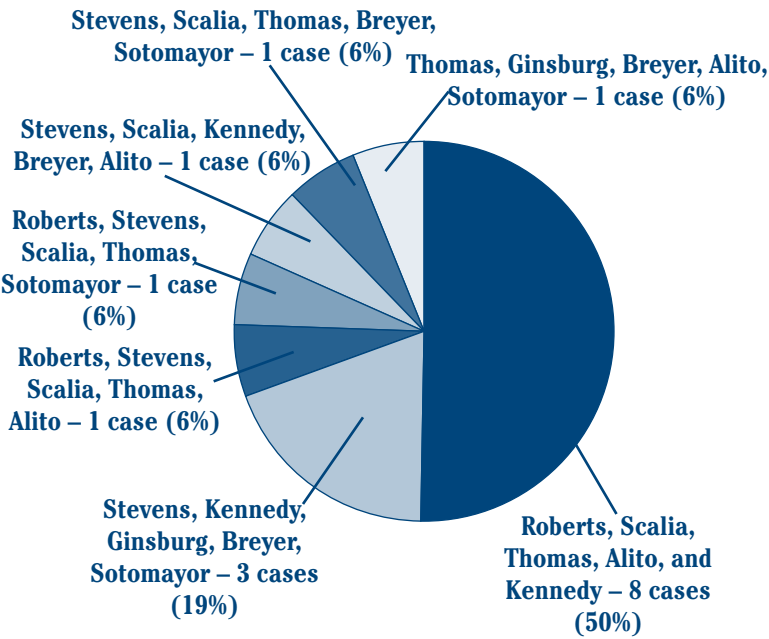
Chief Justice Roberts was the majority star this term, with no dissents in any merits cases until the end of January; between the end of January and June 14, he dissented in only two merits cases. By the end of the term, he dissented in eight cases, including six times in 5-4 decisions. He joined the majority in a remarkable 78 cases (91 percent of those decided on the merits).

He shares the top spot for majority voter with Justice Kennedy. While Justice Kennedy dissented earlier in the term than did Chief Justice Roberts, he ended the term voting with the liberals twice in 5-4 cases. In the end, he also voted with the majority in 78 cases (91 percent).

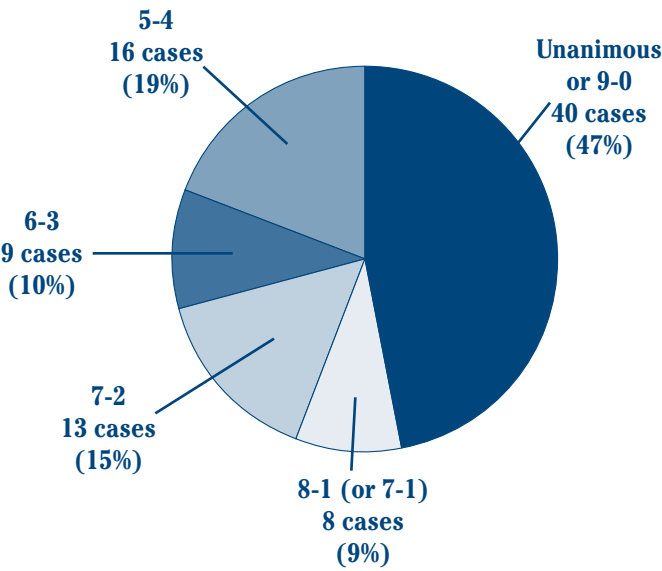
The rest of the rankings for majority voters are as follows: Justice Scalia (75 cases, or 87 percent of those in which he voted); Justice Alito (73 cases, or 87 percent); Justice Sotomayor (67 cases, or 84 percent); Justice Thomas (71 cases, or 83 percent); Justice Ginsburg (69 cases, or 80 percent); Justice Breyer (66 cases, or 78 percent); and Justice Stevens (63 cases, or 74 percent).

Thomas C. Goldstein is the founder and publisher of the world's leading online Supreme Court blog, SCOTUSblog.com, where the following statistical analysis first appeared. He can be reached at tgoldstein.akingump.com.

Five-to-Four Case Alignments



Splits in Decisions



Total Number of 5-4 decisions was 16
** *Conkright v. Frommert* and *Stolt-Nielson S.A. v. AnimalFeeds International Corp.* are both classified as 5-4 because it seems very likely that, had all nine justices participated, the vote would have split that way.

Opinion Authorship: Summary			
	Majority opinions	Concurring opinions	Dissenting opinions
Roberts	8	2	3
Stevens	6	12	12
Scalia	8	13	6
Kennedy	8	8	4
Thomas	8	13	4
Ginsburg	9	3	3
Breyer	9	3	8
Alito	8	9	7
Sotomayor	8	3	4

Circuit Scorecard—Federal and State Courts

Court	Total	% of Term Cases	Affirmed	% Affirmed	Reversed	% Reversed	Reversed in Part	% Reversed in Part
First Circuit	2	2%	1	50%	0	0	1	50%
Second Circuit	7	8%	1	14%	6	86%	0	0%
Third Circuit	5	6%	3	60%	2	40%	0	0%
Fourth Circuit	5	6%	1	20%	4	80%	0	0%
Fifth Circuit	4	5%	0	0%	3	75%	1	25%
Sixth Circuit	7	8%	0	0%	7	100%	0	0%
Seventh Circuit	11	13%	1	9%	10	91%	0	0%
Eighth Circuit	3	4%	0	0%	2	67%	1	33%
Ninth Circuit	15	18%	4	27%	9	60%	2	13%
Tenth Circuit	2	2%	2	100%	0	0%	0	0%
Eleventh Circuit	10	12%	2	20%	8	80%	0	0%
D.C. Circuit	3	4%	0	0%	1	33%	2	67%
Federal Circuit	1	1%	1	100%	0	0%	0	0%
State Courts	8	9%	1	13%	7	88%	0	0%
Other (no lower court decision)	86	100%	17	20%	59	71%	7	8%

Order to vacate the lower court's decision are counted as reversals. Consolidated cases are counted together. These totals exclude those cases that were dismissed, vacated after oral argument, or on reargument from the 2008 term.

The Criminal Docket in October Term 2009

by Erwin Chemerinsky

The conventional wisdom about the current Supreme Court is that it is really the Anthony Kennedy Court and that overall its decisions are quite conservative. As is often the case with conventional wisdom, this statement is generally true and certainly was evident during the just-completed term. There were seventeen 5-4 decisions and, as in each of the years in which John Roberts has been chief justice, Justice Kennedy was in the majority in more of these close cases than any other justice, 13 times.

There were twelve 5-4 decisions that split along traditional ideological lines, with Chief Justice Roberts and Justices Antonin Scalia, Clarence Thomas, and Samuel Alito on one side, and Justices John Paul Stevens, Ruth Bader Ginsburg, Stephen Breyer, and Sonia Sotomayor on the other. Justice Kennedy sided with the conservatives in nine of these cases and with the liberals in three. This, too, was not unique to this term. A year ago, there were sixteen 5-4 cases split along traditional ideological lines and Justice Kennedy sided with the conservatives in 11 and with the liberals in five of the decisions.

Yet, as is also often the case with conventional wisdom, this one is an over-generalization. It fails to describe a number of cases in which the results were not conservative and criminal defendants prevailed. In some of these decisions, but definitely not all, it was because Justice Kennedy sided with the more liberal justices.

Two other generalizations about the criminal docket are worth mentioning: First, Justice Sotomayor was a consistently liberal vote. Many had predicted that she would generally vote the same as the justice she replaced, David Souter, would have voted, but that, based on her decisions as a Second Circuit judge, she might be more conservative in criminal justice cases. It did not turn out that way at all, as she was always with the more liberal group in the criminal cases as well. In fact, overall, she was in agreement with Justices Ginsburg and Breyer in 90 percent of the decisions, second only to the 92 percent agreement between Justices Scalia and Thomas.

Second, there were an exceptionally large number of per curiam opinions decided without briefing and oral arguments. There were 14 such decisions in which the justices ruled on the basis of the petition for certiorari and the brief in opposition to certiorari. Most of these were in criminal cases, and some were quite significant. What is troubling about this is that the justices were ruling in these important cases without all of the benefits that advocacy on the merits provides. There is a major difference between the advocacy for or against certiorari, which is focused on whether the Court should take the case, and that on the merits of the question presented.

Fourth Amendment

Surprisingly, the only criminal case presenting a Fourth Amendment issue—usually one of the staples of the Court's criminal docket—was one of these per curiam decisions, *Michigan v. Fisher*, 130 S.Ct. 546 (2010). In this case, police received a call reporting a disturbance in a

house and went to investigate. Upon arrival, they saw much disarray, including a pickup truck with the front smashed and three broken windows, with glass still on the ground. The officers noticed blood on the hood of the pickup truck and on some clothes inside the truck's cab. Through a window of the house, the officers could see Jeremy Fisher screaming and throwing things. The back door was locked, and a couch had been placed to block the front door.

The officers knocked, but Fisher refused to answer. The officer saw that Fisher had a cut on his hand and asked him whether he needed medical attention. Fisher told the officers to go away until they got a search warrant. The officer then pushed the front door open and went into the house. Fisher pointed a gun at the officer and the officer withdrew.

Fisher was charged under Michigan law with assault with a dangerous weapon and possession of a firearm during the commission of a felony. The trial court concluded that the officer violated the Fourth Amendment when he entered Fisher's house. It granted Fisher's motion to suppress the evidence, the Michigan Court of Appeal affirmed, and the Michigan Supreme Court denied review.

In a per curiam opinion, the U.S. Supreme Court reversed. The Court stressed that "reasonableness" is the central inquiry under the Fourth Amendment and reiterated that police may enter a home without a warrant if there are "exigent circumstances." Earlier, in *Brigham City v. Stuart*, 547 U.S. 398 (2006), the Court had ruled that police may enter a home without a warrant if there is reason to believe that someone is injured there. The Court held that this "emergency aid" exception applied in the present case. The Court said that the tumultuous situation, including the car accident, the broken windows, and Fisher's behavior, all led officers reasonably to believe there was an emergency. The Court stated: "[T]hey did see Fisher screaming and throwing things. It would be objectively reasonable to believe that Fisher's projectiles might have a human target (perhaps a spouse or a child), or that Fisher would hurt himself in the course of his rage."

The dissent by Justices Stevens and Sotomayor questioned whether there was an emergency warranting entry into the home. After all, there were only a few drops of blood and the officers could see that they likely came from Fisher's cut finger. More importantly, the dissent expressed disagreement over the need to review a state court's decision to suppress the state's evidence at a state trial. The bottom line, however, is that as in *Brigham City v. Stuart*, the Court once again made clear that it doesn't take very much for police to be able to invoke the "emergency aid" exception in order to enter a home without a warrant.

The most important Fourth Amendment decision of the term, *City of Ontario v. Quon*, 130 S.Ct. ____ (June 17, 2010), did not arise in a criminal case. Jeffrey Quon was an officer in the Ontario Police Department and a member of its SWAT team. Quon, and his fellow

officers, were assigned pagers that can send text messages. Officers in the department were required to sign a statement that they understood they had no expectation of privacy when using city-issued electronic equipment. Also, officers were told that the pagers were solely for department business, though “light personal use” was permitted. Department rules prohibited sexually explicit messages.

Officers were allowed a certain number of text messages each month on their pagers. Quon, and other officers, were told by the lieutenant responsible for administration that no one would read their messages so long as they paid for using more than their allocated number of messages. For two months after receiving the pager, Quon significantly exceeded his allotment of messages. But he paid for this extra use and no problem arose. The lieutenant, though, became frustrated and asked the provider, Arch Wireless, for transcripts of the text messages sent and received by Quon to see if they were for department business. The lieutenant learned that Quon had been texting his wife, his mistress, and friends. Some of the messages were very sexually explicit.

Quon and his wife and his mistress filed a civil suit pursuant to 42 U.S.C. §1983 for violation of their Fourth Amendment right to privacy. The federal district court, after a jury trial, ruled against them, but the Ninth Circuit reversed.

The Supreme Court ruled unanimously in favor of the city. Justice Kennedy wrote the opinion for the Court. He used the two-part framework that *O'Connor v. Ortega*, 480 U.S. 709 (1987), set out for considering the Fourth Amendment privacy claims of government employees. First, employees must have a reasonable expectation of privacy. Second, if there is such an expectation, the search must be reasonable.

The briefs and argument before the Court focused a great deal on the first question and it presented perhaps the most interesting aspects of the case. How is a reasonable expectation of privacy to be determined? Was the city’s written policy, confirmed with a signed agreement, that officers should have no expectation of privacy determinative, or was the lieutenant’s spoken assurance sufficient to create a reasonable expectation of privacy despite the signed agreement? What was the reasonable expectation of privacy of the others who communicated with Quon?

The Supreme Court, however, avoided these hard questions and said that it would assume, without deciding, that there was a reasonable expectation of privacy. The Court then ruled against the plaintiffs based on the second part of the test, concluding that the lieutenant’s actions were reasonable under the circumstances. The Court explained that the police department had a reasonable interest in knowing how its officers were using its text messaging system and being sure it was being used for department business. The Court also concluded that those communicating with Quon had no separate privacy interest and that the government’s action was reasonable relative to them.

The case was much anticipated because it provided the Court the opportunity to address many important issues, such as the application of the Fourth Amendment to this new technology, the expectation of privacy in the government workplace, and the protections for third

parties communicating with government employees. None of these issues were resolved, though the Court once more demonstrated that it will accord great deference to the government as employer when there are constitutional claims by government employees.

Fifth Amendment

There were two important cases concerning aspects of *Miranda v. Arizona*, and both were significant victories for law enforcement. In *Berghuis v. Thompson*, 130 S.Ct. 2250 (2010), the Court lessened the protections of the right to remain silent under *Miranda*.

Van Chester Thompson was arrested for murder and given his *Miranda* warnings. He was asked to sign a statement that he understood them, but he refused to do so. Police officers questioned Thompson for two hours and forty-five minutes. Thompson remained almost entirely silent during this time. Occasionally he’d answer a question with a single word or a nod.

Almost three hours into the interrogation, the police officer asked Thompson, “Do you believe in God?” Thompson said, “Yes.” The officer then asked Thompson whether he prays to God, and once more he responded, “Yes.” The officer then asked, “Do you pray to God for shooting that boy down?” Thompson again said, “Yes.”

These three one-word answers were admitted against Thompson at trial and were crucial evidence in gaining his conviction. The issue before the Supreme Court was whether the use of this evidence violated the defendant’s privilege against self-incrimination. In a 5-4 decision, the Court ruled against Thompson and found no infringement of his Fifth Amendment rights. Justice Kennedy wrote for the majority, joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito.

The Court concluded that a suspect’s silence is not sufficient to invoke the right to remain silent. Rather the Court said there must be an “unambiguous” invocation of this right. Earlier, in *Davis v. United States*, 512 U.S. 452 (1994), the Supreme Court had held that an invocation of the right to counsel under *Miranda* must be done in a clear and unambiguous manner. The Court now has ruled that the same is true of the right to remain silent.

In this case, the Court ruled, Thompson had validly waived his right to remain silent. The Court said that the waiver of this right need not be explicit: “[a]n implicit waiver of the ‘right to remain silent’ is sufficient to admit a suspect’s statement into evidence.” The Court thus upheld Thompson’s conviction.

Justice Sotomayor wrote a vehement dissent, joined by Justices Stevens, Ginsburg, and Breyer. She accused the majority of turning *Miranda* on its head and lamented the irony that silence is not sufficient to invoke the right to remain silent. *Miranda* created a strong presumption that confessions are inadmissible if obtained after questioning unless there has been an explicit waiver of the Fifth Amendment privilege against self-incrimination. In sharp contrast, *Berghuis v. Thompson* creates a strong presumption that confessions are *admissible* if obtained after questioning unless there has been an explicit invocation of the right to remain silent.

The other major case concerning *Miranda* this term was *Maryland v. Shatzer*, 130 S.Ct. 1213 (2010). In *Edwards v. Arizona*, 452 U.S. 973 (1981), the Court held that police questioning of a suspect must cease once he or she invokes the right to counsel under *Miranda*. The issue in *Shatzer* is whether this mandatory break expires after a period of time.

Michael Shatzer Sr. was in prison for other offenses when police questioned him about molesting his child. Shatzer invoked his right to counsel and police properly stopped questioning him. Three years later, however, while Shatzer was still incarcerated, police once more sought to interrogate him about the child molestation. Police gave Shatzer his *Miranda* warnings, and Shatzer waived them and made incriminating statements. The issue was whether his earlier invocation of his right to counsel precluded this subsequent attempt at questioning without an attorney being present.

The Supreme Court ruled against Shatzer, with Justice Scalia writing for a Court that was unanimous as to the result, although not as to the analysis. Justice Scalia explained that there must be a time at which the protections of *Edwards* expire. The Court concluded that 14 days was the appropriate time period. In other words, after a suspect invokes the right to counsel under *Miranda*, for 14 days the police cannot attempt to elicit incriminating statements without an attorney being present. Although, of course, there is no 14-day clause in the Constitution, Justice Scalia explained that a bright-line rule was needed for these situations and reasoned that it was appropriate for the Court to create one as a limit on a Court-created protection.

Critics object that the 14-day rule is arbitrary and invites police circumvention: Police simply will wait two weeks after a suspect invokes the right to counsel before trying again to elicit incriminating statements. Also, it is notable that Shatzer never actually was released from custody between the questioning; he was just returned to the general prison population. The Court, though, found this sufficient to end the “in custodial interrogation” and make the resultant incriminating statements admissible.

Sixth Amendment

Over the last quarter-century, it has been very difficult to successfully challenge convictions or sentences based on a claim of ineffective assistance of counsel. In *Strickland v. Washington*, 466 U.S. 668 (1984), the Court prescribed a two-step inquiry for determining whether there has been ineffective assistance of counsel. First, the criminal defendant must show that counsel’s performance was grossly deficient. Second, there must be a showing of “prejudice,” that is, that the outcome of the case likely would have been different had there been adequate representation. This is a very difficult standard to meet. A former colleague of mine once said that under *Strickland*, counsel’s performance will be deemed adequate if at trial a mirror in front of his or her mouth would have shown a breath. Obviously, this is an exaggeration, but at times it has not seemed like much of one.

Thus, it was particularly significant that there were three cases this term, including two per curiam opinions, in which the Court overruled lower court decisions that had rejected claims of ineffective assistance of counsel. In *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010), a man who had spent 40 years lawfully living in the United States faced deportation because of the consequences of his guilty plea. His lawyer

had mistakenly advised him that there would be no immigration consequences to accepting the plea bargain.

The Supreme Court reversed the lower court, which had rejected a claim of ineffective assistance of counsel. Justice Stevens, writing for a five-justice majority, explained that deportation is now usually a consequence of a criminal conviction. Therefore immigration consequences must be considered as part of the punishment that a criminal defendant must be advised of before entering a guilty plea. The Court concluded that counsel’s failure to advise Padilla of these consequences rendered his performance deficient under the first prong of the *Strickland* test. The Court then remanded the case back to the lower court for consideration of whether there was prejudice sufficient to meet the second part of *Strickland*’s analysis.

Porter v. McCollom, 130 S.Ct. 447 (2010), was a death penalty case in which the Florida Supreme Court had found there was no “prejudice” to meet the second prong of the *Strickland* analysis. In subsequent federal post-conviction proceedings, the U.S. district court ruled otherwise, but the Eleventh Circuit reversed. The U.S. Supreme Court, in a per curiam opinion, reversed yet again. The Court stressed defense counsel’s failure to uncover or present mitigating evidence of the defendant’s childhood abuse, mental impairment, and most importantly, distinguished military service in multiple battles during the Korean War.

Similarly, on the last day of the term, June 29, in *Sears v. Upton*, 130 S.Ct. ____ (June 29, 2010), the Court in a per curiam opinion overturned another death sentence after finding ineffective assistance of counsel. In this case, defense counsel had presented some evidence of mitigation. But the Court noted that the lawyer had devoted less than a day to uncovering mitigation evidence and had missed substantial evidence of child abuse. Once more, the Court found that this failure was significant and remanded the case for further consideration.

Porter and *Sears*, though per curiam opinions, will be very important for lawyers urging ineffective assistance of counsel because they are among the few cases in which the *Strickland* standard has been deemed satisfied. Moreover, it is particularly powerful that the Court found the law so clear in these cases that it did not see the need for briefing and oral argument before providing the defendant his requested relief.

Eighth Amendment

In *Graham v. Florida*, 130 S.Ct. 2011 (2010), the Court held that it is cruel and unusual punishment in violation of the Eighth Amendment to impose a sentence of life without the possibility of parole for a crime committed by a juvenile. Justice Kennedy wrote for a majority comprised of Justices Stevens, Ginsburg, Breyer, and Sotomayor. Chief Justice Roberts concurred in the judgment, concluding that in this case the sentence violated the Eighth Amendment, but refusing to agree that such sentences are always unconstitutional.

In 2003, in *Ewing v. California*, 538 U.S. 11 (2003), and *Lockyer v. Andrade*, 538 U.S. 63 (2003), the Court held that it did not violate the Eighth Amendment to impose very long sentences for shoplifting under California’s “three strikes law.” In *Lockyer v. Andrade*, for example, by a 5-4 margin, the Court upheld a sentence of life

imprisonment (with no possibility of parole for 50 years) for the crime of stealing \$153 worth of children's videotapes from Kmart stores. But in *Roper v. Simmons*, 542 U.S. 551 (2005), the Court held that it was cruel and unusual punishment to impose a death sentence for a crime committed by a juvenile.

The question now before the Court was how it should treat a sentence of life without the possibility of parole for a crime committed by a juvenile. In finding that such a sentence is inherently cruel and unusual punishment, the Court explained that there are only 129 individuals serving such a sentence for a crime committed as a juvenile and 77 of these people are in Florida. The Court discussed the differences between adults and juveniles, especially in terms of their respective chances for change and rehabilitation. The Court observed that nowhere else in the world could a person receive a sentence of life without parole for a crime committed before adulthood.

Interestingly, although the Court prohibited such sentences in the future, it did not order the release of all who are now serving life without parole for crimes they committed while they were juveniles. Instead, the Court said that these individuals are entitled only to a meaningful hearing to decide if release is appropriate.

Habeas Corpus

It would be an understatement to say that the government usually prevails in habeas cases before the Supreme Court, especially those that involve issues concerning the meaning of the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, which significantly restricted the availability of habeas corpus. To be sure, that was true again this term. Once more, in a number of cases, the Court expressed the need for federal courts to show great deference to state courts in deciding whether to grant relief under 28 U.S.C. § 2254(d) on the ground that the state court decision is “contrary to or an unreasonable application of clearly established federal law.” See, e.g., *Berghuis v. Smith*, 130 S.Ct. 1382 (2010); *Renico v. Lett*, 130 S.Ct. 1855 (2010).

This made two very important victories for habeas petitions all the more surprising and significant. In *Holland v. Florida*, 130 S.Ct. ____ (June 14, 2010), the Court concluded that equitable tolling of the statute of limitations is permissible under AEDPA. This act creates a one-year statute of limitations for the filing of habeas petitions that begins to run at the conclusion of the state court proceedings.

Albert Holland repeatedly advised his lawyer of this statute of limitations and of the need to file a habeas petition. The attorney was not responsive. Holland even went so far as to ask the court to fire his lawyer so that he could get competent counsel. The request was refused and a timely habeas petition was not filed.

Holland's request for equitable tolling was rejected by the Eleventh Circuit. It held that equitable tolling, the doctrine that permits courts to excuse a petitioner's failure to comply with a statute of limitations, was allowed only if there was bad faith, dishonesty, divided loyalty, or mental impairment; none of these were claimed here. In a 7-2 decision, with Justice Breyer writing for the majority, the Supreme Court concluded that the standard for triggering equitable tolling is more permissive than that applied by the Eleventh Circuit.

The Court explained that because the statute of limitations in AEDPA is not jurisdictional, there must be a presumption in favor of allowing equitable tolling. The Court also said that allowing equitable tolling would not frustrate the goal of AEDPA in expediting litigation, but would fulfill the Constitution's assurance of the “Great Writ” of habeas corpus.

The Court said that there must be “extraordinary circumstances” to warrant equitable tolling, but it did not try to enumerate the criteria for determining this. The Court explained that a lawyer's “garden variety” inadequacy would not be enough to warrant equitable tolling, but that the incompetence was much more egregious in this case.

Most habeas petitions are filed pro se, by prisoners petitioning the courts without the aid of a lawyer. The rules for calculating the statute of limitations and the time of tolling are complicated and often can lead to injustices. *Holland v. Florida* is important because it allows federal courts to mitigate this harshness through equitable tolling when there are extraordinary circumstances.

The other important victory for habeas petitioners came in *Magwood v. Patterson*, 130 S.C. ____ (June 24, 2010).

After Billy Joe Magwood was convicted and sentenced to death, a federal court granted his writ of habeas corpus on the grounds that there had not been an adequate consideration of mitigating evidence during the penalty phase of his trial. The case was remanded to the state court, which held a new proceeding. A death sentence was again imposed. The question then became whether Magwood could file a habeas petition in federal court or whether the new petition was a “second or successive petition” that had to meet the restrictive standards and procedures of AEDPA.

AEDPA says that “second or successive” habeas petitions are allowed only in very limited circumstances and only with the permission of the United States Court of Appeals.

In a surprising 5-4 decision, the Court held that the new petition was not a second or successive petition. Justice Thomas wrote for the Court, joined by Justices Stevens, Scalia, Breyer, and Sotomayor. Justice Thomas focused on the language of AEDPA in concluding that the new petition should not be regarded as a second or successive petition within the meaning of the statute. In fact, the Court held that the additional petition could present matters that had been, or could have been, raised in the initial habeas petition. Thus, a successful habeas petitioner who as a result receives new proceedings in the state court may bring another habeas petition at the completion of those proceedings.

Federal Criminal Law

Likely the most high-profile criminal case of the term involved Jeffrey Skilling, who had been convicted for his role in the Enron scandal. Skilling presented two major issues to the Supreme Court in challenging his convictions. First, he argued that the extensive pretrial publicity deprived him of a fair trial in violation of the Sixth Amendment. Second, he contended that the federal statute making it a crime to deprive the intangible benefit of “honest services” (18 U.S.C. §1346) was unconstitutionally vague.

In *Skilling v. United States*, No. 08–1394 (June 24, 2010), the Court rejected both of these arguments but narrowed the scope of the honest services statute and remanded the case to determine whether the jury instructions in this case were impermissibly prejudicial. As for Skilling’s first claim, the Court in a 6-3 decision found that he had not been denied a fair trial. Justice Ginsburg wrote for the Court, with Justices Stevens, Breyer, and Sotomayor dissenting. Justice Ginsburg stressed that pretrial publicity, even extensive publicity that is very adverse to a criminal defendant, is not sufficient to show a violation of the Sixth Amendment. The Court found that the steps taken by the trial court to carefully question prospective jurors were sufficient to satisfy the Constitution’s requirements for a fair jury. This case indicates that it will be very difficult for a criminal defendant to have a conviction overturned on account of prejudicial pretrial publicity so long as the trial court takes appropriate steps to ensure a fair and impartial jury.

The Court also upheld the constitutionality of the federal honest services statute. This time with Justices Scalia, Thomas, and Alito dissenting, Justice Ginsburg rejected the argument that the federal honest services law was void on vagueness grounds. The Court concluded that, based on the history of the honest services doctrine, the statute should be limited to instances of bribes and kickbacks. This is an important narrowing of the law, but one that protects it as a tool for federal prosecutors.

Conclusion

Without a doubt, the most important development of the year was Justice John Paul Stevens announcing his resignation effective June 29, 2010, at the age of 90. No one knows where Elena Kagan will be on the ideological spectrum, and this is especially so with regard to criminal matters. Kagan never was a judge, so she has no prior opinions to scrutinize that might give a clearer sense of her views and likely votes in criminal cases. She wrote only five major law review articles and none dealt with criminal issues. Nor did the confirmation process offer any sense of her views on specific issues that are likely to come before her as a justice.

So the most important aspect of the coming October Term 2010 will be getting used to the absence of Justice Stevens after 35 years on the bench and getting a sense of the ideology of the Court’s newest justice.

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The Labor and Employment Docket in October Term 2009

by Jayne Zanglein and Bruce Berger, Western Carolina University

This term the Court issued eight labor and employment decisions. From a case potentially affecting over 600 decisions by the National Labor Relations Board (NLRB) to a missed chance to clarify employee privacy rights with regard to new technologies, the Court's 2009 labor and employment docket was full and varied. The cases that received the most public attention are *New Process Steel, L.P. v. NLRB*; *City of Ontario v. Quon*; and *Lewis v. City of Chicago*. In *New Process Steel, L.P. v. NLRB*, the Court invalidated cases issued by a three-member group empowered by the sitting members of the National Labor Relations Board to decide cases, after the term of one of the group members expired. *City of Ontario v. Quon* involved the application of the Fourth Amendment to a search by a governmental employer of text messages sent and received on an employer-issued pager. Although the Court had an opportunity to clarify the constitutional standard applicable to searches of technology used by employees, the Court crafted a narrow opinion that applied only to the facts presented—which involved rather old-fashioned technology by today's standards. In *Lewis v. City of Chicago*, a case with potential widespread consequences, the Court held that a class of 6,000 qualified applicants for firefighter positions with the city had a cognizable claim for disparate impact relating to the city's allegedly discriminatory practices relating to a single employment test.

The Court issued three cases relating to arbitrability. In the most significant case, *Granite Rock Co. v. International Brotherhood of Teamsters*, the Court held that issues relating to the formation and scope of an arbitration agreement contained in a collective bargaining agreement are not arbitrable. In *Rent-A-Center, West, Inc., v. Jackson*, the Court described the specific pleading requirements a former employee must meet when he alleges that a stand-alone arbitration agreement is invalid as a whole. Finally, in *Union Pacific Railroad Co. v. Brotherhood of Locomotive Engineers and Trainmen General Committee of Adjustment*, the Court unanimously held that the National Railroad Adjustment Board's pre-arbitration conferencing rule is a procedural rule, not a jurisdictional requirement.

The Court also issued two cases under the Employee Retirement Income Security Act (ERISA). In the first case, *Conkright v. Frommert*, the Court refused to take advantage of an opportunity to tweak the deferential standard of review applicable where an ERISA plan delegates decision-making authority to the administrator. Instead, the Court held that like all other people, plan administrators make honest mistakes. In *Hardt v. Reliance Standard Life Ins. Co.*, the Court held that ERISA authorizes an award of attorneys' fee to either party—not just to the prevailing party, so long as the party has enjoyed some measure of success.

These eight cases show the Court's willingness to take bold steps to protect workers' rights in the presence of a clear danger, but its reluctance to issue bold, sweeping statements to clarify or extend its prior rulings when it believes such clarification is unnecessary.

New Process Steel, L.P. v. NLRB: Court Holds That NLRB's Delegation of Powers Was Invalid

The employment case with possibly the most far-reaching implications this term is *New Process Steel, L.P. v. NLRB*, No. 08-1457, (June 17, 2010), in which the Supreme Court in a 5-4 decision, held that where the National Labor Relations Board delegated its powers to a three-member group, two members did not have authority to continue to decide cases after the expiration of the third group member's term even though two members constituted a quorum.

In late 2007, the Labor Board had one vacancy and the terms of two Board members, Walsh and Kirsanow, were about to expire. On December 20, the Board delegated all of its powers to two new members, Liebman and Schaumber, and then-member Kirsanow, effective as of December 28, 2007. At the time of the delegation, the Board members knew that the term of Kirsanow was set to expire at year-end. The Board believed, however, that Liebman and Schaumber would constitute a quorum even after Kirsanow's term expired. The Board relied on the opinion of its general counsel in reaching this conclusion.

On December 31, Kirsanow's term expired. Between January 1, 2008 and March 27, 2010, when President Obama appointed two new members, Liebman and Schaumber decided almost 600 cases. Liebman is a Democrat and Schaumber is a Republican. *New Process Steel*, petitioner in this case, was one of several parties who challenged cases heard by the Liebman-Schaumber-Kirsanow Labor Board. The circuit courts reached differing decisions on the validity of the delegatee-group's authority to hear cases.

The Court agreed that Section 3(b) of the National Labor Relations Act (NLRA) authorized the existing Board members to delegate their power to a three-member group and that the same section also authorized the two members of the group to act as a quorum as long as the group of three continued to exist. When the term of Board member Kirsanow expired, the three-member group ceased to exist and the two remaining board members no longer had authority to decide cases on behalf of the Board. The majority stated that a contrary interpretation is "structurally implausible" and would allow "two members to act as the Board *ad infinitum*, which dramatically undercuts the Board quorum requirement by allowing its permanent circumvention." In the words of the majority: the NLRA "does not authorize the Board to create a tail that would not only wag the dog, but would continue to wag after the dog died."

Justice Kennedy dissented, joined by Justices Ginsburg, Breyer, and Sotomayor. The dissent would have held that the vacancy clause of Section 3(b), which provides that the authority of the Board is not impaired by a vacancy, applies to both the Board as a whole and the delegatee group. The dissent agreed with the majority that Congress did not intend that a "two-member quorum would act as the Board for extended periods, but unintended consequences are typically the result of unforeseen circumstances."

In a press release issued after the Court's decision, the Labor Board stated that the approximately 100 pending cases (of the 600 cases issued by the challenged group) that challenge the authority of the two-member panel will be remanded to the Board to be heard by a three-member panel. The losing parties in the remaining 500 cases may be able to retroactively challenge the validity of the Board's decisions although most of the cases have already been resolved by now. Although Schaumber's term expires in August, the Board currently has five members so the situation is not likely to recur. Nevertheless, the Court's decision will require the Labor Board to undertake a review of many previously decided cases.

City of Ontario v. Quon: Governmental Employee Did Not Have Reasonable Expectation of Privacy on Pager Texts According to the Court

In *City of Ontario v. Quon*, No. 08-1332, (June 17, 2010), the Supreme Court declined the opportunity to clarify the application of the Fourth Amendment to governmental employees in the context of text messages. Although the Court noted that the use of technology in the workplace and the pace of technological innovations are rapidly expanding, it refused to provide more concrete guidance.

The city of Ontario issued Jeff Quon, a police sergeant employed by the city, a pager because he was a member of the Special Weapons and Tactics (SWAT) team. The city issued the pagers capable of sending and receiving text messages "to help the SWAT Team mobilize and respond to emergency situations."

The wireless service contract provided free texting up to a specified number of characters per month. The provider charged the city for excess messages.

Although the city had adopted an email and computer-use policy that allowed it to monitor emails without notice, no policy was in effect with respect to text messages. Recognizing this gap in the policy, the city advised employees, including Quon, in writing that it would treat texts in the same manner as emails.

Several employees exceeded the permissible number of text message characters. In response, the city billed them for the overage and reminded them that the texts could be audited. When significant overages continued, the police chief decided to audit the texts to determine if the character limit was insufficient for police business. The Police Department requested a transcript of the texts from the provider. When the Department discovered that Quon had sent and received sexually explicit texts, it referred the case to Internal Affairs, which discovered that only 57 of the 456 texts that Quon sent or received in August were work related. On an average day, Quon had 28 messages, three of which related to work. On one day he had 80 messages. Internal Affairs concluded that Quon had violated Departmental rules and recommended discipline. Quon challenged the search of his pager transcript as a violation of his Fourth Amendment rights.

Noting that the Fourth Amendment's privacy protection extends to the government in its role as employer, the Supreme Court held that the search was reasonable. The Court refused to "establish far-reaching premises that define the existence and extent, of privacy expectations enjoyed by employees when using employer-provided communication devices." The Court noted that not only is technology evolving, but

societal expectations of proper workplace behavior are also changing, thus requiring the Court to proceed with caution. The Court further observed that text messaging can be considered a means of self-expression and self-identification, strengthening privacy expectations. Lastly, the Court pointed out that as cell phone costs decrease, the general expectation that employees should use their own cell phones for personal use may prevail.

Rather than decide the proper analytical approach dictated under the Court's 1987 plurality decision in *O'Connor v. Ortega*, 480 U.S. 709 (1987), the Court analyzed the search under both the four-justice plurality decision and Justice Scalia's concurring opinion. The plurality decision requires the court to first consider the "operational realities of the workplace" in order to determine if the employee's Fourth Amendment rights are implicated. Second, if the employee has a reasonable expectation of privacy, the employer's intrusion into that privacy for work-related purposes must be reasonable. Under Justice Scalia's *O'Connor* opinion, the Fourth Amendment would automatically apply to government employees, but if a search is work-related, it would be held to be normal and not a violation of the Fourth Amendment. In applying *O'Connor* to *Quon*, the Supreme Court concluded that the search would have been constitutional under either the plurality decision or Justice Scalia's opinion.

The Court based its decision on several assumptions: (1) Quon had a reasonable expectation of privacy in the text messages he sent, (2) the Department's audit of the messages was a search, and (3) "the principles applicable to a government employer's search of an employee's physical office apply with at least the same force when the employer intrudes on the employee's privacy in the electronic sphere."

Under the *O'Connor* plurality, a governmental employer's search conducted for noninvestigatory, work-related purposes is justified if "the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light" of circumstances that give rise to the search. The Court held that the search was justified at its inception because its purpose was to determine if the character limit was sufficient for work-related purposes. The review of the transcript was not excessively intrusive because Internal Affairs redacted all off-duty messages and only audited two of the four available months. The Court concluded that this was "an efficient and expedient way to determine whether Quon's overages were the result of work-related messaging or personal use." Furthermore, "a reasonable employee would be aware that sound management principles might require the audit of messages to determine whether the pager was being appropriately used."

Justice Stevens concurred to "highlight that the Court has sensibly declined to resolve whether the plurality opinion in *O'Connor*... provides the correct approach." Justice Scalia wrote a concurring opinion to reiterate that the *O'Connor* plurality opinion is standardless and to criticize the Court's reluctance to decide the appropriate standard. The task may be difficult in the context of electronic communications in the workplace, but the task must be done: "The-times-they-are-a-changin' is a feeble excuse for disregard of duty."

Lewis v. City of Chicago: The Court Allows Disparate Claims Based on Application of a Discriminatory Practice Even Where Plaintiffs Did Not Complain When the Policy Was Adopted

In *Lewis v. City of Chicago*, No. 08-974, (May 24, 2010), the Court held that a plaintiff, who in spite of not filing a timely challenge to the adoption of a discriminatory practice, still may assert a claim that charges that the employer's application of that practice was discriminatory. The practice at issue was the city's exclusion from consideration for employment of firefighter applicants who did not achieve a minimum score on an employment exam.

In 1995, the city of Chicago gave a written examination to 26,000 applicants. After grading the exams, the city grouped the firefighters into three categories: "well-qualified" applicants, who received a score of 89 percent or more; "qualified" applicants, who scored between 65 and 88 percent; and "non-qualified" applicants, who scored below 65 percent. Well-qualified applicants were randomly selected to move on to the next phase of the application process, which included a test of physical abilities, a background check, a medical exam, and a drug test. Qualified applicants were told that they had passed the exam but that given the number of well-qualified applicants it was unlikely that they would be called for further testing. Non-qualified applicants were told they would not be considered for the position. Caucasian applicants were disproportionately represented in the "well-qualified" category.

The city used this procedure for selecting firefighters over the next six years. By the last year, the group of "well-qualified" applicants had been exhausted and the city started randomly selecting applicants from the "qualified" pool.

Two years after the exam was administered, Crawford Smith, and several other "qualified" African American applicants, filed charges of discrimination with the Equal Employment Opportunity Commission (EEOC). Eventually, a class-action suit was certified consisting of 6,000 "qualified" African American applicants.

The Supreme Court held that the city's practice of only choosing from well-qualified applicants could be the basis for a disparate impact claim under Title VII. The Court rejected the city's claim that the only unlawful employment act was the initial sorting of applicants into categories. According to the Court, the city's argument, that since no applicant timely challenged the classification and therefore the city could lawfully use the classification, was erroneous. The Court agreed that the classification might be a free-standing disparate impact claim that is legally beyond reproach but stated that "it does not follow that no new violation could arise—when the city implemented that decision down the road."

The Court considered the potential effects of its decision: "Employers may face new disparate-impact suits for practices they have regularly used for years. Evidence essential to their business-necessity defenses might be unavailable (or in the case of witnesses' memories, unreliable) by the time the later suits are brought. And affected employees and prospective employees may not even know they have claims if they are unaware the employer is still applying the disputed practice." The Court concluded that if the class can prove that the city applied a practice that caused a disparate impact, they could prevail regardless of the employer's motives. The Court commented, "If that effect was unintended, it is a problem for Congress, not one that

federal courts can fix." Given the frequent use of such employment examinations, the Court's decision in *Lewis* could have wide-reaching implications impacting future hiring decisions for cities, counties, and states nation-wide.

Granite Rock Co. v. International Brotherhood of Teamsters: Challenges Regarding the Formation and Scope of a Collective Bargaining Agreement's Arbitration Clause Are Not Arbitrable

Justice Thomas authored the majority opinion in *Granite Rock Co. v. International Brotherhood of Teamsters*, No. 08-1214, (June 24, 2010).

Granite Rock Co. employed members of Teamsters Local 287. The Teamsters contract expired in April 2004 and the parties bargained to impasse on June 9, 2004. The Teamsters union then instructed its members to strike. On July 2, the parties broke the impasse and agreed to a new Collective Bargaining Agreement (CBA) that included no-strike and arbitration clauses, but the parties did not agree on the union members' potential liability for strike-related damages. The Teamsters' business representative informed the employer's representative that the union wanted the employer to sign a separate "back-to-work" agreement that would hold the members harmless for economic damages relating to the June strike. When the members voted to ratify the contract on July 2, the ratification vote was not contingent on execution of the back-to-work agreement. The union, fearing that the members would be held liable for the June strike-related damages, encouraged union members not to return to work until the employer signed the back-to-work agreement. The employer refused to sign the agreement and a second strike ensued.

On July 9, the employer filed suit to enjoin the strike on the ground that the dispute over the agreement regarding economic damages was arbitrable under *Boys Markets, Inc. v. Retail Clerks*, 398 U. S. 235 (1970). The union contended that the contract had not been ratified and held a second ratification vote on August 22. Despite a successful ratification vote, the union continued the strike until September 14, when the injunction hearing was scheduled.

In the majority opinion, Justice Thomas stated that the unusual nature of the case required the Court to "reemphasize the proper framework for deciding when disputes are arbitrable under our precedents." The majority reiterated that if a district court finds that the parties agreed to arbitrate a particular dispute, then arbitration is appropriate. In circumstances such as the instant case, the court may be required to "resolve any issue that calls into question the formation or applicability of the specific arbitration clause that a party seeks to have the court enforce" or the question of whether the parties agreed to the arbitration clause and when such agreement was reached.

Justice Thomas concluded that because arbitration must be consensual, "courts should order arbitration of a dispute only where the court is satisfied that neither the formation of the parties' arbitration agreement nor (absent a valid provision specifically committing such disputes to an arbitrator) its enforceability or applicability to the dispute is in issue. Where a party contests either or both matters, 'the court' must resolve the disagreement." The Court emphasized that the presumption of arbitrability in labor disputes does not override the "principle that a court may submit to arbitration 'only those disputes ... that the parties have agreed to submit.'" (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995)).

The Court held that under this framework the parties were required to submit two issues for judicial resolution: “when the CBA was formed, and whether its arbitration clause covers the matters [the union] wishes to arbitrate.” The Court continued: “If, as Local asserts, the CBA containing the parties’ arbitration clause was not ratified, and thus not formed, until August 22, there was no CBA for the July no-strike dispute to ‘arise under,’ and thus no valid basis for the Court of Appeals’ conclusion that Granite Rock’s July 9 claims arose under the CBA and were thus arbitrable along with, by extension, Local’s formation-date defense to those claims.” The Court concluded that the lower court was required to decide the date the CBA was ratified before it could decide whether the no-strike issue was arbitrable.

Finally, the majority refused to create a new federal common law cause of action of tortious interference with a CBA under LMRA Section 301(a). The Court noted that the employer had not pursued other remedies such as state law agency or alter ego claims or remedies under the National Labor Relations Act for unfair labor practices.

Justice Sotomayor, joined by Justice Stevens, concurred with the majority that the tortious interference claim should fail; however, they dissented from the Court’s conclusion that the ratification-date defense was a formation dispute for the courts to decide.

Rent-A-Center, West, Inc., v. Jackson: Court Establishes Specific Pleading Requirements for Claims Alleging That an Arbitration Agreement as a Whole Is Invalid

In *Rent-A-Center, West, Inc., v. Jackson*, 09-497, (June 21, 2010), the Court considered whether the Federal Arbitration Act (FAA) authorizes a district court to decide a claim alleging that an arbitration agreement is unconscionable in its entirety, where the agreement expressly requires such decision to be made by an arbitrator.

Antonio Jackson filed a Section 1981 employment discrimination suit against his former employer, Rent-A-Center. The employer filed a motion to compel arbitration on the ground that Jackson had signed a Mutual Agreement to Arbitrate Claims as a condition of employment. Under this agreement, the parties agreed to arbitrate “all past, present or future” employment disputes “including but not limited to any claim that all or part of the Agreement is void or voidable.” The agreement gave the arbitrator “exclusive authority to resolve any dispute about the enforceability of the Agreement.” Jackson argued that the agreement was unconscionable in its entirety.

In a 5-4 opinion, Justice Scalia, writing for the majority, noted that agreements to arbitrate are enforceable in accordance with their terms, including “gateway” questions of arbitrability. He held that an “agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other.”

Justice Scalia examined the validity of the Rent-A-Center arbitration agreement under the FAA. Justice Scalia pointed out that Jackson had failed to specifically challenge the portion of the provision that gave the arbitrator “exclusive authority to resolve any dispute relating to the ... enforceability ... of this Agreement.” Therefore, the reviewing court must treat the clause as valid and enforce it. In order for the court to have jurisdiction over the challenge, Jackson would have had

to have pled with specificity the problematic provision. Because Jackson was challenging the unconscionability of the agreement in its entirety, the Court held that such a challenge to the whole agreement must be resolved by an arbitrator.

The dissenting opinion, authored by Justice Stevens on behalf of Justices Breyer, Ginsburg, and Sotomayor, rejected the majority’s “fantastic reasoning” regarding the severability rule and argued, instead, that in order to object to an entire arbitration agreement, the employee should not be required to identify the particular sentences within the agreement that delegates the claims to the arbitrator and challenge those sentences “on some contract ground that is particular and unique to those sentences.” The dissent would have held that the dispute over the validity of the arbitration agreement is severable from the underlying issue of employment discrimination.

Union Pacific Railroad Co. v. Brotherhood of Locomotive Engineers and Trainmen General Committee of Adjustment, Central Region: NRAB Pre-Arbitration Conferencing Rule Is Not Jurisdictional According to the Court

In *Union Pacific Railroad Co. v. Brotherhood of Locomotive Engineers and Trainmen General Committee of Adjustment, Central Region*, 08-604 (Dec. 8, 2010), the Court unanimously held that the pre-arbitration conferencing rule is a procedural and not a jurisdictional prerequisite to National Railroad Adjustment Board (NRAB) arbitrations.

Union Pacific Railroad Co. charged five employees with various disciplinary violations. The union initiated grievance proceedings pursuant to the Collective Bargaining Agreement (CBA). After the union exhausted its internal grievance procedures, including settlement conferences in some but not all five of the cases, the union demanded arbitration. Although neither the carrier nor the union raised conferencing as a disputed issue, a panel member inquired as to whether a settlement conference had been held in all five cases. The union produced evidence of conferencing and argued that the issue had been raised in an untimely manner because the carrier had failed to object before the arbitration date. Subsequently, the panel dismissed the arbitration petitions for lack of jurisdiction and ruled it had no power to consider evidence offered after the notice of intent to arbitrate had been filed with the NRAB.

45 U.S.C Section 153 First (q) provides, among other things, that an NRAB order may be vacated for failure to comply with the provisions of the Railway Labor Act (RLA) such as the pre-arbitration settlement meeting requirement. In a decision written by Justice Ginsburg, the Court held that Section 153 is a procedural claims-processing rule, not a jurisdictional requirement. Although the Court acknowledged that the consideration of new evidence in support of the union’s grievance “would sandbag the carrier,” evidence of pre-arbitration conferencing does not relate to the merits of a grievance. The Court held that NRAB should have considered the union’s offer of evidence of the conferences. Justice Ginsburg concluded with a sharp rebuke of NRAB for its professed lack of jurisdiction: “By refusing to adjudicate cases on the false premise that it lacked power to hear them, the NRAB panel failed ‘to conform or confine itself’, to the jurisdiction Congress gave it.”

***Conkright v. Frommert*: Court Gives Second Bite at the Apple to Plan Administrator Who Makes a Mistake**

At issue in *Conkright v. Frommert*, 08-810 (April 21, 2010), was whether the deference typically accorded an ERISA plan administrator who has discretionary authority to interpret a plan should be disregarded when the administrator makes an honest mistake. Chief Justice Roberts bluntly stated the Court's decision, right from the first sentence: "People make mistakes. Even administrators of ERISA plans. . . . The question here is whether a single honest mistake in plan interpretation justifies stripping the administrator of that deference for subsequent related interpretations of the plan. We hold that it does not."

The facts of the case are "exceedingly complicated," but can be distilled to the following. Employees of Xerox left the company in the 1980's and received lump-sum distributions of their pension benefits. When a cashed-out employee was rehired, the plan administrator determined his benefits using a "phantom account" method that calculated the amount of earnings that the participant's accrued benefit would have earned if it had remained in the retirement account. The plan administrator then reduced the participant's future benefits by the phantom earnings, a method that did not take into account the time value of money.

During the convoluted litigation that ensued, the Second Circuit held that the plan administrator abused his or her discretion by adopting the phantom account method because such a method constituted an unlawful retroactive cutback of accrued benefits. On remand, the plan administrator proposed a new way to calculate benefits of the returning employees. The district court refused to defer to the plan administrator's proposal, since the plan administrator's decision had previously been overruled, and instead adopted its own approach. Under the court's approach, each employee's present benefit was reduced by the lump sum payment received at the time of his or her original retirement. The Second Circuit upheld this decision, stating that the lower court was not required to apply a deferential standard "where the administrator ha[s] previously construed the same [plan] terms and we found such construction to have violated ERISA" *Fommert*, 535 F.3d 111, 119 (2008).

The Supreme Court rejected this "one-strike-and-you're out" approach. Relying on *Metropolitan Life Ins. Co. v. Glenn*, 554 U.S. 105 (2008), the Court said that "If, as we held in *Glenn*, a systemic conflict of interest does not strip a plan administrator of deference, it is difficult to see why a single honest mistake would require a different result." The Court focused on the fact that there was no evidence that

the plan administrator acted in bad faith or would not be fair in its interpretation of the plan. In addition, the Court buttressed its decision with ERISA's "interests in efficiency, predictability, and uniformity."

The Court did not consider that Xerox clearly benefited by the use of the phantom accrual (under this method the employer's contributions would be drastically reduced.) Instead, the Court focused on the harm to the plan that occurred because the district court's method did not account for the time value of money: "In the actuarial world, this is heresy." The Court also focused on the fact that the administrator's decision protected the integrity of the plan by preventing a windfall for the cashed-out employees who may have invested the distribution for the last twenty years.

Justice Breyer dissented, joined by Justices Stevens and Ginsburg. The dissenting opinion characterized the majority's decision as offering a "one free honest mistake rule." This rule gives administrators incentives to "take 'one free shot' at employer-favorable plan interpretations and to draft ambiguous requirement plans . . . with the expectation that they will have repeated opportunities to interpret and possibly reinterpret) the ambiguous terms."

***Hardt v. Reliance Standard Life Insurance Company*: Court Determines That a Party Need Not Prevail in Order to Receive Attorneys' Fees but Must Achieve Some Degree of Success**

In *Hardt v. Reliance Standard Life Insurance Company*, 09-448, (May 24, 2010), the Court interpreted ERISA Section 502(g)(1), which grants a court discretion to award attorneys' fees and costs to either party, to permit an award to a party that has achieved "some degree of success on the merits." (quoting *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 694 (1983)). The party does not need to prevail to be eligible for an attorneys' fee award. But the party must have more than a "trivial success on the merits" or a "purely procedural victor[y]." Thus, in the instant case where the district court refused to award summary judgment in favor of the participant but acknowledged that there is "compelling evidence that [she] is totally disabled . . . and [was] inclined to rule in her favor," an award of attorneys' fees was appropriate.

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The First Amendment in the 2009 Term: It's All About How You Frame It

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The Supreme Court this term decided a number of cases involving various aspects of the First Amendment. Some turned on rather technical First Amendment doctrines. For example, in *United States v. Stevens*, the Court by an 8-1 vote (with only Justice Alito dissenting) overturned a federal ban on so-called animal “crush” videos—videos depicting animal killing or maiming—on the ground that the law violated overbreadth limitations. The Court took issue with the fact that the statute swept in depictions of activities that could be completely and legally acceptable (such as hunting) in the locations where the videos were shot but were illegal where the videos were purchased or viewed.

In other cases, the justices seemed ultimately to reject the challengers’ First Amendment arguments based on important objectives and principles that were drawn from outside of First Amendment law. In *Holder v. Humanitarian Law Project*, for example, the Court by a 6-3 vote (Justices Ginsburg and Sotomayor joining Justice Breyer’s dissent) rejected First Amendment claims by a group of human rights and peace activists who sought to advise and train militant groups, groups that had been designated as “foreign terrorist organizations.” The activists sought to help these groups accomplish political ends lawfully; however, the Court concluded that to the extent that such advice constituted prohibited “material support” to terrorist groups, any free speech interests were outweighed by the government’s compelling objective of preventing terrorism. In *Milavetz, Gallop & Milavetz v. United States*, the Court, unanimous in its result, turned away—in the name of deterring bankruptcy fraud and abuse—a claim that a federal law ran afoul of free speech guarantees by limiting the advice attorneys can give clients on the verge of bankruptcy. Construing a law that prohibits anyone from “adv[is]ing an assisted person . . . to incur more debt in contemplation of [filing for bankruptcy]” narrowly to mean only that persons are barred “from advising a debtor to incur more debt because the debtor is filing for bankruptcy, rather than for a valid purpose,” the Court said the government—to ensure that the bankruptcy regime can operate properly—can lawfully regulate attorney speech when the “impelling reason” for the attorney’s advice to the client “to incur more debt” was the prospect of the client’s filing for bankruptcy.

Another example of the justices rejecting a First Amendment claim due to concerns lying outside the First Amendment’s scope is *Salazar v. Buono*. In *Salazar*, the Court rejected by a 5-4 vote (with Justice Kennedy writing an opinion for the Court joined by the chief justice and Justices Scalia, Thomas, and Alito) an Establishment Clause challenge to the presence of a Latin cross on what had been federal property. The case was complicated because, after the district court ruled in favor of the challenger and granted an injunction requiring the government to remove the cross, Congress enacted a statute transferring the land beneath the cross to the Veterans of Foreign Wars in exchange for other property. Because Congress’s actions changed the facts that bore on the appropriateness of the lower court’s injunction,

the case turned not just on how best to interpret Congress’s attempt to resolve the dispute and core Establishment Clause principles, but also on nuanced aspects of the law of remedies as it relates to changed circumstances after an injunction.

Beyond these cases that were based on legal nuances found in the First Amendment doctrine or within another legal arena, there were three additional First Amendment rulings that received a great deal of media attention and fell more squarely within the First Amendment substantive doctrinal matrix itself. Although each case poses distinct questions within a particular First Amendment doctrinal box or category, the cases also contain themes that tie them to other First Amendment rulings of the term, illustrating how connected seemingly disparate First Amendment disputes frequently are. And just as the cases this term remind us of how First Amendment disputes are sometimes linked to each other, they also illustrate how First Amendment contests are but a species of constitutional adjudication more generally, and as such implicate and sometimes depend upon transcendent tools and techniques the Court uses to manage and resolve its constitutional docket.

Citizens United v. Federal Election Commission

Let us start with what was perhaps the most high-profile decision of the entire term, *Citizens United v. Federal Election Commission*, where the Court by a 5-4 vote invoked the First Amendment to strike down a provision of federal election law, section 203 of the Bipartisan Campaign Reform Act (BCRA), that prohibits corporations and unions from using general treasury money for “electioneering communications,” that is, to support or oppose candidates for federal office in the period before a federal election. Justice Kennedy’s majority opinion (for himself and the four traditionally more conservative justices) was not altogether surprising to those who keep close track of campaign finance rulings, but because the decision explicitly overruled two Supreme Court precedents from the last twenty years, and washed away decades of federal statutory limits on corporate political speech, it attracted attention from the media, the political establishment, the public, the Congress, and the president. (Indeed, the president criticized it and called for a legislative response in the presence of many of the justices at the State of the Union address.)

Justice Kennedy’s opinion did not repudiate, and indeed built squarely upon the doctrinal foundation of the 1976 seminal ruling in *Buckley v. Valeo*. But unlike *Buckley*, the *Citizens* Court emphatically rejected each of the three justifications that the government offered to support its ban on corporate political speech. Treating section 203 of the BCRA as law that banned a type of political speech on account of the identity of the speaker, the Court applied strict scrutiny and found all of the state interests on behalf of the statute wanting. In 1990, the Court, in *Austin v. Michigan Chamber of Commerce*, one of the cases that *Citizens United* overrules, had found the government’s interest in preventing distortion of the political debate adequate

under strict scrutiny. In upholding a state ban on corporate political speech in *Austin*, the Court gave credence to the problem raised by the ability of corporations to accumulate and then spend vast sums of money in a way that might swamp all other speakers. The *Citizens United* Court, by contrast, found this rationale to be treacherous, especially as applied to media corporations, who were exempted from the federal statute, but not in a way that eased the Court's concerns about discrimination against certain kinds of speakers.

The second justification advanced by the government was the need to avoid quid pro quo corruption or the appearance of it. In rejecting this rationale, the Court highlighted the lack of evidence showing that candidates favor the corporations that make political expenditures on their behalf.

The Court was also unimpressed with the third government rationale: the protection of shareholders whose assets would be used to promote corporate speech with which they might disagree. The Court held that such concerns could be more narrowly addressed by carefully crafted disclosure requirements (some of which were at issue and upheld in the case) rather than a blanket ban on corporate speech, and that strict scrutiny required such precision.

What effect *Citizens United* will have on the electoral landscape is yet to be seen, but there might be more data after the 2010 elections this fall. On the one hand, there is no denying that corporations could, if they chose, spend tremendous amounts of money to promote or defeat candidates based on their views on issues of importance to the corporation. On the other hand, many states have permitted corporate political speech in state elections, and there is no consensus about how important or dominant such speech has been. (It bears pointing out in this regard that there might be some issues, e.g., large scale health care regulation, or financial regulatory reform, that are unique to the federal legislative agenda.) And the effect of union speech as a possible counterbalance to corporate speech is another unknown. So too is what, precisely, Congress may try to do to limit *Citizen United*'s applicability to foreign corporations or to beef up shareholder rights. Both are areas in which the Court's opinion left some room to operate.

As noted above, although *Citizens United* was a major case, it did not come as a bolt from the blue. Justice Kennedy wrote a passionate dissent in *Austin*, and other members of the *Citizens United* majority had signaled over the past decade (including in *McConnell v. Federal Election Commission*, the other case that was explicitly overruled) a willingness, indeed a desire, to revisit *Austin*. Moreover, *Austin* was in deep tension with one of the precepts of *Buckley* itself, where the Court flatly observed that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." Indeed, the antidistortion rationale behind section 203 was not pressed very hard by the government in *Citizens United*. Justice Kennedy made extensive use of this near-concession; the opinion intimated that it need not take the argument very seriously since the United States had all but abandoned the idea: "As for *Austin*'s antidistortion rationale, the Government does little to defend it."

Nor was that the only framing issue that critics have seized on in analyzing *Citizens United*. Justice Stevens's dissent spends much of its ink blasting the majority for distorting the statute and the specifics of the challenge brought by the plaintiffs—a conservative group that

wanted to air a movie funded by corporate money and critical of Hillary Clinton in the period shortly before the 2008 presidential primary campaign. According to Justice Stevens, the majority was reaching out to decide a frontal assault on section 203 that nobody was really making. The merits of this rather technical debate over whether the majority was procedurally activist cannot be resolved here, but suffice it to say that the precise scope of issues appropriately before the Court was a big part of the disagreement between the two groups of justices.

In addition to these framing issues, there were other important aspects of the *Citizens United* decision that also implicate the Constitution more generally, not just cases under the First Amendment. One such issue is the proper role of stare decisis. Chief Justice Roberts (joined by Justice Alito) wrote a special concurrence, the main point of which was to explain why overruling past cases was warranted here. Yet none of the justices in the majority seem to apply the approach created eighteen years ago in *Planned Parenthood v. Casey*. There, the Court held that a decision to overrule an earlier case "should rest on some special reason above and beyond the belief that [the] prior case was wrongly decided." In *Citizens United*, it would be hard to argue that the doctrine of *Austin* was unworkable logistically, that it had been completely undermined by subsequent developments, or that it rested on factual foundations we now see as empirically flawed. To be clear, I am not arguing in favor of the *Casey* approach—indeed I have written that it itself is flawed. I am merely observing that the Court itself no longer seems inclined to follow *Casey*'s command either, at least in this context.

Another important constitutional topic implicated by *Citizens United* is originalism. As he did in his dissent in the Second Amendment case of *District of Columbia v. Heller* two years ago, Justice Stevens in his *Citizens United* dissent attempted to demonstrate that the conservative majority was betraying its professed originalist methodological commitments. Justice Stevens discussed how the framers might have been skeptical of corporations and very surprised to think that free speech was one of the rights corporations would enjoy on a par with all other persons: "[T]here is not a scintilla of evidence to support the notion that anyone believed [the First Amendment] would preclude regulatory distinctions based on the corporate form." Justice Scalia felt the need to respond to Stevens's historical survey in a separate concurrence (joined by Justices Thomas and Alito). Justice Scalia tried to put the historical record in some more careful context, but much of his response to Justice Stevens rests on the fact that any distrust of corporations did not find its way into the text of the First Amendment. The suggestion he makes is that original understandings are important, but textual breadth can override them. This suggestion is a bit hard to swallow given the lack of textual foundation for all the other categories of speakers who lack full free speech rights such as prisoners, government employees, students, and military personnel. It is a little late in the day to rely much on the text of the First Amendment in trying to explain or develop its doctrine.

Doe v. Reed

A second case involving speech and the political process was *Doe v. Reed*, where the Court (by an 8-1 vote with only Justice Thomas dissenting) rejected a claim that the First Amendment categorically prohibits a state from making public the names of persons who sign a petition to place a referendum measure on the ballot. The Washington state legislature had enacted a law known as SB 5688, which

conferred domestic partnership rights (but not the label “marriage”) to same-sex couples within the state. Gay marriage proponents thought the measure did not go far enough; opponents thought the law went too far. A conservative group calling itself Protect Marriage Washington (PMW) began a drive to repeal the measure by referendum, a procedure provided for under state law. PMW filed over 137,000 signatures with the Washington Secretary of State—more than the number needed to place the referendum (R-71) in front of the state’s voters. The measure ultimately failed at the ballot box, but before the election was held, opponents of the referendum invoked the state’s Public Records Act (PRA) to seek the names and addresses of all those who signed the referendum petition. This identifying information was to be disseminated during the political campaign.

Fearing intimidation and harassment, PMW and some unnamed signers of the petition sued to enjoin the release, arguing they had a First Amendment right to support the petition free from public view. The district court agreed, and enjoined the state officials from disclosing the names and addresses of the petition signers. The Ninth Circuit reversed, and the Supreme Court agreed with the Ninth Circuit, ruling that the injunction was not required or supported by the First Amendment.

There are at least three noteworthy aspects of the Supreme Court’s ruling. First, as was true in *Citizens United*, a framing issue was crucial. The Court construed the challenge to the PRA as a facial one—the complaint and the relief sought in the lower court alleged that the “PRA is unconstitutional as applied to referendum petitions,” not just to R-71 and the special fears of intimidation its signers in particular may have felt. Facial challenges are always the hardest to maintain, and the Court left open the possibility that certain signers of particular initiatives might have a First Amendment claim against disclosure.

Second, the Court pointed out that while signers of petitions are engaged in expressive activity that is protected by the First Amendment, it was important to note that the state was not trying to prohibit or require the signers from doing or saying anything, but rather, the state was attempting to disclose information. While disclosure regimes may sometimes run afoul of the Constitution, the Court implied, again citing back and linking to *Citizens United*, that disclosure is often a kind of regulation the First Amendment prefers over more coercive regulations. Interestingly, however, the goal served by disclosure in *Doe*—to help prevent fraud in the referendum process—was very different than the goal served by disclosure in *Citizens United*, making the world aware of who is speaking so that private persons may hold each other accountable for speech. Indeed, this second interest in disclosure for the sake of public accountability was urged in *Doe* by Washington but was not addressed by the Court since the justices found the antifraud rationale sufficient.

Third, in finding disclosure for the purpose of fraud preventing an adequate justification, the Court gave explicit deference to the state in administering its own electoral scheme. Since no discrimination on the basis of content or speaker was being perpetrated, the state’s reasonable belief that some fraudulent activity would be detected and/or deterred by the possibility of public disclosure was sufficient to overcome any First Amendment interests, at least in the context of a facial challenge. As the Court put it: “We allow states significant flexibility in implementing their own voting systems. To the extent a regulation concerns the legal effect of a particular activity in that

process, the government will be afforded substantial latitude to enforce that regulation.” I think this deference proved important; the fraud-reducing effect of public dissemination of the identities of petition signers was plausible, but far from compelling.

Christian Legal Society v. Martinez

The final case I take up in this brief survey of the 2009 First Amendment terrain is *Christian Legal Society v. Martinez*, where the Court upheld, by a 5-4 vote, a public university policy regarding student group recognition against First Amendment challenge. The lawsuit originated when the Hastings College of the Law in San Francisco (a public law school that is separate from, but affiliated with, the University of California system) declined to grant official recognition as a Registered Student Organization (RSO) to the Hastings chapter of the Christian Legal Society (CLS), a national network of lawyers and law students devoted to upholding Christian ideals.

Hastings has a policy that, as written, requires all student groups seeking RSO status (a status that brings with it various benefits, including an opportunity for a small amount of monetary resources and the use of certain bulletin boards and email distribution channels) to agree to refrain from discriminating in accepting voting members and choosing officers “on the basis of [among other things] religion [and] sexual orientation.”

The policy was later explained by Hastings in the litigation to prohibit discrimination based on ideology as well, so that, in essence, officially recognized student groups must accept all comers. Hence, the policy became known as the “all-comers policy.” As Hastings put it, the policy requires that RSOs must “allow any student to participate, become a member, or seek leadership positions in the organization, regardless of status or beliefs.”

CLS members at Hastings maintained that, despite this policy, they had a First Amendment right to receive RSO recognition and support, yet also to exclude non-Christians and practicing gays. The lower courts ruled in favor of Hastings, and the Supreme Court affirmed, by a 5-4 vote, with swing vote Justice Kennedy joining the more “liberal” wing of the Court; Justice Ginsburg authored the majority opinion.

CLS argued two main points, both of them ultimately unsuccessful: First, CLS maintained that it had a right to exclude students, and still receive official recognition, because the inclusion of people whom CLS considered to be nonbelievers would impair CLS’s ability to convey its message. Put in its most basic terms, this argument suggested that CLS’s inclusion of persons who had a vision of Christianity, or the role of sexual conduct within it, that was different from CLS’s stance would undermine the viewpoint that CLS attempts to promote. Second, CLS argued, Hastings’s policy in effect discriminated against religious groups on the basis of their viewpoint, since religious groups tended to be the ones most likely to run afoul of the policy. The Court dispensed with both of CLS’s arguments by applying a single line of cases and a single judicially crafted test.

Because, wrote Justice Ginsburg, the relevant standard governing so-called “limited public forums”—as established by past Supreme Court cases—requires only that a government policy be “reasonable” and not overtly viewpoint-targeted, the law school’s program passed constitutional muster. As the Court pointed out, the First Amendment framework erected by these past cases distinguishes between (1) “traditional” public forums (e.g., streets and parks); (2) “designated”

public forums (which are not streets or parks, but are areas that the government has affirmatively opened up generally for expressive purposes, and that are therefore treated like traditional public forums); and (3) “limited” public forums, which are forums created for, and limited to, specific expressive purposes and speakers.

Applying the more lenient test governing “limited public forums,” the Court found the Hastings policy to be reasonable because it advanced, at least to some nontrivial extent, Hastings’s goals in setting up the RSO program. And the policy wasn’t viewpoint-based, the Court reasoned, because a “take all comers” requirement, on its face, does not target any group, but rather requires all groups—regardless of their particular messages—to accept persons who may not agree with the group’s beliefs.

What are we to make of this ruling? For starters, as in *Citizens United* and *Doe*, the constitutional framing of the issue was crucial in resolving the case. The choice of the “reasonable” and viewpoint-neutral test—that is, the choice of the appropriate doctrinal box or category on the First Amendment case law flowchart—essentially dictated the result. If a different box had been chosen, a different (and more stringent) test would have applied, and a different result might very well have been obtained. To see that point clearly, consider how the majority treated what CLS might have thought was one of its most helpful past cases, *Hurley v. Irish-American, Gay, Lesbian and Bisexual Group of Boston, Inc.* In that case, the Court unanimously upheld the First Amendment right of a veterans’ group sponsoring a St. Patrick’s Day parade to be exempt from a state law permitting gay individuals to march in the parade with a banner celebrating their Irish background and their sexual orientation. In rejecting the relevance of *Hurley*, the CLS Court pointed out that “*Hurley* involved the most traditional of public forums: the street. That context differs markedly from the limited public forum at issue here” ... which is governed by a “lesser standard of scrutiny ... compared to other forums.”

A point closely related to the importance of issue framing concerns the lawyering in the lower courts. Everyone (rightly) focuses on the choices the Supreme Court makes when it decides a case, but the choices that the lawyers make in framing and litigating the case are often just as important.

In the CLS dispute, one (although perhaps not the only) sufficient explanation of the Court’s crucial use of the “limited” public forum test is that CLS seemed to concede that test’s applicability at oral argument. Justice Ginsburg said this on behalf of the majority, citing to expressions by the lawyers on both sides, “[T]he parties agree that Hastings, through its registered RSO program, established a limited public forum.” Indeed, in a procedural back-and-forth very similar to that in the various opinions in *Citizens United*, Justice Ginsburg’s majority opinion and Justice Alito’s dissent (for himself and three others) painstakingly reviews the record to argue about exactly what issues were litigated below and which ones remain fair game for the Court’s consideration.

Was the concession Justice Ginsburg found to have existed inevitable? Perhaps, but perhaps not. Maybe CLS could have argued to have the case viewed through the prism of a designated public forum. A designated public forum is a generally available forum that the government creates for all speakers on all topics, and such a forum is treated like a traditional public forum as long as the designation remains in place. An example of a designated public forum might be

the forum created by a public college’s decision to permit all students to engage in whatever nonviolent, nondisruptive expressive and associational activities they choose, on a particular lawn or quad on campus. Had CLS been able to characterize Hastings’s RSO program as creating a designated public forum—one that was essentially created for the purpose of hosting unfettered and unstructured expression and association by students—then CLS could have tapped into a higher level of judicial scrutiny.

The designated-public-forum label might have been plausible because Hastings doesn’t seem to limit the subject matter around which any RSO chooses to organize. Organizations can be formed and recognized “to pursue academic and social interests” and to further “education and [help] develop leadership skills.” Pursuing all “academic” and “social” interests is an objective that seems quite capacious. (Indeed, Justice Anthony Kennedy’s separate writing in the case says that the Hastings policy operates “across a broad, seemingly unlimited range of ideas, views and activities.”) A Christian group, a Democratic group, or even a Frisbee club or a co-ed fraternity-like group could all qualify, so long as each was limited to students, refrained from illegal activity, and took “all comers.”

That is to say, the fact that RSOs at Hastings don’t seem to have to involve any particular connection to the law, or legal education, or any other idea or set of ideas—might have at least opened the door to a characterization that Hastings simply wants groups to exist and flourish for no specific purpose other than to express themselves. And if it had been proven that Hastings had only this generalized intent regarding its student groups, then perhaps the groups, put together, would have looked more like a designated, than a limited, public forum. But this avenue of argument and/or proof was foreclosed by CLS’s own use of the limited forum category.

Consider as well the other key stipulation that, according to the majority, at least, CLS made in the litigation: the stipulation that Hastings’s policy really does require a group to do more than refrain from racial or religious or sexual-orientation discrimination, and instead requires a group to take “all comers,” regardless of belief or ideology. As the sniping between Justice Ginsburg’s majority opinion and Justice Samuel Alito’s dissent illustrates, that turned out to be a big stipulation. Most importantly, this stipulation takes much of the wind out of CLS’s claim that the policy is viewpoint-discriminatory. According to the stipulation, the policy doesn’t single out religion as the one kind of ideology that cannot be used to exclude. By its very nature, the “take all comers” policy is not focused on religion or any other particular ideological basis of potential exclusion. Instead, the policy deals with all exclusionary actions, regardless of their ideological motivation, generally. In light of these stipulated features of the policy, it would be hard to claim that Hastings harbored any hostility to any particular ideology when it adopted the policy.

To be sure, even without this concession-by-stipulation, CLS still might well have lost in its bid to characterize the Hastings policy as viewpoint-based, either facially or in practice. But with this concession in place, CLS’s argument about viewpoint discrimination fell particularly flat.

Finally, consider an important way in which the CLS case is similar to and linked with *Doe*—the importance of the Court’s willingness to defer to particular kinds of judgments made by government actors, in this case, the deference given by the Court to educational judgments.

Such deference matters a great deal in resolving constitutional cases against universities. Even under the more lax “limited” public forum test, the Hastings policy still had to be reasonable. But given its open-endedness, what purposes does the RSO policy really serve? Does a policy that allows any group, formed around any set of ideas or activities, to exist—but also requires each such group to take all persons, even those who may vehemently disagree with those ideas or activities—make a lot of sense? What, precisely, does a policy that requires the Federalist Society (a conservative organization) to accept people who believe not in Federalist Society principles, but rather in the precepts of the American Constitution Society (a liberal organization), accomplish? The Court never says much about this.

To be sure, the Court downplays the fear that had been expressed by CLS that if you allow persons who disagree with a group to join and run it, then you permit the hijacking of the group. For instance, imagine that the Hastings Republican Club could be overtaken by persons who dislike Republican Party principles, basically gutting the original group’s objectives. But even if such fears of hijacking are exaggerated, the Court never really explains why Hastings’s policy permits the possibility of hijacking to exist at all.

Another way of putting the question is to ask why, for instance, a Jewish student would want to join CLS if the other members of CLS share a view of the virtues of Christianity that is in deep disagreement with the new joiner’s. This question is especially relevant for groups such as CLS that are not “religion and” groups—that is, groups that seek to promote religion and a nonreligious activity at once, such as the (fictitious) Hindu Backpacking Club or the (equally fictitious) Muslim Chess Club. In those “religion and” instances, members may want to join even if they disagree with some of what the group stands for. But that seems less true for groups such as the CLS. If there is a weakness to the majority opinion, I think it is in defining precisely what goals Hastings is reasonably advancing in setting up its RSO policy the way it has.

The majority says, in this regard, only that “extracurricular programs are, today, essential parts of the educational process” and that “involvement in student groups is a ‘significant contributor to the breadth and quality of the educational experience.’” Fair enough, but what do these vague statements really mean in the context of Hastings’s RSO program, which is so broadly defined?

Justice Alito’s dissent does identify one goal articulated by the Hastings policy—to “promote a diversity of viewpoints among registered student organizations.” But this goal would seem to argue in favor of organizational autonomy. For a diversity of viewpoints among organizations to exist, each organization must have one or more viewpoints, which means it must be free—if this particular goal is to be furthered at all—to define its own membership, based on beliefs and attitudes.

Now, perhaps Hastings’s goal is to promote diversity not just among organizations, but also within each organization, in order to force students of different ideologies and points of views to confront and deal with each other in a civilized way. Justice Kennedy’s separate writing hints at this intra-organizational diversity objective, but it might have been nice to have seen the majority document this objective more tightly in what Hastings actually said it is trying to promote, as shown in the record of its policy and in this litigation. When expressive

activity is directly regulated, even the application of a mere reasonableness test under the First Amendment should, I would argue, require courts to look carefully at what the government was actually trying to accomplish. Until the specific, actual objective is isolated, it is impossible to make a judgment as to whether that objective is reasonably advanced.

And, of course, even if it were shown that this kind of intra-organizational diversity was indeed Hastings’s objective, there would still be a question as to whether forcing people who disagree with each other to be part of a single group would be reasonably likely to be effective; perhaps opposed students would grapple and learn from each other, but they might also splinter off and form another group—until that group, too, is forced to admit persons who don’t agree. Unlike classrooms, where students must be present if they are to receive their educations, membership in any student organization is completely voluntary.

In the end, I think that the Court’s finding that Hastings’s policy is reasonable turns in significant measure on the Court’s reminder that it has “cautioned . . . in various contexts [that judges must] resist ‘substitut[ing] their own notions of sound educational policy for those of the school authorities which they review.’” Granted, in the same breath, the Court does say that it owes “no deference” to universities in deciding the meaning of the First Amendment, but it seems to me that resisting an impulse to substitute one’s own notions for someone else’s is precisely what deference is.

In this regard, the CLS case is reminiscent of the case upholding race-based affirmative action at the University of Michigan, *Grutter v. Bollinger*, seven years ago. There, too, the Court tried—and, again, not entirely successfully—to straddle a line between respect for law-school policies and commitment to independent judicial decision making. And there, the Court disclaimed deference to the University, but nevertheless did not seem to apply strict scrutiny with the same avid skepticism it has employed in other cases.

Technically, I suppose, as a logical matter, one could defer to Hastings on the question of “sound educational policy,” yet still decide the legal First Amendment question of whether there is a constitutional violation *de novo* (that is, on a clean slate, without any deference at all to Hastings). But when the test under the First Amendment that the Supreme Court has itself crafted asks whether a policy is “reasonable,” deferring to the educational institution on what makes for “sound” education seems awfully close to deferring to the university on the ultimate constitutional question; “sound” and “reasonable” are pretty close concepts.

Let me be clear: I am not arguing that deference to universities is necessarily wrong. My only suggestion is that we should all appreciate that such deference may be doing the real work in many high-profile cases involving speech, equality, and related issues arising in the university setting. And if that is the case, this subterranean factor ought to be brought into the light of day and acknowledged more directly in the Court’s opinions.

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Antitrust

American Needle, Inc. v. National Football League

Docket No. 08-661

**Reversed and Remanded:
The Seventh Circuit**

Argued: January 11, 2010

Decided: May 24, 2010

For Case Analysis: See ABA *PREVIEW* 177

Do the licensing practices of the NFL and its member teams constitute concerted activities that must be evaluated under the rule of reason when assessing an alleged violation of § 1 of the Sherman Act?

Yes. The actions of the NFL and its member teams constitute concerted activities that must be evaluated under the rule of reason given that the teams do not possess either the unitary decision-making quality or the single aggregation of economic power characteristic of independent action and given that, although the NFL and the teams may have some similar interests, when it comes to licensing team trademarks, their interests are not necessarily aligned.

From the unanimous opinion by Justice Stevens:

We have long held that concerted action under § 1 does not turn simply on whether the parties involved are legally distinct entities. Instead, we have eschewed such formalistic distinctions in favor of a functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate.

Appellate Procedure

Mohawk Industries, Inc. v. Carpenter

Docket No. 08-678

Affirmed: The Eleventh Circuit

Argued: October 5, 2009

Decided: December 8, 2009

For Case Analysis: See ABA *PREVIEW* 18

Does a federal district court's discovery order to disclose materials alleged to be covered by the attorney-client privilege meet the criteria for immediate appeal under the collateral order doctrine as set forth in *Coehn v. Beneficial Industrial Loan Corp.*?

No. Because effective appellate review can be achieved through other means, orders adverse to the attorney-client privilege do not meet the criteria for immediate appeal under the collateral order doctrine.

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

Postjudgment appeals, together with other review mechanisms, suffice to protect the rights of litigants and preserve the vitality of the attorney-client privilege.

Concurring in part and in judgment:
Justice Thomas

Arbitration

Rent-A-Center, West, Inc. v. Jackson

Docket No. 09-497

Reversed: The Ninth Circuit

Argued: April 26, 2010

Decided: June 21, 2010

For Case Analysis: See ABA *PREVIEW* 306

Must a district court rather than an arbitrator decide claims that an arbitration agreement is unconscionable even though the parties

assigned this "gateway" issue to the arbitrator for decision?

No. A district court may review such a clause, but only if the challenging party is challenging the "gateway" agreement, or the clause in the agreement giving the arbitrator the ability to determine the agreement's enforceability, and not the enforceability of the agreement as a whole.

From the opinion by Justice Scalia

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

In some cases, the claimed basis of invalidity for the contract as a whole will be much easier to establish than the same basis as applied only to the severable agreement to arbitrate. Thus, in an employment contract many elements of alleged unconscionability applicable to the entire contract (outrageously low wages, for example) would not affect the agreement to arbitrate alone.

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

Arbitration

Stolt-Nielsen S.A. v. Animalfeeds International Corp.

Docket. No. 08-1198

**Reversed and Remanded:
The Second Circuit**

Argued: December 9, 2009

Decided: April 27, 2010

For Case Analysis: See ABA *PREVIEW* 133

When the arbitration clause in a maritime agreement is silent with respect to class arbitration, may the arbitrator require the matter be submitted to class arbitration?

No. When the arbitration agreement is silent as to class arbitration, the panel of arbitrators should not submit the claim to class arbitration on the basis of the panel's own policy decisions, but rather, should look to the governing federal or state statute for the correct rule of law.

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

[I]t follows that a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so. In this case, however, the arbitration panel imposed class arbitration even though the parties concurred that they had reached “no agreement” on that issue. . . . The critical point, in the view of the arbitration panel, was that petitioners did not “establish that the parties to the charter agreements intended to *preclude* class arbitration.” . . . Even though the parties are sophisticated business entities, even though there is no tradition of class arbitration under maritime law, and even though AnimalFeeds does not dispute that it is customary for the shipper to choose the charter party that is used for a particular shipment, the panel regarded the agreement’s silence on the question of class arbitration as dispositive. The panel’s conclusion is fundamentally at war with the foundational FAA principle that arbitration is a matter of consent.

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

Taking no part in consideration or decision: Justice Sotomayor

Arbitration

Union Pacific R. Co. v. Locomotive Engineers and Trainmen Gen. Comm. of Adjustment, Central Region

Docket No. 08-604

Affirmed: The Seventh Circuit

Argued: October 7, 2009

Decided: December 8, 2009

For Case Analysis: See ABA *PREVIEW* 57

Does the Railway Labor Act allow a court to set aside on due process grounds a National Railroad Adjustment Board decision dismissing five employees’ grievance claims contesting their discipline or discharge?

Yes. Congress gave the National Railroad Adjustment Board the jurisdiction to hear the grievances and a panel of the Board cannot declare procedural rules as jurisdictional.

From the unanimous opinion by Justice Ginsburg:

The panel’s characterization, we hold, was misconceived. Congress authorized the Board to prescribe rules for the presentation and processing of claims, §153 First (v), but Congress alone controls the Board’s jurisdiction. By presuming authority to declare procedural rules “jurisdictional,” the panel failed “to conform, or confine itself, to matters [Congress placed] within the scope of [NRAB] jurisdiction,” §153 First (q). Because the panel was not “without authority to assume jurisdiction over the [employees’] claim[s],” Panel Decision 72a, its dismissals lacked tenable grounding.

Attorneys’ Fees

Astrue v. Ratliff

Docket No. 08-1322

**Reversed and Remanded:
The Eighth Circuit**

Argued: February 22, 2010

Decided: June 14, 2010

For Case Analysis: See ABA *PREVIEW* 221

Is an award of fees and other expenses under the Equal Access to Justice Act awarded to the prevailing party rather than to the prevailing party’s attorney and therefore subject to an offset under the Debt Improvement Act for a preexisting debt owed by the prevailing party to the United States?

Yes. Such an award of attorneys’ fees is payable to the litigant and is therefore subject to an offset to satisfy the litigant’s preexisting debt to the Government.

From the unanimous opinion by Justice Thomas:

We have long held that the term “prevailing party” in fee statutes is a “term of art” that refers to the prevailing litigant. . . . This treatment reflects the fact that statutes that award attorney’s fees to a prevailing party are exceptions to the “American Rule” that each *litigant* “bear [his] own attorney’s fees.” . . . Nothing in EAJA supports a different reading.

Concurring: Justice Sotomayor (joined by Justices Stevens and Ginsburg)

Attorneys’ Fees

Perdue v. Kenny

Docket No. 08-970

**Reversed and Remanded:
The Eleventh Circuit**

Argued: October 14, 2009

Decided: April 21, 2010

For Case Analysis: See ABA *PREVIEW* 39

Can a reasonable attorney’s fee award under a federal fee-shifting statute ever be enhanced based solely on quality of performance and results obtained when these factors are included in the lodestar calculation?

Yes. Attorneys’ fees may be increased beyond the lodestar calculation due to the quality of performance but only in extraordinary circumstances; however, specific findings must be made showing that the lodestar fee would not have been sufficient enough so as to attract competent counsel or that the performance required an extraordinary outlay of expenses and that the litigation is exceptionally protracted.

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

In light of what we have said in prior cases, we reject any contention that a fee determined by the lodestar method may not be enhanced in any situation. The lodestar method was never intended to be conclusive in all circumstances. Instead, there is a “strong presumption” that the lodestar figure is reasonable, but that presumption may be overcome in those rare circumstances in which the lodestar does not adequately take into account a factor that may properly be considered in determining a reasonable fee.

Concurring: Justice Kennedy

Concurring: Justice Thomas

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

Bankruptcy
Hamilton v. Lanning

Docket No. 08-998
Affirmed: The Tenth Circuit

Argued: March 22, 2010
Decided: June 7, 2010
For Case Analysis: See ABA *PREVIEW* 263

In calculating the debtor's projected disposable income during the plan period, may the bankruptcy court consider evidence suggesting that the debtor's income or expenses during that period are likely to be different from her income or expenses during the prefiling period?

Yes. When calculating a debtor's projected income, a bankruptcy court should follow the "forward-looking approach" and can take into account changes in a debtor's income or expenses if the change is known or virtually certain at the time of confirmation.

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

On the night of an election, experts do not "project" the percentage of the votes that a candidate will receive by simply assuming that the candidate will get the same percentage as he or she won in the first few reporting precincts. And sports analysts do not project that a team's winning percentage at the end of a new season will be the same as the team's winning percentage last year or the team's winning percentage at the end of the first month of competition. While a projection takes past events into account, adjustments are often made based on other factors that may affect the final outcome.

Dissenting: Justice Scalia

Bankruptcy
Schwab v. Reilly

Docket No. 08-538
Reversed: The Third Circuit

Argued: November 3, 2009
Decided: June 17, 2010
For Case Analysis: See ABA *PREVIEW* 94

Must the trustee make a timely objection to the exemption of an asset to preserve the trustee's challenge to the debtor's valuation of the asset?

No. Because the debtor Reilly gave "the value of [her] claimed exemption[s]" on Schedule C dollar amounts within the range the Code allows for what it defines as the "property claimed as exempt," trustee Schwab was not required to object to the exemptions in order to preserve the estate's right to retain any value in the equipment beyond the value of the exempt interest.

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

[W]e conclude that Schwab was entitled to evaluate the propriety of the claimed exemptions based on three, and only three, entries on Reilly's Schedule C: the description of the business equipment in which Reilly claimed the exempt interests; the Code provisions governing the claimed exemptions; and the amounts Reilly listed in the column titled "value of claimed exemption." In reaching this conclusion, we do not render the market value estimate on Reilly's Schedule C superfluous. We simply confine the estimate to its proper role: aiding the trustee in administering the estate by helping him identify assets that may have value beyond the dollar amount the debtor claims as exempt, or whose full value may not be available for exemption because a portion of the interest is, for example, encumbered by an unavoidable lien.

Dissenting: Justice Ginsburg (joined by Chief Justice Roberts and Justice Breyer)

Bankruptcy
United Student Aid Funds v. Espinosa

Docket No. 08-1134
Affirmed: The Ninth Circuit

Argued: December 1, 2009
Decided: March 23, 2010
For Case Analysis: See ABA *PREVIEW* 137

Is an order that confirms the discharge of a student loan debt in the absence of an undue hardship finding or an adversary proceeding, or both, a void judgment for Rule 60(b)(4) purposes?

No. The order is not void under Rule 60(b)(4) as there was no issue with the Bankruptcy Court's jurisdiction in the case even though it failed to make a hardship determination before the discharge, nor is there any due process issue even though the debtor failed to adhere to the bankruptcy rules, as the creditor received actual notice of the proceedings.

From the unanimous opinion by Justice Thomas:

[T]he order remains enforceable and binding on United because United had notice of the error and failed to object or timely appeal. United's response—that it had no obligation to object to Espinosa's plan until Espinosa served it with the summons and complaint the Bankruptcy Rules require, Brief for Petitioner 33—is unavailing. Rule 60(b)(4) does not provide a license for litigants to sleep on their rights. United had actual notice of the filing of Espinosa's plan, its contents, and the Bankruptcy Court's subsequent confirmation of the plan.

Campaign Finance
Citizens United v. Federal Election
Commission

Docket No. 08-205
Reversed in part, Affirmed in part,
and Remanded: The District of
Columbia

Argued: March 24, 2009
Reargued: September 9, 2009
Decided: January 21, 2010
For Case Analysis: See ABA *PREVIEW* 472,
Volume No. 36

May political speech be banned based on the
speaker's corporate identity?

No. The Government may regulate corporate
political speech through disclaimer and
disclosure requirements, but it may not sup-
press that speech altogether.

From the opinion by Justice Kennedy
(joined by Chief Justice Roberts and Justices
Scalia and Alito and joined by Justice Thomas
as to all but Part IV and joined by Justices
Stevens, Ginsburg, Breyer, and Sotomayor as
to Part IV):
When government seeks to use its full power,
including the criminal law, to command
where a person may get his or her informa-
tion or what distrusted source he or she
may not hear, it uses censorship to control
thought. This is unlawful. The First Amend-
ment confirms the freedom to think for
ourselves.

Concurring: Chief Justice Roberts (joined by
Justice Alito)
Concurring: Justice Scalia (joined by Justice
Alito and joined in part by Justice Thomas)
Concurring in part and dissenting in
part: Justice Stevens (joined by Justices
Ginsburg, Breyer, and Sotomayor)
Concurring in part and dissenting in
part: Justice Thomas

Civil Procedure
Hollingsworth v. Perry

Docket No. 09A648
Stays: The District Court's Order

Argued: N/A
Decided: January 13, 2010
For Case Analysis: N/A

Should the Supreme Court stay the broadcast
of a federal trial?

Yes. The broadcast in this case should be
stayed because it appears the courts below
did not follow the appropriate procedures set
forth in federal law before changing their
rules to allow such broadcasting.

From the per curiam opinion:
The question whether courtroom proceedings
should be broadcast has prompted consider-
able national debate. Reasonable minds
differ on the proper resolution of that debate
and on the restrictions, circumstances, and
procedures under which such broadcasts
should occur. We do not here express any
views on the propriety of broadcasting court
proceedings generally. Instead, our review
is confined to a narrow legal issue: whether
the District Court's amendment of its local
rules to broadcast this trial complied with
federal law. We conclude that it likely did not
and that applicants have demonstrated that
irreparable harm would likely result from the
District Court's actions. We therefore stay the
court's January 7, 2010, order to the extent
that it permits the live streaming of court
proceedings to other federal courthouses.

Dissenting: Justice Breyer (Joined By Jus-
tices Stevens, Ginsburg and Sotomayor)

Civil Procedure
Krupski v. Costa Crociere S.p.A

Docket No. 09-337
Reversed and Remanded:
The Eleventh Circuit

Argued: April 21, 2010
Decided: June 7, 2010
For Case Analysis: See ABA *PREVIEW* 326

Did the federal courts err when they deter-
mined that the plaintiff did not commit a
“mistake” within the meaning of Fed. R. Civ.
P. 15(c)(1)(C)(ii), and therefore could not
“relate-back” and amend her complaint after
the running of the statute of limitations to
name Costa Crociere S.p.A. as the appropri-
ate defendant in her lawsuit?

Yes. “Relation back” depends on what
the party to be added knew or should have
known, not on the amending party's knowl-
edge; therefore, the plaintiff's “mistake,” or
lack thereof, is not dispositive here.

From the opinion by Justice Sotomayor
(joined by Chief Justice Roberts and Justices
Stevens, Kennedy, Thomas, Ginsburg, Breyer,
and Alito):
That a plaintiff knows of a party's existence
does not preclude her from making a mistake
with respect to that party's identity. A plaintiff
may know that a prospective defendant—
call him party A—exists, while erroneously
believing him to have the status of party B.
Similarly, a plaintiff may know generally what
party A does while misunderstanding the
roles that party A and party B played in the
“conduct, transaction, or occurrence” giving
rise to her claim. If the plaintiff sues party B
instead of party A under these circumstances,
she has made a “mistake concerning the
proper party's identity” notwithstanding her
knowledge of the existence of both parties.
The only question under Rule 15(c)(1)(C)
(ii), then, is whether party A knew or should
have known that, absent some mistake, the
action would have been brought against him.

Concurring in part and in judgment:
Justice Scalia

Civil Procedure
Reed Elsevier, Inc. v. Muchnick

Docket No. 08-103
Reversed and Remanded:
The Second Circuit

Argued: October 7, 2009
Decided: March 2, 2010
For Case Analysis: See ABA *PREVIEW* 34

Does § 411(a) of the Copyright Act restrict the subject-matter jurisdiction of the federal courts over copyright infringement actions?

No. Section 411(a) is a precondition to filing a copyright infringement claim; a copyright holder's failure to comply with § 411(a) does not restrict a federal court's subject-matter jurisdiction over infringement claims involving unregistered works.

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

Section 411(a) imposes a precondition to filing a claim that is not clearly labeled jurisdictional, is not located in a jurisdiction-granting provision, and admits of congressionally authorized exceptions. See §§ 411(a)–(c). Section 411(a) thus imposes a type of precondition to suit that supports nonjurisdictional treatment under our precedents.

Concurring in part and concurring in judgment: Justice Ginsburg (joined by Justices Stevens and Breyer)
Taking no part in consideration: Justice Sotomayor

Civil Procedure
Shady Grove Orthopedic Associates P.A. v. Allstate Insurance Co.

Docket No. 08-1008
Reversed and Remanded:
The Second Circuit

Argued: November 2, 2009
Decided: March 31, 2010
For Case Analysis: See ABA *PREVIEW* 72

Must federal courts in diversity class actions apply state provisions that limit or prohibit certain categories of class actions?

No. A state law limiting certain types of class actions does not override federal class action Rule 23 because both rules deal with the same issue and the federal rule implicitly authorizes a court to grant certification in every case meeting the stated criteria.

From the opinion by Justice Scalia (with respect to Parts I and II-A and joined by Chief Justice Roberts and Justices Stevens, Thomas, and Sotomayor):

Rule 23 provides a one-size-fits-all formula for deciding the class-action question. Because § 901(b) attempts to answer the same question—i.e., it states that Shady Grove's suit “may *not* be maintained as a class action” (emphasis added) because of the relief it seeks—it cannot apply in diversity suits unless Rule 23 is *ultra vires*.

Parts II-B and II-D: Justice Scalia (joined by Chief Justice Roberts and Justices Thomas and Sotomayor)

Part II-C: Justice Scalia (joined by Chief Justice Roberts and Justice Thomas)

Concurring in part and in judgment: Justice Stevens

Dissenting: Justice Ginsburg (joined by Justices Kennedy, Breyer, and Alito)

Civil Rights
Hui v. Castaneda

Docket No. 08-1529
Reversed and Remanded:
The Ninth Circuit

Argued: March 2, 2010
Decided: May 3, 2010
For Case Analysis: See ABA *PREVIEW* 232

Is the Federal Tort Claims Act the exclusive remedy for claims arising from medical care provided by the public health service?

Yes. The Federal Tort Claims Act precludes public health service employees from being personally subject to *Bivens* actions for claims arising out of their employment.

From the unanimous opinion by Justice Sotomayor:

[T]he text of § 233(a) plainly indicates that it precludes a *Bivens* action against petitioners for the harm alleged in this case. Respondents offer three arguments in support of their claim that it does not. None persuades

us that § 233(a) means something other than what it says.

Compact Clause
Alabama v. North Carolina

No. 132, Orig.
Overruled: Exceptions to the
Reports of the Special Masters

Argued: January 11, 2010
Decided: June 1, 2010
For Case Analysis: See ABA *PREVIEW* 181

Does the Southeast Low-Level Radioactive Waste Management Compact (the compact) authorize a commission to impose monetary sanctions against North Carolina in response to North Carolina's alleged breach of its obligations under the compact?

No. The compact did not explicitly give the commission the authority to impose monetary sanctions nor did the compact make the commission the sole arbiter of disputes arising under it.

From the opinion by Justice Scalia
(joined by Justices Stevens, Ginsburg, and Alito; joined in all but Parts II-D and III-B by Chief Justice Roberts; joined in all but Part II-E by Justices Kennedy and Sotomayor; and joined in all but Parts II-C, II-D, and II-E by Justice Breyer):

According to Plaintiffs, however, the word “sanctions” in Article 7(F) naturally “includ[es]” monetary sanctions. Since the Compact contains no definition of “sanctions,” we give the word its ordinary meaning. A “sanction” (in the sense the word is used here) is “[t]he detriment loss of reward, or other coercive intervention, annexed to a violation of a law as a means of enforcing the law.” Webster's New International Dictionary 2211 (2d ed. 1957) ... A monetary penalty is assuredly one kind of “sanction.” See generally *Department of Energy v. Ohio*, 503 U. S. 607, 621 (1992). But there are many others, ranging from the withholding of benefits, or the imposition of a nonmonetary obligation, to capital punishment. The Compact surely does not authorize the Commission to impose all of them.

Concurring in part and in judgment: Justice Kennedy (joined by Justice Sotomayor)
Concurring in part and dissenting in part: Chief Justice Roberts (joined by Justice Thomas)

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

Confrontation Clause
Briscoe v. Virginia

Docket No. 07-11191
Vacated and Remanded:
The Supreme Court of Virginia

Argued: January 11, 2010
Decided: January 25, 2010
For Case Analysis: See ABA *PREVIEW* 165

Did the state violate petitioner's confrontation rights when it introduced certificates of drug analysis at trial without calling the analysts who prepared the certificates, when state law allowed petitioners to call the analysts as an adverse witness?

N/A. The case was remanded for consideration not inconsistent with the Court's opinion in *Melendez-Diaz v. Massachusetts*.

Per curiam opinion.

Congressional Authority
United States v. Comstock

Docket No. 08-1224
Reversed and Remanded:
The Fourth Circuit

Argued: January 12, 2010
Decided: May 17, 2010
For Case Analysis: See ABA *PREVIEW* 156

Does Congress have the power under Article I of the Constitution to authorize court-ordered civil commitment by the federal government of (1) "sexually dangerous" federal prisoners who are at or near the end of their original sentence and (2) "sexually dangerous" persons who are in federal custody because they are mentally incompetent to stand trial?

Yes. The Necessary and Proper Clause grants Congress authority sufficient to take such actions because the means justify the ends, mental health care for federal prisoners and civil commitment are activities Congress has long been involved with, there are sound reasoning behind this statute, the statute does not invade state rights, and lastly, the statute is narrow in scope.

From the opinion by Justice Breyer (joined by Chief Justice Roberts and Justices Stevens, Ginsburg, and Sotomayor): If a federal prisoner is infected with a communicable disease that threatens others, surely it would be "necessary and proper" for the Federal Government to take action, pursuant to its role as federal custodian, to refuse (at least until the threat diminishes) to release that individual among the general public, where he might infect others (even if not threatening an interstate epidemic, cf. Art. I, §8, cl. 3). And if confinement of such an individual is a "necessary and proper" thing to do, then how could it not be similarly "necessary and proper" to confine an individual whose mental illness threatens others to the same degree?

Concurring in judgment: Justice Kennedy
Concurring in judgment: Justice Alito
Dissenting: Justice Thomas (joined by Justice Alito as to all but Part III-A-1-b)

Criminal Law
Black v. United States and
Weyhrauch v. United States

Docket No. 08-876 and 08-1196
Vacated and Remanded:
The Seventh Circuit and
the Ninth Circuit

Argued: December 8, 2009
Decided: June 24, 2010
For Case Analysis: See ABA *PREVIEW* 150

During a prosecution under the "honest services" mail fraud statute, are jury instructions allowing for a conviction based on nondisclosure of material information appropriate?

No. Based on the Court's ruling in *Skilling v. United States*, a conviction under the "honest services" mail fraud statute is only appropriate when the government has proven a kickback or bribery which did not occur in this case and the defendants had no obligation to specifically object to jury special interrogatories or verdicts in order to maintain their right to appeal.

From the opinion by Justice Ginsburg (joined by Chief Justice Roberts and Justices Stevens, Breyer, Alito, and Sotomayor): We hold, in short, that, by properly objecting to the honest-services jury instructions at

trial, Defendants secured their right to challenge those instructions on appeal. They did not forfeit that right by declining to acquiesce in the Government-proposed special-verdict forms. Our decision in *Skilling* makes it plain that the honest-services instructions in this case were indeed incorrect. As in *Skilling* ... we express no opinion on the question whether the error was ultimately harmless, but leave that matter for consideration on remand.

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

Criminal Law
Carr v. United States

Docket No. 08-1301
Reversed and Remanded:
The Seventh Circuit

Argued: February 24, 2010
Decided: June 1, 2010
For Case Analysis: See ABA *PREVIEW* 228

May a person be criminally prosecuted under § 2250(a) of the Sex Offender Registration and Notification Act (SORNA) for failure to register when the defendant's underlying offense and travel in interstate commerce both predate SORNA's enactment?

No. SORNA § 2250(a) does not apply to sex offenders whose interstate travel occurred before SORNA's effective date.

From the opinion by Justice Sotomayor (joined by Chief Justice Roberts and Justices Stevens, Kennedy, and Breyer and joined except for Part III-C by Justice Scalia): It is far more sensible to conclude that Congress meant the first precondition to § 2250 liability to be the one it listed first: a "require[ment] to register under[SORNA]." Once a person becomes subject to SORNA's registration requirements, which can occur only after the statute's effective date, that person can be convicted under § 2250 if he thereafter travels and then fails to register. That § 2250 sets forth the travel requirement in the present tense ("travels") rather than in the past or present perfect ("traveled" or "has traveled") reinforces the conclusion that preenactment travel falls outside the statute's compass. Consistent with normal usage, we

have frequently looked to Congress's choice of verb tense to ascertain a statute's temporal reach.

Concurring in part and in judgment:
Justice Scalia

Dissenting: Justice Alito (Justices Thomas and Ginsburg)

Criminal Law

Holder v. Humanitarian Law Project

Docket No. 08-1498

**Affirmed in part, Reversed in part,
and Remanded: The Ninth Circuit**

Argued: February 23, 2010

Decided: June 21, 2010

For Case Analysis: See ABA *PREVIEW* 203

Does a federal statute that prohibits the knowing provision of “any ... service ... training, expert advice or assistance ... [or] personnel” to a designated foreign terrorist organization violate the First and Fifth Amendments as applied to activities such as provision of humanitarian aid and instruction in how to engage in political advocacy?

No. The statute, as applied to the particular types of support in this given case, is constitutional if the challenged activities are coordinated or controlled by the foreign terrorist organization.

From the opinion by Chief Justice

Roberts (joined by Justices Stevens, Scalia, Kennedy, Thomas, and Alito):

Our precedents, old and new, make clear that concerns of national security and foreign relations do not warrant abdication of the judicial role. We do not defer to the Government's reading of the First Amendment, even when such interests are at stake. We are one with the dissent that the Government's “authority and expertise in these matters do not automatically trump the Court's own obligation to secure the protection that the Constitution grants to individuals.” ... But when it comes to collecting evidence and drawing factual inferences in this area, “the lack of competence on the part of the courts is marked” ... and respect for the Government's conclusions is appropriate.

From the dissenting opinion by Justice Breyer (joined by Justices Ginsburg and Sotomayor):

[T]he risk that those who are taught will put otherwise innocent speech or knowledge to bad use is omnipresent, at least where that risk rests on little more than (even informed) speculation. Hence to accept this kind of argument without more and to apply it to the teaching of a subject such as international human rights law is to adopt a rule of law that, contrary to the Constitution's text and First Amendment precedent, would automatically forbid the teaching of any subject in a case where national security interests conflict with the First Amendment. The Constitution does not allow all such conflicts to be decided in the Government's favor.

Criminal Law

Skilling v. United States

Docket No. 08-1394

**Affirmed in part, Vacated in part,
and Remanded: The Fifth Circuit**

Argued: March 1, 2010

Decided: June 24, 2010

For Case Analysis: See ABA *PREVIEW* 217

Does the federal “honest services” mail fraud statute require the government to prove that a defendant employee's conduct was intended to achieve private gain rather than to advance the employer's interest?

Yes. In order to successfully prove guilt under the federal “honest services” mail fraud statute, the government must demonstrate that the defendant employee intended to achieve private gain through either a kickback or bribery.

From the opinion by Justice Ginsburg

(Part I joined by Chief Justice Roberts and Justices Stevens, Scalia, Kennedy, Thomas, and Alito; Part II joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas; and Part III joined by Chief Justice Roberts and Justices Stevens, Breyer, Alito, and Sotomayor):

In view of this history, there is no doubt that Congress intended § 1346 to reach *at least* bribes and kickbacks. Reading the statute to proscribe a wider range of offensive conduct, we acknowledge, would raise the due process concerns underlying the vagueness doctrine.

To preserve the statute without transgressing constitutional limitations, we now hold that § 1346 criminalizes *only* the bribe-and-kickback core of the pre-*McNally* case law.

Concurring in part and in judgment:

Justice Scalia (joined by Justice Thomas and joined by Justice Kennedy except as to Part III)

Concurring in part and in judgment:

Justice Alito

Concurring in part and dissenting in

part: Justice Sotomayor (joined by Justices Stevens and Breyer)

Criminal Procedure

Bloate v. United States

Docket No. 08-728

**Reversed and Remanded:
The Eighth Circuit**

Argued: October 6, 2009

Decided: March 8, 2010

For Case Analysis: See ABA *PREVIEW* 28

Is additional time granted to a defendant to prepare pretrial motions automatically excluded in calculating compliance with the Speedy Trial Act's requirement that defendants be tried within 70 days of indictment or first appearance?

No. Such time is not automatically excluded; but may be excluded if the district court makes appropriate findings under the act.

From the opinion by Justice Thomas

(joined by Chief Justice Roberts and Justices Stevens, Scalia, Kennedy, Ginsburg, and Sotomayor):

The fact that courts reading subsection (h) (1) [of the Speedy Trial Act] to exclude preparation time have imposed extratextual limitations on excludability to avoid “creating a big loophole in the statute,” ... underscores the extent to which their interpretation—and the dissent's—strays from the Act's text and purpose. As noted, subsection (h)(7) expressly accounts for the possibility that a district court would need to delay a trial to give the parties adequate preparation time. An exclusion under subsection (h)(7) is not automatic, however, and requires specific findings. Allowing district courts to exclude automatically such delays would redesign this statutory framework.

From the dissenting opinion by Justice Alito (joined by Justice Breyer):

Under the Court's interpretation, petitioner may be entitled to dismissal of the charges against him because his attorney persuaded a Magistrate Judge to give the defense additional time to prepare pretrial motions and thus delayed the commencement of his trial. The Speedy Trial Act does not require this strange result.

Concurring: Justice Ginsburg

Criminal Procedure
Johnson v. United States

Docket No. 08-6925
Reversed and Remanded:
The Eleventh Circuit

Argued: October 6, 2009

Decided: March 2, 2010

For Case Analysis: See ABA *PREVIEW* 62

Is a prior state conviction for felony battery a "violent" felony for purposes of an enhanced sentence pursuant to the Armed Career Criminal Act despite the state court's determination that the crime does not contain an element of the use or threatened use of force?

No. The Florida state felony of battery does not include the element of "physical force" based on the ordinary meaning of "physical force" and thus is not a "violent felony" under the Armed Career Criminal Act.

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

We think it clear that in the context of a statutory definition of "violent felony," the phrase "physical force" means violent force—that is, force capable of causing physical pain or injury to another person.

Dissenting: Justice Alito (joined by Justice Thomas)

Criminal Procedure
United States v. Marcus

Docket No. 08-1341
Reversed and Remanded:
The Second Circuit

Argued: February 24, 2010

Decided: May 24, 2010

For Case Analysis: See ABA *PREVIEW* 239

Is the appropriate standard for plain error review of an ex post facto violation to ask whether there is any possibility, no matter how unlikely, that the jury could have convicted the defendant based exclusively on preenactment evidence?

No. The "any possibility" standard of review cannot be reconciled with the Court's precedent of that an error eligible for plain error review be one that seriously affects "the fairness, integrity, or public reputation of judicial proceedings."

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

[E]rrors similar to the one at issue in this case—i.e., errors that create a risk that a defendant will be convicted based exclusively on noncriminal conduct—come in various shapes and sizes. The kind and degree of harm that such errors create can consequently vary. Sometimes a proper jury instruction might well avoid harm; other times, preventing the harm might only require striking or limiting the testimony of a particular witness. And sometimes the error might infect an entire trial, such that a jury instruction would mean little. There is thus no reason to believe that *all or almost all* such errors *always* "affect" the framework within which the trial proceeds."

Dissenting: Justice Stevens

Taking no part: Justice Sotomayor

Death Penalty
Smith v. Spisak

Docket No. 08-724
Reversed: The Sixth Circuit

Argued: October 13, 2009

Decided: January 12, 2010

For Case Analysis: See ABA *PREVIEW* 43

Did the Sixth Circuit violate the Antiterrorism and Effective Death Penalty Act (AEDPA) when it granted the defendant's habeas corpus petition on the grounds that the jury instructions and defense counsel's closing argument were unconstitutional?

Yes. The Sixth Circuit was wrong to hold that the state-court decisions were contrary to or an unreasonable application of clearly established federal law because a reasonable juror would not have read the jury instructions to say that a unanimous vote was required for each mitigating factor and there was no reasonable probability that a different closing argument would have resulted in a different outcome.

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

Whatever the legal merits of the rule or the underlying verdict forms in this case were we to consider them on direct appeal, the jury instructions at Spisak's trial were not contrary to "clearly established Federal law" ...

[W]e conclude that there is not a reasonable probability that a more adequate closing argument would have changed the result, and that the Ohio Supreme Court's rejection of Spisak's claim was not "contrary to, or ... an unreasonable application of" Strickland.

Concurring in part and in judgment: Justice Stevens

Death Penalty
Wood v. Allen

Docket No. 08-9156
Affirmed: The Eleventh Circuit

Argued: November 4, 2009
Decided: January 20, 2010
For Case Analysis: See ABA *PREVIEW* 80

Did the Eleventh Circuit err in affirming a state court decision that the defendant's counsel's strategic decision making was reasonable?

No. The state court decision's that defense counsel had made a strategic choice not to pursue or present certain evidence was reasonable.

From the opinion by Justice Sotomayor (joined by Chief Justice Roberts and Justices Scalia, Thomas, Ginsburg, Breyer, and Alito): Although we granted certiorari to resolve the question of how §§ 2254(d)(2) and (e)(1) fit together, we find once more that we need not reach this question, because our view of the reasonableness of the state court's factual determination in this case does not turn on any interpretive difference regarding the relationship between these provisions.

From the dissenting opinion by Justice Stevens (joined by Justice Kennedy): It does not follow from this single strategic decision that counsel also made a strategic decision to forgo investigating powerful mitigating evidence of Wood's mental deficits for the penalty phase. On the contrary, the only reasonable factual conclusion I can draw from this record is that counsel's decision to do so was the result of inattention and neglect. Because such a decision is the antithesis of a "strategic" choice, I would reverse the decision of the Court of Appeals.

**Due Process and Separation
of Powers**
***Robertson v. United States ex rel.
Watson***

Docket No. 08-6261
**Dismissed: District Court of
Columbia Court of Appeals**

Argued: March 31, 2010
Decided: May 24, 2010
For Case Analysis: See ABA *PREVIEW* 267

Can an action for criminal contempt in a congressionally created court constitutionally be brought in the name and pursuant to the power of a private person, rather than in the name and pursuant to the power of the United States?

Dismissed. Certiorari improvidently granted.

Per curiam opinion.

From the dissenting opinion by Chief Justice Roberts (joined by Justices Scalia, Kennedy, and Sotomayor): The answer to that question is no. The terrifying force of the criminal justice system may only be brought to bear against an individual by society as a whole, through a prosecution brought on behalf of the government.

Dissenting: Justice Sotomayor (joined by Justice Kennedy)

Eighth Amendment
Graham v. Florida

Docket No. 08-7412
**Reversed and Remanded: The
District Court of Appeal of Florida,
First District**

Argued: November 9, 2009
Decided: May 17, 2010
For Case Analysis: See ABA *PREVIEW* 76

Can a juvenile defendant be sentenced to a life sentence without the possibility of parole for a nonhomicide offense?

No. The Eighth Amendment's Cruel and Unusual Punishments Clause does not permit a juvenile to be sentenced to live without the possibility of parole for a nonhomicide crime because such a sentence is not graduated or proportioned to the offense.

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

Life without parole is an especially harsh punishment for a juvenile. Under this sentence a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender. A 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only.

Concurring: Justice Stevens (joined by Justices Ginsburg and Sotomayor)

Concurring in judgment: Chief Justice Roberts

Dissenting: Justice Thomas (joined by Justice Scalia and joined by Justice Alito as to Parts I and III)

Dissenting: Justice Alito

Eighth Amendment
Sullivan v. Florida

Docket No. 08-7621
From: The District Court of Appeal
of Florida, First District

Argued: November 9, 2009
Decided: May 17, 2010
For Case Analysis: See ABA *PREVIEW* 76

Can a juvenile defendant be sentenced to a life sentence without the possibility of parole for a nonhomicide offense?

No. See *Graham v. Florida*.

From the per curiam opinion:
The writ of certiorari is dismissed as improvidently granted.

Eighth Amendment
Wilkins v. Gaddy

Docket No. 08-10914
Reversed and Remanded:
The Fourth Circuit

Argued: N/A
Decided: February 22, 2010
For Case Analysis: N/A

Did the district court err when it dismissed the petitioner-prisoner's claim of excessive force based entirely on the determination that his injuries were "de minimis"?

Yes. The District Court was erroneously applying the precedent of *Hudson v. McMillian* by requiring a showing of significant injury; "significant injury" is not a threshold requirement for stating an excessive force claim.

From the per curiam opinion:
The "core judicial inquiry," we held, was not whether a certain quantum of injury was sustained, but rather "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm."

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

Employment Discrimination
Lewis v. Chicago

Docket No. 08-974
Reversed and Remanded:
The Seventh Circuit

Argued: February 22, 2010
Decided: May 24, 2010
For Case Analysis: See ABA *PREVIEW* 207

May a plaintiff who does not file a timely challenge to adoption of an employment practice assert a disparate-impact claim in a timely challenge to the employer's later application of the practice?

Yes. So long as the plaintiff asserts each of the elements of a disparate-impact claim, such a challenge to the application of the practice is permissible because in this case, the practice is "used," and therefore eligible to Title VII review, each time the hiring practice is applied to a new class of applicants.

From the unanimous opinion by Justice Scalia:

Petitioners' claim satisfies that requirement. Title VII does not define "employment practice," but we think it clear that the term encompasses the conduct of which petitioners complain: the exclusion of passing applicants who scored below 89 (until the supply of scores 89 or above was exhausted) when selecting those who would advance. The City "use[d]" that practice in each round of selection. Although the City had adopted the eligibility list (embodying the score cutoffs) earlier and announced its intention to draw from that list, it made use of the practice of excluding those who scored 88 or below each time it filled a new class of firefighters. Petitioners alleged that this exclusion caused a disparate impact. Whether they adequately proved that is not before us. What matters is that their allegations, based on the City's actual implementation of its policy, stated a cognizable claim.

Environmental Law
Monsanto v. Geertson Seed Farms

Docket No. 09-475
Reversed and Remanded:
The Ninth Circuit

Argued: April 27, 2010
Decided: June 21, 2010
For Case Analysis: See ABA *PREVIEW* 317

Was it correct for the district court to order a permanent injunctive relief barring future planting of genetically engineered alfalfa sprouts after the plaintiff alleged a violation of the National Environmental Policy Act by the Animal and Plant Health Inspection Service (APHIS) when the APHIS deregulated the sprouts?

No. Such an injunction was an abuse of the district court's discretion because such an injunction prohibited any partial deregulation, there was no showing of irreparable injury, and given that the injunction was nationwide, it was too drastic in nature.

From the opinion by Justice Alito (joined by Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, Ginsburg, and Sotomayor):
An injunction should issue only if the traditional four-factor test is satisfied. ... In contrast, the statements quoted above appear to presume that an injunction is the proper remedy for a NEPA violation except in unusual circumstances. No such thumb on the scales is warranted. Nor, contrary to the reasoning of the Court of Appeals, could any such error be cured by a court's perfunctory recognition that "an injunction does not automatically issue" in NEPA cases. ... It is not enough for a court considering a request for injunctive relief to ask whether there is a good reason why an injunction should *not* issue; rather, a court must determine that an injunction *should* issue under the traditional four-factor test set out above.

Dissenting: Justice Stevens
Taking in part: Justice Breyer

ERISA
Conkright v. Frommert

Docket No. 08-810
Reversed and Remanded:
The Second Circuit

Argued: January 20, 2010
Decided: April 21, 2010
For Case Analysis: See ABA *PREVIEW* 169

Must a court defer to a plan administrator's interpretation of plan terms even if the administrator's original decision was a violation of the Employee Retirement Income Security Act (ERISA) and an abuse of discretion?

Yes. District courts should apply a deferential standard of review to plan administrators' interpretations because such a standard was originally included for ERISA cases in order to maintain a balance of efficiency, predictability, and uniformity.

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

Firestone deference protects these interests and, by permitting an employer to grant primary interpretive authority over an ERISA plan to the plan administrator, preserves the "careful balancing" on which ERISA is based. Deference promotes efficiency by encouraging resolution of benefits disputes through internal administrative proceedings rather than costly litigation. It also promotes predictability, as an employer can rely on the expertise of the plan administrator rather than worry about unexpected and inaccurate plan interpretations that might result from de novo judicial review. Moreover, *Firestone* deference serves the interest of uniformity, helping to avoid a patchwork of different interpretations of a plan[.]

Dissenting: Justice Breyer (joined by Justices Stevens and Ginsburg)
Taking no part in consideration or decision: Justice Sotomayor

ERISA
Hardt v. Reliance Standard Life Insurance Co.

Docket No. 09-448
Reversed and Remanded:
The Fourth Circuit

Argued: April 26, 2010
Decided: May 24, 2010
For Case Analysis: See ABA *PREVIEW* 313

Is a party entitled to attorneys' fees pursuant to ERISA when she persuades a district court that an ERISA violation has occurred, the court remands the case to the administrator for a redetermination, and on remand, the administrator changes its position and agrees to pay the benefits sought?

Yes. A party does not necessarily have to be a "prevailing party" in order to be eligible for an attorney's fees award because it is up to the district court's discretion to award attorneys' fees to either party if the party's attorney is able to show "some degree of success on the merits."

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

The words "prevailing party" do not appear in this provision. Nor does anything else in § 1132(g)(1)'s text purport to limit the availability of attorney's fees to a "prevailing party." Instead, § 1132(g)(1) expressly grants district courts "discretion" to award attorney's fees "to *either* party."

Concurring in part and in judgment:
Justice Stevens

Fair Debt Practices Act
Jerman v. Carlisle, McNellie, Rini, Kramer and Ulrich LPA

Docket No. 08-1200
Reversed and Remanded:
The Sixth Circuit

Argued: January 13, 2010
Decided: April 21, 2010
For Case Analysis: See ABA *PREVIEW* 184

Does a debt collector's mistaken interpretation of legal requirements qualify for the "bona fide" error defense under the Fair Debt Collection Practices Act (FDCPA)?

No. The bona fide error defense does not apply to a debt collector's mistaken interpretation of the FDCPA's legal requirements; such a mistake of law cannot be "not intentional" unless Congress makes such an exception more explicit in the text of the statute and such a reading is consistent with the FDCPA's history and context.

From the opinion by Justice Sotomayor (joined by Chief Justice Roberts and Justices Stevens, Thomas, Ginsburg, and Breyer):
The dissent advances a novel interpretative rule under which the combination of a "mens rea requirement" and the word "violation" (as opposed to language specifying "the conduct giving rise to the violation") creates a mistake-of-law defense. . . . Such a rule would be remarkable in its breadth, applicable to the many scores of civil and criminal provisions throughout the U. S. Code that employ such a combination of terms. The dissent's theory draws no distinction between "knowing," "intentional," or "willful" and would abandon the care we have traditionally taken to construe such words in their particular statutory context.

From the dissenting opinion by Justice Kennedy (joined by Justice Alito):
When the law is used to punish good-faith mistakes; when adopting reasonable safeguards is not enough to avoid liability; when the costs of discovery and litigation are used to force settlement even absent fault or injury; when class-action suits transform technical legal violations into windfalls for

plaintiffs or their attorneys, the Court, by failing to adopt a reasonable interpretation to counter these excesses, risks compromising its own institutional responsibility to ensure a workable and just litigation system. The interpretation of the FDCPA the Court today endorses will entrench, not eliminate, some of the most troubling aspects of our legal system.

Concurring: Justice Breyer
Concurring in part and concurring in judgment: Justice Scalia
Dissenting: Justice Kennedy (joined by Justice Alito)

False Claims Act
Graham County Soil and Water Conservation Dist. v. United States ex rel. Wilson

Docket No. 08-304
Reversed and Remanded:
The Fourth Circuit

Argued: November 30, 2009
Decided: March 30, 2010
For Case Analysis: See ABA *PREVIEW* 129

May whistleblower litigants recover under the federal False Claims Act for claims they pursued based on information publicly disclosed in a state or local administrative report?

No. The False Claims Act bars actions for recovery based on public disclosures that are contained in a “congressional, administrative, or Governmental Accounting Office report, hearing, audit, or investigation.” Although the disclosures in this case were contained in state and local administrative reports, not federal ones, it is clear that Congress intended such disclosures to be included as exceptions barring recovery.

From the opinion by Justice Stevens (joined by Chief Justice Roberts and Justices Kennedy, Thomas, Ginsburg, and Alito and joined by Justice Scalia except as to Part IV): Given that “administrative” is not itself modified by “federal,” there is no immediately apparent textual basis for excluding the activities of state and local agencies (or their contractors) from its ambit.

Concurring in part and concurring in judgment: Justice Scalia
Dissenting: Justice Sotomayor (joined by Justice Breyer)

Federal Courts
Hertz Corp. v. Friend

Docket No. 08-1107
Vacated and Remanded:
The Ninth Circuit

Argued: November 10, 2009
Decided: February 23, 2010
For case analysis: See ABA *PREVIEW* 83

In the interests of simple and efficient judicial administration, should federal courts apply a nationwide corporate “headquarters” test to determine a corporation’s principal place of business in order to satisfy federal diversity jurisdiction requirements under 28 U.S.C. § 1332(c)?

Yes. The phrase “principal place of business” refers to the place where a corporation’s high officers direct, control, and coordinate the corporation’s activities, i.e. its nerve center, which will typically be found at its corporate headquarters.

From the unanimous opinion by Justice Breyer:

We conclude that “principal place of business” is best read as referring to the place where a corporation’s officers direct, control, and coordinate the corporation’s activities. It is the place that Courts of Appeals have called the corporation’s “nerve center.” And in practice it should normally be the place where the corporation maintains its headquarters—provided that the headquarters is the actual center of direction, control, and coordination, i.e., the “nerve center,” and not simply an office where the corporation holds its board meetings (for example, attended by directors and officers who have traveled there for the occasion).

First Amendment
Christian Legal Society Chapter of the University of California, Hastings College of Law, aka Hastings Christian Fellowship v. Martinez

Docket No. 08-1371
Affirmed and Remanded:
The Ninth Circuit

Argued: April 19, 2010
Decided: June 28, 2010
For Case Analysis: See ABA *PREVIEW* 300

Does the Constitution permit a public university law school to refuse to recognize a religious student organization on the grounds that the group violates the school’s nondiscrimination policy by requiring its officers and voting members to share its core religious commitments?

Yes. The school’s nondiscrimination “all-comers” policy is a reasonable, viewpoint-neutral limitation on recognized student organizations that does not violate the First Amendment.

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

Compliance with Hastings’s all-comers policy, we conclude, is a reasonable, viewpoint-neutral condition on access to the student-organization forum. In requiring CLS—in common with all other student organizations—to choose between welcoming all students and forgoing the benefits of official recognition, we hold, Hastings did not transgress constitutional limitations. CLS, it bears emphasis, seeks not parity with other organizations, but a preferential exemption from Hastings’s policy. The First Amendment shields CLS against state prohibition of the organization’s expressive activity, however exclusionary that activity may be. But CLS enjoys no constitutional right to state subvention of its selectivity.

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

First Amendment
Doe v. Reed

Docket No. 09-559
Affirmed: The Ninth Circuit

Argued: April 28, 2010
Decided: June 24, 2010
For Case Analysis: See ABA *PREVIEW* 296

Does the First Amendment right to privacy in political speech, association, and belief prevent a state from compelling the public release of identifying information about referendum petitioner signers?

No. When reviewed under “exacting scrutiny,” disclosure of referendum petitions does not as a general matter violate the First Amendment if the Government has a particularly strong interest in combating fraud and simple mistakes to ensure the integrity of the referendum process.

From the opinion by Chief Justice Roberts (joined by Justices Kennedy, Ginsburg, Breyer, Alito, and Sotomayor): Public disclosure thus helps ensure that the only signatures counted are those that should be, and that the only referenda placed on the ballot are those that garner enough valid signatures. Public disclosure also promotes transparency and accountability in the electoral process to an extent other measures cannot. In light of the foregoing, we reject plaintiffs’ argument and conclude that public disclosure of referendum petitions in general is substantially related to the important interest of preserving the integrity of the electoral process.

From the concurring opinion by Justice Stevens:

This is not a hard case. It is not about a restriction on voting or on speech and does not involve a classic disclosure requirement. Rather, the case concerns a neutral, nondiscriminatory policy of disclosing information already in the State’s possession that, it has been alleged, might one day indirectly burden petition signatories.

Concurring: Justice Breyer
Concurring: Justice Alito
Concurring: Justice Sotomayor (joined by Justices Stevens and Ginsburg)

Concurring in part and in judgment: Justice Stevens (joined by Justice Breyer)
Concurring in judgment: Justice Scalia
Dissenting: Justice Thomas

First Amendment
Milavetz, Gallop & Millavetz, P.A. v. United States

Docket No. 08-1119
Affirmed in part, Reversed in part, and Remanded: The Eighth Circuit

Argued: December 1, 2009
Decided: March 8, 2010
For Case Analysis: See ABA *PREVIEW* 126

If attorneys included as “debt relief agencies” under the Bankruptcy Abuse Prevention and Consumer Protection Act, do the restrictions the Act places on such agencies violate the First Amendment?

No. By giving “advice” or “counsel” or by preparing bankruptcy documents, attorneys clearly fall in the category of giving “bankruptcy assistance” and are therefore covered by the Act; further, however, when read while keeping congressional intent in mind, the challenged restrictions are neither impressively vague nor do they impose an affirmative limitation on speech but are reasonably related to valid government interest.

From the opinion by Justice Sotomayor (joined by Chief Justice Roberts and Justices Stevens, Kennedy, Ginsburg, Breyer, and Alito and joined by Justice Scalia except for no. 3 and joined by Justice Thomas except for Part III-C):

It would make scant sense to prevent attorneys and other debt relief agencies from advising individuals thinking of filing for bankruptcy about options that would be beneficial to both those individuals and their creditors. That construction serves none of the purposes of the Bankruptcy Code or the amendments enacted through the BAPCPA. Milavetz itself acknowledges that its expansive view of § 526(a)(4) would produce absurd results; that is one of its bases for arguing that “debt relief agency” should be construed to exclude attorneys. Because the language and context of § 526(a)(4) evidence a more targeted purpose, we can avoid the absurdity of which Milavetz complains without reaching the result it advocates.

Concurring in part and concurring in judgment: Justice Scalia
Concurring in part and concurring in judgment: Justice Thomas

First Amendment
Salazar v. Buono

Docket No. 08-472
Reversed and Remanded: The Ninth Circuit

Argued: October 7, 2009
Decided: April 28, 2010
For Case Analysis: See ABA *PREVIEW* 4

Did the district court err when it permanently enjoined the federal government from implementing a statute transferring a Christian cross and the federal land upon which the cross had been erected?

Yes. The district court erred in enjoining the transfer given that it failed to engage in the appropriate inquiry by not looking at the statute’s context or the reasoning behind its passage.

From the opinion by Justice Kennedy (joined by Chief Justice Roberts and joined by Justice Alito in part): The goal of avoiding governmental endorsement does not require eradication of all religious symbols in the public realm. A cross by the side of a public highway marking, for instance, the place where a state trooper perished need not be taken as a statement of governmental support for sectarian beliefs. The Constitution does not oblige government to avoid any public acknowledgment of religion’s role in society. . . . Rather, it leaves room to accommodate divergent values within a constitutionally permissible framework.

Concurring: Chief Justice Roberts
Concurring in part and concurring in judgment: Justice Alito
Concurring in judgment: Justice Scalia (joined by Justice Thomas)
Dissenting: Justice Stevens (joined by Justices Ginsburg and Sotomayor)
Dissenting: Justice Breyer

First Amendment
United States v. Stevens

Docket No. 08-769
Affirmed: The Third Circuit

Argued: October 6, 2009
Decided: April 20, 2010
For Case Analysis: See ABA *PREVIEW* 11

Is a federal statute that makes it illegal to create, sell, or possess depictions of animal cruelty unconstitutional on its face?

Yes. The Government has not met its burden to show that such speech is presumptively invalid.

From the opinion by Chief Justice Roberts (joined by Justices Stevens, Scalia, Kennedy, Thomas, Ginsburg, Breyer, and Sotomayor):
Our decisions in *Ferber* and other cases cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment. Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law. But if so, there is no evidence that “depictions of animal cruelty” is among them. We need not foreclose the future recognition of such additional categories to reject the Government’s highly manipulable balancing test as a means of identifying them.

Dissenting: Justice Alito

Foreign Sovereign Immunities Act
Samantar v. Yousuf

Docket No. 08-1555
Affirmed and Remanded:
The Fourth Circuit

Argued: March 3, 2010
Decided: June 1, 2010
For Case Analysis: See ABA *PREVIEW* 243

Does the Foreign Sovereign Immunities Act (FSIA) bar suits against former government officials for actions taken in their official capacities?

No. The FSIA does not govern such claims of immunities because it is intended to cover “foreign states” and not necessarily an official acting on behalf of that state.

From the opinion by Justice Stevens (joined by Chief Justice Roberts and Justices Kennedy, Ginsburg, Breyer, Alito, and Sotomayor):
Petitioner argues that either “foreign state,” § 1603(a), or “agency or instrumentality,” § 1603(b), could be read to include a foreign official. Although we agree that petitioner’s interpretation is literally possible, our analysis of the entire statutory text persuades us that petitioner’s reading is not the meaning that Congress enacted.

Concurring: Justice Alito
Concurring in part and in judgment: Justice Thomas
Concurring in judgment: Justice Scalia

Forfeiture
Alvarez v. Smith

Docket No. 08-351
Vacated and Remanded:
The Seventh Circuit

Argued: October 14, 2009
Decided: December 8, 2009
For Case Analysis: See ABA *PREVIEW* 48

Is a mechanism to test the validity of the retention of personal property seized by the state required by the Due Process Clause?

The case is moot. As the state had already returned all the personal property, there is no “case” or “controversy.”

From the opinion by Justice Breyer (joined by Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, Ginsburg, Alito, and Sotomayor and joined as to Parts I and II by Justice Stevens):
At the time of oral argument, however, we learned that the underlying property disputes have all ended. The State has returned all the cars that it seized, and the individual property owners have either forfeited any relevant cash or have accepted as final the State’s return of some of it. We consequently find the case moot, and we therefore vacate the judgment of the Court of Appeals and remand the case to that court with instructions to dismiss.

Concurring in part and dissenting in part: Justice Stevens

Fourth Amendment
City of Ontario v. Quon

Docket No. 08-1332
Reversed and Remanded:
The Ninth Circuit

Argued: April 19, 2010
Decided: June 17, 2010
For Case Analysis: See ABA *PREVIEW* 309

Is there a reasonable expectation of privacy under the Fourth Amendment for communication between a police sergeant and others over a pager issued by a local police department?

No. Such a search was reasonable given that it was motivated by a legitimate work-related purpose and is not excessive in scope.

From the opinion by Justice Kennedy (joined by Chief Justice Roberts and Justices Stevens, Thomas, Ginsburg, Breyer, Alito, and Sotomayor and joined by Justice Scalia except for Part III-A):
The Court must proceed with care when considering the whole concept of privacy expectations in communications made on electronic equipment owned by a government employer. The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear. ... Prudence counsels caution before the facts in the instant case are used to establish far-reaching premises that define the existence, and extent, of privacy expectations enjoyed by employees when using employer-provided communication devices.

From the concurring opinion by Justice Scalia:
Applying the Fourth Amendment to new technologies may sometimes be difficult, but when it is necessary to decide a case we have no choice. The Court’s implication ... that where electronic privacy is concerned we should decide less than we otherwise would (that is, less than the principle of law necessary to resolve the case and guide private action)—or that we should hedge our bets by concocting case-specific standards

or issuing opaque opinions—is in my view indefensible.

Concurring: Justice Stevens

Concurring in part and in judgment:
Justice Scalia

Fourth Amendment
Maryland v. Shatzer

Docket No. 08-680
Reversed and Remanded:
The Court of Appeals of Maryland

Argued: October 5, 2009

Decided: February 24, 2010

For Case Analysis: See ABA *PREVIEW* 52

Is the per se rule of *Edwards v. Arizona*, which bars further questioning after a request for counsel, violated when police later reinterrogated a suspect who initially invoked that right, but has been incarcerated elsewhere on a different charge for over two years?

No. Because the defendant was released from custody for at least 14 days in between the first and second interrogation, the *Edwards* presumption that the confession was coerced does not apply, even in light of the fact that the defendant was released from *Miranda* custody into the general prison population.

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

We have frequently emphasized that the *Edwards* rule is not a constitutional mandate, but judicially prescribed prophylaxis. . . . Because *Edwards* is “our rule, not a constitutional command,” “it is our obligation to justify its expansion.”

Concurring in part and concurring in judgment: Justice Thomas

Concurring in judgment: Justice Stevens

Fourth Amendment
Michigan v. Fisher

Docket No. 09-91
Reversed and Remanded:
The Michigan Court of Appeals

Argued: N/A

Decided: December 7, 2009

For Case Analysis: N/A

Did police officers violate the defendant’s Fourth Amendment rights when they entered the defendant’s home after observing a smashed pickup truck, damaged fenceposts, and broken windows and seeing the defendant through his home’s window and noting that he was bleeding?

No. Given the tumultuous scene that the police officers arrived upon and the defendant’s behavior and physical condition, the decision of the police officers to enter the home without a warrant was reasonable under the exigent circumstances exception to the Fourth Amendment warrant requirement.

From the per curiam opinion:

It sufficed to invoke the emergency aid exception that it was reasonable to believe that Fisher had hurt himself (albeit nonfatally) and needed treatment that in his rage he was unable to provide, or that Fisher was about to hurt, or had already hurt, someone else. The Michigan Court of Appeals required more than what the Fourth Amendment demands.

From the dissenting opinion by Justice Stevens (joined by Justice Sotomayor):

We ought not usurp the role of the fact finder when faced with a close question of the reasonableness of an officer’s actions, particularly in a case tried in a state court.

Habeas Corpus
Beard v. Kindler

Docket No. 08-992
Vacated and Remanded:
The Third Circuit

Argued: November 2, 2009

Decided: December 8, 2009

For Case Analysis: See ABA *PREVIEW* 97

Is a state procedural rule automatically “inadequate” under the adequate-state-grounds doctrine—and therefore unenforceable on federal habeas corpus review—because the state rule is discretionary rather than mandatory?

No. The issue is whether the state rule is “firmly established and regularly followed” and in this case, even though the rule allowed for judicial discretion, there was nothing to eliminate consideration of the federal claim.

From the opinion by Chief Justice Roberts (joined by all members except for Justice Alito who took no part in consideration):

A contrary holding would pose an unnecessary dilemma for the States: States could preserve flexibility by granting courts discretion to excuse procedural errors, but only at the cost of undermining the finality of state court judgments. Or States could preserve the finality of their judgments by withholding such discretion, but only at the cost of precluding any flexibility in applying the rules. We are told that, if forced to choose, many States would opt for mandatory rules to avoid the high costs that come with plenary federal review.

Concurring: Justice Kennedy (joined by Justice Thomas)

Habeas Corpus
Corcoran v. Levenhagen

Docket No. 08-10495
Vacated and Remanded:
The Seventh Circuit

Argued: N/A
Decided: October 20, 2009
For Case Analysis: N/A

Did the Seventh Circuit err when, in reversing a district court's ruling on a defendant's Sixth Amendment claims, it also denied without any explanation the defendant's other claims and ordered no rehearing at the district court level on the outstanding claims?

Yes. The court of appeals should have allowed the district court to hear the defendant's unresolved challenges on remand or should have explained its reasoning as to why a rehearing was unnecessary.

From the per curiam opinion:
The Seventh Circuit should have permitted the District Court to consider Corcoran's unresolved challenges to his death sentence on remand, or should have itself explained why such consideration was unnecessary.

Habeas Corpus
Holland v. Florida

Docket No. 09-5327
Reversed and Remanded:
The Eleventh Circuit

Argued: March 1, 2010
Decided: June 14, 2010
For Case Analysis: See ABA *PREVIEW* 225

Can a lawyer's "gross negligence," which results in the late filing of a federal habeas petition in a capital case, provide a basis for equitable tolling of AEDPA's statute of limitations?

Yes. The AEDPA's statute of limitations is subject to equitable tolling but only in those cases where the defendant can show "extraordinary circumstances."

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

In short, no pre-existing rule of law or precedent demands a rule like the one set forth by the Eleventh Circuit in this case. That rule is difficult to reconcile with more general equitable principles in that it fails to recognize that, at least sometimes, professional misconduct that fails to meet the Eleventh Circuit's standard could nonetheless amount to egregious behavior and create an extraordinary circumstance that warrants equitable tolling. And, given the long history of judicial application of equitable tolling, courts can easily find precedents that can guide their judgments.

Concurring in part and in judgment:

Justice Alito

Dissenting: Justice Scalia (joined by Justice Thomas as to all but Part I)

Habeas Corpus
Kiyemba v. Obama

Docket No. 08-1234
Vacated and Remanded: Court of
Appeals for the District of Columbia

Argued: N/A
Decided: March 1, 2010
For Case Analysis: See ABA *PREVIEW* 252

Do federal judges exercising habeas jurisdiction have the power to order the release of non-enemy combatants held at Guantanamo into the United States against the politic branches' will when the detention is long-standing and indefinite, and when release into the country is the only effective habeas remedy?

N/A. Because most of the detainees had, since the time the original case was filed, received and accepted offers of resettlement and the five detainees to remain had declined such offers, the Court determined that it is inappropriate for it to rule at this time.

From the per curiam opinion:

This change in the underlying facts may affect the legal issues presented. No court has yet ruled in this case in light of the new facts, and we decline to be the first to do so.

Habeas Corpus
Magwood v. Patterson

Docket No. 09-158
Reversed and Remanded:
The Eleventh Circuit

Argued: March 24, 2010
Decided: June 24, 2010
For Case Analysis: See ABA *PREVIEW* 248

Is a petition for writ of habeas corpus challenging a due process violation in resentencing a "second or successive" petition when the same alleged violation could have been challenged in a prior habeas petition challenging the initial sentence?

No. Such a petition challenges a new judgment for the first time and is not a "second or successive" petition given the text, context, and relief provided by the Antiterrorism and Effective Death Penalty Act.

From the opinion by Justice Thomas, except as to Part IV-B (joined in full by Justice Scalia and joined by Justices Stevens, Breyer, and Sotomayor except as to Part IV-B):

The State's "custody"-based rule is difficult to justify for another reason. Under the State's approach, applying the phrase "second or successive" to any subsequent application filed before a prisoner's release would mean that a prisoner who remains in continuous custody for a completely unrelated conviction would have to satisfy the strict rules for review under § 2244(b) to challenge his unrelated conviction *for the first time*. Nothing in the statutory text or context supports, much less requires, such an anomalous result.

Concurring in part and in judgment:

Justice Breyer (joined by Justices Stevens and Sotomayor)

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

Habeas Corpus
McDaniel v. Brown

Docket No. 08-559
Reversed and Remanded:
The Ninth Circuit

Argued: N/A
Decided: January 11, 2010
For Case Analysis: N/A

Did the Ninth Circuit misapply the standard in *Jackson v. Virginia* when it held that the defendant was eligible for habeas corpus relief in light of DNA evidence and other convincing evidence of guilt?

Yes. Under *Jackson*, a reviewing court must consider all the evidence admitted at trial in a light most favorable to the prosecution, and given the circumstances of this case, it is clear that the Ninth Circuit failed to do so.

From the per curiam opinion:
The Court of Appeals acknowledged that it must review the evidence in the light most favorable to the prosecution, but the court's recitation of inconsistencies in the testimony shows it failed to do that.

Concurring: Justice Thomas (joined by Justice Scalia)

Habeas Corpus
Renico v. Lett

Docket No. 09-338
Reversed and Remanded:
The Sixth Circuit

Argued: March 29, 2010
Decided: May 3, 2010
For Case Analysis: See ABA *PREVIEW* 279

Did the Sixth Circuit err when it found that the trial court's declaration of a mistrial violated the Constitution's protection against double jeopardy and that the Michigan Supreme Court's ruling to the contrary was an unreasonable application of clearly established law?

Yes. The Michigan Supreme Court's decision that the trial court judge was within his discretion when granting a mistrial was not an unreasonable decision under the

Antiterrorism and Effective Death Penalty Act. It is clearly established federal law that when a trial judge discharges a jury on grounds that the jury cannot reach a verdict, the Double Jeopardy Clause does not bar a new trial before a new jury.

From the opinion by Chief Justice Roberts (joined by Justices Scalia, Kennedy, Thomas, Ginsburg, and Alito):
The Michigan Supreme Court's adjudication involved a straightforward application of our longstanding precedents to the facts of Lett's case. The court cited our own double jeopardy cases—from *Perez* to *Washington*—elaborating upon the “manifest necessity” standard for granting a mistrial and noting the broad deference that appellate courts must give trial judges in deciding whether that standard has been met in any given case. . . . It then applied those precedents to the particular facts before it and found no abuse of discretion, especially in light of the length of deliberations after a short and uncomplicated trial, the jury notes suggesting heated discussions and asking what would happen “if we can't agree,” and— “[m]ost important”—“the fact that the jury foreperson expressly stated that the jury was not going to reach a verdict.” . . . In these circumstances, it was reasonable for the Michigan Supreme Court to determine that the trial judge had exercised sound discretion in declaring a mistrial.

From the dissenting opinion by Justice Stevens (joined by Justice Sotomayor and in which Justice Breyer joined as to Parts I and II):
In this case, the trial judge did not meet that burden. The record suggests that she discharged the jury without considering any less extreme courses of action, and the record makes quite clear that she did not fully appreciate the scope or significance of the ancient right at stake. The Michigan Supreme Court's decision rejecting Reginald Lett's double jeopardy claim was just as clearly in error.

Habeas Corpus
Wellons v. Hall

Docket No. 09-5731
Vacated and Remanded:
The Eleventh Circuit

Argued: N/A
Decided: January 19, 2010
For Case Analysis: N/A

Did the Eleventh Circuit err by denying the defendant's petition to reconsider his conviction in light of evidence of juror interactions with judge and bailiff and the Court's decision in *Cone v. Bell* on the grounds of res judicata?

Yes. Although the defendant failed to raise his current challenges during his direct appeal, *Cone*, which applies in this case, held that a state court's refusal to hear the merits of a claim on the grounds that it already did so is not a bar to federal habeas relief.

From the per curiam opinion:
The denial of discovery and an evidentiary hearing rested in part on the *Cone* error.

Dissenting: Justice Scalia (joined by Justice Thomas)

Dissenting: Justice Alito (joined by Chief Justice Roberts)

Immigration
Kucana v. Holder

Docket No. 08-911
Reversed and Remanded:
The Seventh Circuit

Argued: November 10, 2009
Decided: January 20, 2010
For Case Analysis: See ABA *PREVIEW* 91

Does 8 U.S.C. § 1252(a)(B)(ii) bar judicial review of an immigration judge's denial of a motion to reopen immigration proceedings?

No. Because such immigration proceedings are under the discretion of the Attorney General they are regulatory and not statutory in nature and therefore do not fall under 8 U.S.C. § 1252(a)(B)(ii)'s proscription against judicial review.

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

Separation-of-powers concerns, moreover, caution us against reading legislation, absent clear statement, to place in executive hands authority to remove cases from the Judiciary's domain.

Concurring: Justice Alito

Immigration Law
Carachuri-Rosendo v. Holder

Docket No. 09-60
Reversed: The Fifth Circuit

Argued: March 31, 2010

Decided: June 14, 2010

For Case Analysis: See ABA *PREVIEW* 285

Can a person convicted in state court for a misdemeanor drug possession that also constitutes a federal misdemeanor be deemed convicted of an "aggravated felony" for purposes of the Immigration and Nationality Act on the grounds that he could have been prosecuted for the federal felony of recidivist simple possession?

No. Such second or subsequent simple possession offenses are not aggravated felonies when the state conviction is not based on the fact of a prior conviction.

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

A recidivist possession offense such as *Carachuri-Rosendo's* does not fit easily into the "everyday understanding" of those terms. . . . This type of petty simple possession offense is not typically thought of as an "aggravated felony" or as "illicit trafficking." We explained in *Lopez* that "ordinarily 'trafficking' means some sort of commercial dealing." And just as in *Lopez*, "[c]ommerce . . . was no part of" *Carachuri-Rosendo's* possessing a single tablet of Xanax, and certainly it is no element of simple possession." As an initial matter, then, we observe that a reading of this statutory scheme that would apply an "aggravated" or "trafficking" label to *any* simple possession offense is, to say the least, counterintuitive and "unorthodox."

Concurring in judgment: Justice Scalia
Concurring in judgment: Justice Thomas

International Law
Abbott v. Abbott

Docket No. 08-645
Reversed and Remanded:
The Fifth Circuit

Argued: January 12, 2010

Decided: May 17, 2010

For Case Analysis: See ABA *PREVIEW* 173

Does a *ne exeat* clause (that is, a clause that prohibits one parent from removing a child from the country without the other parent's consent) confer a "right of custody" within the meaning of the Hague Convention on the Civil Aspects of International Child Abduction?

Yes. A parent has a right of custody under the Convention by reason of the parent's *ne exeat* right in spite of the fact that a *ne exeat* right does not fit with traditional physical-custody notions; an opposite ruling would render the Convention useless for those cases when it is most needed and would run contrary to the Convention's objects and purposes.

From the opinion by Justice Kennedy (joined by Chief Justice Roberts and Justices Scalia, Ginsburg, Alito, and Sotomayor): To interpret the Convention to permit an abducting parent to avoid a return remedy, even when the other parent holds a *ne exeat* right, would run counter to the Convention's purpose of deterring child abductions by parents who attempt to find a friendlier forum for deciding custodial disputes. Ms. Abbott removed A. J. A. from Chile while Mr. Abbott's request to enhance his relationship with his son was still pending before Chilean courts. After she landed in Texas, the mother asked the state court to diminish or eliminate the father's custodial and visitation rights. The Convention should not be interpreted to permit a parent to select which country will adjudicate these questions by bringing the child to a different country, in violation of a *ne exeat* right.

Dissenting: Justice Stevens (joined by Justices Thomas and Breyer)

Juries
Berghuis v. Smith

Docket No. 08-1402
Reversed and Remanded:
The Sixth Circuit

Argued: January 20, 2010

Decided: March 30, 2010

For Case Analysis: See ABA *PREVIEW* 193

Did the Sixth Circuit err in concluding that the Michigan Supreme Court failed to apply "clearly established" Supreme Court precedent in determining a fair cross-section question under the Sixth Amendment?

Yes. There is no clearly established Supreme Court precedent holding that the defendant's Sixth Amendment right to a jury drawn from a fair cross section of the community was violated; to date, the Court has not specified any given test that should be used when measuring underrepresentation and no clearly established precedent gives support to the defendant's claim of underrepresentation.

From the unanimous opinion by Justice Ginsburg:

No "clearly established" precedent of this Court supports Smith's claim that he can make out a *prima facie* case merely by pointing to a host of factors that, individually or in combination, *might* contribute to a group's underrepresentation.

Concurring: Justice Thomas

Juries
Thaler v. Haynes

Docket No. 09-273
Reversed and Remanded:
The Fifth Circuit

Argued: N/A

Decided: February 22, 2010

For Case Analysis: N/A

Has any decision of the Court "clearly established" that a judge, in ruling on an objection to a peremptory challenge under *Batson v. Kentucky*, must reject a demeanor-based explanation for the challenge unless the judge personally observed and recalls the aspects of the prospective juror's demeanor on which the explanation is based?

No. Although *Batson* requires a judge to undertake a sensitive inquiry in the circumstantial and direct evidence of a lawyer's intent when challenging a perspective jury member, such a rule does not require a judge to reject demeanor-based explanation if the judge did not observe or cannot remember the juror's demeanor.

From the per curiam opinion: Where the explanation for a peremptory challenge is based on a prospective juror's demeanor, the judge should take into account, among other things, any observations of the juror that the judge was able to make during the voir dire. But *Batson* plainly did not go further and hold that a demeanor-based explanation must be rejected if the judge did not observe or cannot recall the juror's demeanor.

Labor Law

Granite Rock Co. v. International Brotherhood of Teamsters

Docket No. 08-1214

**Reversed in part, Affirmed in part,
and Remanded: The Ninth Circuit**

Argued: January 19, 2010

Decided: June 24, 2010

For Case Analysis: See ABA *PREVIEW* 160

Does a federal court have jurisdiction to determine whether a collective bargaining agreement was formed when it is disputed whether any binding contract exists, but no party makes an independent challenge to the arbitration clause apart from claiming it is inoperative before the contract is established?

Yes. Arbitration is only appropriate when the dispute arises under a collective bargaining agreement; when, as in this case, the dispute is about whether such an agreement even exists in the first place, a federal district court has proper jurisdiction over the dispute.

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

These unusual facts require us to reemphasize the proper framework for deciding when disputes are arbitrable under our precedents. Under that framework, a court may order arbitration of a particular dispute only where

the court is satisfied that the parties agreed to arbitrate that dispute. . . . To satisfy itself that such agreement exists, the court must resolve any issue that calls into question the formation or applicability of the specific arbitration clause that a party seeks to have the court enforce.

Concurring in part and dissenting in part: Justice Sotomayor (joined by Justice Stevens)

Labor Law

New Process Steel L.P. v. National Labor Relations Board

Docket No. 08-1457

**Reversed and Remanded:
The Seventh Circuit**

Argued: March 23, 2010

Decided: June 17, 2010

For Case Analysis: See ABA *PREVIEW* 259

Does the National Labor Relations Board have authority to decide cases with only two sitting members, when 29 U.S.C. § 153(b) provides that “three members of the Board shall, at times, constitute a quorum of the Board”?

No. The Section requires that the group maintain a membership of three in order to exercise the delegated authority of the Board.

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

[R]eading the delegation clause to require that the Board's delegated power be vested continuously in a group of three members is the only way to harmonize and give meaningful effect to all of the provisions in § 3(b). . . . Those provisions are: (1) the delegation clause; (2) the vacancy clause, which provides that “[a] vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board”; (3) the Board quorum requirement, which mandates that “three members of the Board shall, at all times, constitute a quorum of the Board”; and (4) the group quorum provision, which provides that “two members shall constitute a quorum” of any delegate group.

Dissenting: Justice Kennedy (joined by Justices Ginsburg, Breyer, and Sotomayor)

Maritime Law

Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.

Docket No. 08-1553

**Reversed and Remanded:
The Ninth Circuit**

Argued: March 24, 2010

Decided: June 21, 2010

For Case Analysis: See ABA *PREVIEW* 271

Does the Carmack Amendment apply to the inland rail leg of a multimodal shipment from a foreign country when a through bill of lading extends the Carriage of Goods by Sea Act to the entire shipment, including the inland transport?

No. The Carmack Amendment does not apply to a shipment originating overseas under a single through bill of lading, and any parties involved in such transactions will have to litigate their disputes in the forum they agreed to.

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

The above principles establish that for Carmack's provisions to apply the journey must begin with a receiving rail carrier, which would have to issue a Carmack-compliant bill of lading. It follows that Carmack does not apply if the property is received at an overseas location under a through bill that covers the transport into an inland location in the United States. In such a case, there is no receiving rail carrier that “receives” the property “for [domestic rail] transportation,” § 11706(a), and thus no carrier that must issue a Carmack-compliant bill of lading. The initial carrier in that instance receives the property at the shipment's point of origin for overseas multimodal import transport, not for domestic rail transport.

Dissenting: Justice Sotomayor (joined by Justices Stevens and Ginsburg)

Miranda
Berghuis v. Thompkins

Docket No. 08-1470
Reversed and Remanded:
The Sixth Circuit

Argued: March 1, 2010
Decided: June 1, 2010
For Case Analysis: See ABA *PREVIEW* 235

Was the state court correct in finding that a defendant's silence during interrogation was an implied waiver of his right to remain silent?

Yes. The state court was reasonable in its decision to reject the defendant's *Miranda* claim given that the defendant did not "unambiguously" invoke his right to remain silent.

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

If Thompkins wanted to remain silent, he could have said nothing in response to Helgert's questions, or he could have unambiguously invoked his *Miranda* rights and ended the interrogation. The fact that Thompkins made a statement about three hours after receiving a *Miranda* warning does not overcome the fact that he engaged in a course of conduct indicating waiver. Police are not required to rewarn suspects from time to time.

From the dissenting opinion by Justice Sotomayor (joined by Justices Stevens, Ginsburg, and Breyer):

Today's decision turns *Miranda* upside down. Criminal suspects must now unambiguously invoke their right to remain silent—which, counterintuitively, requires them to speak. At the same time, suspects will be legally presumed to have waived their rights even if they have given no clear expression of their intent to do so. Those results, in my view, find no basis in *Miranda* or our subsequent cases and are inconsistent with the fair-trial principles on which those precedents are grounded.

Miranda Rights
Florida v. Powell

Docket No. 08-1175
Reversed and Remanded:
The Supreme Court of Florida

Argued: December 7, 2009
Decided: February 23, 2010
For Case Analysis: See ABA *PREVIEW* 122

Must a *Miranda* warning explicitly tell a suspect that he can have counsel present and available for consultation *during* an interrogation?

No. Police satisfy *Miranda* by telling a suspect he can consult with an attorney before being questioned and that he can exercise these rights any time; police do not need to explicitly inform suspects that they can consult counsel during interrogation.

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

To reach the opposite conclusion, i.e., that the attorney would not be present throughout the interrogation, the suspect would have to imagine an unlikely scenario: To consult counsel, he would be obliged to exit and reenter the interrogation room between each query. A reasonable suspect in a custodial setting who has just been read his rights, we believe, would not come to the counterintuitive conclusion that he is obligated, or allowed, to hop in and out of the holding area to seek his attorney's advice. Instead, the suspect would likely assume that he must stay put in the interrogation room and that his lawyer would be there with him the entire time.

Dissenting: Justice Stevens (joined by Justice Breyer as to Part II)

Mutual Funds
Jones v. Harris Association L.P.

Docket No. 08-586
Vacated and Remanded:
The Seventh Circuit

Argued: November 2, 2009
Decided: March 30, 2010
For Case Analysis: See ABA *PREVIEW* 87

In order for investors to show that an investment adviser's compensation is so excessive as to breach fiduciary obligations under the Investment Company Act, must they make a showing that the Fund's trustees were misled in approving the compensation?

No. Under the appropriate standard created in *Gartenberg v. Merrill Lynch Asset Management, Inc.*, a shareholder must only show that the adviser charged a fee that is so disproportionately large that it bears no reasonable relationship to the services rendered and could not have been the result of arms-length bargaining.

From the unanimous opinion by Justice Alito:

By focusing almost entirely on the element of disclosure, the Seventh Circuit panel erred. ... The *Gartenberg* standard, which the panel rejected, may lack sharp analytical clarity, but we believe that it accurately reflects the compromise that is embodied in § 36(b), and it has provided a workable standard for nearly three decades. The debate between the Seventh Circuit panel and the dissent from the denial of rehearing regarding today's mutual fund market is a matter for Congress, not the courts.

Concurring: Justice Thomas

Oil and Gas
Mac's Shell Service, Inc. v. Shell Oil Products Co.

Docket No. 08-240
**Reversed in part, Affirmed in part,
and Remanded: The First Circuit**

Argued: January 19, 2010
Decided: March 2, 2010
For Case Analysis: See ABA *PREVIEW* 190

Does the Petroleum Marketing Practices Act encompass a claim for “constructive nonrenewal” of the franchise relationship?

No. The Act does not provide further definitions for the terms “termination” and “cancellation” and based on their ordinary usages and the general understanding of the doctrine of constructive termination, the Act does not provide relief for franchisees unless the franchiser’s wrongful conduct compelled the franchisee to abandon the franchise.

From the unanimous opinion by Justice Alito:

The dealers would have us interpret the PMPA in a manner that ignores the Act’s limited scope. On their view, and in the view of the Court of Appeals, the PMPA prohibits, not just unlawful terminations and nonrenewals, but also certain serious breaches of contract that do not cause an end to the franchise. . . . Reading the Act to prohibit simple breaches of contract, however, would be inconsistent with the Act’s limited purpose and would further expand federal law into a domain traditionally reserved for the States. Without a clearer indication that Congress intended to federalize such a broad swath of the law governing petroleum franchise agreements, we decline to adopt an interpretation of the Act that would have such sweeping consequences.

Patents
Bilski v. Kappos

Docket No. 08-964
Affirmed: The Federal Circuit

Argued: November 9, 2009
Decided: June 28, 2010
For Case Analysis: See ABA *PREVIEW* 108

Must a “process,” such as a method for hedging risk, be embodied in a particular machine or transform a particular article into a different thing, to be patentable under Section 101 of the Patent Act of 1952?

No. The machine-or-transformation test is not the sole test for patent eligibility under Section 101 of the Patent Act.

From the opinion by Justice Kennedy (joined by Chief Justice Roberts and Justices Thomas and Alito and joined by Justice Scalia except as to Parts II-B-2 and II-C-2):

Adopting the machine-or-transformation test as the sole test for what constitutes a “process” (as opposed to just an important and useful clue) violates these statutory interpretation principles. Section 100(b) provides that “[t]he term ‘process’ means process, art or method, and includes a new use of a known process, machine, manufacture, composition of matter, or material.” The Court is unaware of any “ordinary, contemporary, common meaning,” . . . of the definitional terms “process, art or method” that would require these terms to be tied to a machine or to transform an article.

Concurring in judgment: Justice Stevens (joined by Justices Ginsburg, Breyer, and Sotomayor)

Concurring in judgment: Justice Breyer (joined by Justice Scalia as to Part II)

Prisoners’ Rights
Barber v. Thomas

Docket No. 09-5201
Affirmed: The Ninth Circuit

Argued: March 30, 2010
Decided: June 7, 2010
For Case Analysis: See ABA *PREVIEW* 290

Is the Bureau of Prisons’ method to calculate good time credit through the Sentencing Reform Act unlawful because the calculations are based on the length of the term of imprisonment imposed by the sentencing judge, not the length of time the prisoner actually serves?

No. The BOP’s method for calculating good time credit reflects the most natural reading of the statute and the statute’s purpose.

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

Finally, we note that petitioners urge us not to defer to the BOP’s implementation of § 3624(b). In our view, the BOP’s calculation system applies that statute as its language is most naturally read, and in accordance with what that language makes clear is its basic purpose. No one doubts that the BOP has the legal power to implement the statute in accordance with its language and purposes; hence we need not determine the extent to which Congress has granted the BOP authority to interpret the statute more broadly, or differently than it has done here.

Dissenting: Justice Kennedy (joined by Justices Stevens and Ginsburg)

Public Utilities
NRG Power Marketing, LLC v. Maine Pub. Util. Comm’n

Docket No. 08-674
**Reversed in part and Remanded:
The District of Columbia Circuit**

Argued: November 3, 2009
Decided: January 13, 2010
For Case Analysis: See ABA *PREVIEW* 112

Is the *Mobile-Sierra* doctrine—which prohibits the Federal Energy Regulatory

Commission (FERC) from modifying or abrogating electricity and natural gas contracts unless they are shown to be contrary to the public interest—inapplicable when a contract is challenged by a noncontracting third party?

No. The *Mobile-Sierra* doctrine applies regardless of the identity of the party challenging the contract.

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

[T]he *Mobile-Sierra* doctrine does not overlook third-party interests; it is framed with a view to their protection. The doctrine directs the Commission to reject a contract rate that “seriously harms the consuming public.”... Finally, as earlier indicated ... the D. C. Circuit’s confinement of *Mobile-Sierra* to rate challenges by contracting parties diminishes the animating purpose of the doctrine: promotion of “the stability of supply arrangements which all agree is essential to the health of the [energy] industry.”

From the dissenting opinion by Justice Stevens:

In this third chapter of the *Mobile-Sierra* story, the Court applies a rule—one designed initially to protect the enforceability of freely negotiated contracts against parties who seek a release from their obligations—to impose a special burden on third parties exercising their statutory right to object to unjust and unreasonable rates. This application of the rule represents a quantum leap from the modest origin set forth in the first chapter of this tale.

Restitution ***Dolan v. United States***

Docket No. 09-367
Affirmed: The Tenth Circuit

Argued: April 20, 2010
Decided: June 14, 2010
For Case Analysis: See ABA *PREVIEW* 322

Does the district court lose its authority to order a defendant to pay restitution to the victims of the defendant’s offense when it fails to determine the amount of the victim’s losses within 90 days after sentencing (absent waiver or tolling by the defendant)?

No. A court will maintain its power to order restitution even if it misses the 90-day deadline if the court makes clear before the deadline’s expiration that it will order restitution, leaving open only the amount.

From the opinion by Justice Breyer (joined by Justices Thomas, Ginsburg, Alito, and Sotomayor):

[A] defendant who, like petitioner here, knows that restitution will be ordered and is aware of the restitution amount prior to the expiration of the 90-day deadline can usually avoid additional delay simply by pointing to the statute and asking the court to grant a timely hearing. That did not happen here. And that minimal burden on the defendant is a small cost relative to the prospect of depriving innocent crime victims of their due restitution. (Should the court still refuse, the defendant could seek mandamus—which we believe will rarely be necessary.)

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

RICO

Hemi Group, LLC v. City of New York

Docket No. 08-969
Reversed and Remanded:
The Second Circuit

Argued: November 3, 2009
Decided: January 25, 2010
For Case Analysis: See ABA *PREVIEW* 105

Has New York City satisfied the Racketeer Influenced and Corrupt Organizations Act’s (RICO) requirement that it must suffer injury to its “business or property” in order to collect damages caused by a conspiracy between Internet vendors and their customers to avoid the city’s tax on cigarettes?

No. Because the city cannot show a causal relationship between its loss of tax revenue “by reason” of the alleged RICO violation, it cannot state a RICO claim and the Court cannot review the alleged injury to the “business or property.”

From the opinion by Chief Justice Roberts (joined by Justices Scalia, Thomas, and Alito and Justice Ginsburg in part): The City’s theory thus requires that we extend RICO liability to situations where the defendant’s fraud on the third party (the

State) has made it easier for a fourth party (the taxpayer) to cause harm to the plaintiff (the City). Indeed, the fourth-party taxpayers here only caused harm to the City in the first place if they decided not to pay taxes they were legally obligated to pay. Put simply, Hemi’s obligation was to file the Jenkins Act reports with the State, not the City, and the City’s harm was directly caused by the customers, not Hemi. We have never before stretched the causal chain of a RICO violation so far, and we decline to do so today.

Concurring in part and concurring in judgment: Justice Ginsburg

Dissenting: Justice Breyer (joined by Justices Stevens and Kennedy)

Taking no part in consideration: Justice Sotomayor

Second Amendment ***McDonald v. City of Chicago***

Docket No. 08-1521
Reversed and Remanded:
The Seventh Circuit

Argued: March 2, 2010
Decided: June 28, 2010
For Case Analysis: See ABA *PREVIEW* 214

Is the Second Amendment right to keep and bear arms incorporated in the Fourteenth Amendment’s Privileges or Immunities Clause or in its Due Process Clause and thus made applicable to state and local governments?

Yes. The Fourteenth Amendment makes the Second Amendment right to keep and bear arms fully applicable to the States and local governments given that it is a fundamental right that is deeply rooted in this Nation’s history and tradition and is necessary to the Nation’s system of ordered liberty.

From the opinion by Justice Alito (as to Parts I, II-A, II-B, II-D, III-A, and III-B joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas and an opinion with respects to Parts II-C, IV, and V joined by Chief Justice Roberts and Justices Scalia and Kennedy):

[W]e must decide whether the right to keep and bear arms is fundamental to our scheme of ordered liberty... or as we have said in a related context, whether this right is “deeply rooted in this Nation’s history and tradition.”

Our decision in *Heller* points unmistakably to the answer. Self-defense is a basic right, recognized by many legal systems from ancient times to the present day, and in *Heller*, we held that individual self-defense is “the central component” of the Second Amendment right.

From the dissenting opinion by Justice Stevens:

But the reasons that motivated the Framers to protect the ability of militiamen to keep muskets available for military use when our Nation was in its infancy, or that motivated the Reconstruction Congress to extend full citizenship to the freedmen in the wake of the Civil War, have only a limited bearing on the question that confronts the homeowner in a crime-infested metropolis today.

Concurring: Justice Scalia

Concurring in part and in judgment: Justice Thomas

Dissenting: Justice Stevens

Dissenting: Justice Breyer (joined by Justices Ginsburg and Sotomayor)

Securities

Merck Co. v. Reynolds

Docket No. 08-905

Affirmed: The Third Circuit

Argued: November 30, 2009

Decided: April 27, 2010

For Case Analysis: See ABA *PREVIEW* 145

Does the statute of limitations in securities fraud litigation, under the “inquiry notice” standard, begin to run only upon evidence that the defendant acted with scienter in carrying out the fraud under Section 10(b)?

Yes. Because scienter is one of the requirements under Section 10(b), the limitations period begins to run once the plaintiff actually discovered or a reasonably diligent plaintiff would have discovered the facts constituting the violation, whichever comes first, including scienter.

From the opinion by Justice Breyer

(joined by Chief Justice Roberts and Justices Kennedy, Ginsburg, Alito, and Sotomayor): This Court long ago recognized that something different was needed in the case of fraud, where a defendant’s deceptive conduct may prevent a plaintiff from even *knowing* that he or she has been defrauded.

Otherwise, “the law which was designed to prevent fraud” could become “the means by which it is made successful and secure.”

Concurring in part and in judgment:

Justice Stevens

Concurring in part and in judgment:

Justice Scalia (joined by Justice Thomas)

Securities

Morrison v. National Australia Bank, Ltd.

Docket No. 08-1191

Affirmed: The Second Circuit

Argued: March 29, 2010

Decided: June 24, 2010

For Case Analysis: See ABA *PREVIEW* 275

Do U.S. federal courts have subject matter jurisdiction over an action brought under Section 10(b) of the Securities Exchange Act by plaintiffs who allege that an Australian bank made fraudulent representations when it incorporated false statements made by a wholly owned U.S. subsidiary into Australian securities documents?

No. Section 10(b) of the Securities Exchange Act cannot be used by plaintiffs challenging misconduct made in connection with securities traded on foreign exchanges.

From the opinion by Justice Scalia

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

Petitioners and the Solicitor General next point out that Congress, in describing the purposes of the Exchange Act, observed that the “prices established and offered in such transactions are generally disseminated and quoted throughout the United States and foreign countries.” 15 U. S. C. § 78b(2). The antecedent of “such transactions,” however, is found in the first sentence of the section, which declares that “transactions in securities as commonly conducted upon securities exchanges and over the counter markets are affected with a national public interest.”

§ 78b. Nothing suggests that this *national* public interest pertains to transactions conducted upon *foreign* exchanges and markets. The fleeting reference to the dissemination and quotation abroad of the prices of securities traded in domestic exchanges and markets cannot overcome the presumption against extraterritoriality.

Concurring in part and in judgment:

Justice Breyer

Concurring in judgment: Justice Stevens (joined by Justice Ginsburg)

Taking no part: Justice Sotomayor

Sentencing

Dillon v. United States

Docket No. 09-6338

Affirmed: The Third Circuit

Argued: March 30, 2010

Decided: June 17, 2010

For Case Analysis: See ABA *PREVIEW* 282

May a federal district court, acting pursuant to its sentencing authority, reduce the prison term of a defendant for a crack cocaine conviction by an amount greater than the amount recommended in policy statements set out by the U.S. Sentencing Commission when it authorized sentence reductions for certain crack offenders?

No. Even in light of recent Court precedent regarding the Sentencing Guidelines, the procedures for reviewing a prison sentence due to a subsequent reduction in the recommended policy statements are still constrained by the Guidelines and a court may not reduce the sentence below the range laid out in the amended Guidelines.

From the opinion by Justice Sotomayor

(joined by Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, Ginsburg, and Breyer):

Notably, the sentence-modification proceedings authorized by § 3582(c)(2) are not constitutionally compelled. We are aware of no constitutional requirement of retroactivity that entitles defendants sentenced to a term of imprisonment to the benefit of subsequent Guidelines amendments. Rather, § 3582(c)(2) represents a congressional act of lenity intended to give prisoners the benefit of later enacted adjustments to the judgments reflected in the Guidelines.

Dissenting: Justice Stevens

Taking no part: Justice Alito

Sentencing
United States v. O'Brien

Docket No. 08-1569
Affirmed: The First Circuit

Argued: February 23, 2010
Decided: May 24, 2010
For Case Analysis: See ABA *PREVIEW* 200

Is the fact that the firearm used during an armed robbery is a machine gun an element of the offense that must be charged and proved to a jury beyond a reasonable doubt?

Yes. The machine gun element of the federal armed robbery statute, which requires an additional thirty-year mandatory minimum sentence if the firearm is used during an armed robbery, is an element of the offense that must be proved to the jury beyond a reasonable doubt and cannot simply be determined like a sentencing factor to be proved to the judge.

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

The immense danger posed by machine guns, the moral depravity in choosing the weapon, and the substantial increase in the minimum sentence provided by the statute support the conclusion that this prohibition is an element of the crime, not a sentencing factor. It is not likely that Congress intended to remove the indictment and jury trial protections when it provided for such an extreme sentencing increase. . . . Perhaps Congress was not concerned with parsing the distinction between elements and sentencing factors, a matter more often discussed by the courts when discussing the proper allocation of functions between judge and jury. Instead, it likely was more focused on deterring the crime by creating the mandatory minimum sentences. But the severity of the increase in this case counsels in favor of finding that the prohibition is an element, at least absent some clear congressional indication to the contrary.

Concurring: Justice Stevens
Concurring in judgment: Justice Thomas

Separation of Powers
Free Enterprise Fund v. Public
Company Accounting Oversight
Board

Docket No. 08-861
Affirmed in part, Reversed in part,
and Remanded: The District of
Columbia Circuit

Argued: December 7, 2009
Decided: June 28, 2010
For Case Analysis: See ABA *PREVIEW* 116

Does the Sarbanes-Oxley Act violate constitutional separation of powers by vesting members of the Public Company Accounting Oversight Board (PCAOB) with regulatory authority, under the control of the Securities and Exchange Commission (SEC), while also protecting them from all but for-cause termination by the SEC?

Yes. The two-level for-cause limitations on removal of PCAOB members violate the Constitution's separation of powers because such a limitation unconstitutionally interferes with the President's ability to execute federal laws.

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

As explained, we have previously upheld limited restrictions on the President's removal power. In those cases, however, only one level of protected tenure separated the President from an officer exercising executive power. It was the President—or a subordinate he could remove at will—who decided whether the officer's conduct merited removal under the good-cause standard. The Act before us does something quite different. It not only protects Board members from removal except for good cause, but withdraws from the President any decision on whether that good cause exists. That decision is vested instead in other tenured officers—the Commissioners—none of whom is subject to the President's direct control. The result is a Board that is not accountable to the President, and a President who is not responsible for the Board.

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

Sixth Amendment
Bobby v. Van Hook

Docket No. 09-144
Reversed and Remanded:
The Sixth Circuit

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

Did the Sixth Circuit err when it found that the defendant's counsel during the sentencing phase of his murder prosecution was ineffective on the basis that his counsel performed deficiently in investigating and presenting mitigating evidence?

Yes. The principles of "effective assistance of counsel" are general and the Sixth Circuit erroneously relied too heavily upon the American Bar Association's (ABA) "Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases" when assessing the counsel's performance, and furthermore, the court held that the defense counsel presented a reasonable amount of mitigating evidence and were acting reasonably when they failed to investigate distant relatives.

From the per curiam opinion: Restatements of professional standards, we have recognized, can be useful as "guides" to what reasonableness entails, but only to the extent they describe the professional norms prevailing when the representation took place. The Sixth Circuit ignored this limiting principle, relying on ABA guidelines announced 18 years after Van Hook went to trial.

Concurring: Justice Alito

Sixth Amendment
Jefferson v. Upton

Docket No. 09-8852
Vacated and Remanded:
The Eleventh Circuit

Argued: N/A
Decided: May 24, 2010
For Case Analysis: N/A

Should the state court's findings not be presumed correct after the state court found

that the defendant's trial counsel's performance was adequate despite the fact that the counsel failed to investigate a traumatic head injury suffered by the defendant as a child?

Yes. Such a factual finding is presumed correct unless one of eight exceptions applies and if the lower court fails to review each of the exceptions, the review of the factual findings is not complete.

From the per curiam opinion:

In our view, the Court of Appeals did not properly consider the legal status of the state court's factual findings. Under *Townsend*, as codified by the governing statute, a federal court is not "duty-bound" to accept any and all state-court findings that are "fairly supported by the record." Those words come from § 2254(d)(8), which is only one of eight enumerated exceptions to the presumption of correctness. But there are seven others, see §§ 2254(d)(1)–(7), none of which the Court of Appeals considered when addressing Jefferson's claim. . . . In treating § 2254(d)(8) as the *exclusive* statutory exception, and by failing to address Jefferson's argument that the state court's *procedures* deprived its findings of deference, the Court of Appeals applied the statute and our precedents incorrectly.

Dissenting: Justice Scalia (joined by Justice Thomas)

Sixth Amendment
Padilla v. Kentucky

Docket No. 08-651
Reversed and Remanded:
The Supreme Court of Kentucky

Argued: October 13, 2009
Decided: March 31, 2010
For Case Analysis: See ABA *PREVIEW* 24

Under the Sixth Amendment's guarantee of the effective assistance of counsel, is a longtime permanent resident defendant's guilty plea to drug trafficking undermined by ineffective assistance if his attorney wrongly advised him that the guilty plea would have no effect on his immigration status?

Yes. A showing that a defendant's counsel failed to inform the defendant that a guilty plea would carry a risk of deportation is enough to prove constitutionally deficient

assistance of counsel when there is a specific, very clear risk of deportation.

From the opinion by Justice Stevens

(joined by Justices Kennedy, Ginsburg, Breyer, and Sotomayor):
These changes to our immigration law have dramatically raised the stakes of a noncitizen's criminal conviction. The importance of accurate legal advice for noncitizens accused of crimes has never been more important. These changes confirm our view that, as a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.

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

Dissenting: Justice Scalia (joined by Justice Thomas)

Sixth Amendment
Porter v. McCollum

Docket No. 08-10537
Reversed and Remanded:
The Eleventh Circuit

Argued: N/A
Decided: November 30, 2009
For Case Analysis: N/A

Did the Eleventh Circuit err when it held the Florida Supreme Court was reasonable when determining that the defendant was not prejudiced by the trial counsel's deficient performance?

Yes. It was objectively unreasonable to find that there was no reasonable possibility that the sentence might have been different if the judge or jury would have heard the mitigating evidence the defense counsel failed to present, including his abusive childhood, his heroic military service and the associated trauma which resulted in his long-term substance abuse and impaired mental health.

From the per curiam opinion:

Furthermore, the Florida Supreme Court, following the state postconviction court, unreasonably discounted the evidence of Porter's childhood abuse and military service. It is unreasonable to discount to irrelevance the evidence of Porter's abusive childhood, especially when that kind of history may have particular salience for a jury evaluating

Porter's behavior in his relationship with Williams. It is also unreasonable to conclude that Porter's military service would be reduced to inconsequential proportions[.]

Sixth Amendment
Presley v. Georgia

Docket No. 09-5270
Reversed: The Supreme Court
of Georgia

Argued: N/A
Decided: January 19, 2010
For Case Analysis: N/A

Did the Supreme Court of Georgia err in affirming the state-court conviction in light of the trial court's decision to exclude the defendant's uncle from the public gallery during jury voir dire?

Yes. Excluding the public from jury voir dire was a violation of the defendant's Sixth Amendment rights.

From the per curiam opinion:

There are no doubt circumstances where a judge could conclude that threats of improper communications with jurors or safety concerns are concrete enough to warrant closing voir dire. But in those cases, the particular interest, and threat to that interest, must "be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered."

Dissenting: Justice Thomas (joined by Justice Scalia)

Sixth Amendment
Wong v. Belmontes

Docket No. 08-1263
Reversed and Remanded:
The Ninth Circuit

Argued: N/A
Decided: November 16, 2009
For Case Analysis: N/A

In arguing that his counsel was ineffective during the penalty phase of his trial, did the defendant properly satisfy both the deficient performance and the prejudice prong of *Strickland v. Washington*?

No. There is no reasonable possibility that a jury would have found rejected a death sentence even in light of the mitigating evidence the defense counsel could have presented, because, in response, the prosecution, in response to the mitigating evidence, would have been able to present more aggravating evidence related to another murder the defendant was alleged to have played a role in.

From the per curiam opinion:

[T]o establish prejudice, Belmontes must show a reasonable probability that the jury would have rejected a capital sentence after it weighed the entire body of mitigating evidence (including the additional testimony Schick could have presented) against the entire body of aggravating evidence (including the Howard murder evidence). Belmontes cannot meet this burden.

Concurring: Justice Stevens

Takings Clause

Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection

Docket No. 08-1151

Affirmed: The Supreme Court of Florida

Argued: December 2, 2009

Decided: June 17, 2010

For Case Analysis: See ABA *PREVIEW* 141

Does the Florida Beach Renourishment Act's stipulation that the state takes title over all land seaward of the pre-renourishment project "mean high water line" deprive landowners of property without due process of law, in violation of the Fourteenth Amendment?

No. The Act does not constitute a taking without compensation in violation of due process because the landowners cannot show that as beachfront owners, they have a right to the littoral (waterfront) property or a right to contact the water that is superior to the State's right to fill in its submerged land.

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

It would be absurd to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat.

Concurring in part and in judgment: Justice Kennedy (joined by Justice Sotomayor)

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

Taking no part: Justice Stevens

Taxation

Levin v. Commerce Energy

Docket No. 09-223

Reversed and Remanded: The Sixth Circuit

Argued: March 22, 2010

Decided: June 1, 2010

For Case Analysis: See ABA *PREVIEW* 256

May a federal court enjoin allegedly discriminatory state taxes that petitioners contend violate the Commerce Clause and the Equal Protection Clause of the U.S. Constitution?

No. Under the comity doctrine, such a complaint must proceed originally in state court.

From the opinion by Justice Ginsburg

(joined by Chief Justice Roberts and Justices Stevens, Kennedy, Breyer, and Sotomayor): In particular, when this Court—on review of a state high court's decision—finds a tax measure constitutionally infirm, "it has been our practice," for reasons of "federal-state comity," "to abstain from deciding the remedial effects of such a holding."... If lower federal courts were to give audience to the merits of suits alleging uneven state tax burdens, however, recourse to state courts for the interim remedial determination would be unavailable. That is so because federal tribunals lack authority to remand to the state court system an action initiated in federal court.

Concurring: Justice Kennedy

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

Concurring in judgment: Justice Alito

Water Law

South Carolina v. North Carolina

Docket No. 138, Orig.

Overruled in part and Sustained in part: Exceptions to Special Master's First Interim Report

Argued: October 13, 2009

Decided: January 20, 2010

For Case Analysis: See ABA *PREVIEW* 31

Do any of the three intervenors have interests sufficiently different from that of the states to support their intervention in this case?

Yes. Two of the intervenors demonstrated that they had satisfied the appropriate intervention standard by showing unique and compelling interests apart from those that were already represented, while one did not.

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

In this case, the Special Master crafted a rule of intervention that accounts for the full compass of our precedents. But a compelling reason for allowing citizens to participate in one original action is not necessarily a compelling reason for allowing citizens to intervene in all original actions. We therefore decline to adopt the Special Master's proposed rule.

From Chief Justice Roberts's opinion concurring in part and dissenting in part (joined by Justices Thomas, Ginsburg, and Sotomayor):

The Court correctly rejects the Special Master's formulation of a new test for intervention in original actions, and correctly denies the city of Charlotte leave to intervene. The majority goes on, however, to misapply our established test in granting intervention to Duke Energy Carolinas, LLC (Duke Energy), and the Catawba River Water Supply Project (CRWSP). The result is literally unprecedented: Even though equitable apportionment actions are a significant part of our original docket, this Court has never before granted intervention in such a case to an entity other than a State, the United States, or an Indian tribe. Never.

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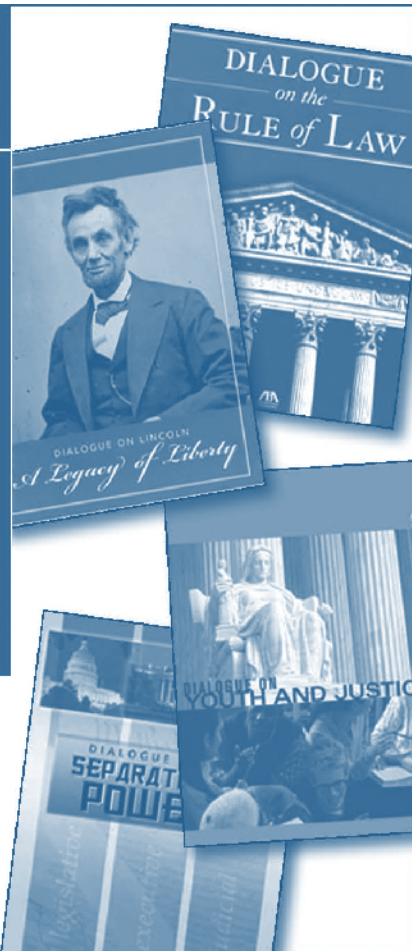
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