Analyzing the Court’s 2010 Term, including …

Statistical Analysis
SCOTUSblog provides a comprehensive statistical analysis of the entire term.

The First Amendment Docket
Professor Vikram Amar analyzes the term’s First Amendment cases. His review includes in-depth looks at the Court’s handling of the Establishment and Petition Clauses, the less high-profile speech cases and those speech cases that grabbed the nation’s attention, in particular, *Snyder v. Phelps* and *Brown v. Entertainment Merchants Association*.

The Court’s Class Action Cases
This year the court decided an unprecedented four cases dealing with class action issues. Professor Linda Mullenix reviews these cases and explains the lessons that can be learned about how the Court, and particular justices, view class action.

The Preemption Docket
Professor Steven Schwinn details the five preemption cases before the Court this term, including *Chamber of Commerce v. Whiting*. Professor Schwinn illuminates the voting alignment in these cases and clarifies the framework the Court applies to preemption cases.

Complete Case Highlights
*PREVIEW* highlights the bottom line in every case decided during the October 2010 term. Case highlights are organized by topic area and feature an overview of the case, the main issue presented, the Court’s answer, how the justices voted, and key excerpts from the opinions.
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SUPREME COURT CALENDAR

OCTOBER

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The Term in Review

Many commentators have, correctly, noted that the 2010 Supreme Court term was without the “fireworks” of recent years, and therefore this year the Court garnered limited media attention and national interest. Contributing to this limited media attention was the fact that the term ended with no retirements or looming confirmation battles. In addition, the term’s highest profile cases ended up being somewhat predictable (for example, the Court’s rejection of the Wal-Mart Stores, Inc. v. Dukes class action or its refusal to create an exception to First Amendment protection of offensive speech targeted at funerals in Snyder v. Phelps). This term did, however, provide some insight into how the Court may rule in important cases working their way through the appellate process. And of course, even without a large number of “blockbuster” cases, this term gave our two new justices, Justices Sotomayor and Kagan, a chance to stretch their legs and provide some insight into their developing jurisprudence.

In keeping with a PREVIEW tradition, this end of term issue provides a summary of, and wrap-up to, the term. To start the issue off, we once again feature a statistical analysis of the term by the team at SCOTUSblog.com. Their summary sheds some light on the always interesting 5-4 voting trends and the key votes of Justice Kennedy.

In his article, Associate Dean and Professor of Law Vikram Amar of the University of California Davis School of Law reviews the Court’s First Amendment docket. While the Court tackled some thorny issues including the Establishment Clause, protests at military funerals and campaign finance, it appears as though the Court may have created more questions than it answered. Professor Amar argues that although it is hard to make generalizations about the Court’s First Amendment jurisprudence, it is clear that the Court will continue to refine and define the First Amendment in the near future.

Linda Mullenix, the Morris and Rita Atlas Chair in Advocacy at the University of Texas School of Law, walks us through a class action roundup. As Professor Mullenix indicates in the title of her article, this year the Court’s class action rulings had “a little something for everyone.” Given that the Court tackled an unprecedented four cases dealing with class action issues, it isn’t surprising that much can be learned from Professor Mullenix’s review, including the fact that it is probably too simplified to say that, at least this term, the Court was resoundingly probusiness (as indicated by the fact that at least two decisions favored the plaintiffs).

Meanwhile, Professor Steven Schwinn, of The John Marshall Law School, shows us how the Court’s preemption cases, although not necessarily predictable in justice alignment or outcomes, is more conventional when it comes to the framework the justices apply when analyzing these cases. However, as Professor Schwinn concludes, the preemption cases from this term still leave us with some significant indeterminacies that may become more visible as other high-profile preemption cases, particularly the Arizona immigration law, make their way up to the High Court.

This summer issue again concludes with our annual Case Highlights. These give a quick recap of what happened in every case previewed and how the justices voted. While it is interesting to read about each case individually, the Highlights help to illustrate the general trends throughout the term. PREVIEW would like to thank Laurie Vassallo for her vital help in compiling the Highlights and her contribution to this issue.

As you prepare for the new term starting in October, one that may likely include more traditional “fireworks” such as the California gay marriage case, the Arizona immigration case, and a case dealing with warrantless GPS monitoring, we encourage you to check out the PREVIEW website (www.supremecourtpreview.org). This site features a number of valuable resources, including all the briefs filed in each case slated for oral argument and an archive of downloadable PREVIEW issues.

PREVIEW and the ABA Division for Public Education wish you a quiet August and look forward to seeing you in October.

THE EDITORS
The Court released 75 signed merits opinions after oral argument during October term 2010. The number of decisions after argument for the most recent terms is 75 for 2009, 76 in 2008, 67 in 2007, 68 for 2006, and 71 in 2005.

The Court decided 86 merits cases in total. That total includes 75 signed opinions, five summary reversals, and two cases that were affirmed by an evenly divided Court. The Court reversed or vacated the lower court in 57 of 81 cases (70 percent), and it affirmed in 24 (30 percent). These figures are similar to those from 2009, when the Court reversed or vacated the lower court in 71 percent of cases and affirmed in part or in full in 29 percent of cases.

The Court once again considered more cases from the Ninth Circuit than it did from any other court—26 of 82 cases (32 percent). This total represents a significant increase from years past, when the Ninth Circuit contributed 15 of 86 cases (18 percent) during 2009 and 16 of 79 cases (20 percent) during 2008. As the Court breaks for its annual summer recess, 16 of the 41 cases scheduled for oral argument during the upcoming 2011 term (39 percent) come from the Ninth Circuit. Although the Ninth Circuit contributes far more cases to the Court’s docket than any other circuit, its reversal rate is only marginally higher than those of other courts: during the 2010 term, the Court voted to reverse or vacate the judgment below in 70 percent of all cases but voted to reverse the Ninth Circuit in 73 percent of its cases. The Ninth Circuit’s unremarkable reversal rate during the 2010 term reflects the recent norm. During the 2009 term, the Court voted to reverse in 71 percent of all cases but reversed the Ninth Circuit in only 60 percent of cases, while during 2008, it voted to reverse in 76 percent of all cases but reversed the Ninth Circuit in 81 percent of cases.

The various state courts provided the second greatest source of cases—9 out of 82 total cases (11 percent). The Court reversed the state courts in 100 percent of the cases during 2010. The Federal Circuit contributed seven cases to the total (9 percent)—a dramatic increase from 2009, when the Federal Circuit contributed only one case to the term. The Federal Circuit contributed four cases to the term during both 2008 and 2007.

Split and Unanimous Decisions
The Court split 5-4 in 16 out of 82 cases during this term (20 percent). Going into the October 2010 term, the Roberts Court, 2005—present, has split 5-4 in 22 percent of cases. Of this term’s 82 cases, 18 (22 percent) were completely unanimous—meaning there were no concurring opinions—and 38 out of 82 (46 percent) had at least a unanimous judgment. From the October term 2005 through 2009, the Court reached a unanimous judgment in about 41 percent of cases.

There were, on average, 1.39 dissenters per decision. That number is on the low end of averages recently: 1.33 (2009), 2.04 (2008), 1.86 (2007), 1.81 (2006), 1.23 (2005), and 1.68 (2004).

The Court split 8-1 in 10 cases (12 percent), a number only slightly higher than the recent average during the Roberts Court, 8 percent.

Justice Scalia was a solo dissenter three times throughout the term even though his average over the preceding ten terms was only 0.6 solo dissents per term. Justice Ginsburg dissented on her own in two cases, while Justices Kennedy, Thomas, Breyer, Alito, and Sotomayor each dissented once on their own. After six full terms on the Court, Chief Justice Roberts still has never been a solo dissenter in a merits decision.

Distribution of Justices in 5-4 Decisions
This term featured remarkably consistent lineups in 5-4 decisions. In fact, there were only four different lineups, and the two primary lineups—Justice Kennedy with either the liberal (Justices Ginsburg, Breyer, Sotomayor, and Kagan) or conservative (the chief justice plus Justices Scalia, Thomas, and Alito) blocs—made up the majority in 88 percent of all 5-4 decisions.

In two cases, the vote lineup departed from the usual lineup of Justice Kennedy with either the conservative or liberal blocs. In CSX Transportation v. McBride, Justice Thomas joined the traditionally “liberal” bloc. And in Bullcoming v. New Mexico, the Confrontation Clause once again divided the Court in an unusual way. Justice Ginsburg wrote the majority opinion for herself and Justices Scalia, Thomas, Sotomayor, and Kagan, while the chief justice authored a dissent for himself and Justices Kennedy, Breyer, and Alito.

Justice Kennedy continues to vote with the conservative justices in the vast majority of 5-4 decisions. During the term, he voted with the conservative bloc in ten cases (63 percent of all 5-4 decisions) and sided with the liberal bloc in only four cases (25 percent). The conservative bloc’s victorious term represents a high-water mark over the past few years: during 2009, that group was victorious in 50 percent of 5-4 decisions, compared to the liberal bloc’s victory in 19 percent of cases; during 2008 they created the majority in 48 percent of cases, while the liberal bloc did the same in only 22 percent of cases. The last time the conservative bloc created the majority in more than 60 percent of 5-4 decisions was during the October term 1999, when they prevailed in 67 percent of cases.

Continuing a recent trend, Justice Kennedy remained the justice most likely to be in the majority of a 5-4 decision. He joined the majority in 14 out of 16 5-4 decisions (88 percent) during the 2010 term, reflecting a rate similar to 2009 (69 percent) and 2008 (78 percent). The liberal bloc of the Court was considerably less successful than its counterpart in securing 5-4 victories during this term, and its frequency in the majority rate reflects that disparity. Justices Ginsburg, Sotomayor, and Kagan joined the majority in 6 of 16 cases (38 percent), while Justice Breyer joined the majority in only 5 of 16 cases (31 percent). By comparison, the conservative justices fared considerably better: Justice Thomas joined the majority in 12 cases (75 percent). Justice Scalia joined the majority in 11 cases (69 percent), and the chief justice and Justice Alito joined the majority in 10 cases each (63 percent).
If majority opinions were distributed randomly, each justice would write around 20 percent of the majority opinions when he or she was in the majority of a 5-4 decision. Justices Thomas and Ginsburg both authored the majority opinion in 33 percent of 5-4 decisions in which they were in the majority. Justice Thomas’s high rate of authorship is especially notable considering his record recently: 9 percent during 2009, 13 percent during 2008, 13 percent during 2007, and 29 percent during the October 2006 term. Chief Justice Roberts wrote the majority opinion in 30 percent of cases when he was in a similar situation. Justice Sotomayor authored her first 5-4 majority opinion this year.

**Levels of Agreement Between Pairs of Justices**

Agreement between a pair of justices can be measured by two measures: the pair’s agreement in full—meaning that the pair agreed on every part of the same opinions—or the pair’s agreement in full, in part, or in the judgment—meaning that the pair simply agreed on the same judgment. For the sake of picking a consistent measurement, this memorandum will use agreement in full, in part, or in the judgment, unless otherwise noted.

Oddly enough, the two pairs of justices with the highest agreement this term are the two pairs of recent appointees. The chief justice and Justice Alito agreed in a remarkable 96.2 percent of cases this year, while Justices Sotomayor and Kagan agreed in 94 percent of cases. Trailing nearly four percentage points behind either of those rates was the pair of Justices Ginsburg and Kagan at 90.4 percent. The high agreement rate of the chief justice and Justice Alito should be expected; the pair recorded the highest agreement rate of any two justices during 2009 (92 percent) and a relatively high agreement during 2008 (88 percent).

The lowest agreement between any two justices was the pair of Justices Ginsburg and Alito with agreement in only 62.5 percent of cases. That rate is hardly surprising because Justice Ginsburg dissented in 26 percent of cases, more than any liberal justice, while Justice Alito dissented in 14 percent of cases, more than any other conservative justice.

Trailing behind that pair was Chief Justice Roberts and Justice Ginsburg with 64.6 percent agreement, and a three-way tie of Justices Scalia and Ginsburg, Scalia and Breyer, and Thomas and Ginsburg with 65.0 percent agreement.

Predictably, the top-ten list of agreement rates is comprised primarily of pairs with similar ideological bents. Justice Kennedy makes only two appearances on the list: tied for the fourth highest rate with Chief Justice Roberts at 89.9 percent agreement and with Justice Alito for the ninth highest rate at 87.5 percent.

The list of the ten lowest agreement rates is also predictably composed of justices who are traditionally on opposite sides of the ideological spectrum, and Justice Kennedy appears only once: creating the seventh-lowest agreement rate with Justice Ginsburg, 66.3 percent. Pairs featuring Justice Ginsburg—the justice who dissented most often this term—created five of the ten lowest agreement rates.

Measured by the harsh test of full agreement—agreement in every word of the same opinions—Justices Ginsburg and Kagan recorded the highest level of agreement, 84.6 percent, followed by the chief justice and Justice Alito with 83.5 percent agreement in full. The lowest rates of agreement in full were recorded by the duos of Justices Thomas and Ginsburg, 36.3 percent, and Justices Thomas and Breyer, 37.5 percent.

**Frequency in the Majority**

Continuing a strong recent trend, Justice Kennedy and Chief Justice Roberts registered the highest frequencies in the majority, 94 percent and 91 percent, respectively. The pair registered the highest rates last year, 91 percent each. Justice Kennedy had the highest frequency during 2008, 92 percent; the chief justice registered the highest frequency during 2007, 90 percent; and Justice Kennedy registered the highest frequency during 2006, 97 percent.

A sorted list of the justices most frequently in the majority reveals a clear division by ideology. Justice Kennedy sits at the top of the list with 94 percent frequency in the majority, and the conservative Justices—the chief justice and Justices Thomas, Scalia, and Alito (in that order)—follow with 91 percent, 88 percent, 86 percent, and 86 percent. The liberal justices round out the list with Justices Kagan, Sotomayor, Breyer, and Ginsburg joining the majority in 81 percent, 81 percent, 79 percent, and 74 percent of cases, respectively.
Splits in Decisions

The following chart shows the merit opinions that have been released by the Court, arranged by strength of the majority vote.

![Splits in Decisions Chart]

Frequency in Majority

The following chart measures how frequently each justice voted with the majority; the chart includes summary reversals but not cases that were dismissed.

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<td>Kennedy</td>
<td>80</td>
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Opinion Authorship: Summary

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## Circuit Scorecard—Federal and State Courts

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In keeping with recent trends, the Supreme Court last term took up and resolved a large number of First Amendment disputes. As explained in more detail below, most of the action involved the Speech Clause, but other provisions of the amendment received attention too. A few cases were sharply divided, and many others seemed easy as to result. Either way, the opinions that were issued answered some questions, created many others, and thus will provide fodder for scholars, judges, and litigants in the coming years.

Establishment, Privacy, and Petition
In the Establishment Clause realm, the Court, in Arizona Christian School Tuition Organization v. Winn, 131 S.Ct. __ (2011), rejected, by a 5-4 vote, taxpayers standing to challenge an Arizona law giving tax credits to taxpayers for contributions they make to school tuition organizations (STOs). The STOs use these contributions to provide scholarships to students attending private schools, including religious schools. Justice Kennedy’s opinion for the Court, joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito, distinguished this case from the doctrine associated most with Flast v. Cohen, 392 U.S. 83 (1968). That doctrine permits taxpayer standing to challenge legislatively authorized government spending in violation of Establishment norms; Justice Kennedy distinguished Flast from the case here on the ground that a challenge to a tax credit is different from a challenge to a government expenditure:

[While] [i]t is easy to see that tax credits and governmental expenditures can have similar economic consequences, at least for beneficiaries whose tax liability is sufficiently large to take full advantage of the credit …

tax credits and governmental expenditures do not both implicate individual taxpayers in sectarian activities. A dissenter whose tax dollars are ‘extracted and spent’ knows that he has in some small measure been made to contribute to an establishment in violation of conscience. … When the government declines to impose a tax, by contrast, there is no such connection between dissenting taxpayer and alleged establishment. Any financial injury remains speculative. … And awarding some citizens a tax credit allows other citizens to retain control over their own funds in accordance with their own consciences. … When Arizona taxpayers choose to contribute to STOs, they spend their own money, not money the State has collected from respondents or from other taxpayers.

Justice Scalia, joined by Justice Thomas, concurred, reiterating his view that Flast should be overruled, even though the majority distinguished it in a way that was not “unprincipled.” Justice Kagan wrote the dissent, her first since arriving at the Court, joined by Justices Ginsburg, Breyer, and Sotomayor. The dissent asked:

[A]ssume a State wishes to subsidize the ownership of crucifixes. It could purchase the religious symbols in bulk and distribute them to all takers. Or it could mail a reimbursement check to any individual who buys her own and submits a receipt for the purchase. Or it could authorize that person to claim a tax credit equal to the price she paid. Now, really—do taxpayers have less reason to complain if the State selects the last of these three options? The Court today says they do, but that is wrong. The effect of each form of subsidy is the same, on the public fisc and on those who contribute to it. Regardless of which mechanism the State uses, taxpayers have an identical stake in ensuring that the State’s exercise of its taxing and spending power complies with the Constitution.

A second case that arguably implicated aspects of the First Amendment but that did not specify particular provisions of it, National Aeronautics and Space Administration v. Nelson, 131 S.Ct. 746 (2011), involved a claimed constitutional right to informational privacy. In the context of the collection of personal background data from employees of government contractors, the Court (unanimous as to result, with Justice Kagan not participating) rejected the constitutional claim. The Court, in an opinion written by Justice Alito, “assum[ed] that the Government’s challenged inquiries implicate a privacy interest of constitutional significance[,]” but “[h]eld[ed] that, whatever the scope of this interest, it does not prevent the Government from asking reasonable questions of the sort included [on the challenged forms] in an employment background investigation that is subject to the Privacy Act’s safeguards against public disclosure.” Concurring in the judgment, Justice Scalia, joined by Justice Thomas, would have resolved the case, not by balancing interests in privacy against government interests, but categorically by “simply hold[ing] that there is no constitutional right to ‘informational privacy’ at all.

In Borough of Duryea, Pennsylvania v. Guarnieri, 131 S.Ct. __ (2011), a police chief who was dismissed, won reinstatement in a union grievance arbitration, and then was subject to working conditions he thought were designed to retaliate against him for pursuing his union remedies, sued, claiming his rights under the Petition Clause of the First Amendment were violated by the allegedly retaliatory measures. The Court (again unanimous as to result) held that claims of retaliation by public employees should be treated the same under the Petition Clause as under the Speech Clause. On the relationship between the two clauses, Justice Kennedy’s majority opinion observed: “Although this case proceeds under the Petition Clause, Guarnieri just as easily could have alleged that his employer retaliated against him for the speech contained within his grievances and lawsuit. … There may arise cases where the special concerns of the Petition Clause would provide a sound basis for a distinct analysis; and if that is so, the rules and principles that define the two rights might differ in emphasis and formulation. … [H]owever, claims of retaliation by public employees do not call for this divergence. … The considerations that shape the application of the Speech Clause to
public employees apply with equal force to claims by those employees under the Petition Clause.”

The Less High-Profile Speech Cases: Legislator Voting as Speech, Commercial Speech

Among the speech cases, perhaps the easiest one for the Court to resolve was *Nevada Commission on Ethics v. Carrigan*, 131 S.Ct. __, (2011), where the Court rejected the notion that the casting of an official vote by a legislator is expressive activity protected by the Speech Clause of the First Amendment. A Nevada law prohibited every public officer from “vot[ing] upon or advocat[ing] the passage or failure of … a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by … [h]is commitment in a private capacity to the interests of others.” When this provision was applied by the Nevada Commission on Ethics against an elected member of a local City Council who had voted on a land-use proposal in which his longtime friend and campaign manager had a financial interest, the City Council member challenged the recusal law, arguing that it violated the First Amendment. The Nevada Supreme Court agreed, and the U.S. Supreme Court unanimously reversed. Justice Scalia’s opinion for eight members of the Court held that legislative voting is not protected speech because “a legislator’s vote is the commitment of his apportioned share of the legislature’s power to the passage or defeat of a particular proposal. The legislative power thus committed is not personal to the legislator but belongs to the people: the legislator has no personal right to it. … In this respect, voting by a legislator is different from voting by a citizen.” The Court also expressed its view that the “act of voting [itself] symbolizes nothing … [and is not] an act of communication.” The Court buttressed its rejection of the free speech claim by noting the early and unbroken American tradition of legislative (and judicial) recusal laws and procedures. Justice Kennedy joined the majority opinion but wrote separately to express his view that more serious freedom-of-association issues, not part of this case, may be presented by enforcement of legislative recusal rules. Justice Alito concurred in the result and wrote separately.

In the term’s most important commercial speech case, *Sorrell v. IMS Health, Inc.*, 131 S.Ct. __ (2011), the Court (6-3, with Justice Breyer, joined by Justices Ginsburg and Kagan, dissenting) struck down a Vermont law restricting the sale, disclosure, and use of pharmacy records that reveal the prescribing practices of individual doctors. Subject to certain exceptions, the Vermont statute prohibited such information from being sold, disclosed by pharmacies for marketing purposes, or used for marketing by pharmaceutical manufacturers. Vermont argued that its prohibitions safeguarded medical privacy and diminished the likelihood that marketing will lead to prescription decisions not in the best interests of patients or the state. The Court assumed these interests are significant, but because speech in aid of pharmaceutical marketing is a form of expression protected by the Speech Clause of the First Amendment, held that Vermont’s statute was subjected to heightened judicial scrutiny. The Court concluded the law did not satisfy that standard, because of the imprecise fit between means and ends.

The Headline-Grabbing Speech Cases: Funeral Protestors, Violent Video Games, and Campaign Finance

Perhaps the most highly publicized free speech case of the term was *Snyder v. Phelps*, 131 S.Ct. 1207 (2011). Snyder, the father of a marine killed in Iraq, obtained a multimillion dollar intentional infliction of emotional distress (IIED) jury verdict based on picketing—in three public locations not far from his son’s funeral—by members of the Westboro Baptist Church. The church members held up signs such as “God Hates the USA/Thank God for 9/11,” “America is Doomed,” “Don’t Pray for the USA,” “Thank God for IEDs,” “Thank God for Dead Soldiers,” “Pope in Hell,” “Priests Rape Boys,” “God Hates Fags,” “You’re Going to Hell,” and “God Hates You.” The Court, by an 8-1 vote (with Justice Alito dissenting), overturned the tort liability judgment in an opinion by Chief Justice Roberts that provided free speech protection to the picketing in a “narrow” holding “limited by the particular facts before us,” including:

The church had notified the authorities in advance of its intent to picket at the time of the funeral, and the picketers complied with police instructions in staging their demonstration. The picketing took place within a 10-by-25-foot plot of public land adjacent to a public street, behind a temporary fence. … That plot was approximately 1,000 feet from the church where the funeral was held. Several buildings separated the picket site from the church. … The Westboro picketers displayed their signs for about 30 minutes before the funeral began and sang hymns and recited Bible verses. None of the picketers entered church property or went to the cemetery. They did not yell or use profanity, and there was no violence associated with the picketing. … The funeral procession passed within 200 to 300 feet of the picket site. Although Snyder testified that he could see the tops of the picket signs as he drove to the funeral, he did not see what was written on the signs until later that night, while watching a news broadcast covering the event.

Under these circumstances, the Court rejected liability, observing that “[w]hether the First Amendment prohibits holding Westboro liable for its speech in this case turns largely on whether that speech is of public or private concern, as determined by all the circumstances of the case. … The ‘content’ of Westboro’s signs plainly relates to broad issues of interest to society at large, rather than matters of ‘purely private concern.’ … While [the] messages [on the placards] may fall short of refined social or political commentary, the issues they highlight—the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy—are matters of public import.”

As a normative and a scholarly matter, the Court’s role in the resolution of this case is hard to justify or explain. Many are aware of the adage that hard cases make bad law; but easy cases can also make for bad law, or at the very least misleading legal observations.

Indeed, given the clear consensus of the justices that an IIED claim and damage award, on the facts of this case, violated the free speech clause of the First Amendment, one can only wonder why the Court thought it appropriate to grant review in this matter in the first place. The Fourth Circuit had emphatically reversed the district court’s decision in the plaintiff’s favor. Constitutional law scholars largely supported that holding. There was no backlog of IIED cases involving funeral protests in the lower courts that required guidance on how to proceed. Granting review may have raised false expectations of redress for the plaintiff, the father of an American soldier killed in the line of duty, a person who surely had suffered enough and did not need the High Court rubbing salt in his wounds. Granting review further rewarded defendants, who crave attention for their
invidious and hurtful views, with a victory before the Supreme Court and substantial national exposure for their hateful message. These are serious normative costs to incur for no useful purpose.

Moreover, it is not as if there aren’t other, serious constitutional questions raised by state responses to Phelps’s funeral protests that the Court might have chosen to address rather than hearing this case. As the Court noted, over 40 states have enacted content-neutral time, place, and manner restrictions limiting picketing or demonstrations within some specified distance from funeral services, processions, or cemeteries. There is a circuit split on the constitutionality of these laws. Adjudicating the constitutionality of these regulations would have provided a valuable service to courts and state and local governments alike. Instead, the Court granted review in Snyder v. Phelps, a case which provided no basis for evaluating or providing guidance on the constitutionality of these common and repeatedly challenged restrictions on speech.

As to the merits of Chief Justice Roberts’s opinion, the Court’s opinion might have affirmatively misdirected the law, by placing undue emphasis on the question of whether the content of Phelps’s speech constituted a matter of public or private concern. Other factors really did the lion’s share of the analytic work. The location of the protests was about 1,000 feet from the funeral service. The protestors’ message was neither seen by, nor visible to, the mourners when they entered or left the church where the service was held. The protestors complied with police directions as to where they could stand and hold their signs. The protest was directed to the public at large. This was public discourse, not speech exclusively, or at least primarily, directed at a target audience.

If all of these conditions are satisfied, it is not clear that classifying speech as a matter of public or private concern should be the primary or controlling factor in the Court’s analysis. Assume a speaker strongly dislikes one of his colleagues at work. The speaker stands on a soapbox in a public park, states that his colleague is a horrible person who should be despised by God and sent to hell when he dies. That is mean-spirited private speech, but as long as it isn’t defamatory, I would think it is constitutionally protected—at least it is constitutionally protected as long as it is addressed to a public audience and expressed in a location some distance away from the place where the maligned colleague lives and works.

Now assume that members of the Westboro church placed telephone calls to the home of parents of a soldier killed in the line of duty immediately before and after the funeral service for their son or daughter. Church members expressed the same messages that were on the signs in Snyder v. Phelps—messages that the Supreme Court has characterized as a matter of public concern. As Alan Brownstein and I argued elsewhere, there is a strong argument that such calls could be sanctioned as harassment. Similarly, the anti-abortion messages communicated by residential picketers in Fritz v. Shultz, 487 U.S. 474 (1988), were also speech on a matter of public concern. The Fritz picketers’ expressive activity could be restricted, however, because it “inherently and offensively intrude[d] on residential privacy” and had a “devastating effect … on the quiet enjoyment of the home.” Thus, in particular cases, when, where, and how speech is communicated may be more important to determining whether the speech can be restricted or subject to penalty than the determination that the speech is a matter of public or private concern.

That leads to another question the Court does not answer in its opinion in Snyder. In supporting his conclusion that the Phelps defendants could not be held liable for IED, Chief Justice Roberts made it clear that “the church members had the right to be where they were” when they engaged in their expressive activities. He explained that “what Westboro said, in the whole context of how and where it chose to say it” is constitutionally protected, “and that protection cannot be overcome by a jury finding that the picketing was outrageous.”

But what if the church members were standing in a place where they did not have a right to be? If a state had a constitutionally valid content-neutral law prohibiting picketing within 100 feet of a funeral service and protestors violated the law and caused immediate and extreme distress to the mourners, would a cause of action for IED be constitutionally valid on these facts? Juries would still have the discretion to punish some speech more severely than other speech because of its content and viewpoint under the outrageousness element of this tort. However, no protestors would be subject to civil liability as long as they maintained a lawful distance from the funeral service. Also, appellate courts could limit the risk of the tort being used abusively against particular defendants to some extent by reviewing jury findings de novo (as is appropriate in a free speech case) and developing rules regarding damages—as it has done in defamation cases.

In another high-profile speech case, Brown v. Entertainment Merchants Association, 131 S.Ct. __ (2011), this one out of California, a somewhat divided Court (with only five justices joining the majority opinion and seven agreeing with the result) invalidated a state statute that prohibited the sale or rental of “violent video games” to minors, and requires their packaging to be labeled “18.” The California statute covered games “in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted” in a manner that “[a] reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors,” that is “patently offensive to prevailing standards in the community as to what is suitable for minors,” and that “causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors.”

Observing that video games qualify for First Amendment protection and drawing no meaningful distinction between speech for adults and speech for children outside the realm of sexual speech, Justice Scalia’s opinion for the Court recognized that it is difficult to distinguish politics from entertainment, and dangerous to try. The opinion went on to remind that [A]s a general matter, … government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. … There are of course exceptions. From 1791 to the present, … the First Amendment has permitted restrictions upon the content of speech in a few limited areas,… and has never include[d] a freedom to disregard these traditional limitations.’ [But] without persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription, a legislature may not revise the ‘judgment [of] the American people,’ embodied in the First Amendment, ‘that the benefits of its restrictions on the Government outweigh the costs.’ … That holding controls this case.
As my colleague and frequent co-author Professor Brownstein has observed, the Court’s decision here, as in Snyder, may have fashioned some bad principles in a case that could have been resolved much more simply. As Professor Brownstein and I explained when we testified before the California legislature considering the measure, California’s law reached too far. It makes no sense, for First Amendment purposes or otherwise, to prohibit a 17-year-old planning to join the Marines when he turns 18 from buying a violent video game unless he brings his mother along to the store to buy it for him. The age prohibition in the statute was simply too high.

The Court could have made that point succinctly and noted that a more carefully tailored law restricting access to violent video games to children under the age of 13 or 14 would have raised a very different case. But the Court didn’t do that. Instead, it insisted that, with the exception of sexually graphic materials, children have pretty much the same free speech rights as adults. Thus, if adults get access to depraved and vicious violent video games in which women and racial and religious minorities are slaughtered like animals, kids must have the same freedom to obtain these materials as well.

But as Professor Brownstein has pointed out, this constitutional equivalence between adults and children is very much open to question. Children don’t have the same rights as adults to vote, to have an abortion, to marry, or to keep and bear arms. Children don’t have the full panoply of rights guaranteed to adults because they lack the experience, maturity, and knowledge to decide how to exercise that level of freedom. Why is freedom of speech any different?

The Brown Court didn’t adequately answer that question. Instead, it cited language from one case, Erznoznik v. Jacksonville, 422 U.S. 205 (1975), to support the argument that children and adults have equivalent First Amendment rights. But Erznoznik wasn’t about the marketing of expressive materials to children. It invalidated a law prohibiting drive-in theaters from showing movies containing nude scenes to prevent children from catching fleeting glimpses of such images on the screen from afar. That decision correctly recognized that the state can’t childproof the marketplace of ideas and restrict speech among adults because it might be overheard (or seen) by kids. But California’s law only restricted the direct marketing of video games to children. It imposed no limits on adult purchases.

I am not suggesting that determining the free speech rights of children and the rights of adults who target child audiences is a simple issue for the courts to resolve. Age matters, and there is a continuum of rights that increases along with the child’s maturity and experience. Courts will confront difficult questions about what falls within the scope of legislative discretion. While we may avoid those hard questions by providing children the same free speech rights as adults, that avoidance creates problems. Does the fact that Nazis can hold rallies on public streets mean they can patrol sidewalks in front of elementary schools and recruit children to attend their meetings? Justice Scalia points out that a 17-year-old can attend the church of his choice and that church groups have a free speech right to proselytize our youth. Does that mean that any group that identifies itself as religious in nature can proselytize 8-year-olds and invite them to attend church meetings without their parents’ permission? Scenarios such as these raise serious questions that deserve more attention.

The final speech case discussed here is also very prominent, and very controversial. In Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett, 131 S.Ct. __ (2011), the Court by a 5-4 vote (with Chief Justice Roberts writing a majority opinion for himself, Justices Kennedy, Scalia, Thomas, and Alito) invalidated an Arizona campaign finance law that increased the amount available to publicly financed candidates based on the amount self-financed candidates spent or independent organizations spent on behalf of self-financed candidates. Under the Arizona law, candidates for state office who accept public financing could receive additional money from the state in direct response to the campaign activities of privately financed candidates and independent expenditure groups. Once a set spending limit is exceeded, a publicly financed candidate receives roughly one dollar for every dollar spent by an opposing privately financed candidate, up to a cap. The publicly financed candidate also received, again up to a limit, roughly one dollar for every dollar spent by independent expenditure groups to support the privately financed candidate, or to oppose the publicly financed candidate. The Court held that this funding scheme substantially burdens protected political speech by self-financed candidates and independent expenditure groups without serving a compelling state interest and therefore violates the First Amendment.

Although the speech of the self-financed candidates and independent expenditure groups was not directly capped by Arizona’s matching funds provision, those parties contended that their political speech was substantially burdened by the law in the same way that speech was unconstitutionally burdened in Davis v. Federal Election Comm’n, 554 U.S. 724 (2008). There, the Court struck down a federal provision that said if a candidate for the United States House of Representatives spent more than $350,000 of his personal funds, “a new, asymmetrical regulatory scheme”—in which the opponent would then be permitted to collect individual contributions up to $6,900 per contributor, three times the normal contribution limit of $2,300—came into play. The Court held that the scheme “burden[ed] [the self-funded candidate’s] exercise of his First Amendment right to make unlimited expenditures of his personal funds because” doing so had “the effect of enabling his opponent to raise more money and to use that money to finance speech that counteract[ed] and thus diminishe[d] the effectiveness of his own speech.”

The Bennett Court held that “the logic of Davis largely controls.” Indeed, the differences between Arizona’s regime and that struck down in Davis made the Arizona law worse. First, in Davis, unlike in Bennett, the opponent of the self-funded candidate was not guaranteed more money based on what the self-funded candidate spent; he merely had the opportunity to raise more money. Moreover, under the Arizona law, additional monies for an opponent were triggered by expenditures of third parties rather than just by the self-funded candidate himself, further increasing the burden on the self-funded candidate.

The Court then rejected the two government rationales that were advanced as possibly compelling enough to justify any burden on expression—the leveling of the playing field among candidates and the desire to avoid corruption or its appearance. As to the former, the Court reiterated that equalizing the resources among candidates is not a permissible objective of campaign finance laws under the First Amendment. And as to the latter, the Court noted that self-expenditures and independent expenditures, unlike contributions, do not raise the specter of corruption.

Justice Kagan wrote a passionate dissent, joined by Justices Ginsburg, Breyer, and Sotomayor, in which she distinguished Davis on the ground that it involved limits on the self-funded candidate’s ability to raise money, not subsidies for the opponent, as in Bennett.
Whether *Bennett* turns out, years from now, to be a major case depends on how it is later understood by the Court. One possible way to read the majority is that explicit near dollar-for-dollar “matching” subsidies triggered by opponent speech is hard to understand as anything other than an attempt to level the playing field, which is an impermissible goal under the First Amendment ever since *Buckley v. Valeo*, 424 U.S. 1 (1976). Under this reading, more nuanced public finance schemes that avoid the appearance of equalization, but instead give publicly funded candidates an amount of money adequate to get their message out regardless of what others spend, will remain permissible. A second reading of *Bennett* is more ominous for advocates of public financing; under this reading, most if not all public financing schemes are, at base, efforts to equalize resources, and as such they will be looked at skeptically by the Court.

* * *

It is hard to generalize about the Court’s work in the First Amendment arena this term, except to say that it seems very likely that the Court’s interest in refining and reconceptualizing First Amendment doctrine seems alive and strong.

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*PREVIEW of United States Supreme Court Cases, pages 325–329.*

The Supreme Court this term decided an unprecedented four cases dealing with class action issues, and in the process the Court clarified the standards for certification, commented on duplicative class litigation, and again expressed its strong distaste for class action arbitration. But collectively the cases do not represent a clean sweep for either side of the docket; two of the Court’s decisions clearly favor corporate defendants, and two favor plaintiffs. However, in perhaps the two most important decisions—Wal-Mart Stores, Inc. v. Dukes and AT&T Mobility LLC v. Concepcion—the Court sided with corporate defendants, but split 5-4 along conservative and liberal lines, with the liberals losing the day.

Viewing the cases jointly, the Court clearly has made it more difficult to seek class certification generally, but demurred when it had the choice to ratchet up the requirements for specialized Rule 10(b)(5) securities class actions. In so doing, the Court saved the “fraud on the market” presumption for another day, no doubt to plaintiffs’ great relief. On the other hand, the possibility of plaintiffs pursuing classwide relief through arbitration auspices now seems something of a dead letter. And, in reversing appellate decisions in all four cases, the Court spread its criticisms equally among the Fifth, Eighth, and Ninth Circuits.

In one of the most closely watched and highly publicized cases of the term, the Supreme Court decided in Wal-Mart Stores, Inc. v. Dukes, in a 5-4 decision, that the certification of the largest female employment discrimination case ever—against the country’s largest employer—was an abuse of discretion. This was a high-stakes case for thousands of other corporate employers faced with massive employment discrimination cases. In repudiating the Wal-Mart class action, American corporations no doubt collectively issued a great sigh of relief. More importantly for class action defendants, though, the Court has clearly articulated a more stringent standard for class certification that will leave many class actions at the starting gate.

In the underlying litigation, six female Wal-Mart employees sued Wal-Mart Stores, Inc., in 2001 in California federal court. At the time the complaint was filed, Wal-Mart employed approximately 500,000 women spread across 41 regions. Since then, Wal-Mart has employed more than three million women.

The women filed the lawsuit on behalf of “all women employed at any Wal-Mart domestic retail store at any time since December 26, 1998, who may have been or may be subjected to Wal-Mart’s challenged pay and management track promotions and policies and practices.” The class action suit alleged two types of Title VII violations: disparate impact and disparate treatment claims. See Title VII, 42 U.S.C. §§ 2000e et seq.

Wal-Mart is the nation’s largest private employer, with millions of employees working in over 3,400 stores. Each Wal-Mart employs between 80 to 500 people and hourly workers are assigned to 53 departments in 170 job classifications. While there are several departments within each store, most hourly workers fall within five job positions (support manager, department manager, cashier, sales associate, and stockers). Women comprise over 80 percent of hourly workers and hold only one-third of managerial store management jobs. The numbers of women diminish at each successive step of the corporate hierarchy.

Wal-Mart historically and currently has a companywide policy that bars workplace discrimination based on sex. According to Wal-Mart, company policy is intended to promulgate and enforce equal opportunity policies, foster diversity, ensure fair treatment, and prohibit unlawful discrimination.

Notwithstanding this companywide policy, individual Wal-Mart store managers had substantial discretion in making salary and promotion decisions in each individual store. Wal-Mart limited that local discretion through objective standards and salary ranges that managers were to apply when making employment decisions.

The women complained that they had been subjected to an array of discriminatory actions, including denial of management training, retaliation for initiating internal grievance procedures, failure to promote, harassment, and denial of equal pay. The complaint alleged that Wal-Mart “fosters or facilitates gender stereotyping and discrimination, … and that this discrimination is common to all women who work or have worked in Wal-Mart stores.”

The plaintiffs sought certification of a mandatory Rule 23(b)(2) class action, seeking injunctive and declaratory relief, back pay, and punitive damages on behalf of every woman employed in every Wal-Mart since 1998. The class action did not seek compensatory damages under Rule 23(b)(3). The plaintiffs did not identify a specific discriminatory policy promulgated by Wal-Mart, but premised their motion for class certification on statistics, expert witness testimony, and anecdotal evidence.

The plaintiffs relied on two expert opinions and the affidavits of over 100 female Wal-Mart employees. One expert provided a statistical analysis demonstrating regional and national pay and promotion disparities. In response, Wal-Mart offered its own statistical expert who conducted a store-by-store analysis, which showed that in 90 percent of the stores there were no statistically significant salary disparities between men and women. The plaintiffs also offered the testimony of a sociological expert who opined that Wal-Mart institutionally was vulnerable to gender bias. Wal-Mart moved to strike this expert’s opinions as unreliable and inadmissible, but the court rejected this motion. Finally, the plaintiffs offered affidavits of 112 current and former Wal-Mart employees, which detailed anecdotal instances of discriminatory actions. In response, Wal-Mart submitted declarations from other female Wal-Mart employees refuting the contention of a companywide policy of discrimination.
The district court certified the Rule 23(b)(2) injunctive relief class action, including relief for back pay and punitive damages. *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137 (N.D. Cal. 2004). In an eighty-four page decision, the court ordered that notice be given to class members and that they be afforded the opportunity to opt-out of the litigation. At the time the court certified the class, the class definition covered at least 1.5 million women, making the *Wal-Mart* class action the largest employment discrimination lawsuit in history. The district court accepted the plaintiffs’ theory that Wal-Mart fostered or facilitated gender stereotyping and discrimination, relying on the plaintiffs’ two expert opinions and the affidavits of numerous female employees describing anecdotal discriminatory experiences.

Wal-Mart appealed the district court’s opinion, which the Ninth Circuit affirmed. *Dukes v. Walmart Stores, Inc.*, 474 F.3d 1214 (9th Cir. 2007). The Ninth Circuit’s opinion affirming class certification subsequently was withdrawn and superseded by another opinion affirming the certification. *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168 (9th Cir. 2007). On a rehearing en banc by the entire Ninth Circuit, the court’s majority upheld that class certification in substantial part. *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010).

The Ninth Circuit agreed that the class satisfied the Rule 23(a) threshold class certification requirements for commonality, typicality, and adequacy. The court concluded that the plaintiffs’ evidence was sufficient to raise the common question whether Wal-Mart’s female employees nationwide were subjected to a single set of corporate policies that may have worked to unlawfully discriminate against them in violation of Title VII. The court also found the plaintiffs’ claims sufficiently “typical” because the claimed discrimination occurred through alleged common practices: that is, subjective decision making in a corporate culture of gender stereotyping. Finally, the court found that adequacy was not lacking merely because the class included non-supervisory and supervisory employees.

The Ninth Circuit also upheld certification of the proposed class pursuant to Rule 23(b)(2) for back pay but remanded the plaintiffs’ punitive damage claims for further consideration. In so doing, the court rejected other appellate standards for certification of Rule 23(b)(2) damage class actions, instead setting forth a new standard. Two Ninth Circuit judges dissented to the class certification.

* * *

The Supreme Court’s *Wal-Mart* opinion focused on two main issues: (1) whether the *Wal-Mart* class satisfied the threshold Rule 23(a)(2) requirement for common questions of law or fact, and (2) whether the court properly certified the class under Rule 23(b)(2). All nine justices joined, in Part III, to agree that the trial court had improperly certified the class under Rule 23(b)(2), which excludes class actions for damages. But the justices split 5-4 concerning whether the class satisfied the threshold requirement for commonality. Justice Scalia wrote the majority opinion joined by four justices; Justice Ginsburg wrote a dissent joined by Justices Breyer, Kagan, and Sotomayor, disapproving of Part II of the opinion relating to the standard for threshold Rule 23(a)(2) commonality.

The Court’s rulings on Rule 23(a)(2) commonality is the crux of its decision and the most significant discussion for certification of future class actions. Rule 23(a)(2) requires that the proponents of a class action demonstrate that there are “questions of law or fact common to the class.” Under prevailing class action jurisprudence, most courts historically agreed that this standard was easily satisfied, requiring the identification of only one common question.

Justice Scalia confronted this notion of “easy commonality” head on. He indicated that the Rule 23(a)(2) requirement is easy to misread, permitting plaintiffs to state common questions at the highest, most generalized level of abstraction. But Justice Scalia indicated that such generalized questions could not pass muster for stating a common question under Rule 23(a)(2); “commonality requires the plaintiff to demonstrate that the class members ‘have suffered the same injury,’” citing *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147 (1982).

Applying a more stringent interpretation of Rule 23(a)(2) commonality, Justice Scalia concluded that the mere claim by some Wal-Mart female employees that they had suffered a Title VII injury gave no cause to believe that all the women’s claims could be productively litigated at once. Thus, the women’s claims had to depend on a common contention, such as discriminatory bias on the part of the same supervisor, which was not true in this case. In addition, the women’s common contention had to be capable of resolution on a classwide basis, which Justice Scalia believed was not possible.

In viewing the underlying facts, the Court concluded that the plaintiffs were attempting to sue about literally millions of employment decisions at once. “Without some glue holding the alleged reasons for all those decisions together, it will be impossible to say that examination of all the class members’ claims for relief will produce a common answer to the crucial question why I was disfavored.”

Relying on the Court’s landmark employment discrimination case, *Falcon*, the Court further indicated that the *Wal-Mart* plaintiffs had failed to bridge the gap between an individual’s claims of discrimination and the existence of a class of persons who had suffered the same injury. In order to do this, the *Wal-Mart* plaintiffs would have had to show with significant proof that Wal-Mart operated under a general policy of discrimination. Justice Scalia found that significant proof “entirely absent here.” In reaching this conclusion, the Court pointed out that Wal-Mart had an explicit policy prohibiting discrimination. The Court rejected the expert witness testimony, as well as the anecdotal testimony of the female employees, suggesting that the numbers who supplied affidavits represented only a miniscule percentage of all female Wal-Mart employees.

In addition, the Court concluded that the fact that Wal-Mart managers had discretion in employment decisions did not support the classwide assertions of discrimination, because “demonstrating the invalidity of one manager’s use of discretion will do nothing to demonstrate the invalidity of another’s.” Moreover, the class plaintiffs failed to identify a common mode of exercising that discretion which pervaded the entire company.

Perhaps the most important (and controversial) part of the Court’s Rule 23(a)(2) commonality analysis focused on the *dissimilarities* among class members in order to ascertain whether even a single common question existed to satisfy the commonality requirement. The majority’s focus on dissimilarities among class members drew a sharp rebuke from the four dissenting justices.

Regarding dissimilarities among the *Wal-Mart* class members, the Court—agreeing with Ninth Circuit Judge Kozinski’s dissent from the class certification—held that the class embraced too many diverse jobs, workplace categories, different supervisors, store locations, and
a wide variety of regional policies. Some women employees “thrived while others did poorly. They have little in common but their sex and the lawsuit.”

All nine justices, however, agreed that the Wal-Mart class was improperly certified under Rule 23(b)(2). Without resolving a prevailing split among the circuit courts concerning the proper standard for certifying a Rule 23(b)(2) class that combines injunctive and monetary relief, the Court simply held that a class action may not be certified “where (as here) the monetary relief is not incidental to the injunctive or declaratory relief.” In so doing, the Court followed the test for Rule 23(b)(2) class actions articulated in Allison v. Citgo Petroleum Corp., 151 F.3d 402 (5th Cir. 1998). The Court, however, did not reach the broader question whether a Rule 23(b)(2) class applies only to requests for injunctive or declaratory relief and does not authorize class certification of monetary claims at all.

Furthermore, the Court held that a Rule 23(b)(2) certification was justified only where a single injunction or declaratory judgment would provide relief to each member of the class, but such certification was not authorized where each individual class member would be entitled to a different injunction or declaratory judgment against the defendant. The majority expressed further concern that Wal-Mart would not have been entitled to litigate its statutory defenses to the female employees’ individual claims.

In the same vein, certification under Rule 23(b)(2) is improper where the class would require individualized awards of monetary damages—as would the women in the Wal-Mart litigation. The Court further indicated—contrary to the Ninth Circuit’s conclusion—that Wal-Mart was entitled to individualized determinations of each female employee’s eligibility for back pay. In rejecting the plaintiffs’ plan to try damages on a classwide statistical basis, the Court repudiated the notion that classwide proceedings may be accomplished with a “Trial by Formula.”

Finally, the Court noted that combining individualized and classwide relief in a (b)(2) class also was inconsistent with the structure of Rule 23, which requires that damage class actions be certified under Rule 23(b)(3), and satisfy the additional requirements of predominance of common questions and superiority of proceeding as a class action.

In conclusion, the Court rejected the Wal-Mart class action as a “novel project” that interpreted Rule 23 in such a fashion as to violate the Rules Enabling Act, 28 U.S.C. §§ 2072(b), which prohibits procedural rules from abridging, enlarging, or modifying any substantive right.

As indicated above, the four liberal justices (in an opinion authored by Justice Ginsburg) concurred that the Wal-Mart class had been improperly certified under Rule 23(b)(2), but strongly dissented from the majority’s decision that the plaintiffs failed to satisfy Rule 23(a)(2) threshold commonality. In essence, the dissenters objected to the majority’s ratcheting-up of the commonality requirement, noting that the Court’s decision “disqualifies the class at the starting gate.”

The dissenters noted, accurately, that the Court’s ‘dissimilarities’ standard was far-reaching. In addition, the dissenters pointed out that the majority’s interpretation of Rule 23(a)(2) commonality—with its focus on dissimilarities among class members—essentially mimicked the more stringent predominance standard of Rule 23(b)(3). Thus the dissenters stated: “The Court errs in importing a 'dissimilarities' notion suited to Rule 23(b)(3) into the Rule 23(a) commonality inquiry.”

On the facts, the dissenters suggested that the district court had been presented with sufficient evidence to support a finding of at least one common question of fact or law. The dissenters noted that Wal-Mart’s delegation of discretion over pay and promotion was itself a uniform policy throughout its stores, and that a system of delegated discretion can be an actionable practice under Title VII when it produces discriminatory outcomes.

**AT&T Mobility LLC v. Concepcion, No. 09-893, 563 U.S. ___ (2011)**

The Court’s AT&T Mobility decision follows closely on last term’s classwide arbitration decision in Stolt-Nielsen S.A. v. Animal Feeds Int’l Corp., 559 U.S. ___ (2010). In that case, the Court determined that where an arbitration agreement is silent on whether classwide arbitration may occur, the clause could not be interpreted to permit classwide arbitration. In this term’s AT&T Mobility case, in a 5-4 decision authored by Justice Scalia, the majority’s antipathy toward classwide arbitration was extended to disallow classwide arbitration where state law would negate a class action waiver in an arbitration agreement. In reaching this conclusion, the Supreme Court held that California’s rule in Discover Bank v. Superior Court, 36 Cal. 4th 148 (2005), which largely invalidates class action waivers in arbitration agreements, was preempted by the Federal Arbitration Act (FAA).

The Discover Bank case provided California courts with a conceptual framework for determining the validity and enforceability of class action waivers in consumer arbitration clauses. This framework asked whether the consumer contract was a contract of adhesion; whether the dispute between the contracting parties involved small sums of money; and whether “the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money.” Pursuant to this Discover Bank rule, California courts had held many arbitration agreements unconscionable.

* * *

The facts underlying the AT&T litigation were fairly simple. In February 2002, Vincent and Liza Concepcion entered into an agreement with AT&T for the purchase and service of cell phones. When the Concepcions purchased their service, it was advertised as including free phones, but they had to pay $30.22 in retail sales tax. In March 2006, the Concepcions filed a lawsuit in the Federal District Court for the Southern District of California. Their complaint was later consolidated with a putative class action.

The AT&T agreement included an arbitration clause in the case of any disputes and also contained a class action waiver which prohibited any such arbitration from being conducted as a class action. In March 2008, AT&T moved to compel arbitration pursuant to the arbitration clause. The Concepcions opposed this motion, arguing that the arbitration agreement was unconscionable under California law.

The district court agreed with the Concepcions, and refused to compel arbitration, based on the California Supreme Court’s decision in the Discover Bank case. The court held that the arbitration clause was unconscionable because AT&T had not shown that two-party bilateral arbitration adequately substituted for the deterrent effects of class actions.
The Ninth Circuit affirmed, also finding that the AT&T arbitration clause with its class action waiver provision was unconscionable under California’s Discover Bank rule. The Ninth Circuit further held that the Discover Bank rule was not preempted by the Federal Arbitration Act. Finally, the Ninth Circuit rejected AT&T’s contention that classwide arbitration proceedings would reduce the efficiency and expeditiousness of arbitration. See Laster v. AT&T Mobility LLC, 584 F.3d 849 (2009).

* * *

The Court’s majority disagreed with almost every point articulated by the Ninth Circuit. In so doing, the majority went out of its way to affirm its support for the Federal Arbitration Act, which provides that arbitration agreements “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. Thus, the Court reiterated that in numerous decisions it has interpreted this provision as reflecting a federal policy favoring arbitration, and the fundamental principle that arbitration is a matter of contract law.

The Court identified the crux of the case as turning on whether § 2 of the FAA preempts California’s Discover Bank rule, which classifies most class action arbitration waivers in consumer contracts as unconscionable. The Court rejected the Concepcion’s argument that the Discover Bank rule provided an exception to the enforceability of the arbitration clause, as a ground that “exists at law or equity for the revocation of any contract.”

Instead, the Court held that although § 2 of the FAA preserves generally applicable contract defenses (such as unconscionability), “Nothing in it suggests an intent to preserve state law rules that stand as an obstacle to the F.A.A.’s objectives.” Construing FAA §§ 2, 3, and 4, the Court held that the act’s over-arching purpose is to ensure enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. Measured against this core purpose, then, “requiring the availability of classwide arbitration interferes with the fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.”

The majority opinion is highly critical of the Discover Bank rule, which it views as interfering with arbitration in numerous undesirable ways. The Court noted that although the Discover Bank rule arguably was limited to adhesive contracts, in practice California courts had greatly expanded the doctrine: “The times in which consumer contracts were anything other than adhesive are long past.”

Much of the Court’s opinion is devoted to explaining why the possibility of classwide arbitration interferes with the purpose of arbitration. The Court pointed out that shifting from a bilateral arbitration proceeding to classwide arbitration radically alters important structural matters, including absent class members that necessitate additional different procedures. The Court suggested that arbitrators generally are not familiar with dominant class certification requirements, including the protection of absent class members.

Under new rules promulgated by the American Arbitration Association (AAA), classwide arbitrations require more formality and essentially mimic all the requirements of Fed. R. Civ. P. 23. The Court indicated that it doubted that Congress, in enacting the FAA in 1925, ever contemplated leaving the disposition of class action requirements to an arbitrator. Further, the AAA rules provide for a lesser standard for judicial review of arbitration certification decisions.

Thus, the Court concluded that authorization of classwide arbitration sacrifices the principal advantages of arbitration: informality, speed, and cost-effectiveness. In approving classwide arbitration, the dispute resolution process becomes slower, more costly, and “more likely to generate [a] procedural morass than final judgment.” Finally, the Court noted that sanctioning classwide arbitration additionally places defendants at increased risks, creating an “in terrorem” pressure upon defendants to settle questionable claims.

In conclusion, the majority held that because California’s Discover Bank rule “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,” the FAA pre-empted this state law rule.

Justice Breyer, in a dissenting opinion joined by Justices Ginsburg, Kagan, and Sotomayor, argued that the FAA does not preempt the California Discover Bank rule because the California rule was consistent with the FAA’s language and primary objective.

The dissent suggests that the Discover Bank rule did not create a blanket policy in California against class action waivers in the consumer context. Moreover, the rule applies with equal force to waivers in contracts without arbitration agreements. The dissenters also cautioned against interpreting the FAA as guaranteeing particular procedural advantages, such as informality, speed, and lack of expense. Instead, the primary purpose of the act, according to the dissent, was to ensure enforcement of arbitration agreements.

The dissenters further suggested that the majority’s discussion of the disadvantages of classwide arbitration were unfounded and overblown. Instead, the dissenters argued that classwide arbitration proceedings have countervailing advantages, which are consistent with the use of arbitration generally. They pointed to the increasing widespread use and acceptance of classwide arbitration. Finally, the dissenters argue that there is a policy rationale justifying the use of class proceedings: such proceedings are often necessary to prosecute small-dollar claims that might otherwise slip through the legal system.


Unlike the Wal-Mart and AT&T cases, the Erica P. John Fund decision clearly represents a victory for class action plaintiffs involved in securities litigation. In this case, a unanimous Court rejected Halliburton’s suggestion to tighten a plaintiff’s pleading burden of proof at class certification, which would have required securities plaintiffs to provide additional proof in order to invoke and rely on the “fraud on the market presumption” in lieu of actual reliance. Just as corporate America must have breathed a sigh of relief with the Court’s Wal-Mart and AT&T decisions, so too must the plaintiffs’ securities class action bar have been relieved at the Court’s decision in Erica P. John Fund.

In the underlying litigation, the Erica P. John Fund, Inc. (the Fund), as lead plaintiff, brought a securities fraud class action in 2002 on behalf of its shareholders against Halliburton Co. and David J. Lesar, Halliburton’s former president and CEO. In 2006, the plaintiffs filed a fourth amended complaint that alleged the defendants had violated the Securities and Exchange Act of 1934 and SEC Rule 10-b5.

The plaintiffs’ complaint alleged that Halliburton committed securities violations by deliberately falsifying information and misleading the public in three ways: (1) falsely representing Halliburton’s liability for asbestos claims; (2) engaging in accounting practices that obscured Halliburton’s probability of collecting revenue on fixed
price construction contracts; and (3) knowingly misrepresenting and touting the benefits of Halliburton’s merger with Dresser Industries, which efficiencies Halliburton knew would not be realized.

The plaintiffs essentially argued that during the class period, Halliburton made certain corrective statements and disclosures after its original false and misleading statements, causing the company’s stock to decline, incurring losses for its shareholders. During the five years after filing the complaint, extensive discovery occurred and the Fund received more than 600,000 pages of documents from Halliburton.

In September 2007, the plaintiffs moved for class certification. The plaintiffs did not attempt to certify a class action where they would have to prove that every class member individually relied on Halliburton’s disclosures or corrective statements. Rather, the plaintiffs invoked the “fraud-on-the-market” presumption to satisfy the class certification requirement that common issues in the litigation, in this instance reliance, predominated over individual issues.

The Fund filed an expert witness report known as an “event study” in support of the class certification motion, to demonstrate that the market for Halliburton’s stock was efficient. The purpose of establishing an efficient market was to support the plaintiffs’ entitlement to rely on the fraud-on-the-market presumption in support of class certification. In response, Halliburton supplied its own expert report and documentary evidence showing that the stock price declines were caused by the release of unrelated negative news and other causes, not by “corrective” disclosures that revealed the falsity of prior statements. The Fund did not request any additional discovery in connection with the class certification process.

Relying on Fifth Circuit precedent in *Oscar Private Equity Invs. v. Allegiance Telecom, Inc.*, 487 F.3d 261 (5th Cir. 2007), the district court denied class certification. The court held that plaintiffs who invoke the fraud-on-the-market presumption of reliance must show that the alleged false statements affected the stock’s value. The court held that the plaintiffs failed to prove, by a preponderance of the evidence, that their losses were more probably caused by Halliburton’s corrective statements than some other new information. This matter of proof in securities litigation has been labeled “loss causation.” The court held that when a company makes mixed disclosures, plaintiffs have a heightened burden to separate actual corrective effects from the effects of new negative events.

Citing its own *Oscar precedent, the Fifth Circuit affirmed the district court. See 597 F.3d 330 (5th Cir. 2010). The Fifth Circuit first indicated that its *Oscar precedent requires a court to assess an alleged misrepresentation’s effect on market price at the class certification stage. In order to gain class certification, a plaintiff is required to prove loss causation—that is, “the corrected truth of the former falsehoods actually caused the stock price to fall and resulted in losses.” The appellate court held that a plaintiff must do more than simply allege a misrepresentation and show a price decline following a subsequent disclosure of negative information; a plaintiff must show that a stock’s price decline “resulted directly because of the correction to a prior misleading statement.”

The appellate court concluded that the Fund failed to show that any of Halliburton’s alleged misrepresentations had distorted the market price on which investors relied. The court held, therefore, that the plaintiffs failed to establish loss causation as to Halliburton’s statements regarding its asbestos liabilities, its accounting for revenue on unapproved claims, or its projections on the benefits of the merger with Dresser Industries. Consequently, the plaintiffs were not entitled to presume that the Fund and investors relied on the misrepresentations by relying on market price. Because there was no basis for assuming that investors relied on a distorted market price, the plaintiffs would have to prove reliance for each individual plaintiff, which defeated the predominance requirement for class certification.

In a unanimous opinion authored by Chief Justice Roberts (and the shortest of the four class action decisions), the Court answered the simple question whether, in a § 10(b) and Rule 10b-5 securities class action, must a plaintiff prove loss causation in order to obtain class certification, with an unqualified “No.”

In so doing, the Court reaffirmed the continuing vitality of its rebuttable presumption of reliance based on the fraud-on-the-market theory from *Basic Inc. v. Levinson*, 485 U.S. 224 (1988). Thus, the Fifth Circuit’s ruling, that a plaintiff needed to prove loss causation, would prevent a plaintiff from invoking the rebuttable presumption of reliance. Such a rule, according to the Court, contravenes Basic’s fundamental premise: that an investor presumptively relies on a misrepresentation so long as it was reflected in the market price at the time of his or her transaction.

Referring to another case decided this term, the Court indicated that the elements of a private securities fraud claim based on violations of § 10(b) and Rule 10b-5 are: (1) a material misrepresentation or omission by the defendant, (2) scienter, (3) a connection between the misrepresentation or omission and the purchase or sale of a security, (4) reliance upon the misrepresentation or omission, and (5) loss causation. *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. ___ (2011).

The Court indicated that the appellate court erred in holding that the Fund had to prove the separate element of loss causation in order to trigger the fraud-on-the-market presumption. The Court held that the Fifth Circuit’s requirement was not justified by the Basic decision or its logic. The Court indicated that it had never before mentioned proof of loss causation as a precondition for invoking Basic’s presumption of reliance. In addition, the term “loss causation” does not even appear in the Basic decision.

The Court noted that loss causation addresses something different than whether an investor relied on a misrepresentation when buying or selling a stock. Thus, the element of reliance in a private Rule 10b-5 action refers to transaction causation, and not loss causation (which requires a showing of subsequent economic loss).

In a peculiarity not missed by the Court, Chief Justice Roberts observed that even Halliburton had conceded that securities fraud plaintiffs should not be required to prove loss causation in order to invoke Basic’s presumption of reliance. However, the Court resoundingly rejected Halliburton’s somewhat tortured interpretation of the Fifth Circuit’s decision, with Halliburton arguing that the Fifth Circuit was discussing price impact in its opinion, and not loss causation. Repudiating Halliburton’s over-arching theory of the case (“We do not accept Halliburton’s wishful interpretation of the Court of Appeals’ opinion”), the Court indicated that whatever Halliburton thought the appellate court meant to say, what the Fifth Circuit did say was loss causation, and this was an inappropriate basis upon which to deny class certification.
Finally, the Court limited its opinion by not addressing any other question about the Basic decision, its presumption, or how or when the Basic presumption might be rebutted. The Court vacated the Fifth Circuit’s decision, but remanded the case for further proceedings, if Halliburton had preserved any other arguments against class certification.

**Smith v. Bayer Corp., No. 09-1205, 564 U.S. ___ (2011)**

In perhaps the most obscure of the four cases dealing with class action litigation, the Court in *Smith v. Bayer Corp.* essentially permitted a duplicative class action to proceed to class certification in a West Virginia state court, after a Minnesota federal court had denied class certification in an almost identical class action. Similar to the *AT&T Mobility* appeal, the Smith case involved considerations of federalism in federal-state class action litigation.

This case involved a technical construction of the so-called Anti-Injunction Act, 28 U.S.C. § 2283, which the Court in *Smith* interpreted and applied in its narrowest sense to prohibit a federal court from interfering with a parallel state proceeding. Of the four decisions, this case is the least likely to have “legs” or lasting implications. As explained below, the Court suggested, at the end of its opinion, reasons why the peculiar facts that gave rise to the Smith litigation may be avoided after Congress’s enactment of the Class Action Fairness Act of 2005.

The facts underlying this litigation present a landscape that sometimes arises when attorneys pursue similar class actions in both federal and state court against the same defendant. In 2001, Keith Smith and Shirley Sperlaanza filed a class action lawsuit against Bayer Corporation in West Virginia state court, alleging varying claims arising out of their use of the prescription drug Baycol, a drug manufactured and distributed by the Bayer Corporation from 1997 to 2001. Baycol is a “statin” drug that physicians prescribed to lower cholesterol. After its introduction to the market, Baycol became associated with an array of patient side effects, ranging from mild muscle aches and pains to more severe medical conditions such as rhabdomyolysis, an extreme breakdown of muscle tissue that compromises kidney function. After numerous adverse event reports, Bayer voluntarily withdrew Baycol from the market in August 2001.

After Baycol’s withdrawal, plaintiffs filed thousands of lawsuits in federal and state courts. In December 2001, the federal Judicial Panel on Multidistrict Litigation established a Baycol multidistrict litigation (MDL) in the United States District Court for the District of Minnesota. Between 2001 and 2010, the Minnesota Baycol MDL consolidated all the federal Baycol cases for coordinated discovery and other pretrial proceedings. In addition, the federal court worked cooperatively with state judges supervising or managing state Baycol litigation. As part of the MDL proceedings, the district court supervised a settlement program for Baycol claimants with the most severe rhabdomyolysis claims. Through 2010, Bayer Corporation has paid $1.17 billion to resolve 3,144 rhabdomyolysis claims.

Bayer also vigorously defended lawsuits by plaintiffs with all other claims, including economic loss claims, who were not injured by their use of Baycol. In these lawsuits, Baycol won defense victories in six jury trial cases. Of approximately 40,000 cases filed in federal and state court, fewer than 80 Baycol cases are still pending.

Against this backdrop, in 2001 George McCollins brought a lawsuit on behalf of a class of West Virginia Baycol purchasers, in West Virginia state court, asserting claims for economic loss caused by Bayer’s alleged breach of warranty and violation of the West Virginia Consumer and Credit Protection Act. In August 2001, this case was removed to the federal court on diversity grounds and transferred to the Minnesota Baycol MDL.

McCollins did not allege any claims for personal injury, nor did he claim that the drug had not worked as it was intended to reduce his cholesterol. He merely sought a refund of the amount he had paid for Baycol, or statutory damages, because class members had not received a product of the quality, nature, and fitness as represented by Bayer.

In August 2008, the Minnesota federal district court, in a series of rulings, denied McCollins’s request that the case be remanded back to West Virginia state court, granted Bayer’s motion to deny class certification, and then entered a summary judgment against McCollins. See *McCollins v. Bayer Corp.*, 265 F.R.D. 453 (D. Minn. 2008). In opposition to Bayer’s class certification motion, McCollins had argued that class certification was appropriate because common questions predominated over any individual issues.

The Minnesota district court held that class certification was not appropriate because McCollins’s economic loss claims were not suitable for certification under Rule 23(b)(3). Construing the underlying West Virginia law on economic loss, the court held that in order to prevail on an economic loss theory, a plaintiff would have to show injury proximately caused by the defendant. Because this inquiry was inherently individual as to each class member, the court determined that individual issues predominated and the class was not suitable for certification. Neither McCollins nor any class member appealed denial of the class certification, and this judgment became final on September 25, 2008.

On September 30, 2008, five days after the Minnesota judgment denying class certification became final, Keith Smith and Shirley Sperlaanza as class representatives sought class certification of their West Virginia state court class action seeking compensation for economic loss. This West Virginia state Baycol case was not removed to federal court because the plaintiffs had added two West Virginia defendants to the lawsuit, who were then dismissed after the one-year deadline for removal.

When the West Virginia plaintiffs sought class certification, Bayer moved on October 31, 2008, in the Minnesota federal district court to enjoin Smith and Sperlaanza from relitigating the certification of a West Virginia economic loss class. On December 9, 2009, the Minnesota federal district court granted this motion under the relitigation exception to the federal Anti-Injunction Act, 28 U.S.C. § 2283. This order is not officially reported, but is available at *In re Baycol Prods. Litig., Smith v. Bayer Corp.*, 2008 WL 7425712 (D. Minn. Dec. 9, 2008).

The court held that the economic loss class that the West Virginia plaintiffs sought to certify was identical to the class denied in McCollins; that the West Virginia class presented the same substantive issues; the plaintiffs had not identified any substantive or procedural differences between the federal and West Virginia class action rules; that the order denying class certification was final; and that the plaintiffs’ interests in obtaining class certification of a West Virginia economic loss class had been adequately represented in the federal proceedings.
The Eighth Circuit affirmed in January 2010, emphasizing the importance of the finality of judgments to the just and efficient administration of justice through federal MDL proceedings. See In re Baycol Prods. Litig., Smith v. Bayer Corp., 593 F.3d 716 (8th Cir. 2010). The Eighth Circuit chiefly relied on a Seventh Circuit decision upholding the issuance of an injunction against state class certification of similar proposed nationwide class actions that a federal court previously had denied class certification. See In re Bridgestone/Firestone, Inc. Tires Prod. Liab. Litig., 288 F.3d 1012 (7th Cir. 2002).

In reaching this conclusion the appellate court held that the certification issue in Smith was identical to that in McCollins and was enmeshed in the same substantive law. In addition, the Eighth Circuit held that there was no substantive or procedural difference between the federal and West Virginia standards for class certification that would justify allowing the plaintiffs to relitigate the federal district court’s finding of a lack of predominance. Finally, the Eighth Circuit agreed that the West Virginia plaintiffs’ interests had been adequately protected in McCollins, because they had the right to appeal denial of that class certification, as well as the right to pursue their individual claims.

* * *

In another unanimous decision, this time authored by Justice Kagan, the Court held that the Minnesota federal district court had exceeded its authority in issuing an injunction to restrain the class certification proceedings in the West Virginia state court. In so doing, the Court hewed to a very narrow application of the Anti-Injunction Act, concluding that the relitigation excepted to the act did not allow the Minnesota federal court to interfere with West Virginia state court proceedings.

In this instance, the Court not only narrowly construed the Anti-Injunction Act but also relied heavily on maxims and precepts relating to the importance of comity between the federal and state court systems, and the appropriate deference and noninterference required by the Anti-Injunction Act. Thus, the Court reiterated that the Anti-Injunction Act includes only specifically defined exceptions and that courts may not enlarge those exceptions by loose statutory construction. Citing Atlantic Coast Line R. Co. v. Locomotive Engineers, 398 U.S. 281 (1970). Construing the act’s relitigation exception, the Court noted that this exception authorizes federal courts to issue an injunction against a parallel state proceeding only to prevent state litigation of a claim or issue “that previously was presented to and decided by the federal courts.” Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 146 (1988). This inquiry, in turn, rests on well-recognized concepts of issue and claim preclusion.

Turning to issue preclusion, the Court indicated that at the outset the preclusive effect of any prior litigation may only be determined by a second court—in this instance the West Virginia state court. Issue preclusion entails a two-part inquiry: (1) the issue the federal court decided must be the same as the one presented in the state court, and (2) Smith must have been a party to the federal litigation or fit within an exception to the general rule against binding nonparties to the litigation. The Court held that the Anti-Injunction Act relitigation exception was inapplicable because the facts failed both parts of the test.

Thus, the Court held that an injunction could be issued only if preclusion is clear, and any doubts must be resolved in favor of the state court. Here, according to the Court, the issue that the federal court decided—its denial of class certification—was not the same as was presented in the state court. Hence, the federal court in the McCollins action had denied class certification based on Fed. R. Civ. P. 23, whereas the West Virginia state court was poised to determine class certification under the state class action rule.

The Court found it significant that the West Virginia Supreme Court generally has stated that it will not necessarily interpret its state class action rule as coterminal with the Federal Rule. Thus, in absence of evidence that the state court would track the same reasoning as the Minnesota federal court did in denying class certification under Federal Rule 23, the Court could not conclude that the certification issues in the two cases were the same. Moreover, there was evidence that the West Virginia Supreme Court had eschewed federal jurisprudence applying a stringent predominance requirement for Rule 23(b)(3) class actions, an approach embraced by the Minnesota federal court in denying class certification. This uncertainty about different applications of the federal and state class action rules precluded the issuance of an injunction against the state proceedings.

Finally, the Supreme Court, at the conclusion of its opinion, addressed the underlying policy question whether a federal court’s inability to enjoin parallel state class certification proceedings—where a federal court previously has denied class certification in an identical action—will encourage forum-shopping. The Court indicated that such scenarios seem less likely after Congressional enactment of the Class Action Fairness Act of 2005 (CAFA), 28 U.S.C. §§ 1332(d) and 1453. CAFA now enables defendants to remove state class actions into federal court, where the provisions of Federal Rule 23 govern. In addition, under the multidistrict litigation statute, 28 U.S.C. § 1407, federal courts may transfer and consolidate in one venue overlapping class actions. Thus, the situation presented in this Smith litigation—which initiated before enactment of CAFA—is unlikely to reoccur with any frequency.

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The Court’s Preemption Cases
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The Court’s preemption jurisprudence is not always a model of clarity or certainty. Perhaps this should not surprise, given the many different interests pushing and pulling, often at cross-purposes, in preemption cases. Preemption raises complicated issues of federalism, institutional competence, and statutory interpretation, just to name a few. If we overlay these issues with the conventional wisdom on the justices’ political ideologies, we start to get a picture of just how knotty these cases can be. And because the federal and state laws at issue in each case are unique, the Court necessarily proceeds case by case, sometimes resulting in an apparently disjointed jurisprudence.

If the Court’s preemption jurisprudence usually has twists and turns, this term’s preemption cases did not disappoint. The Court decided five preemption cases this term, four of which involved state common law standards applied in state and federal courts, and one of which involved state statutory law. The results do not obviously hang together well within any single dimension or any one proxy for the justices’ political ideologies. For example, the Court did not obviously favor the federal government over the states (or vice versa): it ruled for federal preemption in three cases and against preemption in two. It did not seem to favor (or not) state court forums, state juries, and the legal standards they set: it ruled for federal preemption of state tort claims in two cases and against preemption in one; and it ruled for federal preemption over state common law in a case in federal court. It did not consistently defer to the federal government’s position: it ruled with the government in two cases and against it in two. And it did not rule overwhelmingly for business interests over individuals (or vice versa): its rulings favored business interests in three cases, but disfavored business interests in one and favored individuals in another. Two cases this term came on the heels of previous cases touching on the same or very similar issues; the Court distinguished the prior cases in both and ruled the other way.

If Court watchers were looking for any indication about how the Court might rule if and when it considers the most recent Arizona immigration law, S.B. 1070—the elephant in the room in any preemption discussion today—they did not get much satisfaction. Even Chamber of Commerce v. Whiting, 131 S. Ct. 1968, the Court’s decision upholding Arizona’s punitive licensing scheme for businesses that employ unlawful aliens, does not help much in predicting how the Court might rule on S.B. 1070. Unlike the Court’s preemption cases this term, the challenge to S.B. 1070 involves novel questions related to interpretation of text and congressional purpose within each kind of preemption, including “field” preemption, a type of preemption that the Court did not address this term. Thus the cases this term give little clue how the Court might rule on S.B. 1070.

But while the results in the cases this term might seem disjointed, the alignments and voting patterns of the justices showed much greater consistency and predictability. Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Alito always voted together on this term’s preemptions cases. Justice Thomas, a strict textualist on preemption (and other issues), joined this group’s opinions except when they ventured outside the statutory text for their analysis. Justice Kennedy declined to join this group only for a portion of Justice Thomas’s opinion that argued for an especially strong version of textualism.

Usually on the other side, Justices Ginsburg and Sotomayor always voted together, only once signing different opinions (but on the same side). Justice Kagan joined them, except for the three cases from which she recused herself. Justice Breyer also joined them in all but one case.

The Court split 5-4 or 5-3 (with Justice Kagan recused) in three cases. But it split 6-2 in one (with Justice Breyer switching and Justice Kagan recused), and it issued one unanimous ruling (with Justice Kagan recused). While the splits tended to divide along conventional ideological lines, it is important to remember that these cases often defy easy categorization along the conventional ideological spectrum. The many complicated issues and the necessarily case-by-case approach mean that the results, as described above, do not always come out as we might predict.

If there is one running theme in the Court’s preemption rulings this term, it is methodology. The Court traditionally considers congressional purpose the touchstone of its preemption analysis; it looks first to text to discern that purpose and then to legislative history and other indicators (such as the views of the regulating agency). That basic framework remains intact. But within that framework, there are some interesting debates about how and even whether to look beyond the text.

The Court split most frequently on these questions in its express preemption and conflict (or impossibility) preemption cases—those cases that, by necessity, look first to text. Justice Thomas represented the Court’s most ardent and consistent textualist position. He joined the majority in every case, but he consistently declined to join those opinions or portions of opinions that looked beyond the text to discern legislative purpose. He also propounded an originalist approach to the Supremacy Clause in his opinion for the Court in PLIVA v. Mensing, 131 S. Ct. 817, a conflict (or impossibility) preemption case, that would take the federal legislative text at face value, not working to harmonize it with state law in order to avoid preemption, and thus put a heavy thumb on the scale of federal preemption, at least in those cases that can be resolved on the text alone. (Chief Justice Roberts and Justices Scalia and Alito joined that portion of Justice Thomas’s opinion; Justice Kennedy did not.) Justice Scalia showed only slightly less pure textualist tendencies in express preemption and conflict (or impossibility) preemption cases. For example, he focused on text and structure first in his opinion for the Court in Bruesewitz v. Wyeth, 562 U.S. ____, an express preemption case, and addressed legislative history, but only in order to answer the dissent’s arguments. Chief Justice Roberts and Justices Kennedy, Ginsburg, Breyer, Alito, Sotomayor,
A closer look at the cases will help reveal the patterns in methodology and alignments, and the sometimes surprising results. First, I examine \textit{Bruesewitz} and \textit{PLIVA}, the two express and conflict (or impossibility) preemption cases. Then I review \textit{Whiting}, which involves both express preemption and preemption of state law by frustrating the purpose of federal law. Finally, I examine \textit{AT&T} and \textit{Williamson}, the two cases raising only preemption of state law by frustrating the purpose of federal law.

\textbf{BRUESEWITZ v. WYETH}

\textit{Bruesewitz} tested whether the federal no-fault compensation program for claimants injured by vaccines preempts a state tort claim for design defect against the vaccine manufacturer. The compensation program, established under the National Childhood Vaccine Injury Act of 1986, provides that an individual alleging a vaccine-related injury may file a petition for compensation in the U.S. Court of Federal Claims, the “Vaccine Court.” (Awards are paid out of an excise tax on each vaccine dose.) A claimant may accept the court’s judgment or reject it and seek tort relief from the vaccine’s manufacturer.

But the act eliminates manufacturer liability for certain “unavoidable” injuries. The act’s preemption provision reads as follows:

\textit{No vaccine manufacturer shall be liable in a civil action for damages arising from a vaccine-related injury or death associated with the administration of a vaccine after October 1, 1988, if the injury or death resulted from side effects that were unavoidable even though the vaccine was properly prepared and was accompanied by proper directions and warnings.}

42 U.S.C. § 300a-22(b)(1) (emphasis added).

Hannah Bruesewitz’s parents filed a claim with the Vaccine Court when she developed residual seizure disorder and developmental delay after receiving a diphtheria, tetanus, and pertussis (DTP) vaccine manufactured by Lederle Laboratories (now owned by Wyeth). The Vaccine Court denied their claim. They then sued in Pennsylvania state court, alleging that the vaccine’s design defect caused Hannah’s disabilities and that Lederle was subject to strict liability and liability for negligent design under Pennsylvania common law. (In short, they argued that Lederle should have used a safer design.) Wyeth removed the case to federal court and argued that the federal compensation program, with its preemption provision quoted above, preempted the Bruesewitz’s claims.

The Supreme Court agreed. Justice Scalia writing for the Court, and joined by Chief Justice Roberts and Justices Kennedy, Thomas, Breyer, and Alito, indicated that the plain language of the preemption clause expressly preempts design defect claims like the Bruesewitz’s. In an opinion that reads like a lesson in sentence construction, he wrote that the “even though” clause clarifies the word “unavoidable,” so that the clause preempts claims for unavoidable injuries (given proper preparation and warning), with respect to the design of the particular vaccine at issue. According to the majority, the preemption provision does not even take account of design defect claims; instead, it suggests that a vaccine’s design is not subject to challenge and contemplates only claims that challenge a vaccine’s preparation or warning. The larger structure of the act supports this conclusion. Therefore the Bruesewitz’s design defect claim is expressly preempted.

Justice Breyer wrote separately to emphasize his view that the legislative history, statutory purpose, and positions of the federal agency also support the Court’s holding.

Justice Sotomayor wrote a dissent, joined by Justice Ginsburg, that argued that the language, structure, and legislative history all suggest that the act does not preempt design defect claims. She argued that the term “unavoidable” must refer to harms not caused by improper manufacturing or warning (the only two causes mentioned by the provision); and the only other cause left is design defect. Moreover, Justice Sotomayor argued that the structure of the act and use of the term “unavoidable” in other contexts outside the act both suggest that the act does not preempt design defect claims. Finally, she argued that legislative history suggests that Congress intended to adopt the Restatement approach to the term “unavoidable”—an approach that allows consideration of feasible alternative designs, or design defects, in determining a manufacturer’s tort liability. (Justice Kagan recused herself from the case.)

\textbf{PLIVA v. MENSING}

\textit{PLIVA} involved the preemptive effect of federal drug labeling requirements on state failure-to-warn claims against \textit{generic} manufacturers. (The Court ruled last term in \textit{Wyeth v. Levine}, 129 S. Ct. 1187, that federal drug labeling requirements did not preempt state failure-to-warn claims against \textit{brand-name} manufacturers. \textit{PLIVA} tested whether labeling requirements for generic manufacturers were different enough to warrant preemption.) The \textit{PLIVA} plaintiffs developed tardive dyskinesia, a severe neurological disorder, from their long-term use of generic metoclopramide to treat digestive tract problems. They sued the generic manufacturers in state court for failing to provide adequate labels that would have warned against long-term use of the drug. The manufacturers argued that federal drug labeling requirements preempted the claims. They said that federal law required generic manufacturers to follow the label approved by the FDA for brand-name equivalent drugs (which in this case did not include a warning against long-term use), that they therefore had no independent authority to change their label to warn against long-term

and Kagan all showed a willingness to using both text and legislative history (and other indicators of legislative purpose), but this group often split sharply on how to interpret those sources.
use, and that any state tort judgment based on their failure to warn would conflict with the federal scheme requiring them to follow the equivalent brand-name label.

A sharply divided Court agreed. Justice Thomas delivered the opinion of the Court, joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Alito. He wrote that the plain language of the federal labeling requirements for generic manufacturers (which required generic manufacturers to follow the label for the brand-name equivalent) conflicted with applicable state law (which required a manufacturer to give a warning of known dangers or to give adequate instructions for use) such that it was impossible for a generic manufacturer to comply with both. He rejected arguments that federal law allowed generic manufacturers to advocate for a label change, thus potentially allowing them to comply with both federal and state law, and that the manufacturers here did not even try to start the process that might have led to a federally approved label change. The possibility that the manufacturers might have complied with both federal and state law by taking one of these two actions, he wrote, was too speculative. He concluded that federal law preempted state suits.

Justice Thomas went one step further. He wrote that the original use of a phrase in the Supremacy Clause—“any Thing in the Constitution or Laws of any State to the Contrary notwithstanding,” a non obstante clause by 18th century usage—suggests that federal law should implicitly repeal conflicting state law. He argued that according to the original use of this clause, courts today should only look at the ordinary meaning of federal law to determine its preemptive effect, and not “distort it to accommodate conflicting state law.” According to Justice Thomas, this interpretation rules out consideration of uncertain acts of third parties, such as the FDA’s possible approval of a label change; it might also rule out consideration of legislative history and purpose in preemption analysis. Chief Justice Roberts and Justices Scalia and Alito joined this portion of the opinion—Justice Kennedy did not—lending a solid four votes to Justice Thomas’s more robust theory of preemption.

Justice Sotomayor wrote the dissent, joined by Justices Ginsburg, Breyer, and Kagan. She argued that the generic manufacturers’ ability to advocate for a label change allowed them to comply with both federal and state law. She said that the manufacturers here only showed a possibility that they could not meet both federal and state requirements—and a possibility of impossibility is not enough for conflict preemption. Justice Sotomayor argued that the Court set a new standard for conflict preemption, favoring preemption in cases where a manufacturer might comply with both federal and state law, and effectively rewrote Wyeth v. Levine.

**Chamber of Commerce v. Whiting**

In perhaps the most closely watched preemption case this term, a sharply divided Court ruled in *Chamber of Commerce v. Whiting* that the federal Immigration Reform and Control Act (IRCA) did not preempt an Arizona law that revokes the licenses of state employers that knowingly or intentionally employ unauthorized aliens and that requires all Arizona employers to use the E-Verify system to verify the status of their employees. Chief Justice Roberts writing for the Court, and joined by Justices Scalia, Kennedy, Thomas, and Alito, concluded that those provisions of Arizona law fell squarely within IRCA’s saving clause, and therefore IRCA did not preempt Arizona law.

IRCA expressly preempts “any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.” The Legal Arizona Workers Act of 2007 authorizes Arizona courts to suspend or revoke business licenses of any employer that knowingly or intentionally employs an unauthorized alien. The Arizona law also requires that “every employer, after hiring an employee, shall verify the employment eligibility of the employee” by using E-Verify.

Relying upon the text of the federal and state laws, Chief Justice Roberts wrote that “Arizona law, on its face, purports to impose sanctions through licensing laws,” that Arizona law thus falls within the IRCA’s saving clause, and that the IRCA therefore does not expressly preempt it. He rejected arguments by the Chamber and the United States (as amicus) that the Arizona statute is not a licensing law because it operates only to suspend or revoke licenses (and not to grant them). He also rejected arguments by the Chamber to limit the scope of IRCA’s saving clause.

Chief Justice Roberts wrote further that the IRCA did not implicitly preempt Arizona law. He wrote that neither the license-revocation law nor the E-Verify requirement conflicted with federal objectives in the IRCA; in fact, Arizona went to lengths to ensure that its law closely tracked the IRCA. But the chief justice garnered only four votes for these portions of his opinion; Justice Thomas declined to join.

Justice Breyer wrote a dissent, joined by Justice Ginsburg, arguing that Arizona’s licensing law is too broad to fit within the IRCA’s saving clause. He argued that the law’s capacious definition of “license,” which includes “virtually every state-law authorization for any firm, corporation, or partnership to do business in the State,” goes far beyond what Congress intended. And moreover this overly broad definition obstructs congressional objectives in the IRCA by encouraging Arizona firms to discriminate against workers because of their national origin (in order to protect themselves from losing their licenses) and by subjecting lawful employers to increased burdens and risks of erroneous prosecution. Justice Breyer argued that the “[c]ontext, purpose, and history [of the IRCA] make clear that the ‘licensing and similar laws’ at issue involve employment-related licensing systems.” According to Justice Breyer, Arizona’s law goes beyond an employment-related licensing system, runs up against federal objectives, and is therefore preempted. Finally, Justice Breyer argued that Arizona’s requirement that employers use E-Verify undermines the voluntary nature of that program.

Justice Sotomayor wrote a dissent arguing that the IRCA establishes a comprehensive and centralized federal process for determining whether an employer has knowingly employed an unauthorized alien, and that it withholds from the states the information necessary to make that determination. She argued that the IRCA’s saving clause can therefore only apply to state licensing sanctions after a final federal determination that an employer violated the IRCA. But the Arizona law allows for an independent state process for making this determination. It therefore falls outside the saving clause. Justice Sotomayor argued further that Arizona’s E-Verify requirement “effectively made a decision for Congress regarding use of a federal resource, in contravention of the significant policy objectives motivating Congress’ decision to make participation in the E-Verify program voluntary.”

**AT&T Mobility LLC v. Concepcion**

The Court in *AT&T Mobility LLC v. Concepcion* held that the Federal Arbitration Act (FAA) preempted state common law that would have rendered an arbitration clause unconscionable. The case arose out of...
a contract for cell phone service between Vincent and Liza Concepcion and AT&T. The Concepcions purchased AT&T service, which included, as advertised, “free” phones. But AT&T charged the Concepcions (and a good number of other customers) sales tax on the retail value of the phones. The Concepcions filed a complaint in federal district court, which was later consolidated with a putative class action alleging that AT&T engaged in false advertising and fraud.

AT&T moved to compel arbitration under the cell phone contract. The contract provided for arbitration of all disputes between the parties and required that claims be brought in a customer’s individual capacity, not as a class. The district court rejected AT&T’s motion, and both lower courts found the clause unconscionable under Discover Bank v. Superior Court, 36 Cal. 4th 148 (2005), a California Supreme Court case setting the California common law standard for unconscionability of arbitration agreements, because AT&T failed to show that bilateral arbitration adequately substituted for a class action. The Ninth Circuit further ruled that the “Discover Bank rule” was not preempted by the FAA because it fell within the FAA saving clause.

A sharply divided Supreme Court reversed. Justice Scalia wrote the opinion of the Court, joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito. In an opinion focusing principally on the opinion of the Court, joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito. He argued that the FAA’s saving clause in § 2—which permits arbitration agreements to be declared unenforceable “upon such grounds as exist at law or in equity for the revocation of any contract”—permits arbitration agreements to be invalidated by generally applicable contract defenses (such as unconscionability), but not by “defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.” If it were otherwise, he wrote, contract defenses to arbitration would undermine the very purpose of the FAA: to ensure that private arbitration agreements are enforced. Moreover, the Discover Bank rule creates incentives for parties such as the Concepcions to demand class arbitration—a complicated process that involves high stakes for the defendants. The incentives for class arbitration mean that parties such as AT&T may be less willing to arbitrate, again undermining this core purpose of the FAA.

Justice Thomas wrote separately to express his view that the text alone supported preemption. Justice Thomas wrote that the text and structure suggest that the saving clause applies to defenses related only to contract formation (such as fraud, duress, or mistake) and not to defenses based on public policy (such as unconscionability, as in the Discover Bank rule). Therefore, in his view, the text alone conflicts with, and preempts, the Discover Bank rule.

Justice Breyer wrote the dissent, joined by Justices Ginsburg, Sotomayor, and Kagan. He argued that the Discover Bank rule is consistent with the FAA’s text and purpose. As to the text, he argued that the rule fits squarely within the saving clause language that permits courts to refuse to enforce arbitration agreements on grounds that exist “for the revocation of any contract.” As to purpose, he argued that the legislative history identifies the act’s basic purpose as reflected in § 2, which says that an arbitration agreement “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract”—including the very saving clause that so plainly encompasses the Discover Bank rule. Justice Breyer finally disputed the Court’s conclusions that the rule increases the complexity of arbitration and therefore undermined the purposes of the federal act; he argued that neither the history of the FAA nor the practice of class arbitration support these conclusions.

Williamson v. Mazda Motor of America, Inc.

A unanimous Court in Williamson v. Mazda Motor of America, Inc. held that Federal Motor Vehicle Safety Standard 208, which requires auto manufacturers to install either simple lap belts or lap-and-shoulder belts on rear inner seats in minivans, did not preempt a state tort suit claiming that the manufacturer should have installed a lap-and-shoulder belt. The case arose out of a head-on collision that killed Thanh Williamson, a passenger wearing a lap belt in a rear aisle seat of a Mazda minivan. The Williamson family and Thanh’s estate sued in state court, claiming that Mazda should have installed a lap-and-shoulder belt on the rear aisle seats, and that Thanh died because Mazda equipped the minivan with a lap belt instead.

The state court dismissed the case, ruling that it was governed by Geier v. American Honda Motor Co. In Geier, the Supreme Court held that a different portion of an earlier version of Safety Standard 208 preempted a state tort suit that sought to hold Honda liable for failure to install an airbag. 529 U.S. 861 (2000). The Court held that the purpose of Safety Standard 208 in Geier was to give manufacturers a choice of passive restraints to install in their cars. The state tort suit for failure to install a particular kind of restraint would therefore undermine that purpose by depriving the manufacturer of that choice. The Court ruled in Geier that Safety Standard 208 preempted the plaintiff’s state tort claim.

The Court in Williamson distinguished Geier and reversed. In an opinion by Justice Breyer and joined by all but Justice Thomas, the Court wrote that the purpose of the Safety Standard in this case was to progressively promote the use of safer lap-and-shoulder belts, not to give manufacturers a choice. The Court wrote that the Safety Standard in this case allowed manufacturers to choose between lap belts and lap-and-shoulder belts for the rear aisle seats, but that this choice was designed to encourage manufacturers to move toward safer lap-and-shoulder belts through innovation in design and increased cost-effectiveness for lap-and-shoulder belts. Justice Breyer wrote that a state tort suit that would require lap-and-shoulder belts for rear aisle seats did nothing to undermine this purpose. The Safety Standard therefore did not preempt the suit.

Justice Thomas concurred in the result but wrote separately to express his view that the plain text of the federal Safety Act’s saving clause led to the same result. That clause says that “[c]ompliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law.” Justice Thomas wrote that the Court effectively wrote the saving clause out of the act in Geier by reading it to cancel out the express preemption clause with respect to common law tort claims. The Court then instead looked to the purpose and objective of the act—an approach that Justice Thomas rejects.

Conclusion

The Court’s preemption jurisprudence is not always as clear and predictable as we might like. This term is no different. The results sometimes surprise, even if the alignments are familiar and the methodologies show some patterns. The cases this term do not offer strong insights into how (or even whether) the Court might treat the most significant preemption case now in the lower courts—the case testing Arizona’s immigration law, S.B. 1070, against the comprehensive federal immigration system. But if the Court takes that case, we might reasonably guess that it will use traditional methodology, looking to text and legislative history to discern congressional purpose. The case will then turn on how the justices interpret these sources.
And for all the familiarity in the justices’ alignments this term, there were still some fine distinctions in interpretation and some rulings that did not seem to flow from popularly assumed political ideologies. All this is to say that the cases this term give us some indication of where the Court is headed with its preemption jurisprudence, but they also leave some significant indeterminacies. But this is to be expected in this area of constitutional law, which involves complicated and often opposing interests and requires a case-by-case approach.

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The Commission’s interpretation of its part in consideration or decision): except for Justice Kagan, who took no part in consideration or decision (joined by all members of the Court). From the opinion by Justice Thomas will defer to the FCC.

interconnection, is reasonable and the Court based rates if the facilities are to be used for facilities available to competitors at cost-based rates. (LEC) must make its existing entrance facilities available to competitors at cost-based rates unless it is entitled to deference?

Yes.

The Federal Communications Commission’s (FCC) interpretation of its rules is neither plainly erroneous nor inconsistent with the regulatory text. Contrary to AT&T’s assertion, there is no danger that deferring to the Commission would effectively permit the agency, under the guise of interpreting a regulation, to create de facto a new regulation.

Concurring: Justice Scalia
Taking no part in consideration or decision: Justice Kagan

Appellate Procedure
United States v. Juvenile Male

Docket No. 09-940
Vacated and Remanded: The Ninth Circuit

Argued: N/A
Decided: June 27, 2011
Analysis: N/A

Overview: The respondent here, a juvenile male, was charged with delinquency by the state of Montana for sexually abusing another boy. After the respondent pleaded “true” to the allegations, Congress passed the Sex Offender Registration and Notification Act (SORNA), requiring sex offenders to register with their local jurisdiction. The respondent challenged a “special condition” for supervised release entered by the district court requiring him to register and keep current as a sex offender until his 21st birthday. While his challenge was pending, the respondent turned 21 and the special conditions expired. The Ninth Circuit subsequently issued a ruling holding that parts of SORNA violate the Ex Post Facto Clause.

Issue: Did the Ninth Circuit have the authority to enter judgment in this case?

No. The Court of Appeals had no authority to enter judgment in this case because there was no live controversy.

From the Per Curiam opinion:
But as the Montana Supreme Court has now clarified, respondent’s “state law duty to remain registered as a sex offender is not contingent upon the validity of the conditions of his federal supervision order,” and continues to apply regardless of the outcome in this case. True, a favorable decision in this case might serve as a useful precedent for respondent in a hypothetical lawsuit challenging Montana’s registration requirement on ex post facto grounds. But this possible, indirect benefit in a future lawsuit cannot save this case from mootness.

Remanding the case for consideration of mootness: Justices Ginsburg, Breyer, and Sotomayor
Taking no part in consideration or decision: Justice Kagan

Arbitration
AT&T Mobility LLC v. Concepcion

Docket No. 09-893
Vacated and Remanded: The Ninth Circuit

Argued: November 9, 2010
Decided: April 27, 2011
Analysis: See ABA PREVIEW 87 ISSUE 2

Overview: Customers brought a class action against AT&T Mobility alleging that the company’s offer of a free phone to anyone who signed up for its service was fraudulent. AT&T Mobility moved to compel each customer to submit the claim to arbitration pursuant to the wireless service agreement’s consumer-friendly arbitration clause. The Court must now determine whether the Federal Arbitration Act preempts state law precedent that makes unenforceable a contractual ban on class actions, even if it is embedded in an arbitration agreement that favors consumers.

Issue: Does the Federal Arbitration Act preempt a California state decision that held that a class action ban embedded in an arbitration clause is unenforceable?

Yes. The California state decision is preempted because it “stands as an obstacle to the accomplishment and execution of the full and objective of Congress.”

From the opinion by Justice Scalia (joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito):
The overarching purpose of the FAA, evident in the text of §§ 2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.

Concurring: Justice Thomas
Dissenting: Justice Breyer (joined by Justices Ginsburg, Sotomayor, and Kagan)

Attorney-Client Privilege
United States v. Jicarilla Apache Nation
Docket No. 10-382
Reversed and Remanded: The Federal Circuit

Argued: April 20, 2011
Decided: June 13, 2011
Analysis: See ABA PREVIEW 296 ISSUE 7

Overview: As a fiduciary, the secretary of the interior and his staff hold, in trust, certain funds of the Jicarilla Apache Nation, which are derived from the natural resources mined from tribal land. The tribe sued the United States to compel an accounting of the fund. The issue here is whether the tribe can invoke the fiduciary exception to the attorney-client privilege, under which a fiduciary may not shield from trust fund beneficiaries communication with its attorneys on fiduciary matters, in order to compel the production of documents about Indian trust funds managed by the secretary of the interior.

Issue: When the United States acts as a fiduciary to an Indian tribal trust fund, is the “real client,” for purposes of invoking the attorney-client privilege, the U.S. government?

Yes. When the United States is acting as a fiduciary for an Indian tribe’s trust fund, the government is the “real client” for the purpose of the attorney-client privilege and the fiduciary exception does not apply.

From the opinion by Justice Alito (joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas):
The trust obligations of the United States to the Indian tribes are established and governed by statute rather than the common law, and in fulfilling its statutory duties, the Government acts not as a private trustee but pursuant to its sovereign interest in the execution of federal law. The reasons for the fiduciary exception—that the trustee has no independent interest in trust administration, and that the trustee is subject to a general common-law duty of disclosure—do not apply in this context.

Concurring: Justice Ginsburg (joined by Justice Breyer)
Dissenting: Justice Sotomayor
Taking no part in consideration or decision: Justice Kagan

Attorneys’ Fees
Fox v. Vice
Docket No. 10-114
Vacated and Remanded: The Fifth Circuit

Argued: March 22, 2011
Decided: June 6, 2011
Analysis: See ABA PREVIEW 239 ISSUE 6

Overview: Fox sued Vice for violating his constitutional rights. He also asserted related tort claims. Facing a motion for summary judgment on the constitutional claims, Fox dismissed the claims but continued to assert his tort claims. The district court determined that the constitutional claims were frivolous and ordered Fox to pay Vice’s attorneys’ fees incurred in defending the case. Fox contends that 42 U.S.C. § 1988 (b) did not give the court the power to award attorneys’ fees.

Issues: Can defendants be awarded attorneys’ fees under § 1988 in an action based on dismissal of a claim, where the plaintiff asserted other interrelated and nonfrivolous claims?

Yes. When a plaintiff’s suit involves both frivolous and nonfrivolous claims, a court may grant reasonable fees to the defendant, but only for costs that the defendant would not have incurred but for the frivolous claims.

Is it improper to award defendants all of the attorneys’ fees they incurred in an action under § 1988 (b), where the fees were spent defending nonfrivolous claims that were intertwined with the frivolous claims?

Yes. The lower courts used an incorrect standard in awarding fees to Vice. Although the district court noted the usefulness of the attorney's work in defending against the state-law claims, it failed to take proper account of the overlap between the frivolous and nonfrivolous claims.

From the unanimous opinion by Justice Kagan:
The dispositive question is not whether attorney costs at all relate to a nonfrivolous claim but whether the costs would have been incurred in the absence of the frivolous allegation. The answers to these inquiries will usually track each other, but when they diverge, it is the second that matters.

Banking
Chase Bank USA v. McCoy
Docket No. 09-329
Reversed and Remanded: The Ninth Circuit

Argued: December 8, 2010
Decided: January 24, 2011
Analysis: See ABA PREVIEW 142 ISSUE 3

Overview: This case concerns disclosures credit card issuers are required to make to consumers about interest rate increases. Although the pertinent Regulation Z provisions have changed, credit card issuers remain vulnerable to litigation arising under the regulations as they previously existed. Questions about the credit card industry’s reliance on their understanding of Federal Reserve regulations, as well as the appropriate degree of judicial deference due to a federal agency’s interpretations of its own regulations, give this case a high degree of relevance going forward, not only in the banking industry but as a matter of general administrative law.

Issue: When a credit card issuer had provided a cardholder with initial disclosures that the interest rate on the card account could increase up to a stated maximum interest rate in the event of a customer default, did the applicable version of Regulation Z require the issuer to provide the cardholder with a subsequent notice of a change in terms and a disclosure of the new rate?

No. The previously existing Regulation Z, as the Federal Reserve Board argues it was defined, did not require subsequent notice of a change in terms and interest rate.

From the unanimous opinion by Justice Sotomayor:
The Board has made clear in the amicus brief it has submitted to this Court that, in the Board’s view, Chase was not required to give
McCoy notice of the interest rate increase under the version of Regulation Z applicable at the time. Under Auer v. Robbins, 519 U.S. 452 (1997), we defer to an agency’s interpretation of its own regulation, advanced in a legal brief, unless that interpretation is “plainly erroneous or inconsistent with the regulation.” Because the interpretation the Board presents in its brief is consistent with the regulatory text, we need look no further in deciding this case.

**Bankruptcy**

**Ransom v. MBNA, America Bank, N.A.**

**Docket No. 09-907**

**Affirmed: The Ninth Circuit**

Argued: October 4, 2010  
Decided: January 11, 2011  
Analysis: See ABA PREVIEW 41 ISSUE 1

**Overview:** Jason Ransom, a chapter 13 debtor, proposed a payment plan. To be confirmed by the Bankruptcy Court, a plan must pay creditors “all the debtor’s projected disposable income.” The Bankruptcy Code permits various income deductions including those set forth in certain Internal Revenue Service charts. One such chart is “Vehicle Ownership Costs.” The code does not say, however, who is permitted to deduct the amount in the chart. Ransom deducted the specified amount for vehicle ownership costs; the creditors claim that the chart does not apply to him because his car was completely paid for. The Bankruptcy Court, the Bankruptcy Appellate Panel, and the Ninth Circuit all agreed with the creditors.

**Issue:** In calculating the debtor’s “projected disposable income” during the plan period, may the debtor deduct automobile “ownership costs” pursuant to Internal Revenue Service charts even though the debtor’s vehicle is completely paid for?

**No.** Debtors who are not making loan or lease payments cannot take the car-ownership deduction provided under the Bankruptcy Code.

**From the opinion by Justice Kagan**

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

Based on BAPCPA’s text, context, and purpose, we hold that the Local Standard expense amount for transportation

“Ownership Costs” is not “applicable” to a debtor who will not incur any such costs during his bankruptcy plan. Because the “Ownership Costs” category covers only loan and lease payments and because Ransom owns his car free from any debt or obligation, he may not claim the allowance. In short, Ransom may not deduct loan or lease expenses when he does not have any.

**Dissenting:** Justice Scalia

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**Bankruptcy**

**Stern v. Marshall**

**Docket No. 10-179**

**Affirmed: The Ninth Circuit**

Argued: January 18, 2011  
Decided: June 23, 2011  
Analysis: See ABA PREVIEW 186 ISSUE 4

**Overview:** Vickie Lynn Marshall, the celebrity better known as Anna Nicole Smith, filed bankruptcy after her wealthy husband died, leaving her nothing. His son, Pierce, then claimed in bankruptcy court that she had defamed him (Pierce) by alleging that he had wrongfully interfered with his father’s plans to provide for her. Vickie sued by the allegations and counterclaimed for her injuries from Pierce’s conduct. Under 28 U.S.C. § 157(b), bankruptcy judges may resolve certain “core proceedings,” including “counterclaims … against persons filing claims.” Does that encompass Vickie’s counterclaim? Is it unconstitutional to confer such broad authority on judges lacking the life tenure required by Article III?

**Issue:** May a bankruptcy court finally decide as a core matter any compulsory counterclaim the estate asserts against a party that has filed a proof of claim against the estate?

**No.** Although the bankruptcy court had the statutory authority to rule on this estate matter, it did not have the constitutional authority to do so.

**From the opinion by Chief Justice Roberts**

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

What is plain here is that this case involves the most prototypical exercise of judicial power: the entry of a final, binding judgment by a court with broad substantive jurisdiction, on a common law cause of action, when the action neither derives from nor depends upon any agency regulatory regime. If such an exercise of judicial power may nonetheless be taken from the Article III Judiciary simply by deeming it part of some amorphous “public right,” then Article III would be transformed from the guardian of individual liberty and separation of powers we have long recognized into mere wishful thinking.

**Concurring:** Justice Scalia  
**Dissenting:** Justice Breyer (joined by Justices Ginsburg, Sotomayor, and Kagan)

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**Civil Procedure**

**Erica P. John Fund, Inc. v. Halliburton Co.**

**Docket No. 09-1403**

**Vacated and Remanded:** The Fifth Circuit

Argued: April 25, 2011  
Decided: June 6, 2011  
Analysis: See ABA PREVIEW 284 ISSUE 7

**Overview:** The Erica P. John Fund sued Halliburton Co. in a securities fraud class action for losses stemming from alleged misleading statements. Halliburton claimed that the Fund had not satisfied the predominance requirement for class certification. The Court must now determine a plaintiff’s burden of proof to support class certification based on the so-called “fraud-on-the-market” presumption.

**Issue:** Do plaintiffs seeking certification of a securities fraud class action, in addition to invoking a rebuttable fraud-on-the-market presumption, have to demonstrate, by a preponderance of the evidence, “loss causation,” that alleged misrepresentations had an impact on a company’s stock price?

**No.** Securities fraud plaintiffs need not prove loss causation in order to obtain class certification.

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

According to the Court of Appeals, however, an inability to prove loss causation would prevent a plaintiff from invoking the rebuttable presumption of reliance. Such a rule contravenes Basic’s fundamental premise—that an investor presumptively relies on a misrepresentation so long as it was reflected in the market price at the time of his transaction. The fact that a subsequent loss may have been caused by factors other than the revelation of a misrepresentation has nothing to
do with whether an investor relied on the misrepresentation in the first place, either directly or presumptively through the fraud-on-the-market theory. Loss causation has no logical connection to the facts necessary to establish the efficient market predicate to the fraud-on-the-market theory.

Civil Procedure
Henderson v. Shinseki
Docket No. 09-1036
Reversed and Remanded: The Federal Circuit

Argued: December 6, 2010
Decided: March 1, 2011
Analysis: See ABA PREVIEW 107 ISSUE 3

Overview: 38 U.S.C. § 7266(a) allows a veteran to appeal a Board of Veterans’ Appeals final decision to the Court of Appeals for Veterans Claims, an independent Article I federal court, within 120 days after the date on which notice of the Board’s decision is mailed. In this case, a veteran missed that deadline but argued that the deadline was subject to equitable tolling. The Court is being asked to decide whether that Article I federal court deadline is a limitation on federal court subject-matter jurisdiction.

Issue: 38 U.S.C. § 7266(a) limits federal subject-matter jurisdiction, such that it is not subject to equitable tolling, as opposed to merely an interruption in the running of the statutory time limit for filing?

No. The Veterans Court deadline for filing a notice of appeal is not a limit on federal court subject-matter jurisdiction.

From the opinion by Justice Alito
(joined by all members except Justice Kagan, who took no part in the consideration or decision):

We have long applied “the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries’ favor.” … Particularly in light of this canon, we do not find any clear indication that the 120-day limit was intended to carry the harsh consequences that accompany the jurisdiction tag.

Civil Procedure
Ortiz v. Jordan
Docket No. 09-737
Reversed and Remanded: The Sixth Circuit

Argued: November 1, 2010
Decided: January 24, 2011
Analysis: See ABA PREVIEW 52 ISSUE 2

Overview: Michelle Ortiz, an Ohio inmate, sued two reformatory employees for constitutional and civil rights violations. The defendants moved for summary judgment based on their claims of a qualified immunity. The trial court denied the motion and the defendants did not immediately appeal. The defendants lost at trial but did not raise the denial of summary judgment in a timely, posttrial motion. The Sixth Circuit concluded that the defendants could not seek appellate review of the summary judgment order, and reversed the trial court’s order, thereby vacating Ortiz’s trial judgment. Now, the Court will determine whether a party who is denied summary judgment before trial, and who does not seek immediate interlocutory review, may subsequently seek appellate review of the summary judgment denial after a jury returns a verdict. The Courts of Appeal are split on this issue.

Issue: May a United States Court of Appeals review a trial court’s denial of summary judgment after the full trial had already been conducted even in light of the fact that the order dealt with a claim of qualified immunity?

No. The Sixth Circuit erred when it heard the defendants’ appeal on the summary judgment order given that the full trial had already been conducted even in light of the fact that the order dealt with a claim of qualified immunity.

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

[T]he Court of Appeals, although purporting to review the District Court’s denial of the prison officials’ pretrial summary-judgment motion, several times pointed to evidence presented only at the trial stage of the proceedings. The appeals court erred, but not fatally, by incorrectly placing its ruling under a summary judgment headline. Its judgment was infirm, however, because Jordan’s and Bright’s failure to renew their motion for judgment as a matter of law under Federal Rule of Civil Procedure 50(b) left the appellate forum with no warrant to reject the appraisal of the evidence by “the judge who saw and heard the witnesses and ha[d] the feel of the case which no appellate printed transcript can impart.”

Concurring: Justice Thomas (joined by Justices Scalia and Kennedy)

Civil Procedure
Wal-Mart Stores, Inc. v. Dukes
Docket No. 10-277
Reversed: The Ninth Circuit

Argued: March 29, 2011
Decided: June 20, 2011
Analysis: See ABA PREVIEW 249 ISSUE 6

Overview: In the largest and most closely watched employment discrimination class action in decades, the Court has been asked to determine whether millions of female Wal-Mart employees are entitled to billions of dollars of back pay through the enforcement of a mandatory class action.

Issues: Did the certification of an employment discrimination class action involving millions of female Wal-Mart employees throughout the United States violate the Rule 23(a) threshold class certification requirements for commonality, typicality, and adequacy?

Yes. The certification of this employment discrimination involving millions of employees violates Rule 23(a)’s requirements for commonality.

May the Wal-Mart class claimants recover monetary damages in a Rule 23(b)(2) injunctive class action?

No. The Wal-Mart claimants could not recover monetary damages under Rule 23(b)(2) unless monetary damages are incidental to requested injunctive or declaratory relief.

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

The only corporate policy that the plaintiffs’ evidence convincingly establishes is Wal-Mart’s “policy” of allowing discretion by local
supervisors over employment matters. On its face, of course, that is just the opposite of a uniform employment practice that would provide the commonality needed for a class action; it is a policy against having uniform employment practices. It is also a very common and presumptively reasonable way of doing business—one that we have said “should itself raise no inference of discriminatory conduct[].”

From the concurring and dissenting opinion by Justice Sotomayor (joined by Sotomayor, Kagan, and Breyer): The Court blends Rule 23(a)(2)’s threshold criterion with the more demanding criteria of Rule 23(b)(3), and thereby elevates the (a)(2) inquiry so that it is no longer “easily satisfied[].”

Concurring in part and dissenting in part: Justice Sotomayor (joined by Sotomayor, Kagan, and Breyer)

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Yes. Regardless of whether plaintiffs seek monetary or prospective relief, they must show that their constitutional violation was caused by a municipal policy or custom.

From the opinion by Justice Breyer (joined by all members except Justice Kagan, who took no part in the consideration or decision):

The language of § 1983 read in light of Monell’s understanding of the legislative history explains why claims for prospective relief, like claims for money damages, fall within the scope of the “policy or custom” requirement. Nothing in the text of § 1983 suggests that the causation requirement contained in the statute should change with the form of relief sought.

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Civil Rights Enforcement
Los Angeles County v. Humphries

Docket No. 09-350
Reversed and Remanded: The Ninth Circuit

Argued: October 5, 2010
Decided: November 30, 2010
Analysis: See ABA PREVIEW 19 ISSUE 1

Overview: The Humphries, plaintiffs in the case, were designated under state law as substantiated child abusers. They sued the state, the county, and the county officers who were responsible for enforcing the state law for monetary damages and declaratory and injunctive relief under a federal civil rights statute. The Ninth Circuit ruled that the state law violated the Fourteenth Amendment Due Process Clause and awarded attorneys’ fees to the Humphries as the prevailing party on their claims for declaratory and injunctive relief. The county now appeals, arguing that the Humphries could not be a prevailing party because they failed to establish that a municipal party caused the constitutional violation.

Issue: Must a plaintiff show that a municipal government’s policy or custom caused an ongoing constitutional violation in order to prevail in a civil rights suit against the municipality for declaratory and injunctive relief?

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Dissenting: Justice Sotomayor (joined by Justice Breyer)
Taking no part in consideration or decision: Justice Kagan

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Confrontation Clause
Bullcoming v. New Mexico

Docket No. 09-10876
Reversed and Remanded: The Supreme Court of New Mexico

Argued: March 2, 2011
Decided: June 23, 2011
Analysis: See ABA PREVIEW 210 ISSUE 5

Overview: At the trial of Donald Bullcoming on DUI charges, the laboratory analyst who had performed a test indicating elevated blood alcohol content did not testify; instead, the prosecution presented the testimony of a supervisor who had not observed or performed the test. Bullcoming contends that this procedure violated his rights under the Confrontation Clause of the Sixth Amendment.

Issue: Does the Confrontation Clause permit the prosecution to introduce a forensic report through the in-court testimony of a supervisor or other person who did not perform or observe the reported test?

No. The Confrontation Clause prohibits the introduction of forensic certifications through the testimony of an analyst who did not sign the certification or personally perform or observe the test.

From the opinion by Justice Sotomayor (joined in full by Justice Scalia and joined in part by Justice Kennedy and Kagan):

The New Mexico Supreme Court stated that the number registered by the gas chromatograph machine called for no interpretation or exercise of independent judgment on Caylor’s part. We have already explained that Caylor certified to more than a machine-generated number. In any event, the comparative reliability of an analyst’s testimonial report drawn from machine-produced data does not overcome the Sixth Amendment bar. This Court settled in Crawford that the “obvious[s] reliability” of a testimonial statement does for damages that we can “be certain that the State in fact consents” to such a suit.

Dissenting: Justice Sotomayor (joined by Justice Breyer)
Taking no part in consideration or decision: Justice Kagan

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Civil Rights Enforcement
Sossamon v. Texas

Docket No. 08-1438
Affirmed: The Fifth Circuit

Argued: November 2, 2010
Decided: April 20, 2011
Analysis: See ABA PREVIEW 82 ISSUE 2

Overview: Harvey Leroy Sossamon sued the state of Texas and Texas prison officials for monetary damages for violating his rights to worship under the federal Religious Land Use and Institutional Persons Act of 2000 (RLUIPA). The state argues that RLUIPA does not authorize prisoners to sue for monetary damages clearly enough to put the state on warning that it has waived sovereign immunity.

Issue: Does RLUIPA authorize private suits against states for monetary damages with sufficient clarity to overcome states’ Eleventh Amendment sovereign immunity?

No. The RLUIPA does not unequivocally require states to consent to private suits for damages; therefore, a state accepting funds under RLUIPA should not be considered a waiver of sovereign immunity.

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

RLUIPA’s authorization of “appropriate relief against a government,” § 2000cc–2(a), is not the unequivocal expression of state consent that our precedents require. “Appropriate relief” does not so clearly and unambiguously waive sovereign immunity to private suits for damages that we can “be certain that the State in fact consents” to such a suit.

Dissenting: Justice Sotomayor (joined by Justice Breyer)
Taking no part in consideration or decision: Justice Kagan

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not dispense with the Confrontation Clause. Accordingly, the analysts who write reports that the prosecution introduces must be made available for confrontation even if they possess “the scientific acumen of Mme. Curie and the veracity of Mother Teresa.”

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

In short, there is an ongoing, continued, and systemic displacement of the States and dislocation of the federal structure. If this Court persists in applying wooden formalism in order to bar reliable testimony offered by the prosecution—testimony thought proper for many decades in state and federal courts committed to devising fair trial processes—then the States might find it necessary and appropriate to enact statutes to accommodate this new, intrusive federal regime. If they do, those rules could remain on State statute books for decades, even if subsequent decisions of this Court were to better implement the objectives of Crawford. This underscores the disruptive, long-term structural consequences of decisions like the one the Court announces today.

Concurring in part: Justice Sotomayor
Dissenting: Justice Kennedy (joined by Chief Justice Roberts and Justices Breyer and Alito)

Criminal Procedure
Connick v. Thompson
Docket No. 09-571
Reversed: The Fifth Circuit

Argued: October 6, 2010
Decided: March 29, 2011
Analysis: See ABA PREVIEW 32 ISSUE 1

Overview: In 1985, prosecutors in the Orleans Parish District Attorney’s Office obtained a conviction against John Thompson for attempted armed robbery. Aided by that conviction, prosecutors then obtained a conviction against Thompson for capital murder. A month before his execution, investigators for Thompson discovered that prosecutors had hidden exculpatory evidence in the robbery case that exonerated him of that charge. Thompson’s execution was stayed, his robbery conviction vacated, and his murder conviction eventually reversed. Thompson then sued the Orleans Parish District Attorney’s Office and was awarded a $14 million civil rights verdict. The Court must now determine whether a district attorney’s deliberate indifference to his need to train prosecutors with regard to their responsibilities under Brady v. Maryland qualifies as a 42 U.S.C. § 1983 claim.

Issue: Does failure to train subordinate attorneys impose liability under 42 U.S.C. § 1983 upon a district attorney’s office for a prosecutor’s deliberate violation of Brady v. Maryland, even with no history of similar violations in the office?

No. A district attorney’s office cannot be held liable under § 1983 for a prosecutor’s single Brady violation.

From the opinion by Justice Thomas (joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Alito):
Failure to train prosecutors in their Brady obligations does not fall within the narrow range of Canton’s hypothesized single-incident liability. The obvious need for specific legal training that was present in the Canton scenario is absent here. Armed police must sometimes make split-second decisions with life-or-death consequences. There is no reason to assume that police academy applicants are familiar with the constitutional constraints on the use of deadly force. And, in the absence of training, there is no way for novice officers to obtain the legal knowledge they require. Under those circumstances there is an obvious need for some form of training. In stark contrast, legal “[t]raining is what differentiates attorneys from average public employees.”

From the dissenting opinion by Justice Ginsburg (joined by Justices Breyer, Sotomayor, and Kagan):
Based on the evidence presented, the jury could conclude that Brady errors by untrained prosecutors would frequently cause deprivations of defendants’ constitutional rights. The jury learned of several Brady oversights in Thompson’s trials and heard testimony that Connick’s Office had one of the worst Brady records in the country. Because prosecutors faced considerable pressure to get convictions, and were instructed to “turn over what was required by state and federal law, but no more,” the risk was all too real that they would err by withholding rather than revealing information favorable to the defense.

Concurring: Justice Scalia (joined by Justice Alito)
Dissenting: Justice Ginsburg (joined by Justices Breyer, Sotomayor, and Kagan)

Criminal Procedure
Fowler v. United States
Docket No. 10-5443
Vacated and Remanded: The Eleventh Circuit

Argued: March 29, 2011
Decided: May 26, 2011
Analysis: See ABA PREVIEW 261 ISSUE 6

Overview: Charles Fowler was convicted of murder in federal court for killing a local police officer. The federal charge was premised on Fowler’s intent to prevent the officer from reporting Fowler’s involvement in federal offenses. The Eleventh Circuit held that the trial evidence sufficiently proved that Fowler
when he was questioned at his school and suppressed statements J.D.B. made to police. The juvenile court concluded that, because J.D.B. was not in custody when he spoke to the police, the requirements of Miranda v. Arizona, 348 U.S. 436 (1966), were inapplicable and his statements were therefore admitted in evidence. J.D.B. now asks the Court to hold that his age should have been considered in determining if he was in custody at the time of the questioning.

**Issue:** In determining whether a statement complied with the Miranda requirements governing custodial interrogation, may the age of a suspect be taken into consideration in determining whether a reasonable person in the juvenile’s position would have felt he was free to terminate the police questioning?

**Yes.** In determining whether a child was in custody for Miranda purposes, a child’s age is a relevant factor.

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

As this discussion establishes, “[o]ur history replete with laws and judicial recognition” that children cannot be viewed simply as miniature adults. We see no justification for taking a different course here. So long as the child’s age was known to the officer at the time of the interview, or would have been objectively apparent to any reasonable officer, including age as part of the custody analysis requires officers neither to consider circumstances “unknowable” to them, nor to “anticipat[e] the frailties or idiosyncrasies” of the particular suspect whom they question. The same “wide basis of community experience” that makes it possible, as an objective matter, “to determine what is to be expected” of children in other contexts likewise makes it possible to know what to expect of children subjected to police questioning.

**From the dissenting opinion by Justice Alito** (joined by Chief Justice Roberts and Justice Scalia and Thomas):

The Government need not show that such a communication would have been made to a federal officer or judge.

**Yes.** To establish a violation of § 1512(a)(1) (C), the government must show that there was a reasonable likelihood that a relevant communication would have been made to a federal officer.

**From the opinion by Justice Breyer** (joined by Chief Justice Roberts and Justice Kennedy, Thomas, Sotomayor, and Kagan): The Government need not show that such a communication, had it occurred, would have been federal beyond a reasonable doubt, nor even that it is more likely than not. For, as we have said, one can act with an intent to prevent an event from occurring without it being true beyond a reasonable doubt (or even more likely than not) that the event would otherwise occur. ... But the Government must show that the likelihood of communication to a federal officer was more than remote, outlandish, or simply hypothetical.

**Concurring in judgment: **Justice Scalia

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

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**Criminal Procedure**

**J.D.B. v. North Carolina**

**Docket No. 09-11121**

**Reversed and Remanded: The Supreme Court of North Carolina**

**Argued:** March 23, 2011
**Decided:** June 16, 2011
**Analysis:** See ABA PREVIEW 232 ISSUE 6

**Overview:** J.D.B., a thirteen-year-old, was adjudicated a delinquent by a North Carolina juvenile court for two residential burglaries. His attorney moved unsuccessfully to suppress statements J.D.B. made to police when he was questioned at his school and subsequently at his home. The juvenile court concluded that, because J.D.B. was not in custody when he spoke to the police, the requirements of Miranda v. Arizona, 348 U.S. 436 (1966), were inapplicable and his statements were therefore admitted in evidence. J.D.B. now asks the Court to hold that his age should have been considered in determining if he was in custody at the time of the questioning.

**Issue:** In determining whether a statement complied with the Miranda requirements governing custodial interrogation, may the age of a suspect be taken into consideration in determining whether a reasonable person in the juvenile’s position would have felt he was free to terminate the police questioning?

**Yes.** In determining whether a child was in custody for Miranda purposes, a child’s age is a relevant factor.

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

As this discussion establishes, “[o]ur history replete with laws and judicial recognition” that children cannot be viewed simply as miniature adults. We see no justification for taking a different course here. So long as the child’s age was known to the officer at the time of the interview, or would have been objectively apparent to any reasonable officer, including age as part of the custody analysis requires officers neither to consider circumstances “unknowable” to them, nor to “anticipat[e] the frailties or idiosyncrasies” of the particular suspect whom they question. The same “wide basis of community experience” that makes it possible, as an objective matter, “to determine what is to be expected” of children in other contexts likewise makes it possible to know what to expect of children subjected to police questioning.

**From the dissenting opinion by Justice Alito** (joined by Chief Justice Roberts and Justice Scalia and Thomas):

The Government need not show that such a communication would have been made to a federal officer or judge.

**Yes.** To establish a violation of § 1512(a)(1) (C), the government must show that there was a reasonable likelihood that a relevant communication would have been made to a federal officer.

**From the opinion by Justice Breyer** (joined by Chief Justice Roberts and Justice Kennedy, Thomas, Sotomayor, and Kagan): The Government need not show that such a communication, had it occurred, would have been federal beyond a reasonable doubt, nor even that it is more likely than not. For, as we have said, one can act with an intent to prevent an event from occurring without it being true beyond a reasonable doubt (or even more likely than not) that the event would otherwise occur. ... But the Government must show that the likelihood of communication to a federal officer was more than remote, outlandish, or simply hypothetical.

**Concurring in judgment: **Justice Scalia

**Dissenting: **Justice Alito (joined by Chief Justice Roberts and Justices Scalia and Thomas)
monial as their primary purpose is to assist the police during an ongoing emergency, and therefore the admission of such statements at trial do not violate the Confrontation Clause.

From the opinion by Justice Sotomayor (joined by Chief Justice Roberts and Justices Kennedy, Breyer, and Alito): As we suggested in Davis, when a court must determine whether the Confrontation Clause bars the admission of a statement at trial, it should determine the “primary purpose of the interrogation” by objectively evaluating the statements and actions of the parties to the encounter, in light of the circumstances in which the interrogation occurs. The existence of an emergency or the parties’ perception that an emergency is ongoing is among the most important circumstances that courts must take into account in determining whether an interrogation is testimonial because statements made to assist police in addressing an ongoing emergency presumably lack the testimonial purpose that would subject them to the requirement of confrontation. As the context of this case brings into sharp relief, the existence and duration of an emergency depend on the type and scope of danger posed to the victim, the police, and the public.

Concurring: Justice Thomas
Dissenting: Justice Scalia
Dissenting: Justice Ginsburg
Taking no part in consideration or decision: Justice Kagan

Criminal Procedure
Premo v. Moore
Docket No. 09-658
Reversed and Remanded:
The Ninth Circuit

Argued: October 12, 2010
Decided: January 19, 2011
Analysis: See ABA PREVIEW 45 ISSUE 1

Overview: Randy Joseph Moore pled no contest to felony murder and was sentenced to a mandatory 25 years of imprisonment. Moore claims ineffective assistance of counsel based on his trial counsel’s failure to file a motion to suppress his illegal confession. The Court must decide whether it can combine other Supreme Court precedent with the rule set forth in Strickland 466 U.S. 668 (1984) as the applicable “clearly established federal law” to assess and determine whether counsel’s failure to seek suppression of a concededly unconstitutional confession supports reversing a plea-based confession.

Issues: For purposes of determining whether counsel’s failure to seek suppression of a concededly unconstitutional confession supports the reversal of a plea-based confession based on ineffective assistance of counsel, should the Court conclude that the “clearly established federal law” is a combination of the established collateral standard for ineffective assistance of counsel and the direct appeal standard for coerced confessions?

No. A reviewing court may only grant habeas relief if the state-court decision denying relief involves an unreasonable application of clearly established federal law as determined by the Court; in this case, the state court’s acceptance of the trial counsel’s explanation of his trial strategy in accepting a plea was reasonable under Strickland v. Washington, 466 U.S. 668 (1984).

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

There are certain differences between inadequate assistance of counsel claims in cases where there was a full trial on the merits and those, like this one, where a plea was entered even before the prosecution decided upon all of the charges. A trial provides the full written record and factual background that serve to limit and clarify some of the choices counsel made. Still, hindsight cannot suffice for relief when counsel’s choices were reasonable and legitimate based on predictions of how the trial would proceed.

Hindsight and second guesses are also inappropriate, and often more so, where a plea has been entered without a full trial or, as in this case, even before the prosecution decided on the charges.

Concurring: Justice Ginsburg
Taking no part in consideration or decision: Justice Kagan

Criminal Procedure
Skinner v. Switzer
Docket No. 09-9000
Reversed and Remanded:
The Fifth Circuit

Argued: October 13, 2010
Decided: March 7, 2011
Analysis: See ABA PREVIEW 48 ISSUE 1

Overview: A death row inmate convicted of a triple homicide filed a § 1983 claim to compel the state of Texas to hand over forensic evidence from the crime scene so he can have it tested. The state counters that the inmate lost his chance to test the evidence by choosing, for strategic reasons, not to at trial. The state further argues that the inmate’s sole avenue of federal relief is to petition for a writ of habeas corpus.

Issue: May a convicted prisoner seeking access to biological evidence for DNA testing assert that claim in a civil rights action under 42 U.S. § 1983?

Yes. A convicted prisoner’s claim requesting access to his biological evidence for DNA testing after trial is cognizable under § 1983; such claims do not have to be brought under a writ for habeas corpus.

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

Measured against our prior holdings, Skinner has properly invoked § 1983. Success in his suit for DNA testing would not “necessarily imply” the invalidity of his conviction. While test results might prove exculpatory, that outcome is hardly inevitable; as earlier observed, results might prove inconclusive or they might further incriminate Skinner.

Dissenting: Justice Thomas (joined by Justices Kennedy and Alito)
Criminal Procedure
Wall v. Kholi
Docket No. 09-868
Affirmed: The First Circuit
Argued: November 29, 2010
Decided: March 7, 2011
Analysis: See ABA PREVIEW 139 ISSUE 3

Overview: After having his direct state appeal for his criminal conviction denied, Khalil Kholi, relying on a Rhode Island state rule allowing for motions for leniency, filed a state court motion to reduce his sentence, which was ultimately denied. While Kholi was waiting for the appeal from that ruling, he unsuccessfully filed for state post-conviction relief, alleging, among other things, ineffective assistance of counsel. Subsequently, Kholi filed a habeas corpus petition, which the district court dismissed, ruling that the one-year time limit for filing a habeas corpus petition had expired and that Kholi’s Rule 35(a) motion did not toll the one-year time limit. The Court must decide whether a state prisoner’s motion for leniency regarding his state sentence constitutes an “application for state post-conviction or other collateral review” such that it tolls the limitation period for filing a federal petition for a writ of habeas corpus.

Issue: Does a state prisoner’s motion for discretionary, equitable relief pursuant to applicable state law constitute “post-conviction or other collateral review” within the meaning of 28 U.S.C. § 2244(d)(2), such that it tolls the limitation period for the filing of a federal petition for a writ of habeas corpus?

Yes. The phrase “collateral review” in § 2244(d)(2) means judicial review of a judgment in a proceeding that is not part of direct review. A Rule 35(a) motion to reduce sentence under Rhode Island law is an application for collateral review that triggers the Antiterrorism and Effective Death Penalty Act’s (AEDPA) tolling provision.

From the opinion by Justice Alito (joined by Chief Justice Roberts and Justices Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan and in which Justice Scalia joined, except as to footnote 3):
Not only is a motion to reduce sentence under Rhode Island law collateral, but it also undoubtedly calls for review of the sentence. The decision to reduce a sentence, while largely within the discretion of the trial justice, involves judicial reexamination of the sentence to determine whether a more lenient sentence is proper.[1]

Concurring in part: Justice Thomas

Eighth Amendment
Brown v. Plata
Docket No. 09-1233
Affirmed: The Eastern and Northern District Courts of California
Argued: November 30, 2010
Decided: May 23, 2011
Analysis: See ABA PREVIEW 114 ISSUE 3

Overview: Two class actions, Schwarzenegger v. Plata and Coleman v. Schwarzenegger, challenged the health care conditions in California’s prisons. The prisons were determined to violate the Eighth Amendment’s prohibition on cruel and unusual punishment. The court appointed a receiver for Plata in 2006 and a special master in Coleman in 1995. After years of unsuccessful remediation attempts, a trial to determine whether a prisoner release order should be issued was held before a three-judge court between November 2008 and February 2009. That court concluded that overcrowding was the primary cause of the Eighth Amendment violation and ordered the state to reduce its prison population by about 46,000 inmates. The Court granted review but postponed consideration of jurisdiction.

Issues: Did a three-judge court have jurisdiction to enter the prisoner release order and does the Supreme Court have jurisdiction to review the prisoner release order? If so, did the court correctly apply the Prison Litigation Reform Act (PLRA)?

Yes. The three-judge court had jurisdiction to enter a prison release order, which the Court has jurisdiction to review; the order was a reasonable application of PLRA and an appropriate means to remedy the constitutional violations arising from prison overcrowding.

From the opinion by Justice Kennedy (joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan):
And the three-judge court’s order does not bar the State from undertaking any other remedial efforts. If the State does find an adequate remedy other than a population limit, it may seek modification or termination of the three-court’s order on that basis.

The evidence at trial, however, supports the three-court’s conclusion that an order limited to other remedies would not provide effective relief[1.]

From the dissenting opinion by Justice Scalia (joined by Justice Thomas):
One would think that, before allowing the decree of a federal district court to release 46,000 convicted felons, the Court would bend every effort to read the law in such a way as to avoid that outrageous result. Today, quite to the contrary, the Court disregards stringently drawn provisions of the governing statute, and traditional constitutional limitations upon the power of a federal judge, in order to uphold the absurd.

From the dissenting opinion by Justice Alito (joined by Chief Justice Roberts):
The prisoner release ordered in this case is unprecedented, improvident, and contrary to the PLRA. In largely sustaining the decision below, the majority is gambling with the safety of the people of California. Before putting public safety at risk, every reasonable precaution should be taken. … I fear that today’s decision, like prior prisoner release orders, will lead to a grim roster of victims. I hope that I am wrong. In a few years, we will see.

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

Employment Discrimination
Thompson v. North American Stainless
Docket No. 09-291
Reversed and Remanded: The Sixth Circuit
Argued: December 7, 2010
Decided: January 24, 2011
Analysis: See ABA PREVIEW 132 ISSUE 3

Overview: Title VII of the Civil Rights Act of 1964 prohibits employers from retaliating against an employee if he or she opposes an unlawful employment practice or participates in an employment discrimination proceeding, such as testifying in a co-employee’s discrimination suit. But sometimes an employer retaliates against an employee because that employee’s spouse or significant other opposed an unlawful employment practice.
Here, the Court will decide whether such third-party retaliation claims are covered by Title VII’s anti-retaliation provision.

**Issues:** Does Title VII prohibit an employer from retaliating for protected activities by inflicting reprisals on a third party, such as a spouse or family member of the employee who engaged in the activity? If so, may that prohibition be enforced in a civil action brought by the third-party victim?

**Yes.** Title VII must be construed to cover a broad range of employer conduct and should cover a worker who is closely associated with an employee who opposed the unlawful employment practice.

**From the opinion by Justice Scalia** (joined by all members except Justice Kagan, who took no part in the consideration or decision):

We conclude that Thompson falls within the zone of interests protected by Title VII. Thompson was an employee of NAS, and the purpose of Title VII is to protect employees from their employers’ unlawful actions. Moreover, accepting the facts as alleged, Thompson was not an accidental victim of the retaliation—collateral damage, so to speak, of the employer’s unlawful act. To the contrary, injuring him was the employer’s intended means of harming Regalado. Hurting him was the unlawful act by which the employer punished her. In those circumstances, we think Thompson well within the zone of interests sought to be protected by Title VII. He is a person aggrieved with standing to sue.

**Concurring:** Justice Ginsburg (joined by Justice Breyer)

**Employment Law**

**Borough of Duryea, Pennsylvania v. Guarnieri**

**Docket No. 09-1476**

**Vacated and Remanded:**

The Third Circuit

Argued: March 22, 2011
Decided: June 20, 2011
Analysis: See ABA PREVIEW 246 ISSUE 6

**Overview:** A fired Pennsylvania police chief filed a grievance challenging his termination, and an arbitrator ordered him reinstated. After the chief’s return, however, the Borough Council issued a set of directives that he claimed were retaliatory. The Third Circuit upheld the chief’s contention that his rights had been violated under the Petition Clause of the First Amendment. The Court must decide whether it matters that the complaint did not involve a matter of “public concern.”

**Issue:** Did the Third Circuit err in ruling that a police chief could sue his employer for retaliation under the Petition Clause of the First Amendment, contrary to decisions by all 10 other federal circuits and several state supreme courts that have addressed similar issues?

**Yes.** A government employer’s allegedly retaliatory conduct does not rise to the level of liability under the Petition Clause unless the petition relates to a matter of public concern.

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

The government’s interest in managing its internal affairs requires proper restraints on the invocation of rights by employees when the workplace or the government employer’s responsibilities may be affected. There is no reason to think the Petition Clause should be an exception.

**Concurring: Justice Thomas**

**Concurring in part and dissenting in part:** Justice Scalia

**ERISA**

**CIGNA Corp. v. Amara**

**Docket No. 09-804**

**Vacated and Remanded:**

The Second Circuit

Argued: November 30, 2010
Decided: May 16, 2011
Analysis: See ABA PREVIEW 111 ISSUE 3

**Overview:** Under the Employee Retirement Income Security Act (ERISA), plan administrators must provide all plan participants with a summary plan description (SPD), summarizing the plan terms. After CIGNA converted its traditional defined benefit pension plan to a cash balance retirement plan, it issued an SPD to participants. Janice Amara, a plan participant, filed a class action lawsuit claiming that CIGNA failed to comply with ERISA notice requirements because the SPD failed to adequately notify the participants of the “wear away” effect of the plan. The issue before the Court is whether each of the 27,000 members of the class action must prove detrimental reliance on the SPD in order to recover damages.

**Issue:** Must participants who are members of a class action suit prove detrimental reliance

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**CSX Transportation v. McBride**

**Docket No. 10-235**

**Affirmed:** The Seventh Circuit

Argued: March 28, 2011
Decided: June 23, 2011
Analysis: See ABA PREVIEW 269 ISSUE 6

**Overview:** Robert McBride sued CSX Transportation under the Federal Employers’ Liability Act (FELA) for an on-the-job injury. At trial, the judge refused CSX’s request for jury instructions on proximate cause. The jury awarded McBride damages. On appeal, the Seventh Circuit declined to read proximate cause into FELA. The court refused to rely on the dicta in a concurring Supreme Court opinion, which implied that proximate cause is required. CSX now asks the Court for a definitive ruling on whether proximate cause is required in FELA cases.

**Issue:** Does the Federal Employers’ Liability Act require an injured employee to prove proximate cause to recover for injuries caused in part by a railroad’s negligence?

**No.** The Federal Employers’ Liability Act does not require an employee to prove proximate cause in order to recover for injuries caused in part by a railroad’s negligence.

**From the opinion by Justice Ginsburg with respect to all but Part III-A** (joined in full by Justices Breyer, Sotomayor, and Kagan and joined by Justice Thomas as to all but Part III-A):

In sum, the understanding of Rogers we here affirm “has been accepted as settled law for several decades.” “Congress has had more than 50 years in which it could have corrected our decision in Rogers if it disagreed with it, and has not chosen to do so.” Countless judges have instructed countless juries in language drawn from Rogers. To discard or restrict the Rogers instruction now would ill serve the goals of “stability” and “predictability” that the doctrine of statutory stare decisis aims to ensure.

**Dissenting:** Chief Justice Roberts (joined by Justices Scalia, Kennedy, and Alito)
on an inaccurate summary plan description in order to receive a remedy under ERISA, or is the mere proof of “likely harm” enough to justify equitable relief?

No. The section of ERISA the class relies on for relief, § 502(a)(1)(B), only allows a court to enforce the terms of an existing plan and consequently, relief is inappropriate here; however, the class can seek equitable relief under § 502(a)(3) with a showing of actual harm and causation, not detrimental reliance.

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

We conclude that the standard of prejudice must be borrowed from equitable principles, as modified by the obligations and injuries identified by ERISA itself. Information-related circumstances, violations, and injuries are potentially too various in nature to insist that harm must always meet that more vigorous detrimental harm standard when equity imposed no such strict requirement.

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

Taking no part in consideration or decision: Justice Sotomayor

False Claims Act
Schindler Elevator Corporation v.
U.S. Ex Rel. Daniel Kirk

Docket No. 10-188
Reversed and Remanded:
The Second Circuit

Argued: March 1, 2011
Decided: May 16, 2011
Analysis: See ABA PREVIEW 199 ISSUE 5

Overview: Kirk filed a False Claims Act (FCA) suit against his employer, Schindler Elevator Corporation, alleging violation of the Vietnam Era Veterans’ Readjustment Act. Kirk’s claims were based in part on information obtained from Freedom of Information Act (FOIA) responses obtained from the Department of Labor. Schindler claims that the district court lacks jurisdiction to hear Kirk’s claims based on the False Claims Act’s public information disclosure bar.

Issue: Does a federal agency’s response to a Freedom of Information Act request constitute a “report, hearing, audit, or investigation,” precluding a court from exercising jurisdiction within the public disclosure bar of the FCA, 31 U.S.C. § 3730(e)(4)?

Yes. A federal agency’s written response to a FOIA request for records constitutes a report within the meaning of the FCA’s public disclosure bar.

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

Any records the agency produces along with its written FOIA response are part of that response, “just as if they had been reproduced as an appendix to a printed report.” Nothing in the public disclosure bar suggests that a document and its attachments must be disaggregated and evaluated individually. If an allegation or transaction is disclosed in a record attached to a FOIA response, it is disclosed “in” that FOIA response and, therefore, disclosed “in” a report for the purposes of the public disclosure bar.

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

Taking no part in consideration or decision: Justice Kagan

Federalism
Virginia Office for Protection and Advocacy v. Stewart

Docket No. 09-529
Reversed and Remanded:
The Fourth Circuit

Argued: December 1, 2010
Decided: April 19, 2011
Analysis: See ABA PREVIEW 128 ISSUE 3

Overview: Congress authorized states to create independent agencies to protect and advocate the rights of persons with mental illnesses and developmental disabilities. These agencies have authority under federal law to investigate incidents of abuse and neglect, including obtaining state records. Virginia’s independent agency tried to obtain state records as part of an investigation. After state officials refused to release the records, the agency sued these officials in federal court for injunctive relief.

Issue: Do the Eleventh Amendment and principles of federalism bar an independent state agency from suing state officials in federal court for injunctive relief to remedy a continuing violation of federal law?

No. Ex parte Young allows a federal court to hear a lawsuit for prospective relief against state officials brought by another agency of the same state.

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

Like the Court of Appeals, we are mindful of the central role autonomous States play in our federal system, and wary of approving new encroachments on their sovereignty. But we conclude no such encroachment is occasioned by straightforwardly applying Ex parte Young to allow this suit. It was Virginia law that created VOPA [Virginia Office for Protection and Advocacy] and gave it the power to sue state officials. In that circumstance, the Eleventh Amendment presents no obstacles to VOPA’s ability to invoke federal jurisdiction on the same terms as any other litigant.

From the dissenting opinion by Chief Justice Roberts (joined by Justice Alito):

Sovereign immunity ensures that States retain a stature commensurate with their role under the Constitution. Allowing one part of the State to sue another in federal court, so that a federal judge decides an important dispute between state officials, undermines state sovereignty in an unprecedented and direct way. The fiction of Ex parte Young should not be extended to permit so real an intrusion.

Concurring: Justice Kennedy (joined by Justice Thomas)

Dissenting: Chief Justice Roberts (joined by Justice Alito)

Taking no part in consideration or decision: Justice Kagan

Federal Civil Procedure
Goodyear Luxembourg Tires, S.A. v. Brown

Docket No. 10-76
Reversed: The Court of Appeals of North Carolina

Argued: January 11, 2011
Decided: June 27, 2011
Analysis: See ABA PREVIEW 174 ISSUE 4

Overview: Two American teenagers were killed in a bus crash outside Paris, France. The allegedly defective Goodyear bus tire that contributed to the accident was designed, manufactured, and sold by three Goodyear foreign subsidiaries. A small percentage of foreign subsidiaries. A small percentage of...
the foreign tires was distributed in North Carolina. The teenagers’ parents brought suit against the American Goodyear parent corporation and its foreign subsidiaries in North Carolina state court. In this appeal, the foreign defendants challenge whether an American state court may validly exercise general personal jurisdiction over foreign corporate subsidiaries where the lawsuit does not arise out of or relate to defendants’ attenuated contacts with the forum court.

Problem: May an American state court validly assert general personal jurisdiction consistent with due process over a foreign subsidiary where some small percentage of the subsidiary’s products reach the forum state through the stream of commerce, but the subsidiary’s contacts with the forum state are attenuated and the underlying lawsuit does not arise out of, or relate to, the defendant’s contacts with the state?

No. An American state court may not assert general personal jurisdiction over a foreign defendant on claims unrelated to any activity in the forum state.

From the unanimous opinion by Justice Ginsburg:
Measured against Helicopters and Perkins, North Carolina is not a forum in which it would be permissible to subject petitioners to general jurisdiction. Unlike the defendant in Perkins, whose sole wartime business activity was conducted in Ohio, petitioners are in no sense at home in North Carolina. Their attenuated connections to the State fall far short of the “continuous and systematic general business contacts” necessary to empower North Carolina to entertain suit against them on claims unrelated to anything that connects them to the State.

Federal Civil Procedure

Docket No. 09-1343
Reversed: The Supreme Court of New Jersey

Argued: January 11, 2011
Decided: June 27, 2011
Analysis: See ABA PREVIEW 174 ISSUE 4

Overview: Robert Nicastro, an employee of Curcio Scrap Metal, Inc., in New Jersey, had four fingers severed from his hand by a metal-shearing machine manufactured in England by J. McIntyre Machinery, Ltd. McIntyre employees attended trade shows in the United States and sold equipment through these trade shows. The New Jersey Supreme Court held that, under the stream-of-commerce theory of specific personal jurisdiction, McIntyre England was subject to the jurisdiction of New Jersey courts. In this appeal, McIntyre England challenges whether, under the stream-of-commerce theory, a foreign manufacturer who targets the entire U.S. market for sale of its products, may be subject to personal jurisdiction where its product is purchased by a forum state consumer.

Problem: May an American state court validly, consistent with territoriality concepts, assert specific personal jurisdiction over a foreign national corporation pursuant to the stream-of-commerce theory in which the manufacturer targets the entire United States market for the sale of its product and its product is purchased by a consumer in a forum state?

No. An American state court does not have jurisdiction over a foreign corporation when that corporation has not shown any intent to have its products purchased in the forum state.

From the opinion by Justice Kennedy (joined by Chief Justice Roberts and Justices Scalia and Thomas):
Although the New Jersey Supreme Court issued an extensive opinion with careful attention to this Court’s cases and to its own precedent, the “stream of commerce” metaphor carried the decision far afield. Due process protects the defendant’s right not to be coerced except by lawful judicial power. As a general rule, the exercise of judicial power is not lawful unless the defendant “purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.” There may be exceptions, say, for instance, in cases involving an intentional tort. But the general rule is applicable in this products-liability case, and the so-called “stream-of-commerce” doctrine cannot displace it.

From the dissenting opinion by Justice Ginsburg (joined by Justices Sotomayor and Kagan): The modern approach to jurisdiction over corporations and other legal entities, ushered in by International Shoe, gave prime place to reason and fairness. Is it not fair and reasonable, given the mode of trading of which this case is an example, to require the international seller to defend at the place its products cause injury? Do not litigational convenience and choice-of-law considerations point in that direction? On what measure of reason and fairness can it be considered undue to require McIntyre UK to defend in New Jersey as an incident of its efforts to develop a market for its industrial machines anywhere and everywhere in the United States?

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

Federal Courts
Astra USA, Inc. v. County of Santa Clara, CA

Docket No. 09-1273
Reversed: The Ninth Circuit

Argued: January 19, 2011
Decided: March 29, 2011
Analysis: See ABA PREVIEW 170 ISSUE 4

Overview: Santa Clara County brought a class action in federal court on behalf of public health care providers against a number of pharmaceutical companies, alleging that these companies violated the law by charging more than the ceiling price under the federal Public Health Service Act. The act imposes ceilings on the prices that drug manufacturers may charge for prescription medicines sold to specified health care facilities. As a condition for participating in Medicaid, drug manufacturers are required to enter into contracts with the Secretary of Health and Human Services (HHS) to abide by the act’s pricing restrictions. The Court must now consider whether so-called third-party beneficiaries of a government contract have a private right of action under the federal common law of contracts to enforce the act’s pricing requirements, even though the federal statute contains no express or implied right of action to sue.

Problem: May federal courts confer a private right to sue for breach of contract on the third-party beneficiaries of a government contract, pursuant to federal common law, when the statute mandating the contract contains no express or implied right of action?

No. Public health care providers cannot sue drug manufacturers in order to enforce ceiling-price contracts between those drug manufacturers and the Secretary of HHS.
From the opinion by Justice Ginsburg
(joined by all members of the Court, except
for Justice Kagan, who took no part in consider-
eration or decision):
Far from assisting HHS, suits by 340B enti-
ties would undermine the agency’s efforts to admin-
ister both Medicaid and § 340B harmoni-
ously and on a uniform, nationwide basis. Recognizing the County’s right to proceed in
court could spawn a multitude of dispersed
and uncoordinated lawsuits by 340B entities.
With HHS unable to hold the control rein,
the risk of conflicting adjudications would be
substantial.

Federal Courts
Smith v. Bayer Corporation
Docket No. 09-1205
Reversed: The Eighth Circuit

Argued: January 18, 2011
Decided: June 16, 2011
Analysis: See ABA PREVIEW 181 ISSUE 4

Overview: In 2001, Keith Smith and Shirley
Sperlazza filed a class action lawsuit against
Bayer Corporation in West Virginia state
court in connection with their use of the
prescription drug Baycol. In 2008, a federal
district court overseeing the massive Baycol
products multidistrict litigation denied fed-
eral class certification to a proposed class of
West Virginia consumers alleging economic-
loss injury. The Smith class then moved for
class certification in state court. In response,
Bayer sought a permanent injunction enjoin-
ing the West Virginia class certification hear-
ing, which the federal district court granted.
This appeal involves the issue of whether a
federal court can enjoin a state court from
certifying a class action after a federal court
previously denied class certification in a
virtually identical class action.

Issues: When a federal court in a multi-
district litigation (MDL) proceeding denies
certification of a statewide class action, may
the court, pursuant to the All Writs Act and
the Anti-Injunction Act, enjoin putative class
members who were represented in the fed-
eral hearing from seeking class certification in state court for the same class action?

When a federal court in an MDL proceeding
denies certification of a statewide class ac-
tion, is it impermissible for the federal court
to issue an injunction restraining absent
class members from seeking state class cer-
tification, where those absent class members
were not afforded the due process protections
required if certification had been granted?
No. A federal court exceeds its authority
under the “relitigation exception” of the Anti-
Injunction Act when it enjoins a state court
from considering a class certification motion
on behalf of putative class members who
were represented at prior federal hearings.

From the opinion by Justice Kagan
(joined by Chief Justice Roberts and Justices
Scalia, Ginsburg, Breyer, Alito, and
Sotomayor and joined by Justice Thomas as
to Parts I and II-A):
A federal court and a state court apply dif-
ferent law. That means they decide distinct
questions. The federal court’s resolution
of one issue does not preclude the state
court’s determination of another. It then goes
without saying that the federal court may not
issue an injunction. The Anti-Injunction Act’s
re-litigation exception does not extend nearly
so far.

Federal Courts
Wilson v. Corcoran
Docket No. 10-91
Vacated and Remanded:
The Seventh Circuit

Argued: N/A
Decided: November 8, 2010
Analysis: N/A

Overview: Joseph Corcoran was found guilty
of four counts of murder by an Indiana jury
and the trial judge subsequently sentenced
him to death. Corcoran argued that the judge
improperly relied on nonstatutory aggravat-
ing factors during the sentencing in violation
of his Eighth and Fourteenth Amendment
rights. On appeal, the federal district court
granted habeas relief on separate grounds.
The Court must now determine whether the
Seventh Circuit’s eventual granting of the
writ based on the alleged erroneous reading
of the state laws was appropriate.

Issue: Can a federal court issue a writ of
habeas corpus to a state prisoner before
determining that the prisoner’s confinement
violates federal law?
No. Federal courts must first determine
that a state prisoner’s confinement violates
federal law before granting a writ of habeas
corpus.

From the Per Curiam opinion:
It is not enough to note that a habeas
petitioner asserts the existence of a con-
stitutional violation; unless the federal
court agrees with that assertion, it may not
grant relief. The Seventh Circuit’s opinion
reflects no such agreement, nor does it even
articulate what federal right was allegedly
infringed. In fact, as to one possible federal
claim, the court maintains that it would not
violate federal law for Indiana to adopt a rule
authorizing what the trial court did.

First Amendment
Arizona Christian School Tuition
Organization v. Winn and
Garriott v. Winn
Docket Nos. 09-987 and 09-991
Reversed: The Ninth Circuit

Argued: November 3, 2010
Decided: April 4, 2011
Analysis: See ABA PREVIEW 68 ISSUE 2

Overview: Arizona law allows taxpayers
to receive a tax credit of up to $500 for
contributing money to a student tuition
organization. The largest student tuition
organizations in Arizona fund education at
Catholic schools and evangelical Christian
schools. The Ninth Circuit ruled that taxpay-
ers have standing to challenge this as a form
of government expenditures violating the
Establishment Clause of the First Amend-
ment. The Ninth Circuit also concluded that
the Arizona law encourages parents to send
their children to religious schools and thus
violates the First Amendment. The cases thus
pose important issues concerning standing
to challenge Establishment Clause violations
and whether such government programs are
constitutional.

Issue: Arizona has created a tax credit
system which substantially benefits religious
schools. Do taxpayers have standing to chal-
lenge this program as violating the Establish-
ment Clause of the First Amendment?
No. Taxpayers do not have standing under
Article III to challenge the Arizona tax credit
system as violating the Establishment Clause
because they are challenging a tax credit, not
government spending.

From the opinion by Justice Kennedy
(joined by Chief Justice Roberts and
Justices Scalia, Thomas, and Alito):
The distinction between governmental
expenditures and tax credits refute respondents’ assertion of standing. When Arizona taxpayers choose to contribute to STOs, they spend their own money, not money the State has collected from respondents or from other taxpayers. Arizona’s § 43–1089 does not “extrac[t] and spend[d]” a conscientious dissenter’s funds in service of an establishment or “force a citizen to contribute three pence only of his property” to a sectarian organization. On the contrary, respondents and other Arizona taxpayers remain free to pay their own tax bills, without contributing to an STO. Respondents are likewise able to contribute to an STO of their choice, either religious or secular. And respondents also have the option of contributing to other charitable organizations, in which case respondents may become eligible for a tax deduction or a different tax credit. The STO tax credit is not tantamount to a religious tax or to a tithe and does not visit the injury identified in Flast. It follows that respondents have neither alleged an injury for standing purposes under general rules nor met the Flast exception.

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

However blatantly the government may violate the Establishment Clause, taxpayers cannot gain access to the federal courts. And by ravaging Flast in this way, today’s decision damages one of the Nation’s defining constitutional commitments. “Congress shall make no law respecting an establishment of religion”—ten simple words that have stood for over 200 years as a foundation stone of American religious liberty. Ten words that this Court has long understood, as James Madison did, to limit (though by no means eliminate) the government’s power to finance religious activity.

Concurring: Justice Scalia (joined by Justice Thomas)

Dissenting: Justice Kagan (joined by Justices Ginsburg, Breyer, and Sotomayor)
parents (and aunts and uncles) think violent video games are a harmless pastime. And the overbreadth in achieving one goal is not cured by the underbreadth in achieving the other. Legislation such as this, which is neither fish nor fowl, cannot survive strict scrutiny.

From the dissenting opinion by Justice Thomas:
The practices and beliefs of the founding generation establish that “the freedom of speech,” as originally understood, does not include a right to speak to minors (or a right of minors to access speech) without going through the minors’ parents or guardians. I would hold that the law at issue is not facially unconstitutional under the First Amendment, and reverse and remand for further proceedings.

From the dissenting opinion by Justice Breyer:
The majority’s claim that the California statute, if upheld, would create a “new category of unprotected speech,” ante, at 3, 6, is overstated. No one here argues that depictions of violence, even extreme violence, automatically fall outside the First Amendment’s protective scope as, for example, do obscenity and depictions of child pornography. We properly speak of categories of expression that lack protection when, like “child pornography,” the category is broad, when it applies automatically, and when the State can prohibit everyone, including adults, from obtaining access to the material within it. But where, as here, careful analysis must precede a narrower judicial conclusion ... we do not normally describe the result as creating a “new category of unprotected speech.”

Concurring: Justice Alito (joined by Chief Justice Roberts)
Dissenting: Justice Thomas
Dissenting: Justice Breyer

First Amendment
Nevada Commission on Ethics v. Carrigan
Docket No. 10-568
Reversed and Remanded:
The Supreme Court of Nevada

Argued: April 27, 2011
Decided: June 13, 2011
Analysis: See ABA PREVIEW 309 ISSUE 7

Overview: The Nevada Ethics Commission censured Sparks City Council Member Michael Carrigan for voting on a development project after the commission learned that his campaign manager lobbied on behalf of the project developer. Carrigan sued the commission, claiming that its censure under the Nevada Ethics in Government Law violated the First Amendment. The Nevada Supreme Court applied “strict scrutiny,” the most rigorous test known to constitutional law, and struck the law down as violating the First Amendment.

Issue: Did the Nevada Supreme Court err when it applied strict scrutiny to a city council member’s free speech claim against the Nevada Ethics Commission for censuring him under the Nevada Ethics in Government Law for voting on a development project for which his volunteer campaign manager also advised, and lobbied on behalf of, the developer?

Yes. The Nevada Ethics in Government Law is not unconstitutionally overbroad as a legislator’s voting and arguments during debate are not speech protected by the First Amendment.

From the opinion by Justice Scalia

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

But how can it be that restrictions upon legislators’ voting are not restrictions upon legislators’ protected speech? The answer is that a legislator’s vote is the commitment of his apportioned share of the legislature’s power to the passage or defeat of a particular proposal. The legislative power thus committed is not personal to the legislator but belongs to the people; the legislator has no personal right to it.

Concurring: Justice Kennedy
Concurring in part and in judgment: Justice Alito

First Amendment
Snyder v. Phelps
Docket No. 09-751
Affirmed: The Fourth Circuit

Argued: October 6, 2010
Decided: March 2, 2011
Analysis: See ABA PREVIEW 8 ISSUE 1

Overview: Albert Snyder, father of Matthew Snyder, a Marine killed in Iraq, obtained a $5 million tort damages award from a minister and church that protested against societal tolerance towards homosexuals and the moral decay of American society by picketing Matthew’s funeral and posting material on the church website. The Court is asked to decide whether the Fourth Circuit erred in setting aside that verdict as a violation of the minister and church’s First Amendment free speech rights.

Issue: Does the First Amendment bar a tort damage award for intentional infliction of emotional distress and other claims to the father of a dead soldier, when neither the father nor the son were public figures or involved in public controversies, from a minister and church whose picketing at the son’s funeral and material on the church website included offensive and outrageous expressions?

Yes. The First Amendment bars tort liability for those who stage peaceful protests near military funerals assuming the protests are on matters of public concern.

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

Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate. That choice requires that we shield Westboro from tort liability for its picketing in this case.

From the dissenting opinion by Justice Alito:

Respondents’ outrageous conduct caused petitioner great injury, and the Court now
compounds that injury by depriving petitioner of a judgment that acknowledges the wrong he suffered. In order to have a society in which public issues can be openly and vigorously debated, it is not necessary to allow the brutalization of innocent victims like petitioner.

Concurring: Justice Breyer
Dissenting: Justice Alito

First Amendment
Sorrell v. IMS Health, Inc.
Docket No. 10-779
Affirmed: The Second Circuit

Argued: April 26, 2011
Decided: June 23, 2011
Analysis: See ABA PREVIEW 313 ISSUE 7

Overview: A Vermont law allows physicians to consent or withhold consent before their prescription information can be sold by pharmacies or used for marketing purposes. This law was passed in response to the practice of “data collectors” who collect and sell this information for marketing purposes. The Court must now determine whether the First Amendment trumps the statute.

Issue: Does the First Amendment trump a statute which restricts access to nonpublic prescription drug records and allows physicians the right to refuse to allow their identifying information to be sold or used for marketing purposes?

Yes. The Vermont statute is subject to heightened judicial scrutiny because it imposes content- and speaker-based burdens on protected expression and the justifications provided by Vermont do not withstand such scrutiny and therefore the First Amendment trumps the statute.

From the opinion by Justice Kennedy (joined by Chief Justice Roberts and Justices Scalia, Thomas, Alito, and Sotomayor):
The State has burdened a form of protected expression that it found too persuasive. At the same time, the State has left unburdened those speakers whose messages are in accord with its own views. This the State cannot do.

From the dissenting opinion by Justice Breyer (joined by Justices Ginsburg and Kagan):
At best the Court opens a Pandora’s Box of First Amendment challenges to many ordinary regulatory practices that may only incidentally affect a commercial message. Worst, it reawakens Lochner’s pre-New Deal threat of substituting judicial for democratic decision making where ordinary economic regulation is at issue.

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

Fourth Amendment
Ashcroft v. Al-Kidd
Docket No. 10-98
Reversed and Remanded: The Ninth Circuit

Argued: March 2, 2011
Decided: May 31, 2011
Analysis: See ABA PREVIEW 196 ISSUE 5

Overview: Abdullah Al-Kidd, an American citizen, was arrested pursuant to a material witness warrant and detained in a high-security facility before he was to board a plane to Saudi Arabia. Al-Kidd’s acquaintance was investigated for but never convicted of terrorism-related activity. Al-Kidd, whose testimony was never used, argues that, following a policy approved by then-Attorney General John Ashcroft, federal prosecutors used the material witness statute as a pretext to hold and investigate him as a terrorism suspect in violation of his Fourth Amendment rights. Ashcroft claims immunity.

Issue: is a former U.S. Attorney General entitled to qualified immunity from a pretext claim in which that claim is based on the conclusion that (a) the Fourth Amendment prohibits an officer from executing a valid material witness warrant with the subjective intent of conducting further investigation or preventatively detaining the subject; and (b) this Fourth Amendment rule was clearly established?

Yes. The objectively reasonable arrest and detention of a material witness pursuant to a validly obtained warrant cannot be challenged as unconstitutional on the basis of allegations that the arresting authority had an improper motive; then-Attorney General Ashcroft did not violate clearly established law and thus is entitled to qualified immunity.

From the opinion by Justice Scalia (joined by Chief Justice Roberts and Justices Kennedy and Alito):
Because Al-Kidd concedes that individualized suspicion supported the issuance of the material-witness arrest warrant; and does not assert that his arrest would have been unconstitutional absent the alleged pre-textual use of his warrant; we find no Fourth Amendment violation.

Concurring in part: Justice Kennedy (joined by Justices Ginsburg, Breyer, and Sotomayor as to Part I)
Concurring in judgment: Justice Ginsburg (joined by Justices Breyer and Sotomayor)
Concurring in judgment: Justice Sotomayor (joined by Justices Ginsburg and Breyer)
Taking no part in consideration or decision: Justice Kagan

Fourth Amendment
Camreta v. Greene and Alford v. Greene
Docket Nos. 09-1454 and 09-1478
Vacated in part and Remanded: The Ninth Circuit

Argued: March 1, 2011
Decided: May 26, 2011
Analysis: See ABA PREVIEW 227 ISSUE 5

Overview: An Oregon caseworker and a law enforcement officer conducted an interview with a minor student without the permission of her parents because the caseworker had concerns that the minor had been sexually abused by her father. The caseworker and officer did not have a warrant, a court order, or parental consent. The girl’s mother later sued the government officials, alleging that they violated her daughter’s Fourth Amendment rights. The Court is now asked to determine whether law enforcement officials must obtain a warrant, a court order, or parental consent before interviewing a minor child in school regarding suspected sexual abuse.

Issue: Is the Ninth Circuit’s constitutional ruling reviewable, not withstanding that it ruled in the petitioner’s favor on qualified immunity grounds?

Yes. A lower court’s constitutional ruling is reviewable even if the government official petitioning for review won final judgment on qualified immunity grounds; in this particular case, the issue is moot because the plaintiff no longer needs protection from the challenged government practice.

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

About all that exclusion would deter in this case is conscientious police work. Responsible law-enforcement officers will take care to learn “what is required of them” under Fourth Amendment precedent and will conform their conduct to these rules. But by the same token, when binding appellate precedent specifically authorizes a particular police practice, well trained officers will and should use that tool to fulfill their crime-detection and public-safety responsibilities. An officer who conducts a search in reliance on binding appellate precedent does no more than “ac[te] as a reasonable officer would and should act” under the circumstances. The deterrent effect of exclusion in such a case can only be to discourage the officer from “do[ing] his duty.”

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

The Court goes on, however, to decide how Gant’s new rule will apply. And here it adds a fatal twist. While conceding that, like the search in Gant, this search violated the Fourth Amendment, it holds that, unlike Gant, this defendant is not entitled to a remedy. That is because the Court finds a new “good faith” exception which prevents application of the normal remedy for a Fourth Amendment violation, namely, suppression of the illegally seized evidence. Leaving Davis with a right but not a remedy, the Court “keep[s] the word of promise to our ear” but “break[s] it to our hope.”

Concurring: Justice Sotomayor

Dissenting: Justice Breyer (joined by Justice Ginsburg)

Fourth Amendment

Davis v. United States

Docket No. 09-11328

Affirmed: The Eleventh Circuit

Speakers:

Issue: Is evidence admissible under the good-faith exception to the exclusionary rule when it is discovered during a search that was conducted in objectively reasonable reliance on existing Fourth Amendment precedent, but subsequent to the search, that precedent is overturned by the Court?

Yes. Evidence obtained during a search conducted in reasonable reliance on existing Fourth Amendment precedent is not subject to the exclusionary rule and is therefore admissible, even if that precedent is subsequently overturned.

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

About all that exclusion would deter in this case is conscientious police work. Responsible law-enforcement officers will take care to learn “what is required of them” under Fourth Amendment precedent and will conform their conduct to these rules. But by the same token, when binding appellate precedent specifically authorizes a particular police practice, well trained officers will and should use that tool to fulfill their crime-detection and public-safety responsibilities. An officer who conducts a search in reliance on binding appellate precedent does no more than “ac[te] as a reasonable officer would and should act” under the circumstances. The deterrent effect of exclusion in such a case can only be to discourage the officer from “do[ing] his duty.”

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

The Court goes on, however, to decide how Gant’s new rule will apply. And here it adds a fatal twist. While conceding that, like the search in Gant, this search violated the Fourth Amendment, it holds that, unlike Gant, this defendant is not entitled to a remedy. That is because the Court finds a new “good faith” exception which prevents application of the normal remedy for a Fourth Amendment violation, namely, suppression of the illegally seized evidence. Leaving Davis with a right but not a remedy, the Court “keep[s] the word of promise to our ear” but “break[s] it to our hope.”

Concurring: Justice Sotomayor

Dissenting: Justice Breyer (joined by Justice Ginsburg)

Fourth Amendment

Kentucky v. King

Docket No. 09-1272

Reversed and Remanded: The Supreme Court of Kentucky

Speakers:

Issue: Is evidence admissible under the good-faith exception to the exclusionary rule when it is discovered during a search that was conducted in objectively reasonable reliance on existing Fourth Amendment precedent, but subsequent to the search, that precedent is overturned by the Court?

Yes. Evidence obtained during a search conducted in reasonable reliance on existing Fourth Amendment precedent is not subject to the exclusionary rule and is therefore admissible, even if that precedent is subsequently overturned.

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

About all that exclusion would deter in this case is conscientious police work. Responsible law-enforcement officers will take care to learn “what is required of them” under Fourth Amendment precedent and will conform their conduct to these rules. But by the same token, when binding appellate precedent specifically authorizes a particular police practice, well trained officers will and should use that tool to fulfill their crime-detection and public-safety responsibilities. An officer who conducts a search in reliance on binding appellate precedent does no more than “ac[te] as a reasonable officer would and should act” under the circumstances. The deterrent effect of exclusion in such a case can only be to discourage the officer from “do[ing] his duty.”

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

The Court goes on, however, to decide how Gant’s new rule will apply. And here it adds a fatal twist. While conceding that, like the search in Gant, this search violated the Fourth Amendment, it holds that, unlike Gant, this defendant is not entitled to a remedy. That is because the Court finds a new “good faith” exception which prevents application of the normal remedy for a Fourth Amendment violation, namely, suppression of the illegally seized evidence. Leaving Davis with a right but not a remedy, the Court “keep[s] the word of promise to our ear” but “break[s] it to our hope.”

Concurring: Justice Sotomayor

Dissenting: Justice Breyer (joined by Justice Ginsburg)

Fourth Amendment

Tolentino v. New York

Docket No. 09-11556

Dismissed: The Court of Appeals of New York

Speakers:

Issue: Is it reasonable for the police to rely on the “exigent circumstance” exception when they act in a way that creates the exigent circumstances in the first place?

Yes. The exigent circumstances rule applies when the police create the circumstances so long as they do not create the exigency by engaging in or threatening to engage in conduct that violates the Fourth Amendment.

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

It would be extremely difficult for police officers to know how loudly they may announce their presence or how forcefully they may knock on a door without running afoul of the police-created exigency rule. And, in most cases, it would be nearly impossible for a court to determine whether that threshold had been passed. The Fourth Amendment does not require the nebulous and impractical test that respondent proposes.

From the dissenting opinion by Justice Ginsburg:

The Court today arms the police with a way to circumvent the Fourth Amendment’s warrant requirement in drug cases. In lieu of presenting their evidence to a neutral magistrate, police officers may now knock, listen, then break the door down, never mind that they had ample time to obtain a warrant.

Dissenting: Justice Ginsburg
answering whether the rule applies to the suppression of preexisting governmental identity records that were obtained after an unlawful traffic stop. The Court may also review the decision in INS v. Lopez-Mendoza, 468 U.S. 1032 (1984), in which it held that “[t]he … identity of a defendant … is never suppressible as a fruit of an unlawful arrest.” The circuits appear to be split on whether Lopez-Mendoza is limited to only preventing a defendant from being able to defeat jurisdiction or does it extend to the admissibility of what is otherwise identity-related evidence.

**Issue:** Are preexisting identity-related governmental documents such as motor vehicle records, obtained as a direct result of police action in violation of the Fourth Amendment, subject to the exclusionary rule?

The writ of certiorari was dismissed.

**Freedom of Information Act**

**Federal Communications Commission v. AT&T, Inc.**

Docket No. 09-1279

Reversed: The Third Circuit

Argued: January 19, 2011

Decided: March 1, 2011

Analysis: See ABA PREVIEW 156 ISSUE 4

**Overview:** In 2004, AT&T provided the Federal Communications Commission (FCC) with a variety of documents in connection with an investigation into possible overcharging by AT&T. Later, ComTel, a competitor of AT&T, requested those documents under the Freedom of Information Act (FOIA). AT&T argued the documents should not be released because to do so would violate AT&T’s “personal privacy” in contravention of Exemption 7(c) of FOIA. The FCC concluded that corporations do not have personal privacy, and the Third Circuit reversed.

**Issue:** Does Exemption 7(c) of the Freedom of Information Act, which exempts from mandatory disclosure information compiled for law enforcement purposes when such disclosure could reasonably be expected to constitute an unwarranted invasion of “personal privacy,” protect the privacy of corporate entities?

**No.** For the purposes of FOIA Exemption 7(c), corporations do not have “personal privacy” and therefore, corporations are ineligible to use Exemption 7(c) to prevent disclosure of material.

**From the opinion by Chief Justice Roberts** (joined by all members except Justice Kagan, who took no part in the consideration or decision):

“Person” is a defined term in the statute; “personal” is not. When a statute does not define a term, we typically “give the phrase its ordinary meaning.” “Personal” ordinarily refers to individuals. We do not usually speak of personal characteristics, personal effects, personal correspondence, personal influence, or personal tragedy as referring to corporations or other artificial entities. This is not to say that corporations do not have correspondence, influence, or tragedies of their own, only that we do not use the word “personal” to describe them.

**Freedom of Information Act**

**Milner v. Department of the Navy**

Docket No. 09-1163

Reversed and Remanded: The Ninth Circuit

Argued: December 1, 2010

Decided: March 17, 2011

Analysis: See ABA PREVIEW 104 ISSUE 3

**Overview:** The petitioner requested maps from the U.S. Navy showing how far an explosion would travel from the Navy’s Indian Island explosive storage facilities into the surrounding community and waters. The Navy refused to release certain information, saying the information was predominantly internal and disclosure presented a risk of circumvention of agency regulation by providing information about possible targets of attack, the test of the judicially created “High 2” exemption to the Freedom of Information Act. The district court and the Ninth Circuit ruled for the Navy.

**Issue:** Does the judicially created “High 2” exemption to the Freedom of Information Act (FOIA) exceed the scope of the statute?

**Yes.** Because Exemption 2 encompasses only records relating to employee relations and human resources issues, the explosives maps and data requested here do not qualify for withholding under that exemption.

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

Exemption 2 as we have construed it, does not reach the ESQD [Explosive Safety Quantity Distance] information at issue here. These data and maps calculate and visually portray the magnitude of hypothetical detonations. By no stretch of imagination do they relate to personnel rules and practices, as that term is most naturally understood. They concern the physical rules governing explosives, not the workplace rules governing sailors; they address the handling of dangerous materials, not the treatment of employees. The Navy therefore may not use Exemption 2, interpreted in accordance with its plain meaning to cover human resources matters, to prevent disclosure of the requested maps and data.

**Concurring:** Justice Alito

**Dissenting:** Justice Breyer

**Habeas Corpus**

**Cullen v. Pinholster**

Docket No. 09-1088

Reversed: The Ninth Circuit

Argued: November 9, 2010

Decided: April 4, 2011

Analysis: See ABA PREVIEW 95 ISSUE 2

**Overview:** Scott Lynn Pinholster was convicted in state court of first-degree murder and sentenced to death. He filed state and federal habeas corpus petitions arguing that his trial attorneys provided ineffective assistance of counsel because they failed to investigate and present mitigating evidence of brain damage and seizure disorder at the penalty phase of the trial.

**Issues:** May a federal court reject a state-court adjudication of a petitioner’s claim as “unreasonable” under AEDPA, 28 U.S.C. § 2254(d)(1), and grant habeas corpus relief, in which the petitioner proffered evidence in the federal court that he did not proffer in the state proceedings?

Was trial counsel ineffective for failing to investigate and present mitigating evidence of brain damage and seizure disorder at the penalty phase of a capital case, in which counsel consulted with a psychiatrist who disclaimed any such diagnosis, as well as with the defendant and his mother, but in which counsel did not seek out a different
psychiatrist and different family members, despite evidence of brain damage?

No. On the record before the state court, Pinholster was not entitled to federal habeas relief; there is no reasonable probability that the additional evidence presented at Pinholster’s state proceedings would have changed the verdict.

From the opinion by Justice Thomas (joined by Chief Justice Roberts and Justices Scalia and Kennedy, and joined in part by Justices Alito, Breyer, Ginsburg, and Kagan): Given what little additional mitigating evidence Pinholster presented in state habeas, we cannot say that the California Supreme Court’s determination was unreasonable. … The new material is thus not so significant that, even assuming Pinholster’s trial counsel performed deficiently, it was necessarily unreasonable for the California Supreme Court to conclude that Pinholster had failed to show a substantial likelihood of a different sentence.

Concurring in part and in judgment: Justice Alito
Concurring in part and dissenting in part: Justice Breyer
Dissenting: Justice Sotomayor (joined in part by Justices Ginsburg and Kagan)

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Habeas Corpus
Swarthout v. Cooke

Docket No. 10-333
Reversed: The Ninth Circuit

Argued: N/A
Decided: January 24, 2011
Analysis: N/A

Overview: When Damon Cooke was denied parole by the California Board of Prison Terms, he filed a habeas petitioner with the state superior court as provided for by California penal codes. The state courts denied his petition and Cooke eventually filed a federal habeas petition. The Ninth Circuit decided that the federal courts could hear the petition because the state law created a protected liberty interest in parole hearings.

Issue: Did the Ninth Circuit err when it held that a federal court can grant state habeas relief to a prisoner under a state-law establishing the evidentiary standard for state parole hearings?

Yes. Under the California system for parole hearings, state prisoners receive a minimum Due Process protection during their parole hearings, including that they are allowed to speak during the hearing, contest the evidence against them, and are notified as to the reasons behind the board’s ruling, and, subsequently, federal courts have no ability to grant habeas relief based on the state parole laws.

From the Per Curiam opinion: In granting habeas relief based on its conclusion that the state courts had misapplied California’s “some evidence” rule, the Ninth Circuit must have assumed either that federal habeas relief is available for an error of state law, or that correct application of the State’s “some evidence” standard is required by the federal Due Process Clause. Neither assumption is correct.

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Habeas Corpus
Walker v. Martin

Docket No. 09-996
Reversed: The Ninth Circuit

Argued: November 29, 2010
Decided: February 23, 2011
Analysis: See ABA PREVIEW 118 ISSUE 3

Overview: This case examines the adequacy of a state law establishing a procedural bar for prisoners whose collateral attack of their conviction is untimely. Specifically, California state law procedurally bars all habeas petitions unless filed “without substantial delay.” In the case at bar, the prisoner challenges the “without substantial delay” requirement on the grounds that (a) it is impermissibly vague and (b) the state of California has not consistently applied this rule.

Issue: In federal habeas corpus proceedings, is a state law under which a prisoner may be barred from collaterally attacking his conviction when the prisoner “substantially delayed” filing his habeas corpus petition “inadequate” to support a procedural bar because (i) the federal court believes that the rule is vague and (ii) the state failed to prove that its courts “consistently” exercised their discretion when applying the rule in other cases?

No. California’s state time requirement for habeas filings is an adequate procedural bar that is neither vague nor inconsistently applied.

From the unanimous opinion by Justice Ginsburg:
The Ninth Circuit concluded that California’s time bar is not consistently applied because outcomes under the rule vary from case to case … A discretionary rule ought not be disregarded automatically upon a showing of seeming inconsistencies. Discretion enables a court to home in on case-specific considerations and to avoid the harsh results that sometimes attend consistent application of an unyielding rule.

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Immigration
Chamber of Commerce v. Whiting

Docket No. 09-115
Affirmed: The Ninth Circuit

Argued: December 8, 2010
Decided: May 26, 2011
Analysis: See ABA PREVIEW 121 ISSUE 3

Overview: An Arizona law makes it a violation for employees to hire unauthorized aliens. Violators may be sanctioned by the loss of their licenses to do business in the state, including revocation of their articles of incorporation. The law also requires employers to use a federal electronic employment verification system to check whether new hires have the right to work in the United States. The Court will consider whether such a law is preempted by federal law.

Issue: Does the federal government’s scheme for regulating the employment of aliens in the United States preempt an Arizona law that may suspend the business license of an employer who knowingly employs an unauthorized alien?

No. The Arizona licensing law is not impliedly preempted by the federal law, as the Arizona law falls well within the confines of the authority Congress chose to leave to the States.

From the opinion by Chief Justice Roberts except as to Parts II-B and III-B (joined in full by Justices Scalia, Kennedy, and Alito and joined in part as to Parts I, II-A, and III-A by Justice Thomas):
Arizona’s procedures simply implement the sanctions that Congress expressly allowed Arizona to pursue through licensing laws. Given that Congress specifically preserved such authority for the States, it stands to reason that Congress did not intend to prevent
the States from using appropriate tools to exercise that authority.

From the dissenting opinion by Justice Breyer (joined by Justice Ginsburg):
Either directly or through the uncertainty that it creates, the Arizona statute will impose additional burdens upon lawful employers and consequently lead those employers to erect ever stronger safeguards against the hiring of unauthorized aliens — without countervailing protection against unlawful discrimination. And by defining licensing so broadly, by bringing nearly all businesses within its scope, Arizona’s statute creates these effects statewide.[]

From the dissenting opinion by Justice Sotomayor:
The statutory scheme as a whole defeats Arizona’s and the majority’s reading of the savings clause. Congress would not sensibly have permitted States to determine for themselves whether a person has employed an unauthorized alien, while at the same time creating a specialized federal procedure for making such a determination, withholding from the States the information necessary to make such a determination, and precluding use of the I-9 forms in nonfederal proceedings.

Concurring in judgment: Justice Thomas
Dissenting: Justice Breyer (joined by Justice Ginsburg)
Dissenting: Justice Sotomayor
Taking no part in consideration or decision: Justice Kagan

**Immigration**
*Flores-Villar v. United States*

**Docket No. 09-5801**
**Affirmed: The Ninth Circuit**

Argued: November 10, 2010
Decided: June 13, 2011
Analysis: See ABA *PREVIEW* 79 ISSUE 2

**Overview:** Ruben Flores-Villar, born out of wedlock in Mexico but raised in the United States, faced removal unless he could establish his U.S. citizenship following a drug charge and an illegal reentry.
His father, a U.S. citizen, was sixteen at the time of Flores-Villar’s birth. Under federal law, Flores-Villar’s father could transmit citizenship to his son only upon proof that he (the father) was physically present in the United States for ten years prior to the birth, with five years occurring after the father’s fourteenth birthday, an impossibility given that the father was only sixteen at the time. A citizen mother in the same situation could transmit citizenship to her son upon proving only one year of physical presence in the United States at any time prior to the child’s birth. The Court will examine whether this differential treatment of U.S. citizen mothers and fathers violates the Fifth Amendment.

**Issues:** Does intermediate scrutiny apply to this sex-based law, or does plenary power in the immigration area require greater deference to congressional line-drawing?

Does the government’s concern about the potential for children’s statelessness justify a sex-based approach in U.S. law?

When, if ever, does the affected child have standing to press the constitutional equal protection claim?

An equally divided Court upheld the decision of the lower court, rejecting the argument that the federal law establishes different standards for children born out of wedlock based on the gender of American parent.

**Per Curiam Opinion.**
**Taking no part in consideration or decision:** Justice Kagan

**Indian Law**
*United States v. Tohono O’odham Nation*

**Docket No. 09-846**
**Reversed and Remanded: The Federal Circuit**

Argued: November 1, 2010
Decided: April 26, 2011
Analysis: See ABA *PREVIEW* 60 ISSUE 2

**Overview:** The Court of Federal Claims (CFC) has jurisdiction over claims for money damages against the government, but it cannot hear any claim “for or in respect to which” the plaintiff has already sued in another court, deprive the CFC of jurisdiction over a claim for monetary relief for the government’s breach of trust when the plaintiff has another suit for equitable relief based on the same facts pending in federal district court.

**Yes.** Two suits making the same claim, based on substantially the same operative facts, are barred from the Court of Federal Claims’ jurisdiction, regardless of the relief sought in each suit.

**From the opinion by Justice Kennedy (joined by Chief Justices Roberts and Justices Scalia, Thomas, and Alito):**
There is no merit to the Nation’s assertion that the interpretation adopted here cannot prevail because it is unjust, forcing plaintiffs to choose between partial remedies available in different courts. The hardship in this case is far from clear. The Nation could have filed in the CFC alone and if successful obtained monetary relief to compensate for any losses caused by the Government’s breach of duty. It also seems likely that Indian tribes in the Nation’s position could go to district court first without losing the chance to later file in the CFC.[]

**Concurring in judgment:** Justice Sotomayor (joined by Justice Breyer)
**Dissenting:** Justice Ginsburg
**Taking no part in consideration or decision:** Justice Kagan

**Labor and Employment Law**
*Kasten v. Saint-Gobain Performance Plastics*

**Docket No. 09-834**
**Vacated and Remanded: The Seventh Circuit**

Argued: October 13, 2010
Decided: March 22, 2011
Analysis: See ABA *PREVIEW* 12 ISSUE 1

**Overview:** Kevin Kasten filed an anti-retaliation claim under the Fair Labor Standards Act (FLSA) after his employer terminated him for multiple time clock violations. He had orally complained about the placement of the time clocks but had not filed a written complaint. The location of the clock precluded employees from punching in and out until after they had donned or removed safety gear. As a result, workers were not paid for time spent putting on or removing safety gear. The issue
is whether the FLSA anti-retaliation clause applies to internal, oral complaints.

**Issue:** Does § 15(a)(3) of the Fair Labor Standards Act (FLSA) protect oral, internal complaints about wage and hour violations?

**Yes.** The scope of the statutory term “filed any complaint” includes oral, as well as written complaints.

**From the opinion by Justice Breyer** (joined by Chief Justice Roberts and Justices Kennedy, Ginsburg, Alito, and Sotomayor): To limit the scope of the antiretaliation provision to the filing of written complaints would also take needed flexibility from those charged with the Act’s enforcement. It could prevent Government agencies from using hotlines, interviews, and other oral methods of receiving complaints.

**Dissenting:** Justice Scalia (joined by Justice Thomas as to all but n. 6)

**Taking no part in consideration or decision:** Justice Kagan

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**Labor and Employment Law**

**NASA v. Nelson**

**Docket No. 09-530**

**Reversed and Remanded:** The Ninth Circuit

**Argued:** October 5, 2010  
**Decided:** January 19, 2011  
**Analysis:** See ABA PREVIEW 37 ISSUE 1

**Overview:** At issue in this case is a newly instituted NASA policy to conduct background checks of the employees of its contractors. The plaintiffs, contract employees, claim that the questions asked during the course of their investigations violate their constitutional rights to information privacy. Questions include those asking whether the employee has received treatment or counseling for illegal drug use in the past year as well as questions posed to third parties that the government claims have bearing on the employee’s suitability for employment.

**Issues:** Does the government violate a federal contract employee’s constitutional right to informational privacy when, in the course of a background investigation, it asks whether the employee has received counseling or treatment for illegal drug use that occurred within the past year, pursuant to which the government claims that the employee’s response is used only for employment purposes and is protected under the Privacy Act?

Does the government violate a federal contract employee’s constitutional right to informational privacy when, in the course of a background investigation, it asks the employee’s designated references for any adverse information that may have a bearing on the employee’s suitability for employment at a federal facility, pursuant to which the government claims that the response is used only for employment purposes and is protected under the Privacy Act?

**No.** Even if there is a constitutional right to informational privacy, NASA’s background checks for contract employees are reasonable and the plaintiff’s are fully protected against public disclosures by the Privacy Act.

**From the opinion by Justice Alito** (joined by Chief Justice Roberts and Justices Kennedy, Ginsburg, Breyer, and Sotomayor): As was our approach in *Whalen*, we will assume for present purposes that the Government’s challenged inquiries implicate a privacy interest of constitutional significance. We hold, however, that, whatever the scope of this interest, it does not prevent the Government from asking reasonable questions of the sort included on SF–85 and Form 42 in an employment background investigation that is subject to the Privacy Act’s safeguards against public disclosure.

**From the concurring opinion by Justice Scalia** (joined by Justice Thomas): I agree with the Court, of course, that background checks of employees of government contractors do not offend the Constitution. But rather than reach this conclusion on the basis of the never-explained assumption that the Constitution requires courts to “balance” the Government’s interests in data collection against its contractor employees’ interest in privacy, I reach it on simpler grounds. Like many other desirable things not included in the Constitution, “informational privacy” seems like a good idea—wherefore the People have enacted laws at the federal level and in the states restricting the government’s collection and use of information. But it is up to the People to enact those laws, to shape them, and, when they think it appropriate, to repeal them. A federal constitutional right to “informational privacy” does not exist.

**Concurring:** Justice Scalia (joined by Justice Thomas)

**Concurring:** Justice Thomas

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**Taking no part in consideration or decision:** Justice Kagan

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**Labor and Employment Law**

**Staub v. Proctor Hospital**

**Docket No. 09-400**

**Reversed and Remanded:** The Seventh Circuit

**Argued:** November 2, 2010  
**Decided:** March 1, 2011  
**Analysis:** See ABA PREVIEW 72 ISSUE 2

**Overview:** The parties ask the Court to articulate the circumstances under which an employer may be liable for a termination decision that was prompted by a biased manager, but was actually carried out by a higher-ranking official who was unbiased.

**Issue:** May an employer be liable for a termination decision that was prompted by a biased manager, but was actually carried out by a higher-ranking official who was unbiased?

**Yes.** An employee can sue an employer for a termination decision that was motivated by a manager’s bias, even if the actual decision was carried out by a higher-ranking official if that official relied on the actions of the biased manager.

**From the opinion by Justice Scalia** (joined by Chief Justice Roberts and Justices Kennedy, Ginsburg, Breyer, and Sotomayor): [T]he approach urged upon us by Proctor gives an unlikely meaning to a provision designed to prevent employer discrimination. An employer’s authority to reward, punish, or dismiss is often allocated among multiple agents. The one who makes the ultimate decision does so on the basis of performance assessments by other supervisors. Proctor’s view would have the improbable consequence that if an employer isolates a personnel official from an employee’s supervisors, vests the decision to take adverse employment actions in that official, and asks that official to review the employee’s personnel file before taking the adverse action, then the employer will be effectively shielded from discriminatory acts and recommendations of supervisors that were designed and intended to produce the adverse action. That seems to us an implausible meaning of the text, and one that is not compelled by its words.
Concurring: Justice Alito (joined by Justice Thomas)
Taking no part in consideration or decision: Justice Kagan

Patent Law
Board of Trustees of the Leland Stanford Junior University
v. Roche Molecular Systems, Inc.
Docket No. 09-1159
Affirmed: The Federal Circuit

Argued: February 28, 2011
Decided: June 6, 2011
Analysis: See ABA PREVIEW 213 ISSUE 5

Overview: A researcher doing federally funded AIDS research at Stanford promised to assign any inventions to the university and then, while doing related work at Cetus Corporation (later acquired by Roche), assigned to Cetus his interest in inventions. The Federal Circuit held that the Cetus assignment was operative, that Roche was a co-owner of the resulting patents, and that Stanford lacked standing to sue. The Court will decide whether an inventor’s assignment of rights in inventions stemming from federally funded research vests title to federally funded research effective, despite the Bayh-Dole Act’s provision stating that a contractor university may “elect to retain title” to an invention stemming from federally funded research.

Issue: Is an inventor’s assignment of his ownership rights in inventions resulting from federally funded research effective, despite the Bayh-Dole Act’s provision stating that a contractor university may “elect to retain title” to an invention stemming from federally funded research?

Yes. The Bayh-Dole Act does not automatically vest title to federally funded inventions in federal contractors or authorize contractors to unilaterally take title to such inventions.

From the opinion by Chief Justice Roberts (joined by Justices Scalia, Kennedy, Thomas, Alito, Sotomayor, and Kagan):
Under Stanford’s construction of the Act, title to one of the employee’s inventions could vest in the University even if the invention was conceived before the inventor became a University employee, so long as the invention’s reduction to practice was supported by federal funding. What is more, Stanford’s reading suggests that the school would obtain title to one of its employee’s inventions even if only one dollar of federal funding was applied toward the invention’s conception or reduction to practice.

Concurring: Justice Sotomayor
Dissenting: Justice Breyer (joined by Justice Ginsburg)

Patent Law
Global-Tech Appliances, Inc. v. SEB S.A.
Docket No. 10-6
Affirmed: The Federal Circuit

Argued: February 23, 2011
Decided: May 31, 2011
Analysis: See ABA PREVIEW 207 ISSUE 5

Overview: In this case, the Court will consider the state of mind necessary to establish liability for actively inducing the patent infringement of another under § 271(b) of the Patent Act. Global-Tech contends that a party that induces infringement must have actual knowledge of the disputed patent, while SEB maintains that a party must show only deliberate indifference or willful blindness to the existence of a known patent to demonstrate that a party has actively induced others to infringe a patent.

Issue: Under § 271(b) of the Patent Act of 1952, does an accused patent infringer need to know of the existence of the patent to actively induce its infringement?

Yes. Induced infringement under § 271(b) requires knowledge that the induced acts constitute patent infringement. Deliberate indifference to a known risk that a patent exists does not satisfy the knowledge required by 271(b).

From the opinion by Justice Alito (joined by Chief Justice Roberts and Justices Scalia, Thomas, Ginsburg, Breyer, Sotomayor, and Kagan):
Given the long history of willful blindness and its widespread acceptance in the Federal Judiciary, we can see no reason why the doctrine should not apply in civil lawsuits for induced patent infringement under 35 U.S.C. § 271(b).

Dissenting: Justice Kennedy

Patent Law
Microsoft v. i4i Limited Partnership
Docket No. 10-290
Affirmed: The Federal Circuit

Argued: April 18, 2011
Decided: June 9, 2011
Analysis: See ABA PREVIEW 299 ISSUE 7

Overview: i4i incorporated a custom XML editor into a product and began selling it more than one year before filing a patent application. Microsoft later used the XML editor in its Word program. i4i sued Microsoft for patent infringement. Microsoft claimed the patent was invalid under the “on-sale” bar. The parties now ask the Court whether the Federal Circuit’s interpretation of 35 U.S.C. § 282, requiring the party challenging the validity of a patent to prove invalidity by “clear and convincing” evidence, is appropriate when the patent examiner did not consider prior art.

Issue: Must a party who claims that a patent is invalid prove invalidity by “clear and convincing” evidence even though the patent examiner did not consider prior art before issuing the patent?

Yes. Section 282 requires an invalidity defense to be proved by clear and convincing evidence.

From the opinion by Justice Sotomayor (joined by Justices Scalia, Kennedy, Ginsburg, Breyer, Alito, and Kagan):
The question remains, however, whether Congress has specified the applicable standard of proof. As established, Congress did just that by codifying the common-law presumption of patent validity and, implicitly, the heightened standard of proof attached to it.

Concurring: Justice Breyer (joined by Justices Scalia and Alito)
Concurring in judgment: Justice Thomas
Taking no part in consideration or decision: Chief Justice Roberts
Preemption

Bruesewitz v. Wyeth

Docket No. 09-152
Affirmed: The Third Circuit

Argued: October 12, 2010
Decided: February 22, 2011
Analysis: See ABA PREVIEW 15 ISSUE 1

Overview: Federal law creates a procedure for persons injured by a vaccination to obtain compensation for damages. The law also limits an injured party’s ability to sue a vaccine manufacturer outside that procedure. This case addresses the scope of that limit for a particular claim and design defect, and asks the question: Does federal law prohibit all design defect claims, or does it allow those claims to proceed on a case-by-case basis?

Issue: Does the Vaccine Act preempt all state law claims against vaccine manufacturers based on design defect?

Yes. The National Childhood Vaccine Injury Act preempts all design-defect claims against vaccine manufacturers for injury or death.

From the opinion by Justice Scalia (joined by Chief Justice Roberts and Justices Kennedy, Thomas, Breyer, and Alito):
If a manufacturer could be held liable for failure to use a different design, the word “unavoidable” would do no work. A side effect of a vaccine could always have been avoidable by use of a differently designed vaccine not containing the harmful element. The language of the provision thus suggests that the design of the vaccine is a given, not subject to question in the tort action. What the statute establishes as a complete defense must be unavoidability (given safe manufacture and warning) with respect to the particular design. Which plainly implies that the design itself is not open to question.

From the dissenting opinion by Justice Sotomayor (joined by Justice Ginsburg):
[T]he Court excises 13 words from the statutory text, misconstrues the Act’s legislative history, and disturbs the careful balance Congress struck between compensating vaccine-injured children and stabilizing the childhood vaccine market. Its decision leaves a regulatory vacuum in which no one ensures that vaccine manufacturers adequately take account of scientific and technological advancements when designing or distributing their products.

Concurring: Justice Breyer
Dissenting: Justice Sotomayor (joined by Justice Ginsburg)
Taking no part in consideration or decision: Justice Kagan

Preemption

PLIVA, Inc. et al. v. Mensing,
Actavis Elizabeth v. Mensing,
and Actavis, Inc. v. Demahy

Docket Nos. 09-993, 09-1039, and 09-1501
Reversed and Remanded: The Fifth and Eighth Circuits

Argued: March 30, 2011
Decided: June 23, 2011
Analysis: See ABA PREVIEW 272 ISSUE 6

Overview: Gladys Mensing and Julie Demahy were both injured after consuming a generic drug, as prescribed, beyond the safe period of use. They filed state court claims against the manufacturers for failure to warn of the dangers associated with long-term use of the drug. The manufacturers argued that they complied with federal labeling requirements under the Food, Drug, and Cosmetic Act (FDCA), and that the FDCA preempts such state court claims.

Issue: Do federal drug labeling requirements, which require generic drugs to issue the same warning as their brand-name equivalents, preemp state failure-to-warn claims against the manufacturer of a generic drug whose warnings meet this federal requirement?

Yes. Federal drug regulations, as they apply to generic drugs, directly conflict with these state claims alleging failure to provide adequate warning labels and therefore this sort of state claim is preempted.

From the opinion by Justice Thomas as to all but Part III-B-2 (joined by Chief Justice Roberts and Justices Scalia and Alito and joined in part by Justice Kennedy):
If the Manufacturers had independently changed their labels to satisfy their state-law duty, they would have violated federal law. Taking Mensing and Demahy’s allegations as true, state law imposed on the Manufacturers a duty to attach a safer label to their generic metoclopramide. Federal law, however, demanded that generic drug labels be the same at all times as the corresponding brand-name drug labels. Thus, it was impossible for the Manufacturers to comply with both their state-law duty to change the label and their federal law duty to keep the label the same.

From the dissenting opinion by Justice Sotomayor (joined by Justices Ginsburg, Breyer, and Kagan):
And a plurality of the Court tosses aside our repeated admonition that courts should hesitate to conclude that Congress intended to pre-empt state laws governing health and safety. As a result of today’s decision, whether a consumer harmed by inadequate warnings can obtain relief turns solely on the happenstance of whether her pharmacist filled her prescription with a brand-name or generic drug. The Court gets one thing right: This outcome “makes little sense.”

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

Preemption

Williamson v. Mazda Motor of America, Inc.

Docket No. 08-1314
Reversed: The Court of Appeal of California

Argued: November 3, 2010
Decided: February 23, 2011
Analysis: See ABA PREVIEW 56 ISSUE 2

Overview: The National Highway Traffic Safety Administration (NHTSA) extensively regulates automotive occupant restraint systems. NHTSA twice considered and declined to require rear seat belts in middle seats be augmented by shoulder belts. Previously, the Court narrowly found state product liability claims with regard to air bags, which the NHTSA had also not mandated, to be preemted. This case will determine the preemptive effect, if any, of NHTSA determinations not to impose enhanced design requirements, or options, for existing equipment. Williamson also provides an opportunity to reevaluate its prior air bag preemption decision.

Issue: Does the applicable version of FMVSS 208 conflict with, and therefore impliedly preempt, a state law product liability claim that a manufacturer should have installed a lap-shoulder seat belt combination, rather than a lap belt that complied with the regulation, to protect interior middle seat automotive passengers?
No. The federal safety standard requiring manufacturers to install seat belts in the rear of cars, but not requiring lap-and-shoulder belts, does not preempt state tort suits claiming that manufacturers should install the latter.

From the opinion by Justice Breyer (joined by Chief Justice Roberts and Justices Scalia, Kennedy, Ginsburg, Alito, and Sotomayor):
Like the regulation in Geier, the regulation here leaves the manufacturer with a choice. And, like the tort suit in Geier, the tort suit here would restrict that choice. But unlike Geier, we do not believe here that choice is a significant regulatory objective.

Concurring: Justice Sotomayor
Concurring: Justice Thomas
Taking no part in consideration or decision: Justice Kagan

From the opinion by Justice Thomas (joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Alito):
For purposes of Rule 10b-5, the maker of a statement is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it. Without control, a person or entity can merely suggest what to say, not “make” a statement in its own right. One who prepares or publishes a statement on behalf of another is not its maker. And in the ordinary case, attribution within a statement or implicit from surrounding circumstances is strong evidence that a statement was made by—and only by—the party to whom it is attributed.

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

Securities
Matrixx Initiatives v. Siracusano
Docket No. 09-1156
Affirmed: The Ninth Circuit

Argued: January 10, 2011
Decided: March 22, 2011
Analysis: See ABA PREVIEW 160 ISSUE 4

Overview: Plaintiffs allege that Matrixx Initiatives, Inc., violated § 10(b) of the U.S. Securities and Exchange Act by failing to disclose adverse medical events and lawsuits associated with the use of Zicam, a homeopathic cold remedy. Physicians had notified Matrixx about a dozen consumers who developed anosmia, the loss of smell, immediately after using Zicam. In addition, a handful of the millions of Zicam users had sued Matrixx. Matrixx argues it was not required to disclose these adverse medical reactions because they were not statistically significant.

Issue: To meet the materiality requirement of SEC Rule 10b-5, must a plaintiff who claims that a stock issuer failed to disclose patient complaints of serious medical side effects allege that the incidents of adverse medical events were statistically significant?

No. Plaintiffs can base a 10b-5 violation on a company’s failure to disclose complaints of adverse effects even if the number of complaints is not statistically significant.

From the unanimous opinion by Justice Sotomayor:
Matrixx’s argument rests on the premise that statistical significance is the only reliable indication of causation. This premise is flawed: As the SEC points out, “medical researchers … consider multiple factors in assessing causation.” Statistically significant data are not always available. For example, when an adverse event is subtle or rare, “an inability to obtain a data set of appropriate quality or quantity may preclude a finding of statistical significance.” Moreover, ethical considerations may prohibit researchers from conducting randomized clinical trials to confirm a suspected causal link for the purpose of obtaining statistically significant data.
§ 924(c) unless another law provides for a greater mandatory minimum.

From the opinion by Justice Ginsburg (joined by all members except Justice Kagan, who took no part in the consideration or decision):

We doubt that Congress meant a prefaratory clause, added in a bill dubbed "An Act [t]o throttle criminal use of guns," to effect a departure so great from § 924(c)'s longstanding thrust, i.e., its insistence that sentencing judges impose additional punishment for § 924(c) violations. Were we to accept any of the readings proposed by Abbott or Gould, it bears emphasis, we would undercut that same bill's primary objective: to expand § 924(c)'s coverage to reach firearm possession.

Sentencing
DePierre v. United States
Docket No. 09-1533
Affirmed: The First Circuit

Argued: February 28, 2011
Decided: June 9, 2011
Analysis: See ABA PREVIEW 224 ISSUE 5

Overview: Frantz DePierre was convicted of trafficking in over 50 grams of a substance found by the jury to be cocaine base but never found to be crack. His argument on appeal is that the statute that imposes a mandatory ten-year sentence for trafficking in that amount of "cocaine base" should be construed to apply only to crack, as approximately half the federal circuits and the United States Sentencing Commission have held.

Issue: Does the term "cocaine base," as used in the federal drug statute requiring mandatory minimum sentences for trafficking in specified amounts, encompass every form of cocaine chemically classified as a base?

Yes. Cocaine base, as used in § 841(b)(1), means not just crack cocaine, but cocaine in its chemically basic form.

From the opinion by Justice Sotomayor (joined by all members except Justice Kagan): We agree with the Government that the most natural reading of the term cocaine base is cocaine in its base form—i.e., … the molecule found in crack cocaine, freebase, and coca paste. On its plain terms, then, cocaine base reaches more broadly than just crack cocaine. In arguing to the contrary, DePierre asks us to stray far from the statute’s text, as the term crack cocaine appears nowhere in the ADAA [Anti-Drug Abuse Act of 1986] (or the United States Code, for that matter). While the Government’s reading is not without its problems, that reading follows from the words Congress chose to include in the text. In short, the term cocaine base is more plausibly read to mean the chemically basic form of cocaine, than it is crack cocaine.

Concurring in part and in judgment: Justice Scalia

Sentencing
Freeman v. United States
Docket No. 09-10245
Reversed and Remanded: The Sixth Circuit

Argued: February 23, 2011
Decided: June 23, 2011
Analysis: See ABA PREVIEW 217 ISSUE 5

Overview: As part of the Sentencing Reform Act of 1984, Congress permitted federal district judges to “reduce the term of imprisonment” previously imposed upon a particular defendant if he had “been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission.” The Court has not addressed the limits of eligibility for this novel “sentence modification” provision nor its application to binding plea agreements. This case brings the provision before the Court in the context of the (always controversial and consequential) federal Sentencing Guidelines recommending long prison terms for crack cocaine offenses.

Issue: Does the phrase “is prescribed by” in the Armed Career Criminal Act (ACCA) for a firearm conviction because McNeill had three violent felony and serious drug offense convictions in North Carolina. The ACCA defines a “serious drug offense” to include a state drug offense “for which a maximum term of imprisonment of ten years or more is prescribed by law.” After McNeill was convicted of his prior drug offenses, but before he was sentenced on the federal firearm offense, North Carolina lowered the maximum sentence for McNeill’s prior drug offenses to less than ten years. McNeill argues that he should not have been sentenced under the ACCA because the ACCA defines a “serious drug offense” by the maximum sentence that is “prescribed” at the time of federal sentencing.

Sentencing
McNeill v. United States
Docket No. 10-5258
Affirmed: The Fourth Circuit

Argued: April 25, 2011
Decided: June 6, 2011
Analysis: See ABA PREVIEW 288 ISSUE 7

Overview: A federal district court sentenced Clifton Terelle McNeill under the Armed Career Criminal Act (ACCA) for a firearm conviction because McNeill had three violent felony and serious drug offense convictions in North Carolina. The ACCA defines a “serious drug offense” to include a state drug offense “for which a maximum term of imprisonment of ten years or more is prescribed by law.” After McNeill was convicted of his prior drug offenses, but before he was sentenced on the federal firearm offense, North Carolina lowered the maximum sentence for McNeill’s prior drug offenses to less than ten years. McNeill argues that he should not have been sentenced under the ACCA because the ACCA defines a “serious drug offense” by the maximum sentence that is “prescribed” at the time of federal sentencing.

Issue: Does the phrase “is prescribed by” law in the Armed Career Criminal Act, when referring to the maximum sentence for a prior state drug conviction, mean the maximum sentence applicable to the prior drug offense at the time of a defendant’s federal sentencing rather than the prior drug offense?
Yes. A federal sentencing court must determine whether an offense under state law is a serious drug offense by consulting the maximum term of imprisonment applicable to a defendant’s prior state drug offense at the time of the defendant’s conviction for that offense.

From the unanimous opinion by Justice Thomas:
The statute requires the court to determine whether a previous conviction was for a serious drug offense. The only way to answer this backward looking question is to consult the law that applied at the time of that conviction.

Sentencing
Pepper v. United States
Docket No. 09-6822
Vacated in part, Affirmed in part, and Remanded: The Eighth Circuit

Argued: December 6, 2010
Decided: March 2, 2011
Analysis: See ABA PREVIEW 135 ISSUE 3

Overview: This case is another follow-up to the Supreme Court’s landmark ruling in United States v. Booker, 543 U.S. 220 (2005), which declared judicial fact-finding within the mandatory federal Sentencing Guidelines unconstitutional and remedied this problem by making the Guidelines “effectively advisory.” Since Booker, the Court, in a series of decisions, has stressed that district judges now have broad discretion at initial Sentencing. This case presents the Court with its first opportunity to address the scope of a district judge’s discretion after an initial sentence has been reversed on appeal and remanded for resentencing.

Issues: Is a new judge, when resentencing a defendant after remand, obligated, under the “law of the case” doctrine, to follow sentencing findings issued by the original sentencing judge?

No. To avoid undermining a district court’s original sentencing intent, an appellate court when reversing one part of a sentence may vacate the entire sentence so that, on remand, the trial court can reconfigure the sentencing plan to satisfy sentencing factors.

May a federal district judge consider a defendant’s rehabilitation after his initial sentencing as a factor in support of a reduced sentence in accord with statutory sentencing instructions set forth in 18 U.S.C. § 3553(a)?

Yes. When a defendant’s sentence has been set aside on appeal, a district court at resentencing may consider evidence of the defendant’s post-sentencing rehabilitation, and such evidence may, in appropriate cases, support a downward variance from the non-advisory Guidelines range.

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

The logic of the Court of Appeals’ approach below—ie., that post-sentence rehabilitation is not relevant … because the district court could not have considered that evidence at the time of the original sentencing—would require sentencing courts categorically to ignore not only postsentencing rehabilitation, but any postsentencing information, including, for example, evidence that a defendant had committed postsentencing offenses. Our precedents, however, provide no basis to support such a categorical bar.

Concurring in part and concurring in judgment:
Justice Breyer

Concurring in part, concurring in judgment in part, and dissenting in part:
Justice Alito

Dissenting:
Justice Thomas

Taking no part in consideration or decision: Justice Kagan

Sentencing
Sykes v. United States
Docket No. 09-11311
Affirmed: The Seventh Circuit

Argued: January 12, 2011
Decided: June 9, 2011
Analysis: See ABA PREVIEW 167 ISSUE 4

Overview: The federal Armed Career Criminal Act (ACCA) significantly increases the minimum and maximum sentences for any felony who illegally possesses a firearm if he has “three previous convictions by any court … for a violent felony or a serious drug offense, or both” (18 U.S.C. § 924(e)). Though ACCA provisions elaborate on what previous convictions can qualify as a “violent felony” or a “serious drug offense,” lower federal courts have struggled to determine which prior state offenses trigger ACCA’s severe sentencing terms. In this case, the Court will resolve a circuit split over whether using a vehicle while intentionally fleeing from a law enforcement officer after being ordered to stop constitutes an ACCA violent felony.

Issue: Does Marcus Syke’s Indiana conviction for resisting law enforcement, which was based on his use of a vehicle while intentionally fleeing from a law enforcement officer after being ordered to stop, qualify as a violent felony under 18 U.S.C. § 924(e) to trigger the ACCA’s severe sentencing terms?

Yes. Felony vehicle flight, as proscribed by Indiana law, is a violent felony for purposes of ACCA.

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

The felony at issue here is not a strict liability, negligence, or recklessness crime and because it is, for the reasons stated and as a categorical matter, similar in risk to the listed crimes, it is a crime that “otherwise involves conduct that presents a serious potential risk of physical injury to another.”

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

Sentencing
Tapia v. United States
Docket No. 10-5400
Reversed and Remanded: The Ninth Circuit

Argued: April 18, 2011
Decided: June 16, 2011
Analysis: See ABA PREVIEW 291 ISSUE 7

Overview: Alejandra Tapia is a federal prisoner serving a 51-month sentence. Tapia was sentenced at the top-end of her advisory guideline range by the district court so that she would be eligible to participate in the Bureau of Prison’s 500-hour drug treatment program to promote her rehabilitation. This case requires the Court to determine whether a district court may, after determining that some term of imprisonment is appropriate, consider rehabilitation in determining the length of that term of imprisonment.

Issues: May a district court give a defendant a longer prison sentence to promote rehabilitation, as the Eighth and Ninth Circuits have held, or is such a factor prohibited, as the
Second, Third, Eleventh, and D.C. Circuits have held?

Said another way, does 18 U.S.C. § 3582(a), which dictates the factors to be considered in determining a prison sentence, allow a district court to impose a longer sentence so a defendant might participate in a rehabilitation program while in prison?

No. A sentencing court does not have the discretion under 18 U.S.C. § 3582(a) to impose or lengthen a prison term in order to foster a defendant’s rehabilitation.

From the unanimous opinion by Justice Kagan:

If Congress had similarly meant to allow courts to base prison terms on offenders’ rehabilitative needs, it would have given courts the capacity to ensure that offenders participate in prison correctional programs. But in fact, courts do not have this authority. When a court sentences a federal offender, the BOP has plenary control, subject to statutory constraints, over “the place of the prisoner’s imprisonment and the treatment programs (if any) in which he may participate. A sentencing court can recommend that the BOP place an offender in a particular facility or program. But decision making authority rests with the BOP.

Concurring: Justice Sotomayor (joined by Justice Alito)

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Separation of Powers
American Electric Power Co. v. Connecticut

Docket No. 10-174
Reversed and Remanded: The Second Circuit

Argued: April 19, 2011
Decided: June 20, 2011
Analysis: See ABA PREVIEW 304 ISSUE 7

Overview: Eight states, the City of New York, and three private land trusts sued five power companies and the federal Tennessee Valley Authority in federal court based on common law nuisance for harms resulting from the defendants’ greenhouse gas emissions. The defendants argue that federal courts cannot hear the case because the plaintiffs lack standing, their claims are displaced by federal law and regulations, and their claims present a nonjusticiable political question.

Issues: Did the plaintiffs allege a sufficiently concrete and particularized injury, traceable to the defendants’ greenhouse gas emissions, and redressable by injunctive relief to satisfy both constitutional and prudential standing requirements?

Affirmed. The Second Circuit’s exercise of jurisdiction was affirmed by an equally divided court.

Is the plaintiffs’ federal common law public nuisance claim displaced by the federal Clean Air Act and implementing regulations?

Yes. The Clean Air Act and the implementing regulations displace any federal common law public nuisance claims seeking abatement of carbon-dioxide emissions from fossil-fuel fired power plants.

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

If EPA does not set emissions limits for a particular pollutant or source of pollution, States and private parties may petition for a rulemaking on the matter, and EPA's response will be reviewable in federal court. As earlier noted, EPA is currently engaged in a § 7411 rulemaking to set standards for greenhouse gas emissions from fossil-fuel fired power plants. To settle litigation brought under § 7607(b) by a group that included the majority of the plaintiffs in this very case, the agency agreed to complete that rulemaking by May 2012. The Act itself thus provides a means to seek limits on emissions of carbon dioxide from domestic power plants—the same relief the plaintiffs seek by invoking federal common law. We see no room for a parallel track.

Concurring in part and in judgment: Justice Alito (joined by Justice Thomas) Taking no part in consideration or decision: Justice Sotomayor

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Sixth Amendment
Harrington v. Richter

Docket No. 09-587
Reversed and Remanded: The Ninth Circuit

Argued: October 12, 2010
Decided: January 19, 2011
Analysis: See ABA PREVIEW 28 ISSUE 1

Overview: Joshua Richter was convicted of murder based in part on expert testimony about blood found at the crime scene. The state court summarily denied Richter’s claim that trial counsel rendered ineffective assistance by failing to consult forensic blood experts. The Court will decide whether that denial merits deference under the Antiterrorism and Effective Death Penalty Act (AEDPA), which limits federal courts’ power to grant habeas corpus relief when a state court denied a claim “on the merits.” The Court must then decide whether habeas corpus relief is appropriate.

Issues: Does trial counsel violate a defendant’s Sixth Amendment right to effective counsel by failing to investigate available forensic evidence that might support the defense theory and instead relying on cross-examination or other methods designed to create reasonable doubt about the defendant’s guilt?

Does AEDPA deference apply to a state court’s summary disposition of a claim, including a claim under Strickland v. Washington, 466 U.S. 668 (1984)?

No. Richter was not entitled to habeas relief because the state court’s assessment of the defense counsel’s performance was not unreasonable; a state court can reasonably determine that trial counsel elected to use a strategy that did not include using blood evidence experts.

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

The Court of Appeals appears to have treated the unreasonableness question as a test of its confidence in the result it would reach under de novo review: Because the Court of Appeals had little doubt that Richter’s Strickland claim had merit, the Court of Appeals concluded the state court must have been unreasonable in rejecting it. This analysis overlooks arguments that would otherwise justify the state court’s result and ignores further limitations of § 2254(d), including its requirement that the state court’s decision be evaluated according to the precedents of this Court. … It bears repeating that even a strong case for relief does not mean the state court’s contrary conclusion was unreasonable.

Concurring: Justice Ginsburg Taking no part in consideration or decision: Justice Kagan
**Sixth Amendment**

**Turner v. Rogers**

Docket No. 10-10
Vacated and Remanded:
The Supreme Court of South Carolina

Argued: March 23, 2011
Decided: June 20, 2011
Analysis: See ABA PREVIEW 243 ISSUE 6

Overview: Michael Turner failed to make a court-ordered payment of back child support and was incarcerated after a civil contempt proceeding in which he represented himself. He argues that he was constitutionally entitled to a lawyer in the contempt proceeding and should have been provided counsel at South Carolina’s expenses because he is indigent. South Carolina counters that his claim is moot because he is now free and, in any case, there is no constitutional right to counsel in civil contempt proceedings.

Issue: Does an indigent individual have a constitutional right to appointed counsel at a civil contempt proceeding that results in his incarceration?

No. An indigent individual is not automatically entitled to appointed counsel at civil contempt proceedings even if the individual faces incarceration; if the opposing party is not represented by counsel and the state provides alternative safeguards, counsel is not required by the Due Process Clause.

From the opinion by Justice Breyer (joined by Justices Kennedy, Ginsburg, Sotomayor, and Kagan):
We consequently hold that the Due Process Clause does not automatically require the provision of counsel at civil contempt proceedings to an indigent individual who is subject to a child support order, even if that individual faces incarceration (for up to a year). In particular, that Clause does not require the provision of counsel where the opposing parent or other custodian (to whom support funds are owed) is not represented by counsel and the State provides alternative procedural safeguards equivalent to those we have mentioned (adequate notice of the importance of ability to pay, fair opportunity to present, and to dispute, relevant information, and court findings).

Dissenting: Justice Thomas (joined by Justice Scalia and Chief Justice Roberts and Justice Alito as to Parts I-B and II)

**Speedy Trial Act**

**United States v. Tinklenberg**

Docket No. 19-1498
Affirmed: The Sixth Circuit

Argued: February 22, 2011
Decided: May 26, 2011
Analysis: See ABA PREVIEW 220 ISSUE 5

Overview: Jason Louis Tinklenberg was convicted of firearm and drug manufacturing offenses. Prior to trial, Tinklenberg moved to dismiss, arguing that the government violated the Speedy Trial Act by not trying him within seventy days. The district court denied Tinklenberg’s motion, and he was convicted. The Sixth Circuit reversed, finding that the Speedy Trial Act’s 70-day trial deadline included the time during which the district court resolved three pretrial motions because those motions did not delay trial. The government argues that the Speedy Trial Act excluded this time as “delay resulting from any pretrial motion,” regardless of whether the motion delayed trial.

Issue: Does the Speedy Trial Act exclude from its 70-day trial deadline the time during which a district court resolves any pretrial motion, regardless of whether the motion time delays trial?

Yes. The act contains no requirement that the filing of a pretrial motion actually caused, or was expected to cause, delay of a trial; rather, § 3161(h)(1)(D) stops the Speedy Trial clock from running automatically upon the filing of a pretrial motion irrespective of whether the motion has any impact on when the trial begins.

From the opinion by Justice Breyer (joined by Justices Kennedy, Ginsburg, Alito, and Sotomayor and joined as to Parts I and III by Chief Justice Roberts and Justices Scalia and Thomas):
Subparagraph (D) clarifies that the trial court should measure the period of excludable delay for a pretrial motion from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of such motion, but nowhere does it mention the date on which the trial begins or was expected to begin.

Concurring in part and in judgment: Justice Scalia (joined by Chief Justice Roberts and Justice Thomas)
Taking no part in consideration or decision: Justice Kagan

**Standing**

**Bond v. United States**

Docket No. 09-1227
Reversed and Remanded:
The Third Circuit

Argued: February 22, 2011
Decided: June 16, 2011
Analysis: See ABA PREVIEW 203 ISSUE 5

Overview: Carol Anne Bond tried to poison Myrlinda Haynes after Bond learned that Haynes was pregnant with Bond’s husband’s child. Bond was charged with two counts of possessing and using a chemical weapon in violation of federal law. She challenged that law as violating the Tenth Amendment.

Issue: Does a criminal defendant convicted under a federal statute have standing to challenge her conviction on the ground that, as applied to her, the statute is beyond the federal government’s enumerated powers and inconsistent with the Tenth Amendment?

Yes. A criminal defendant has standing to challenge his or her conviction under a federal statute as interfering with those powers reserved to the States in violation of the Tenth Amendment.

From the unanimous opinion by Justice Kennedy:
By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power. When government acts in excess of its lawful powers, that liberty is at stake. The limitations that federalism entails are not therefore a matter of rights belonging only to the States. States are not the sole intended beneficiaries of federalism.

Concurring: Justice Ginsburg (joined by Justice Breyer)
State Secrets Privilege

General Dynamics Corp. v. United States and Boeing Company v. United States

Docket Nos. 09-1298 and 09-1302
Vacated and Remanded:
The Federal Circuit

Decided: May 23, 2011
Analysis: See ABA PREVIEW 152 ISSUE 4

Overview: The state secrets privilege is designed to allow the government to protect secret government material from public disclosure in litigation. But the government may not invoke the privilege to withhold material to a criminal prosecution, if the protected material is necessary for the accused’s defense. This case asks whether that exception also applies to certain civil cases.

Issue: May the government prevail on a claim that a contractor defaulted on a government contract, even as it asserted the state secrets privilege to prevent the contractor from rebutting the government’s claim?

N/A. When, to protect state secrets, a court dismisses a government contractor’s prima facie valid affirmative defense to the government’s allegations of contractual breach, the proper remedy is to leave the parties where they were on the day they filed suit.

From the unanimous opinion by Justice Scalia:
Our refusal to enforce this contract captures what the ex ante expectations of the parties were or reasonably ought to have been. Both parties must have understood that state secrets would prevent courts from resolving many possible disputes under the A-12 agreement. … Both parties—the government no less than petitioners—must have assumed the risk that state secrets would prevent the adjudication of claims of inadequate performance.

Taxation

CSX Transportation, Inc. v. Alabama Department of Revenue

Docket No. 09-520
Reversed and Remanded:
The Eleventh Circuit

Argued: November 10, 2010
Decided: February 22, 2011
Analysis: See ABA PREVIEW 92 ISSUE 2

Overview: Alabama imposes a sales and use tax on diesel fuel purchased or consumed by rail carriers; this is a tax from which motor and water carriers are essentially exempted. This case asks the Court to determine whether a rail carrier can challenge Alabama’s state and local sales and use tax exemption scheme under 49 U.S.C. § 11501(b)(4), a provision of the Railroad Revitalization and Regulatory Reform Act of 1976 (the 4-R Act) that precludes the states from imposing “another tax” that discriminates against a rail carrier.

Issue: Is Alabama’s imposition of a four percent sales and use tax on diesel fuel purchased or consumed by a rail carrier, while not imposing the same tax on diesel fuel acquired or used by two rail carrier competitors (motor carriers and interstate water carriers), subject to challenge under 49 U.S.C. § 11501(b)(4), a provision of the Railroad Revitalization and Regulatory Reform Act of 1976 (the 4-R Act)?

Yes. CSX may challenge as discriminatory an Alabama tax levied against rail carriers but not their competitors under 49 U.S.C. § 11501(b)(4).

From the opinion by Justice Kagan (joined by Chief Justice Roberts and Justices Scalia, Kennedy, Breyer, Alito, and Sotomayor):
Discrimination cases sometimes do raise knotty questions about whether and when dissimilar treatment is adequately justified. In the context of the 4–R Act, those hard calls can arise when States charge different tax rates to different entities in a practice the statute specifically subjects to challenge. So too, difficult issues can emerge when, as here, States provide certain entities with tax exemptions. In either case, Congress has directed the federal courts to review a railroad’s challenge; and in either case, we would flout the congressional command were we to declare the matter beyond us.

Dissenting: Justice Thomas (joined by Justice Ginsburg)

Taxation

Mayo Foundation v. United States

Docket No. 09-837
Affirmed: The Eighth Circuit

Argued: November 8, 2010
Decided: January 11, 2011
Analysis: See ABA PREVIEW 99 ISSUE 2

Overview: The Federal Insurance Contributions Act allows students who work incidentally to their education to forgo paying certain taxes on their wages. The employers of these students are also exempted from such payroll taxes. In 2005, the Treasury Department issued regulations asserting that medical residents and other full-time employees are excluded from the exemption. The Court must now determine whether the Treasury regulation is valid.

Issue: Do the 2005 regulations issued by the U.S. Treasury Department lawfully deny resident doctors working in hospitals the benefits of the exemption from the Social Security tax levied on wages earned for “service performed in the employ of … a school, college, or university” (26 U.S.C. § 3121(b)(10))? Yes. The Treasury’s full-time employee rule, treating medical residents as full-time employees for tax purposes, is a reasonable interpretation of 26 U.S.C. § 3121(b)(10).

From the opinion by Chief Justice Roberts (joined by all members except Justice Kagan who took no part in the consideration or decision):
Regulation, like legislation, often requires drawing lines. Mayo does not dispute that the Treasury Department reasonably sought a way to distinguish between workers who study and students who work. Focusing on the hours an individual works and the hours he spends in studies is a perfectly sensible way of accomplishing that goal.
Water Law

Montana v. Wyoming and North Dakota

Docket No. 137, Original
Overruled: Exception to the Report of the Special Master

Overview: Montana has obtained leave of the U.S. Supreme Court to file an original action alleging that Wyoming’s activities in the Yellowstone Basin are violating the Yellowstone River Compact. In the instant case, the Court will review several preliminary rulings of Special Master Barton Thompson, Jr.

Issues: Does Article V(A) of the Yellowstone River Compact securing the rights of pre-1950 appropriators in Montana directly limit new (post-1950) surface and groundwater diversions in Wyoming?

No. Because Article V(A) of the Compact incorporates the ordinary doctrine of appropriation without significant qualification, and because in Wyoming and Montana that doctrine allows appropriators to improve their irrigation systems, even to the detriment of downstream appropriators, Montana’s increased-efficiency allegation fails to state a claim for breach of the Compact under Article V(A).

Does the Yellowstone River Compact permit pre-1950 appropriators in Wyoming to increase water use efficiency which results in reduced return flow available downstream in Montana?

Yes. A change in irrigation methods does not appear to run afoul of the no-injury rule in Wyoming which generally concerns changes in the location of the diversion and the place or purpose of use. Thus, an appropriator may increase his consumption by changing to a more water-intensive crop so long as he makes no change in acreage irrigated or amount of water diverted.

From the opinion by Justice Thomas (joined by Chief Justice Roberts and Justices Kennedy, Ginsburg, Breyer, Alito, and Sotomayor):
The doctrine of appropriation in Wyoming and Montana allows appropriators to improve the irrigation systems, even to the detriment of downstream appropriators. We readily acknowledge that this area of law is far from clear. But the apparent scope of the no-injury rule in Wyoming and Montana, the doctrine of recapture and its broad reach in Wyoming and Montana case law, and the specific conclusions of water law scholars all point in the same direction.

Dissenting: Justice Scalia
Taking no part in consideration or decision: Justice Kagan
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