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

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Letters from the Editor

The Term in Review

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This Term, the Roberts Court, and the First Amendment

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Case Highlights
By all accounts, the Supreme Court’s 2011–2012 term was historic. Any perspective piece on the term will likely focus, rightly so, on the Court’s landmark rulings on the challenges to “Obamacare” and Arizona’s attempt to implement state immigration enforcement. These cases certainly defined this term and, as we may see down the road, might be a turning point for the Roberts Court.

Although somewhat narrow in their holdings and with precedent that may not apply to many other cases, these two decisions did much to inform us about how the chief justice views the role of the Court within our system of government, and his role within the Court. These cases, and the term-at-large, help to solidify the Court as the arbiter of disputes within our political system, both between the executive and legislative branches (the health care challenge) and between the federal government and state governments (the Arizona immigration case is the obvious example of this, but there were a number of other preemption and states’ rights cases this term).

With all the focus on health care and immigration, it is important not to forget that this term saw the justices tackling numerous other important legal considerations: the rights of defendants during plea negotiations, challenges to the federal sentencing scheme, bankruptcy issues, and a continued definition and expansion of patent and copyright precedent. Although the number of cases before the Court was on the lighter side again this year given recent history, it was still a jam-packed docket. (Depending on how you count the health care challenge and the juvenile life-without-parole sentencing cases, the Court granted certiorari to just 75 cases this year; last year the Court also heard 75 cases, but the year before that, the number was 92.)

The cases that didn’t dominate headlines go a long way toward dispelling the myth that the Supreme Court is just another cog in the machine that is partisan politics. Although it is easy to focus on the highly divided decisions released at the end of the June, this is a Court that was more often than not unanimous or nearly so. The health care challenges don’t stand for the proposition that this is a highly divided Court; instead, they reflect the reality that when the law is unsettled or unclear, the individual justices struggle with the facts before them, trying to do the right thing (as they each perceive it). On the other hand, when the law is relatively settled, the justices are more likely to come to unanimous or nearly unanimous decisions (National Meat Association v. Harris comes to mind as an example).

PREVIEW is once again honored to publish a wrap-up issue featuring insightful articles written by experts on the Court. In this issue, you will not just get a recap of the health care and Arizona immigration decisions but also gain some valuable knowledge about the possible long-term implications of each. In addition, these articles shed light into other areas of the Court’s docket: criminal procedure issues under the Eighth and Sixth Amendments; preemption issues as they apply to pigs and trains; and the First Amendment as it applies to broadcasters, unions, and liars. This was a once-in-a-lifetime term that will have lasting implications for years to come.

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

Sincerely,

Catherine Hawke
Editor, PREVIEW of United States Supreme Court Cases
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Experts Assess Unpredictable and Independent Roberts Court

by Eric Berkman
Framingham, MA

From the moment the U.S. Supreme Court agreed to hear a set of challenges to the Affordable Care Act (ACA), there was an unmistakable sense that whatever else the Court did during the October 2011 term, its public image and even its very legitimacy, would hinge on how it handled that historic case.

This situation was far from sudden. While the public has generally viewed the Supreme Court more positively than the legislative or executive branches, the Court’s approval ratings had been steadily declining over the past two decades. And after oral arguments this spring in the health care case, the Court’s popularity reached an all-time low. According to a study released in May by the Pew Research Center for the People and the Press, barely 50 percent of adults nationwide now held a favorable view of the Court, down from nearly 60 percent in 2010 and down from 80 percent in the mid-1990s.

It doesn’t take a genius to figure out why the Court’s image had been suffering. Controversial 5-4 decisions such as Bush v. Gore in 2000 and Citizens United v. Federal Election Commission in 2010—both of which broke down along widely perceived partisan lines—seemed to rightly or wrongly feed many Americans’ suspicions that the Court’s members had devolved into just another body of political hacks doing the bidding of corporate and party overlords. Meanwhile, with so many Americans growing more and more disgusted with what they perceived as the government’s general inability to rise above petty partisan bickering to tackle the nation’s economic struggles, the judiciary, as a branch of the federal government, couldn’t avoid suffering guilt by association. Amid all this, the Court seemed poised to strike down the most sweeping piece of social legislation in decades. In a presidential election year, no less.

But experts seem to agree that the ultimate outcome of the ACA case—upholding health care reform, including its controversial mandate, while still finding ways to limit congressional authority under the Commerce Clause and the spending power—reinforces the idea that the justices are indeed independent thinkers who take very seriously their job of interpreting and applying the Constitution. This message has been bolstered by other high-profile decisions this term, such as the Arizona immigration case, the Eighth Amendment challenge to mandatory life sentences without parole for juveniles, and the application of a Sixth Amendment right to counsel in the plea-bargain context. In each of those cases at least one justice crossed perceived partisan lines.

“[These cases] go a long way toward the idea that there are nine life-tenure justices whose voting patterns are not nearly as predictable as people think,” says Steven H. Goldblatt, a Georgetown University law professor who heads the school’s Supreme Court Institute and Appellate Law Program. “After a term like this, the public comes away rightly or wrongly thinking [the court] doesn’t act politically. And this is a good year to not be acting politically.”

Andrew J. Pincus, an appellate lawyer with Mayer Brown in Washington and a visiting lecturer at Yale Law school, agrees.

“People like to view the court as a sort of voting-bloc institution and many people think they can predict how a case will come out,” says Pincus, who has argued 16 cases before the Supreme Court, including one this term. “This term should tell people that’s not at all right and justices are individuals who view cases as individuals and therefore those kinds of predictions are very treacherous.”

The unpredictability and independence of the Court, however, isn’t the only thing that attorneys, the media, and the public can take from this term. Below are some other major takeaways from the October 2011 term.

Roberts’s emergence as an independent thinker and consensus builder

According to Goldblatt, one of the most significant developments this term happened on the last day with the health care decision: the emergence of John G. Roberts Jr. as a better-defined chief justice. Specifically, Chief Justice Roberts freed the Court from the health care issue in an election year, basically stating in his majority opinion that the Court exists to rule on a statute’s constitutionality and not to correct perceived problems in the political branches. In doing so, suggests Goldblatt, Chief Justice Roberts could be signaling that, as chief justice, institutional concern for the Court might impact his decision-making approach in ways that it doesn’t for associate judges.

“If the Court had declared the act unconstitutional, you would have had a very difficult situation of great uncertainty,” says Goldblatt. “From the chief justice’s standpoint, does he want it to go down in history that the Roberts Court created this crisis that’s political in nature in an election year? It would be laid at the doorstep of the court, and that’s not a good place for the Court to be.”

Pincus adds that Chief Justice Roberts’s approach to the health care case illustrates his deference to Congress. “[Roberts] said in his confirmation testimony that striking down a decision by the elected branches is a grave duty and something the Court should only do when there’s no reasonable basis to interpret the statute in a way that makes it constitutional.”

By upholding the mandate provision under the power to tax despite his belief that Congress had no authority to pass the mandate under
In fact, Goldblatt—who’s argued five cases before the Court—recalls an incident in an earlier term where Justices Stephen Breyer and Antonin Scalia started asking each other questions directly. “The chief justice had to intercede and get them back to using the advocate as a ping-pong ball,” he says.

At the same time, Bibas warns, this term showed just how dangerous it is to try and predict a decision based on what happens at oral argument. In both the ACA and Arizona immigration cases, most commentators guessed the outcome incorrectly based on the tone of oral arguments. And the biggest miscalculation was in the consolidated cases of *Missouri v. Frye* and *Mallet v. Cooper*, which addressed a defendant’s Sixth Amendment right to effective counsel in the plea-bargaining context. “From oral arguments, it looked as if six judges were saying, ‘we can’t fix this problem,’” says Bibas. “But Justices [Anthony] Kennedy and [Ruth Bader] Ginsburg, who were skeptical at oral argument, said, ‘Yes, we have to fix this problem.’”

### Increasing use of the Eighth Amendment

Over the past couple of decades the Court has often been stereotyped as insensitive to individual rights in the criminal process. But experts say this is a misperception, particularly when it comes to the most vulnerable defendants, such as juveniles. In recent years, the pendulum has swung away from the Court as a rubber stamp for government power in criminal cases as evidenced by the Court’s increasing willingness to use the Eighth Amendment to protect such defendants—a pattern that continued this term. As UCLA law professor Stuart Banner explains, the pattern began when the Court struck down the death penalty for the mentally retarded in 2002 on grounds that it constituted cruel and unusual punishment. Three years later the Court abolished the death penalty for juveniles on similar grounds. Then in 2010, the Court relied on the Eighth Amendment to bar mandatory sentences of life without parole for juveniles convicted of crimes other than murder. Finally, during the last week of this past session, the Court continued the trend by holding in *Miller v. Alabama* and *Jackson v. Hobbs* that any mandatory sentence of life without parole for juveniles violates the Eighth Amendment.

“‘They’re nibbling at the edges of permissible punishment,’” says Banner, who teaches UCLA’s Supreme Court clinic. “It’s interesting. Each time they do it, opponents say it will lead to a slippery slope. Then the next one comes along and they nibble a bit more. It’s interesting to think about what’s going to be next.”

### Closed court continuing

Few people would contend that U.S. Solicitor General Donald Verrilli Jr. had a great day defending the Affordable Care Act before the Court in March. But nobody who actually listened to his argument thought he sounded as bad as he sounded in a political ad run by the Republican National Committee days later. The audio recording of Verrilli’s oral argument was manipulated to create a sound bite that depicted him as stumbling much worse than he actually did. The mashup concluded with the sound of Verrilli stammering and swallowing as the words “ObamaCare: It’s a Tough Sell” appeared on the screen.
Outraged observers insisted that this ad signaled an unprecedented politicization of the Court. But Banner says this kind of politicization is nothing new. It’s only the technology that’s changed.

“There’s always been extreme political reaction to the Court on both sides,” says Banner, who’s written a number of books on American legal history. “Years ago it wouldn’t have possible to make fun of Verrilli in this manner. But people were certainly putting up signs to impeach [Chief Justice] Earl Warren in the 1960s. The political climate surrounding the Court isn’t much different than it’s ever been.”

But while these kinds of ads obviously won’t affect the Court’s decision making—after all, the Court ultimately upheld almost the entire act, giving the solicitor general a measure of vindication—they could still have an impact. For example, many have called for the Court to allow its proceedings to be televised. In fact, the Senate Judiciary Committee approved a bill to compel cameras in the Court, though the legislative branch’s authority to do so is questionable. The Court continues to resist. Banner says commercials like the one used by the RNC will further galvanize the Court’s opposition to TV cameras.

“I understand why the Court is reluctant to [allow cameras],” he says. “You lose some control over how you’re depicted. Something like this is just going to reinforce that.”

Banner also suspects justices are concerned about their privacy. “Law geeks recognize the justices, but they can still go out in public without being noticed. [The late Chief Justice] William Rehnquist used to take walks around the courthouse and nobody would recognize him. They’d ask him to take their picture for them. If proceedings were broadcast, they’d lose that.”

Experts are split on whether allowing cameras would be a good thing or a bad thing. For example, Pincus says it would be a “terrible mistake” to open the Court to cameras. “No matter what anyone says, it would change the dynamic,” he says. “At some point you’d have advocates—especially advocates for state and local government—worried about the political perception of what they say rather than simply doing the best job for their clients before the court.”

Bibas agrees. “Plenty of information gets out to the public now,” he says. “[The court is] really good about releasing transcripts and audio recordings and letting people have access.”

Meyer, on the other hand, believes that the easy accessibility of transcripts and audio recordings should alleviate fears that cameras would detract from the dignity and decorum of the Court while reducing proceedings to sound bites. “We already have a flotilla of reporters giving their spin,” he says. “In some ways, televising proceedings would allow the public to make their own judgments directly.”

Additionally, as a teacher, Meyer believes it would be valuable for law students to be able to see what justices are doing. Plus, it could promote public confidence in the judiciary. “Once someone goes to observe a Supreme Court argument, he or she realizes how intelligent and capable these justices and the advocates who appear before them really are,” says Meyer. “It would go down very much to the Court’s credit.”

Either way, Goldblatt doubts he’ll see cameras in the courtroom in his lifetime. “Pressure will remain on the Court, but we’re talking about an institution that already moves at glacial speed,” he says. “And if the Court fears that justices will be reluctant to ask the same questions for fear they’ll see it on the news, it would change the dynamic of what is a very important part of the process.”

**Once someone goes to observe a Supreme Court argument, he or she realizes how intelligent and capable these justices and the advocates who appear before them really are.

—Jeffrey A. Meyer, Quinnipiac law professor**

Eric Berkman is an attorney, educator, and writer in Framingham, Massachusetts. A graduate of the University of Michigan and Boston College Law School, Berkman is a former reporter and editor with *Massachusetts Lawyers Weekly* and *Lawyers USA*. He has also contributed to *Fortune Small Business, Knowledge@Wharton*, and a variety of other law, business, and technology publications. He can be reached at eric.berkman@gmail.com.

*PREVIEW of United States Supreme Court Cases, pages 277–279. © 2012 American Bar Association.*
National Federation of Independent Business v. Sebelius: What Will It Mean?
by Erwin Chemerinsky
University of California, Irvine School of Law

Few Supreme Court cases in recent memory have attracted as much attention as National Federation of Independent Business v. Sebelius, which upheld most of the Patient Protection and Affordable Care Act. The attention was deserved. The decision will affect the way health insurance and health care is provided in this country, including insuring tens of millions who otherwise would have been without coverage.

The intense partisanship surrounding the law means that the Court’s decision could matter in the November 2012 elections. After all, every Republican in Congress voted against the act. Every lower federal court judge appointed by a Republican president, with two exceptions, voted to strike down key provisions of the law while every lower federal court judge appointed by a Democratic president, with one exception, voted to uphold it. There seems little doubt that Republican candidates will campaign on a platform to have the act repealed, while Democrats will defend it as improving the health insurance and ultimately the health of a large number of people.

But what will the decision mean for constitutional law?
This question would have been much easier to answer if the Court had struck down the entire statute, as urged by the four dissenting justices. It would have been the first major federal social welfare law invalidated since 1936. When all the spin is set aside, the bottom line is that five justices voted to uphold the individual mandate and therefore almost all of the Affordable Care Act.

The justices came to three major conclusions. First, by a 5-4 margin, the Court ruled that the individual mandate is a tax and within the scope of Congress’s power to tax and spend for the general welfare. Second, five justices, albeit in separate opinions said that the individual mandate is outside the scope of Congress’s commerce power. Third, in a 7-2 ruling, the Court held that it exceeded the scope of Congress’s spending power and violated the Tenth Amendment for Congress to withhold all Medicaid funds to states that did not comply with the new coverage requirements. What is each conclusion likely to mean for the future?

The Individual Mandate Is a Tax and Within the Scope of Congress’s Taxing Power
The centerpiece of the Patient Protection and Affordable Care Act is the requirement that individuals must purchase insurance by 2014 and those who don’t must pay a sum to be collected by the Internal Revenue Service. Closely tied to this, the act’s “guaranteed-issue” and “community-rating” provisions together prohibit insurance companies from denying coverage to those with preexisting conditions or charging unhealthy individuals higher premiums than healthy individuals. In this way, the act seeks to significantly increase the number of people in the United States with health insurance.

The Court held that the individual mandate is within the scope of Congress’s power to tax and spend for the general welfare. Chief Justice Roberts wrote the majority opinion on this issue and was joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan. The Court explained that the individual mandate can be considered a tax on those who do not have health insurance. These individuals, subject to a number of exceptions, must purchase insurance by 2014 or pay 1 percent of their income or $95. This will increase in 2015 to 2 percent of their income or $325. The Internal Revenue Service collects this money, which, estimated to be $4 billion in 2014, then goes to the federal treasury. The Court thus concluded: “Our precedent demonstrates that Congress had the power to impose the exaction in § 5000A under the taxing power, and that § 5000A need not be read to do more than impose a tax.”

The Obama administration never called this a tax, although there were many references in Congress to this being a tax. The Supreme Court, however, said that the label used is not determinative; since it was functionally a tax, it was to be treated as one for purposes of assessing congressional power.

To arrive at this conclusion, the Court had to conclude that the individual mandate was not a tax for purposes of the Anti-Injunction Act. That statute, adopted over a century and a half ago, keeps federal courts from enjoining the collection of taxes. The usual course is that one must pay a tax in order to challenge it as being unconstitutional.

All nine justices agreed that the Anti-Injunction Act was inapplicable. Chief Justice Roberts explained that for purposes of the statute, the individual mandate was a “penalty” and not a “tax,” making the Anti-Injunction Act inapplicable. The dissenting justices said that it made no sense to treat this as a tax for determining the scope of congressional power, but not a tax for purposes of the Anti-Injunction Act.

But Chief Justice Roberts said that these are very different inquiries, one being about interpreting a statute and the other being about interpreting the Constitution. He wrote: “It is of course true that the Act describes the payment as a ‘penalty,’ not a ‘tax.’ But while that label is fatal to the application of the Anti-Injunction Act, it does not determine whether the payment may be viewed as an exercise of Congress’s taxing power. It is up to Congress whether to apply the Anti-Injunction Act to any particular statute, so it makes sense to be guided by Congress’s choice of label on that question. That choice does not, however, control whether an exaction is within Congress’s constitutional power to tax.”

Will the Court’s upholding the individual mandate as an exercise of the taxing power matter in the future? On the one hand, the decision makes no new law with regard to the taxing power. The
Supreme Court long has held that Congress has broad power to tax and spend for the general welfare and previously has ruled that the label used by the president and Congress does not matter.

On the other hand, this part of the Court’s holding may be quite important if ever again Congress wants to encourage people to engage in a particular activity. Congress simply can impose a tax on those who do not do so. To use a frequently mentioned example, if Congress wants to encourage people to eat more vegetables, it could impose a tax on those who do not do so. Of course, pressuring people to eat vegetables may infringe individual liberty in a way that no one argued was true of the Affordable Care Act. Neither in the lower courts nor in the Supreme Court did any lawyer try to challenge the mandate on the grounds that people had a constitutional right to be uninsured.

Since 1936, not one exercise of Congress’s taxing and spending power has been declared unconstitutional. Once five justices agreed that the individual mandate could be considered a tax, the act was clearly constitutional.

**The Individual Mandate Is Not Within the Scope of Congress’s Commerce Clause Power**

The primary argument advanced by the United States, both in the lower courts and the Supreme Court, was that the individual mandate is a valid exercise of Congress’s Commerce Clause power. The Supreme Court previously ruled that Congress, pursuant to its power to regulate commerce among the states, may regulate economic activity which taken cumulatively has a substantial effect on interstate commerce.

The United States argued that those without health insurance have a substantial effect on the cost of health insurance for all others; taken cumulatively, the Affordable Care Act has a profound effect on insurance coverage and on the health care provided. Health insurance is an $850 billion industry; health care $2.6 trillion, or 18 percent of the gross domestic product.

Five justices rejected this argument. Chief Justice Roberts did so as did the joint dissenting opinion of Justices Scalia, Kennedy, Thomas, and Alito. These justices stressed that those without health insurance are not engaged in economic activity and thus they are beyond the scope of Congress’s commerce power. Chief Justice Roberts wrote: “The individual mandate, however, does not regulate existing commercial activity. It instead compels individuals to become active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce. Construing the Commerce Clause to permit Congress to regulate individuals precisely because they are doing nothing would open a new and potentially vast domain to congressional authority.” Similarly, the dissenting justices said, “If this provision ‘regulates’ anything, it is the failure to maintain minimum essential coverage. … [T]hat failure—that abstention from commerce—is not ‘Commerce.’”

Justice Ginsburg, in a dissenting opinion joined by Justices Breyer, Sotomayor, and Kagan, challenged this characterization. She asserted that everyone uses health care; over 99 percent of people will use health care during their lives and 60 percent of the uninsured do each year. Therefore, Justice Ginsburg concluded, everyone is engaged in economic activity when it comes to health care; people are either purchasing insurance or they are self-insuring. Congress, through the individual mandate, is acting to encourage the former and discourage the latter economic activity.

One interesting question is whether Chief Justice Roberts’s discussion of the individual mandate as being outside the scope of the commerce power should be regarded as part of the holding or dicta. He maintained that it is part of the decision’s holding because he would not have reached the question of whether the individual mandate should be construed as a tax except in light of rejecting it as being within the commerce power. Justice Ginsburg strenuously objected and saw this part of the chief justice’s opinion as dicta. Ultimately, what matters, whether it is called dicta or holding, is that five justices accept that there is a difference between Congress regulating inactivity as opposed to activity.

It is unclear how much this will matter for the future. It certainly is possible to see this as a unique situation since Congress rarely requires economic transactions. The political process, especially in light of the strong Republican opposition to the Affordable Care Act, makes it unlikely that Congress will be requiring other economic purchases in the foreseeable future.

But any distinctions, such as “activity”/“inactivity” or “direct”/“indirect,” make too much turn on characterization and could open the door to the courts finding other federal laws unconstitutional.

To take a simple example, Title II of the Civil Rights Act of 1964, which prohibits racial discrimination by hotels and restaurants, was adopted by Congress under the Commerce Clause. Is this Congress regulating “inactivity” because hotels and restaurants that were not serving African Americans were being “inactive”? Or is Congress regulating the economic activity of on-going restaurants and hotels and thus within the conservative justices’ view of “activity”? It is not that the Court is likely to reverse itself and declare Title II unconstitutional. But this distinction could open the door to challenges that particular statutes are regulating “inactivity.”

**Cutting Off Medicaid Funds to States That Do Not Comply with the Federal Requirements Exceeds the Scope of Congress’s Spending Power and Violates the Tenth Amendment**

The Affordable Care Act significantly increases the burden on the states with regard to Medicaid funding. The act expands the scope of the Medicaid program and increases the number of individuals the states must cover. For example, the act requires state programs to provide Medicaid coverage to adults with incomes up to 133 percent of the federal poverty level, whereas many states now cover adults with children only if their income is considerably lower, and do not cover childless adults at all. The act provides that the federal government will pay 100 percent of the states’ additional costs until 2019 and 90 percent thereafter. If a state does not comply with the act’s new coverage requirements, it may lose not only the federal funding for those requirements, but all of its federal Medicaid funds.

The United States argued to the Supreme Court that no state is required to participate in the Medicaid program, but any state that chooses to do so must meet the conditions imposed. The Supreme Court previously ruled that Congress may put strings on federal grants so long as the requirements are clearly stated and so long as...
they relate to the purpose of the program. The Court, however, had said that conditions are unconstitutional if they are too coercive. But never before had the Court found conditions on federal spending to be unconstitutional on this basis. In fact, no lower federal court judge found this aspect of the Affordable Care Act to be unconstitutional.

But the Court, in a 7-2 vote, found this to be so coercive as to exceed the scope of Congress’s spending power and to violate the Tenth Amendment. Chief Justice Roberts, writing for a majority, stated: “In this case, the financial ‘inducement’ Congress has chosen is much more than ‘relatively mild encouragement’—it is a gun to the head. … A State that opts out of the Affordable Care Act’s expansion in health care coverage thus stands to lose not merely ‘a relatively small percentage’ of its existing Medicaid funding, but all of it. Medicaid spending accounts for over 20 percent of the average State’s total budget, with federal funds covering 50 to 83 percent of those costs. The threatened loss of over 10 percent of a State’s overall budget, in contrast, is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion.”

The Court held that Congress may cut off existing Medicaid funds from states that do not comply with the current requirements and that Congress may also cut off additional funds from states that do not meet the new requirements. But what is unconstitutional is depriving states of all Medicaid funding because they do not meet the new terms. In other words, the Court saw there being two Medicaid programs—the existing one and the new one—and what was unconstitutional was Congress tying funds for the existing program to compliance with the terms of the new one.

Justice Ginsburg in dissent, though, challenged this conception; according to her, it doesn’t make sense to see this as two programs and other than Congress tying funds to state compliance with the requirements of the entire Medicaid program. From Justice Ginsburg’s perspective, there is a difference between compelling a state to do something and providing the state a strong inducement and a difficult choice.

It is likely that it is this part of the opinion that will lead to the most lawsuits in the future. Many federal laws give money to state and local governments on the condition of compliance with various terms. When are such conditions so coercive as to be unconstitutional? For example, the federal Solomon Amendment provides that if any law school refuses to allow the military to recruit on campus, its university will lose all federal funds. Similarly, federal law provides that if a university program discriminates based on race, the entire university, not just that program, will lose its federal funding. Many federal environmental laws operate through conditions on state and local governments receiving money.

All of these are open to challenge. Chief Justice Roberts’s majority opinion gave no clear criteria for deciding when conditions are permissible and when they are too coercive. He simply stated: “Nothing in our opinion precludes Congress from offering funds under the Affordable Care Act to expand the availability of health care, and requiring that States accepting such funds comply with the conditions on their use. What Congress is not free to do is to penalize States that choose not to participate in that new program by taking away their existing Medicaid funding.” The issue of when strings on grants are an inducement as opposed to coercion is sure to be much litigated in the future.

Conclusion
What happens next? Without question, there will continue to be litigation over some of the provisions of the Affordable Care Act. For example, a lawsuit is pending as to whether regulations requiring employers, including religious institutions, to provide coverage for contraception violates the First Amendment and the Religious Freedom Restoration Act.

To a large extent, though, the debate over the Affordable Care Act now shifts to the political arena, which is exactly where a majority of the justices believe that its future should be resolved.

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As the Supreme Court entered the home stretch of the 2011–12 term, it not only faced landmark cases involving the Affordable Care Act and the Arizona immigration law but also had to deal with three potentially important free speech cases: (1) FCC v. Fox, involving the FCC’s regulation of indecency with regards to fleeting four-letter words on broadcast television and radio and fleeting nudity on broadcast television; (2) United States v. Alvarez, involving the Stolen Valor Act which criminalizes false claims that a person received the Medal of Honor or other American military decoration; and (3) Knox v. SEIU, involving the relationship between a union and nonmembers whom it represents. As it turned out, the Court ruled in favor of the parties asserting claims under the First Amendment in all three cases.

These outcomes will feed the ongoing debate about whether the Roberts Court is either the most pro-First Amendment Court in memory (as many have contended) or the least. The latter position was argued in a 2011 article by Monica Youn of the Brennan Center called The Roberts Court’s Free Speech Double Standard. See http://www.acslaw.org/acsblog/the-roberts-court%E2%80%99s-free-speech-double-standard. She pointed out that as of the end of the prior Court term, if you looked at all the free speech cases decided by the Roberts Court since 2005, the Court had ruled in favor of the First Amendment claim in only 10 of 29 cases—a rate lower than the Burger and Rehnquist Courts’ and much lower than the Warren Court’s. She was responding to the widespread perception that the First Amendment is in good hands with the Roberts Court, based on a series of campaign finance cases plus the high-profile decisions upholding First Amendment rights to own and distribute videos depicting animal cruelty and violent video games, as well as the right to picket military funerals. See United States v. Stevens, 130 S.Ct. 1207 (2011); Snyder v. Phelps, 131 S.Ct. 1207 (2011); Brown v. Entertainment Merchants Ass’n, 131 S.Ct. 2729 (2011).

In January, for example, this debate was featured in an article in The New York Times authored by their Supreme Court correspondent, Adam Liptak, which cited the Youn article but quoted eminent First Amendment expert Floyd Abrams as saying: “Statistics cannot tell the story of the willingness of a court to defend free expression. … Cases do. It is unpopular speech, distasteful speech, that most requires First Amendment protection, and on that score, no prior Supreme Court has been as protective as this.” Adam Liptak, “Study Challenges Supreme Court’s Image as Defender of Free Speech,” The New York Times, January 7, 2012, at A25.

So what is the reality of the Roberts Court’s treatment of the First Amendment and what do this term’s three cases add to the picture?

**Unpopular Speech**

First, as Floyd Abrams noted, the Roberts Court is strongly committed to opposing content-based restrictions of speech viewed by the elected branches as undesirable, harmful, or offensive. That pattern continued this year. The prior cases extending protection to animal cruelty videos, violent video games, and funeral picketing were joined this term by United States v. Alvarez, invalidating a federal law that criminally punished intentional false statements about having received a military medal.

The case arose when one Xavier Alvarez introduced himself as a new member of a local water board by falsely saying that he had served in the Marine Corps for 25 years and been awarded the Congressional Medal of Honor. There was no indication that he had made this claim in order to gain some concrete prize such as a job or some other privilege associated with medal winners. He simply wanted increased respect from a local audience. This statement, however, violated the federal Stolen Valor Act, which made it a crime to falsely claim to hold any decoration or medal authorized by Congress for the armed forces and which provided enhanced penalties if the claim involved the Medal of Honor. 18 U.S.C. § 704. Alvarez pled guilty, preserving his First Amendment argument. The government defended the law on the theory that it protects the integrity and value of service medals, which in turn help to maintain the effectiveness of the nation’s armed services. The government also argued that intentionally false speech merits no constitutional protection because it cannot contribute value in the marketplace of ideas.

The Court held that the act was unconstitutional by a vote of 6-3. Justice Kennedy authored a plurality opinion joined by the Chief Justice and Justices Ginsburg and Sotomayor. His opinion is remarkable in the way it rejects the notion that false speech is categorically unprotected and goes on to apply strict constitutional scrutiny. He noted that the act was clearly a content-based restriction on speech. And he said that it did not fall into one of the recognized exceptions to protection of the First Amendment. In particular, he rejected the notion that there is a categorical exception for false speech in general. To the contrary, Justice Kennedy said, the Court has only denied protection to false speech when it is tied to a recognized form of harm, such as defamation or fraud. Applying strict scrutiny, Justice Kennedy did not contest that the government has a compelling interest in maintaining the integrity of military medals. But he faulted the government for failing to demonstrate a causal link between that interest and the prohibition at issue. It had not presented evidence that the public’s respect for medals and medal winners would be significantly tarnished by charlatans making
false claims, nor had it shown why any problem could not be solved with counterspeech. Justice Kennedy added that it would have been less restrictive to create a database of actual medal winners to help identify false claims.

Justice Breyer, joined by Justice Kagan, concurred only in the result. He favored applying a form of intermediate scrutiny, in which the extent of any free speech harm caused by the law is balanced against the governmental objectives, taking into account the extent to which the law achieves those objectives and the extent to which they could be achieved in a less restrictive manner. He went on to reject the notion that falsity alone can justify a legal ban on speech, noting that the many laws regulating false speech do so in contexts where speech has a tendency to cause a concrete harm. Without denying the existence of substantial governmental interests in avoiding the undermining of the value of congressional medals, Justice Breyer expressed concern about the breadth of the law (extending even to family conversations) and concluded that the law was unconstitutional because a more finely tailored law would impose less harm to free speech while allowing the government to achieve its legitimate objectives. But he was not particularly helpful in suggesting precisely how a valid law would be tailored.

Justice Alito, joined by Justices Scalia and Thomas, dissented. He emphasized that the law was limited to knowing and intentional false statements of fact. He then catalogued the extent of the proliferating problem of false claims to hold medals, analogizing this to the cheapening of the reputation of luxury goods caused by trademark violators. He added that creation of a comprehensive database of medal winners was not actually possible, and that absent such a database, counter-speech is not an effective remedy. Justice Alito listed the many laws that prohibit false statements, and the many cases indicating that false speech does not deserve constitutional protection. Acknowledging that in many contexts it is necessary to accord some protection to false speech in order to avoid unduly burdening true speech, he concluded that such concerns do not arise in the discrete area of false claims to have won a medal.

The bottom line is that the Court in *Alvarez once again strongly opposed content-based censorship of speech that common sense might lead many to consider socially harmful. Like offensive picketing of military funerals, the Court recognized that the concerns were valid, but pushed back against what it perceived as an overbroad, too-speech-restrictive solution.

*FCC v. Fox Television Stations* gave the Court the opportunity to reconsider its prior decision carving out a semieception to full First Amendment protection to one category of speech—indecent utterances or images when they appear in broadcast television or on broadcast radio. In *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), the Court had upheld the Federal Communication Commission’s sanctioning of a daytime radio broadcast laced with offensive words describing sexual and excretory functions and organs. For a number of years, the Commission limited itself to regulating only comparable broadcasts including repetitious use of offensive and “indecent” language. After 2000, however, it moved in the direction of greater regulation, declaring that a single utterance of an offensive term could be a basis for a sanction. Two of the broadcasts at issue in this term’s case occurred in 2002 and 2003 when two recipients at award shows spontaneously uttered four-letter words. The other broadcast was an episode of *NYPD Blue* in which an image of a woman’s buttocks appeared for several seconds. The FCC found that all three violated its current understanding of the indecency rules as applied to daytime or prime time broadcasts.

The respondent TV networks made two basic arguments. First, they argued that the FCC’s application of its newer and stricter rules was so unpredictable and haphazard as to be unconstitutionally vague. They pointed out that the FCC had allowed prime-time broadcast of the film *Saving Private Ryan*, which contains numerous expletives, while penalizing a documentary about blues musicians containing far fewer. Similarly, they pointed out that the FCC had allowed broadcast of the film *Schindler’s List*, which has a scene showing numerous naked prisoners, but not the *NYPD Blue* episode at issue. (This moved Justice Kagan to comment at oral argument: “The way that this policy seems to work, it’s like nobody can use dirty words or nudity except for Steven Spielberg.”)

The networks’ other argument was that regulation of single expletives and fleeting glimpses of nudity simply goes too far constitutionally, even in the broadcast context. They suggested that *Pacifica* either should be limited to its facts or should be overruled given that the distinction between broadcast television and other forms of delivery of programming, such as cable, had blurred for most people.

The Court, however, ended up addressing neither of these arguments, even as it upheld the broadcasters’ constitutional claims. In an opinion by Justice Kennedy joined by six other justices, the Court held that because the broadcasts at issue preceded the FCC’s 2004 *Golden Globes Order* formalizing its policy of punishing fleeting expletives—a policy that formed the basis of the FCC orders under review—the broadcasters had insufficient notice of what the rules were at the time of the broadcasts. Applying traditional legal norms requiring clear notice before speech can be regulated, the Court disposed of the case on a rationale that applies only to any broadcasts made before 2004. With Justice Sotomayor recused, only Justice Ginsburg was left to concur in the judgment, arguing that *Pacifica* was wrong when it was decided and should be reconsidered now.

Arguably, therefore, *FCC v. Fox* is not in the tradition of recent decisions by the Roberts Court aggressively scrutinizing content-based laws restricting unpopular and controversial speech. After all, it left in place not only *Pacifica* but also the Commission’s entire indecency regulatory scheme, including restrictions on fleeting expletives and images. But there is an argument that the Court was signaling to the FCC to change course. In his opinion, Justice Kennedy went out of his way to include some strong language about the importance of clarity and consistency in rules regulating speech:

Even when speech is not at issue, the void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary.

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so that those enforcing the law do not act in an arbitrary or discriminatory way. See Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972). When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech.

He then concluded by saying that “this opinion leaves the Commission free to modify its current indecency policy in light of its determination of the public interest and applicable legal requirements.” Whether the Court really was signaling the FCC to change course, and whether the Commission will heed the signal, remain to be seen.

Of Unions and Corporations

As noted at the outset, the Court’s third free speech case this term, Knox v. SEIU, also upheld a First Amendment claim—this time a claim brought by public employees who have chosen not to join the union representing their “agency shop” and who object to paying for the union’s political advocacy. The Court, in an opinion written by Justice Alito, joined by the Chief Justice and Justices Scalia, Kennedy, and Thomas, reached out to decide an issue that was not within the questions presented. It is well settled that unions representing nonmembers may collect dues from those nonmembers but must annually give them the opportunity to exclude paying a portion devoted to the costs of the union’s political advocacy. In this case, that occurred, but the union then imposed a special midyear assessment, devoted completely to political advocacy, without giving nonmembers the opportunity to opt out completely. That was the issue presented.

The Court held that this action violated the First Amendment rights of the nonmembers. But it went on to hold that providing a customary opt out process would not have sufficed. Instead, the union can collect money from nonmembers to be used for political speech only if they affirmatively opt in to making such a payment.

Justice Sotomayor, joined by Justice Ginsburg, concurred in the result, saying that the union should not have imposed a special assessment without an opt-out, but strongly criticized the majority for reaching an unnecessary issue that had not even been briefed. Justice Breyer, joined by Justice Kagan, dissented, arguing that the union’s system of basing the allocation of dues to nonpolitical and political activities based on the prior year’s division meant that over time nonmembers who opt out annually would not be required to pay for political activities.

The Knox decision follows on two prior decisions of the Roberts Court rejecting First Amendment challenges regarding unions. One was a challenge to a state law that required use of opt-in procedures for nonmembers paying for political advocacy. Davenport v. Washington Educ. Ass’n, 551 U.S. 177 (2007). The other challenged a state law forbidding use of payroll deductions to pay union dues. Ysursa v. Pocatello Educ. Ass’n, 555 U.S. 353 (2009). The Court’s pattern of decisions in this area, combined with its consistent support for First Amendment claims brought by wealthy individuals and corporations challenging campaign finance laws, has caused some to argue that the Court is using the First Amendment disparately to tip the political scales. See Youn, The Roberts Court’s Free Speech Double Standard, supra. But there are some differences between the two categories of cases that may help explain the different outcomes.

A majority of the justices are clearly very sensitive to any effort by lawmakers to tinker with the balance of power in the marketplace of ideas. We have seen that both in campaign finance cases, where the Court has rejected laws limiting the speech rights of rich persons or corporations or compensating with subsidies to others, and also last term in Sorrell v. IMS Health Inc., 131 S.Ct. 2653 (2011), involving a state law that sought to limit the effectiveness of lawful promotion of prescription drugs. Vermont sought to achieve that goal by prohibiting use of information about individual doctors’ prescription practices when sellers of drugs were meeting with doctors to promote use of particular drugs. The Court held that such a law ran afoul of the First Amendment prohibition on regulating speech to make advocacy of lawful activity less effective.

The union cases, by contrast, involve a separate First Amendment concern—the potential for compelling individuals to subsidize the political speech of others. That concern is not presented in the campaign finance context.

Conclusion

Ultimately, an assessment of the Roberts Court and the First Amendment depends on value judgments. If you agree with Floyd Abrams that the most important and telling cases are those that involve content-based regulation of unpopular speech, the Roberts Court is a forthright defender of speech that many find offensive or even harmful. If you are more concerned about the potential for the Court to take sides in political controversies, then the Roberts Court has provided plenty of grist for that mill with its aggressive use of the First Amendment to make life more difficult for unions along with its equally aggressive assault on campaign finance restrictions affecting the wealthy and corporations.

A central figure in all of these cases is Justice Kennedy, who is the most consistent supporter of First Amendment rights on the Court. The author of the Alvarez plurality opinion and the Fox majority opinion, and a member of the majority in Knox, he regularly joins with shifting cohorts of justices to uphold free speech claims brought under the First Amendment. More than anyone else, he is the justice who determines when and where the First Amendment will be applied to protect speech rights.

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Any analysis of the Supreme Court’s federalism jurisprudence this term has to begin with the two giants: National Federation of Independent Business et al. v. Sebelius, the states’ challenge to federal health care reform; and Arizona v. United States, the federal government’s challenge to Arizona’s immigration law, S.B. 1070. In this pair of cases, both decided the last week of the term, the Court took on defining issues of federal-state relations, including how far the federal government can go to encourage states to adopt federal policy and whether states have any role in enforcing immigration policy. The results were split—with the Court drawing a line at the federal government’s authority to coerce states into expanding Medicaid (in National Federation) but striking the lion’s share of a state’s effort to regulate immigration (in Arizona).

But behind the sheer results, these cases tell a more complicated story—one that, on balance, leans strongly in favor of the federal government.

Start with the holdings. While the Court ruled in National Federation that Congress unconstitutionally coerced the states with the Medicaid expansion provision in the Patient Protection and Affordable Care Act (PPACA), as enacted, the plurality reread the provision to save it. In the end, the Court ruled that Congress could offer federal funding to states to expand Medicaid, just so long as a nonparticipating state would lose only its additional, incremental funding for the expansion (and not its entire federal Medicaid budget). Given the PPACA’s universal coverage requirement (also upheld by the Court) and the realities of state budgets and politics, this ruling makes it all but certain that every state will participate in the expansion (even if at least six states have now said, perhaps disingenuously, that they will not). These realities turn an otherwise equivocal ruling on federalism into an effective endorsement of federal supremacy.

As to Arizona, the Court held that federal law preempted three of the four challenged provisions of S.B. 1070. And it so held even before Arizona had a chance to enforce them. With regard to one of those provisions, the Court held that even federal nonenforcement of federal law preempted the state’s provision authorizing enforcement of a parallel state law, because the federal law occupied the field, and state enforcement could run counter to federal enforcement priorities. With regard to the fourth provision, the Court only said that it was too early to tell whether it might run contrary to federal law—and that Arizona might enforce it consistent with federal law.

Next, look at the lineups. In both cases, one or both of the Court’s swing votes on federalism issues—Chief Justice Roberts and Justice Kennedy—went with the so-called liberals, creating a five- or six-justice majority in favor of the federal government. Chief Justice Roberts famously authored the plurality opinion on Medicaid expansion, joined in full by only Justices Breyer and Kagan. His vote made five for upholding the provision, one way or another. (Justices Ginsburg and Sotomayor would have upheld the expansion as enacted.) Justice Kennedy penned the Court’s opinion on S.B. 1070, joined by Chief Justice Roberts and Justices Ginsburg, Breyer, Sotomayor, and Kagan. Chief Justice Roberts and Justice Kennedy made six for the Court’s ruling. (Justice Alito, concurring in part and dissenting in part, made seven for striking one of the provisions.)

Finally, look at what the Court did not say. The Court notably disregarded the most aggressive federalism arguments propounded by the states. In National Federation, the Court declined to adopt the states’ federalism arguments in its analysis of the universal coverage requirement, and it declined to flatly overturn Medicaid expansion on federalism grounds. In Arizona, the Court declined to say that states had a sovereign right to protect their borders. The states used both of these cases to proffer strong states’ rights positions, and the dissents often adopted them. But the Court did not.

While these two giants dominated the Court’s federalism docket this term, there were other federalism cases that play important roles in understanding federalism in the Roberts Court. The Court also ruled on a pair of preemption cases, a pair of civil rights cases that both involved federalism concerns, and a pair of other, hard-to-categorize cases that raised federalism issues. With the exception of the two civil rights cases—in which the Court leaned strongly toward the states, and suggested that it may lean even more strongly in coming terms—all of these other cases favored federal supremacy.

Let’s start with a more detailed look at the two principal federalism cases this term and then examine the preemption cases, the civil rights cases, and the miscellaneous cases.

National Federation of Independent Business et al. v. Sebelius
In National Federation of Independent Business et al. v. Sebelius, a highly fractured Court held the Medicaid expansion provision in the Patient Protection and Affordable Care Act unconstitutional but interpreted the provision to save it. The provision as enacted required states to expand their Medicaid programs by 2014 to cover all individuals under the age of 65 with incomes below 133 percent of the federal poverty line. The federal government pays 100 percent of the costs of covering the newly eligible individuals through 2016; the federal portion gradually decreases to 90 percent in the following years. Under the provision as enacted, states could decline to participate in the expansion, but a nonparticipating state could lose not only the federal portion of the expansion but also its entire federal Medicaid allotment—a significant loss, to say the least.
Congress enacted the Medicaid expansion provision pursuant to its spending power—that is, its authority “to pay the Debts and provide for the ... general Welfare of the United States.” Under that power, Congress may grant federal funds to the states and even condition those funds upon a state’s adoption of federal policies, so long as the conditions meet certain criteria. This power allows Congress to indirectly effect policies (by way of the states) that it might not be able to effect directly (by way of regulation).

One of the criteria for a valid conditioned spending program says that the program cannot compel the states to act. The Supreme Court has never drawn a precise line between allowable pressure and unconstitutional compulsion, however. The best, most recent guidance it provided came in South Dakota v. Dole, 483 U.S. 203 (1987), when it upheld a federal law that threatened to withhold 5 percent of a state’s federal highway funds if the state did not raise its drinking age to 21. By all accounts, the federal program in Dole was a far cry from compulsion. And the Court had never struck a federal program for crossing the line from pressure to compulsion—except when Congress sought to outright commander the states or state officials. That is, until now.

In National Federation, seven justices—all but Justices Ginsburg and Sotomayor—agreed that the Medicaid expansion provision, as enacted, crossed the line from persuasion to compulsion. These seven wrote (in two separate opinions, one by Chief Justice Roberts and one by the consolidated dissent of Justices Scalia, Kennedy, Thomas, and Alito) that the provision effectively compelled the states to participate in the expansion, because a state that declined to participate risked losing its entire federal Medicaid allotment. (Chief Justice Roberts likened this condition to putting “a gun to the head” of the states.)

But five justices—all but those in the consolidated dissent—agreed that the provision should be upheld in some form. Thus, Chief Justice Roberts, joined by Justices Breyer and Kagan in the Court’s guiding plurality opinion, saved the provision by reading it to mean that a nonparticipating state would lose only its additional federal funds for the expansion, and not its entire federal Medicaid allotment. (The other two justices who would have upheld the provision in some form, Justices Ginsburg and Sotomayor, would have upheld the provision exactly as enacted.) Chief Justice Roberts argued that the Medicaid expansion provision was a new program—one that was different in kind than the baseline Medicaid program, and one that states could not have imagined when they originally signed on to Medicaid. Chief Justice Roberts said that Congress could therefore require a nonparticipating state to forfeit its federal allotment for the new expansion, but not for its entire Medicaid program.

The case marks the first time the Court found that a Spending Clause condition crossed the line from persuasion to compulsion. And Chief Justice Roberts’s reasoning—that conditioning the entire federal Medicaid allotment simply went too far, and that the Medicaid expansion provision was a new program, on top of the baseline Medicaid program—raises alarm bells that courts might strike other “new” federal add-ons to long-standing Spending Clause programs. (For example: How would courts react if Congress adds a new protected category, say sexual orientation, to long-standing civil rights legislation enacted under the Spending Clause?) More: Chief Justice Roberts articulates no clear rule for determining when a federal program becomes so big that it amounts to a “gun at the head,” or when a new add-on is unacceptably different from the baseline program to be unconstitutional. The chief justice’s opinion puts these factors into play but fails to give determinate guidance—inviting constitutional challenges against federal Spending Clause programs but likely leading to confusion in the lower courts. From this vantage point, the Court’s ruling strikes at least a potential blow to federal power in relation to the states.

But on the other hand, this case really is unique, and it may be limited by its facts. For one, federal Medicaid funding constitutes a hefty portion of states’ budgets, as the chief justice readily pointed out in his plurality opinion. No other single federal program even comes close. Thus, the condition here—potentially forfeiting the entire federal Medicaid allotment—is far more significant than a similar condition for any other federal program. Moreover, the Medicaid expansion provision at least arguably looks more like a new program than many conceivable incremental additions to other federal programs—such as civil rights, for example. It is not obvious that the chief justice’s distinction between an acceptably related add-on and an unacceptably different add-on will apply outside this unique context. Thus, while the ruling is obviously significant for identifying a federal spending program in which pressure turned into compulsion, it is not clear that the holding is particularly far-reaching. In other words, this extraordinary case hardly sets a precedent to overturn all manner of other federal spending programs.

Arizona v. United States
The Court ruled in Arizona v. United States that federal law preempted three provisions of Arizona’s S.B. 1070—the state’s effort to create its own immigration enforcement policy—but tentatively upheld a fourth provision, at least until the state started to enforce it. The decision is an especially strong statement of federal supremacy, given that the Court halted enforcement of three key provisions before Arizona even had a chance to enforce them. The holding also endorsed the federal government’s theory that its decision not to enforce certain federal laws was itself a policy choice that could preempt contrary state laws. In other words, the Court rejected Arizona’s argument that it could simply fill a gap in enforcement of federal law; instead, the Court said that the federal immigration scheme was so sweeping and supreme that even nonenforcement could preempt a state’s effort to enforce. Finally, the decision is a notable endorsement of federal supremacy, because both Chief Justice Roberts and Justice Kennedy—the conventional swing votes on federalism questions—joined the majority.

In an opinion by Justice Kennedy and joined by Chief Justice Roberts and Justices Ginsburg, Breyer, and Sotomayor, the Court first struck § 3 of S.B. 1070, which forbade the “willful failure to complete or carry an alien registration document … in violation of 8 United States Code section 1304(e) or 1306(a).” Section 3 only allowed state officers to enforce federal law, but the Court said that this interfered with the federal field of alien registration. Justice Kennedy explained, “Were § 3 to come into force, the State would have the power to bring criminal charges against individuals for violating a federal law even in circumstances where federal officials
in charge of the comprehensive scheme determine that prosecution would frustrate federal policies.” Stated differently, federal supremacy in this area is so strong that the federal government’s decision to not enforce federal law itself preempted state law. The Court also noted that Arizona’s law conflicted with federal law insofar as Arizona’s law ruled out probation as a possible sentence for a violation.

The Court next struck §§ 5C and 6 of S.B. 1070 because they conflicted with, or created an obstacle to, the federal scheme. The Court said that § 5C—which created a state misdemeanor for “an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor”—ran up against the federal enforcement framework, which principally regulates only employers of removable aliens and provides for only civil penalties (not criminal sanctions) for the removable aliens themselves. Similarly, the Court ruled that § 6—which provides that a state officer “without a warrant, may arrest a person if the officer has probable cause to believe . . . [the person] has committed any public offense that makes [him] removable from the United States”—provided state officers even greater authority to arrest aliens than Congress gave to trained federal immigration officers. According to the Court, § 6 frustrated the federal enforcement scheme and “allow[ed] the State to achieve its own immigration policy.” Moreover, the Court said that § 6 could lead to “unnecessary harassment of some aliens . . . whom federal officials determine should not be removed.”

But in contrast to §§ 3, 5C, and 6, the Court upheld § 2(B). That provision requires state officers to make a “reasonable attempt . . . to determine the immigration status” of any person they stop, detain, or arrest on some other legitimate basis if “reasonable suspicion exists that the person is an alien and is unlawfully present in the United States.” The Court said that Arizona officers might enforce § 2(B) in a way that does not conflict with federal law and priorities—by simply contacting U.S. Immigration and Customs Enforcement (ICE) to inquire about someone they have detained—and therefore a preenforcement ruling on preemption was premature. But the Court also warned that Arizona might construe § 2(B) in a way that does conflict with federal law and priorities (and other provisions in the Constitution); and the Court held that Arizona’s law rules out probation as a possible sentence for a violation. (This is hardly the ringing endorsement of states’ rights that some have claimed in the wake of this decision.)

On balance, the case is a decisive statement of federal supremacy. It is all the more so because of the preenforcement nature of the ruling, because of the Court’s endorsement of the federal government’s position that its decision not to enforce federal law has preemptive effect, and because both Chief Justice Roberts and Justice Kennedy joined the majority. If there were any doubt as to the Court’s position on federal supremacy over immigration in the wake of last term’s decision in Chamber of Commerce v. Whiting (holding that Arizona may revoke or suspend the license of a business that employs deportable aliens), 131 S.Ct. 1968 (2011), this case put it to rest. Between Arizona and Whiting, the Court has said that states can only do what is plainly allowable under federal law—require their officers to contact ICE to check the status of an alien (in Arizona) and revoke a business license for an employer who hires a removable alien (in Whiting)—leaving precious little breathing room for the states to regulate immigration—and preempting all similar state laws modeled on the three stricken provisions in S.B. 1070.

Preemption

The Court ruled on two preemption cases this term (other than Arizona)—a field preemption case and an express preemption case. The Court struck down the state laws in both and broke no new ground in preemption doctrine. Instead, the Court simply followed its own precedent and clear legislative language.

In the field preemption case, Karns v. Railroad Friction Products Corp., the Court ruled that federal law occupied the field of locomotive equipment regulation and thus preempted state-law design-defect and failure-to-warn claims. While all nine justices agreed that the federal law occupied some field and thus preempted at least some of the state-law claims, they disagreed about the scope of the field.

The case arose out of a locomotive machinist’s state-court claims against the Railroad Friction Products Corporation and Viad Corporation for asbestos exposure. The defendants removed the case to federal court and argued that the federal Locomotive Inspection Act (LIA) occupied the field of locomotive equipment regulation and preempted the plaintiff’s state-law claims.

The Court agreed. In an opinion by Justice Thomas, and joined by Chief Justice Roberts and Justices Scalia, Kennedy, Alito, and Kagan, the Court looked to an 85-year-old case, Napier v. Atlantic Coast Line R. Co., that held that Congress intended the LIA to occupy the field of locomotive equipment regulation. 272 U.S. 605 (1926). Applying Napier, the Court ruled that the LIA left no room for state regulation, including state-law design-defect and failure-to-warn claims. Justice Sotomayor, joined by Justices Ginsburg and Breyer, wrote separately to argue that the field here only covered the design-defect claim, not the failure-to-warn claim.

In the express preemption case, National Meat Association v. Harris, the unanimous Court held that the Federal Meat Inspection Act (FMIA) expressly preempted a state law restricting the buying, selling, and processing of nonambulatory animals for human consumption. The FMIA specifically allows slaughterhouses to purchase and process nonambulatory animals under certain conditions. But California’s law flatly barred all sales and processing of those animals. The Court held that the plain language of the FMIA preemption clause—which prohibits a state from imposing any requirement “in addition to, or different than” those in the FMIA—meant that the FMIA expressly preempted California’s law. This was so, even though there was no necessary conflict between the FMIA and California law—that is, even though federal law did not require what California prohibited, or vice versa.

Civil Rights

The Court ruled on two civil rights cases that involved federalism issues this term. They both went against the federal government (in different ways) and reflected a trend with this Court in favor of the states on issues related to federal civil rights enforcement. Indeed,
the second case discussed below, Perry v. Perez, foreshadows (yet again) the Court’s next big cases, now percolating in the lower courts, involving federal civil rights enforcement and federalism principles: the constitutional challenges to § 5 of the Voting Rights Act. If history and these cases are any guide, we can expect from the Roberts Court in future years a further chipping away at federal civil rights enforcement measures in the name of federalism.

In Coleman v. Court of Appeals of Maryland, a fractured and sharply divided Court ruled that Congress did not validly abrogate the states’ Eleventh Amendment immunity through the self-care provision of the Family and Medical Leave Act (FMLA), because Congress exceeded its authority in enacting this provision under § 5 of the Fourteenth Amendment. Justice Kennedy wrote the plurality opinion, joined by Chief Justice Roberts and Justices Thomas and Alito, and held that the self-care provision was not a “proportional and congruent” remedy for the constitutional violations that Congress sought to address. Justice Kennedy wrote that congressional findings supporting the self-care provision reflected a “concern for the economic burdens on the employee and the employee’s family resulting from illness-related job loss and a concern for discrimination on the basis of illness, not sex.” According to the plurality, these findings distinguished this case from Nevada Dept. of Human Resources v. Hibbs, 538 U.S. 721 (2003). In Hibbs, the Court held that Congress validly abrogated state sovereign immunity by enacting the family-care provision of the FMLA, because Congress supported that provision with findings that states’ family-leave policies discriminated by sex.

(There is another distinguishing feature of Hibbs: the Court’s personnel. Chief Justice Rehnquist and Justice O’Connor both joined the Court’s majority in Hibbs, whereas Chief Justice Roberts and Justice Alito joined the majority here.) Because Congress produced no such findings for the self-leave provision, the Court ruled that Congress did not validly enact the self-leave provision under § 5 of the Fourteenth Amendment and therefore did not validly abrogate the states’ Eleventh Amendment immunity. (Justice Scalia agreed with the result but wrote separately to argue that the Court should abandon the proportionality-and-congruence test.)

In Perry v. Perez, the Court, in a per curiam opinion, ruled that a federal district court, when compelled to draw legislative districts in an action under the Voting Rights Act (VRA), should “take guidance” from a state’s recently enacted legislative districting plan, even if that plan had not yet received the necessary preclearance under § 5 of the VRA. In this case, Texas drew new legislative boundaries to accommodate increases and shifts in population reflected in the 2010 census. Texas submitted its plans to a three-judge panel of the Federal District Court for the District of Columbia for VRA preclearance. As that case was pending, various plaintiffs sued to stop the plans in the Federal District Court for the Western District of Texas. The Texas court, after receiving proposals from the parties, issued its own interim plans. Texas appealed to the Supreme Court.

The Court ruled that the Texas court should take guidance from the state plans, unless they stand a “reasonable probability” of failing to gain preclearance in the D.C. court. The Court pointed out that it only recently noted the “serious constitutional questions” raised by § 5 of the VRA and said, “Those concerns would only be exacerbated if Section 5 required a district court to wholly ignore the State’s policies in drawing maps that will govern a State’s elections, without any reason to believe those state policies are unlawful.” In this highly unusual context, the ruling puts a thumb on the scale in favor of the state plan, even when that plan had not yet received necessary preclearance, thus dealing a minor blow to § 5.

Perry v. Perez is important for another reason. The Court used the case to repeat what it said two terms ago in Northwest Austin Municipal Utility District v. Holder, 557 U.S. 193 (2009) that § 5 of the VRA, and its “intrusion on state sovereignty,” raise “serious constitutional questions.” Given the apparent trend against the federal government in cases involving civil rights enforcement and federalism, and given the Court’s repeated suggestion that § 5 is unconstitutional, we can expect the Court to take up a case challenging § 5—and quite possibly to overturn it—in the coming terms.

**Miscellaneous Federalism Cases**

Finally, the Court decided two cases that term that involved federalism issues but defy easy categorization. In both of these, the Court leaned toward the federal government.

In Douglas v. Independent Living Center of Southern Cal., Inc., a group of Medicaid providers and beneficiaries sued to stop California from implementing Medicaid rate reductions. The plaintiffs argued that the reductions were void under the Supremacy Clause, because they violated federal Medicaid statutory standards. About a month after the Court heard oral argument, however, the federal government approved California’s reductions, substantially changing the posture of the case, but not mootting it.

The Court, in an opinion by Justice Breyer and joined by Justices Kennedy, Ginsburg, Sotomayor, and Kagan, remanded the case to the Ninth Circuit with instructions to consider whether the plaintiffs should proceed on their original Supremacy Clause claim (on the theory that the federal government’s approval of California’s cuts did not moot this claim, because the cuts might still violate the Medicaid Act itself) or on a new claim against the federal government under the Administrative Procedures Act (on the theory that the agency’s approval of California’s cuts was arbitrary, capricious, or an abuse of discretion). Chief Justice Roberts wrote a dissent joined by Justices Scalia, Thomas, and Alito that argued that the Supremacy Clause alone does not provide a cause of action, absent a statute that provides one.

The ruling leaves open the possibility that an individual may file a cause of action under the Supremacy Clause alone, even without a statutory cause of action. (Justice Breyer’s opinion for the Court is hardly a full-throated endorsement of the principle that the Supremacy Clause alone provides a cause of action. But still, five justices leave open that possibility.) The ruling thus puts the Supremacy Clause on par with the Tenth Amendment, which the Supreme Court held last term in Bond v. United States could alone form the basis of an individual challenge to a federal law. 564 U.S. ___ (2011). Douglas thus means that individuals can challenge state actions under the Supremacy Clause as much as they can challenge federal actions.
under the Tenth Amendment. The case treats the federal government (and federal supremacy) the same as the states (and state sovereignty) when an individual seeks to sue only on the basis of structural features of the Constitution.

In the second case, *PPL Montana, LLC v. Montana*, a unanimous Court ruled that the federal government, not the state, owned the riverbed below nonnavigable waters in the state, and that navigability should be determined segment-by-segment (and not considering the waterway as a whole). The Court said that under the equal-footing doctrine, states gain title to waterbeds within their borders under navigable waters upon entry into the union. But the federal government retains any title vested in it before statehood to any land beneath waters not then navigable. Moreover, the Court said that it considers whether a waterway is navigable on a segment-by-segment basis. As a result, the Court ruled that the federal government, not Montana, owned waterbeds under certain nonnavigable river segments within the state and overturned the Montana Supreme Court’s ruling to the contrary.

This case is really more about application of well-settled principles under the equal-footing doctrine than about any principles of federalism. But to the extent that the case says anything about the Court’s view of federalism, it seems consistent with the Court’s more general trend this term in favor of federal supremacy.

**Conclusion**

Any analysis of the Court’s federalism docket this term has to start with Medicaid expansion and S.B. 1070. Those cases presented the Court with unique opportunities to give its federalism doctrine a much stronger states’ rights dimension. But the Court declined and issued rulings instead that leaned toward the federal government and favored federal supremacy. The Court’s preemption cases and a pair of miscellaneous federalism cases are consistent with this trend.

At the same time, however, the Court also signaled, once again, that it takes federalism principles very seriously in cases involving federal civil rights enforcement. In particular, it again indicated that it is ready to reconsider the constitutionality of § 5 of the Voting Rights Act. With challenges now percolating in the lower courts, this is likely to be the next big federalism case to come to the Court.
Justices’ Comments Provided Much Food for Thought
by Mark A. Cohen

Given the historic nature of the latest Supreme Court term, it is fair to say that the oral arguments have never been more closely listened to or analyzed. Pundits examined and reexamined the justices’ questions, comments, intonations, and facial expressions as if each side’s argument would rise or fall with a single furrowed brow, scratch of the head, or off-the-cuff quip. For the most part, the cadre of media “experts” attempting to use the oral arguments to divine the ultimate decision had about as much success as would a meteorologist using current cloud formations to predict next month’s weather. Still, the oral arguments proved to be magnificent spectator sport. The following are just a few memorable moments from the arguments from the Court’s 2011–12 term.

No cases were more closely watched than the challenges to the Affordable Care Act, argued over the three-day period of March 26–28. Would the Court strike down the centerpiece achievement of the Obama Administration during a presidential election year? It was expected that the oral arguments—which featured some of the best Supreme Court lawyers in the country—would be fascinating to follow, but who would have guessed the word “broccoli” would come up eight times? Interestingly, much of the debate centered on the Commerce Clause, rather than the Tax Power, which turned out to be the constitutional authority that saved the minimum coverage provision. The following are just a few interesting snippets from the oral arguments:

**Justice Scalia:** Could you define the market—everybody has to buy food sooner or later, so you define the market as food, therefore, everybody is in the market; therefore, you can make people buy broccoli.

**Chief Justice Roberts:** You say health insurance is not purchased for its own sake, like a car or broccoli; it is a means of financing health care consumption and covering universal risks. Well, a car or broccoli aren’t purchased for their own sake, either. They’re purchased for the sake of transportation or, in broccoli, covering the need for food.

**Justice Breyer:** All right. But all that sounds like you’re debating the merits of the bill. You asked really for limiting principles so we don’t get into a matter that I think has nothing to do with this case: broccoli. Okay?

**Justice Alito:** Suppose that you and I walked around downtown Washington at lunch hour and we found a couple of healthy young people and we stopped them and we said: You know what you’re doing? You are financing your burial services right now because eventually you’re going to die, and somebody is going to have to pay for it, and if you don’t have burial insurance and you haven’t saved money for it, you’re going to shift the cost to somebody else. Isn’t that a very artificial way of talking about what somebody is doing?

**Justice Sotomayor:** We get tax credits for having solar-powered homes. We get tax credits for using fuel-efficient cars. Why couldn’t we get a tax credit for having health insurance and saving the government from caring for us?

**Justice Scalia:** The president said it wasn’t a tax, didn’t he? Is it a tax or not a tax? The president didn’t think it was.

**Solicitor General Verrilli:** The president said it wasn’t a tax increase because it ought to be understood as an incentive to get people to have insurance. I don’t think it’s fair to infer from that anything about whether that is an exercise of the tax power or not.

**Attorney Paul Clement:** There are lots of reasons why this isn’t a tax. It wasn’t denominated a tax. It’s not structured as a tax. If it’s any tax at all, though, it is a direct tax. Article I, section 9, clause 4—the Framers would have had no doubt that a tax on not having something is not an excise tax but a forbidden direct tax. That’s one more reason why this is not proper legislation, because it violates that.
Arizona Immigration Case: The Argument Not Made

In Arizona v. United States, the closely watched state immigration law enforcement case, one of the key moments came right at the beginning, where Chief Justice John Roberts took the unusual step of having the solicitor general publicly declare what arguments he was not making.

Chief Justice Roberts: Before you get into what the case is about, I’d like to clear up at the outset what it’s not about. No part of your argument has to do with racial or ethnic profiling, does it? I saw none of that in your brief.

Solicitor General Verrilli: That’s correct.

Chief Justice Roberts: Okay. So this is not a case about ethnic profiling.

Solicitor General Verrilli: We’re not making any allegation about racial or ethnic profiling in the case.

Justice Sonia Sotomayor queried Verrilli about the process used to determine if an individual is legally in the country.

Solicitor General Verrilli: So the way this works is there is a system for—for incoming inquiries. And then there is a person at a computer terminal. And that person searches a number of different databases. There are eight or ten different databases, and that person will check the name against this one, check the name against that one, check the name against the other one, to see if there are any hits.

When It Comes to Obscenity, the Justices Get Foxy

In FCC v. Fox Television, Inc., the Supreme Court was asked to take another look at the FCC’s indecency rules. The case involved an FCC fine against ABC for a brief moment of nudity in an NYPD Blue episode and against Fox for fleeting on-air profanities uttered by the singer Cher and reality-TV personality Nicole Ritchie. One question the Court was asked to consider was whether the FCC’s rules were rational given the prevalence of cable and Internet technologies and the fact that the rules only apply to programs televised over the airwaves. Justice Anthony Kennedy pointed out that there is technology available to block offensive cable shows (the “V chip”), but got a few laughs when he noted a rather gaping hole in the effectiveness of such high-tech solutions to protecting children from broadcast content:

Justice Kennedy: What—what you’re saying is, is that there is a public value in having a particular segment of the media with different standards than other segments. … But—you know, in the briefs, it says how much—how many cable stations there are, and you, what do you call it, surf the—you go through all the channels. And it’s not apparent to many people which are broadcast and which are not.

Solicitor General Verrilli: … It does make a difference to preserve a safe haven where, if parents want to put their kids down in front of the television set at 8:00 p.m., they know that there’s a segment of what’s available that—where they’re not going to have to worry about whether the kids are going to get bombarded with curse words or nudity. …

Justice Kennedy: … and then there’s the chip that’s available.

Solicitor General Verrilli: Right.

Justice Kennedy: And, of course, you ask your 15-year-old, or your 10-year-old, how to turn off the chip. They’re the only ones that know how to do it. (Laughter.)
It bears mentioning that even a moment of seeming levity in an oral argument can reveal something significant, if you know what you are looking for. A case in point is this exchange from U.S. v. Jones, the challenge to police officers’ warrantless attachment of a GPS tracker to a drug suspect’s vehicle in order to track its movements from a remote location 24 hours a day for a month. Speaking to Deputy Solicitor General Michael Dreeben, Justice Kennedy posed a hypothetical raising the issues inherent in physically attaching such a device to private property. The following exchange then took place:

Justice Kennedy: I have serious reservations … about the way in which this beeper was installed. But you can get to that—at your convenience.

Justice Alito: Well, broadcast TV is—is living on borrowed time. It’s not going to be long before it goes the way of vinyl records and eight-track tapes.

Attorney Phillips: I hope that—I’m sure my client is not thrilled to hear you say that.

Justice Alito: Well, no, I’m sure. (Laughter.) At least Fox isn’t in the newspaper business. Oh, wait … Meanwhile, Justice Breyer drew laughs with his wry observation about Cher and Ritchie.

Justice Breyer: What Fox was penalized for was two women on television who basically used a fleeting expletive which seems to be naturally part of their vocabulary. (Laughter.) Of course, there are worse things than a justice not thinking much of your vocabulary. For example, the justice might not think much of you. In the Court’s ruling overturning the FCC fine, Justice Kennedy calls the multitalented Cher “the singer Cher,” but only refers to Ritchie as “a person named Nicole Ritchie.” Apparently the fame of a reality TV star is even more fleeting than an expletive.

When It Comes to Obscenity, the Justices Get Foxy, continued

Justice Elena Kagan demonstrated that being a junior justice on the Court is no bar to making witty observations when she pointed out that the FCC has been somewhat inconsistent in enforcing its obscenity rule.

Justice Kagan: I think that the—that the networks really are saying, well, even—even if some regulation is permissible, the kind of regulation that the FCC has done here is regulation that gives it complete discretion as to what kind of speech to go after and what not to go after; that it has not tied itself in any way to any kinds of standards. And it’s, you know, evident in the notion that this—the way that this policy seems to work, it’s like nobody can use dirty words or nudity except for Steven Spielberg. (Laughs.) As E.T. would say, ouch. In an exchange with Fox’s lawyer, Carter Phillips, Justice Samuel Alito expressed his view that the old-fashioned rabbit-eared boob-tube is about ready for the scrap heap of history.

Justice Alito: Well, broadcast TV is—is living on borrowed time. It’s not going to

In GPS Case, Arguments Provided Guidance

It bears mentioning that even a moment of seeming levity in an oral argument can reveal something significant, if you know what you are looking for. A case in point is this exchange from U.S. v. Jones, the challenge to police officers’ warrantless attachment of a GPS tracker to a drug suspect’s vehicle in order to track its movements from a remote location 24 hours a day for a month. Speaking to Deputy Solicitor General Michael Dreeben, Justice Kennedy posed a hypothetical raising the issues inherent in physically attaching such a device to private property. The following exchange then took place:

Justice Kennedy: I have serious reservations … about the way in which this beeper was installed. But you can get to that—at your convenience.

Justice Alito: Well, broadcast TV is—is living on borrowed time. It’s not going to

Justice Scalia: Mr. Dreeben, I’d like to get to it now. (Laughter.)

The Court ultimately ruled that the suspect’s rights had been violated. The decision hinged not on finding that a warrant was required for using this invasive new technology to track suspects, but on the fact that the police officers’ action in physically attaching the device to private property constituted a trespass under ancient principles of common law. Guess who delivered the opinion of the Court? If you said Justice Scalia, congratulations, you are now officially qualified to call yourself a Supreme Court expert.
Overview: Offshore oil workers hurt on the job are entitled to benefits under a federal statute known as the Outer Continental Shelf Lands Act (OCSLA). In this case, the Supreme Court was asked to determine whether the law extends to onshore injuries.

Issue: Does the OCSLA extend coverage to an offshore oil worker who is injured or killed on land?

Yes. The OCSLA extends coverage to an employee who can establish a substantial nexus between his injury and his employer’s extractive operations on the Outer Continental Shelf.

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

If, as Pacific suggests, the purpose of § 1333(b) was to geographically limit the extension of LHWCA coverage to injuries that occurred on the OCS, Congress could easily have achieved that goal by omitting the following six words in § 1333(b)’s text: “as the result of operations conducted.” Had Congress done so, the statute would extend LHWCA coverage to the “disability or death of an employee resulting from any injury occurring on the outer Continental Shelf.” But that is not the text of the statute Congress enacted.

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

Pacific Operators Offshore, LLP v. Valladolid
Docket No. 10-507
Affirmed and Remanded: The Ninth Circuit

Argued: October 11, 2011
Decided: January 11, 2012
Analysis: See ABA PREVIEW 4 ISSUE 1

Arbitration
CompuCredit Corp. v. Greenwood
Docket No. 10-948
Reversed and Remanded: The Ninth Circuit

Argued: October 11, 2011
Decided: January 10, 2012
Analysis: See ABA PREVIEW 7 ISSUE 1

Overview: Consumers brought an action against credit repair organizations, claiming fees they were charged in connection with credit cards violated the Credit Repair Organization Act (CROA). This case asked whether the CROA, in providing a non-waivable right to sue, makes void an arbitration clause in the consumers’ agreement with an organization.

Issue: Are claims arising under the CROA subject to arbitration under a predispute arbitration clause where the act provides for the right to sue credit repair organizations and also states that any consumer waiver of any protection provided by or any right of the consumer under the act must be treated as void?

Yes. Claims arising under the CROA are subject to arbitration because the CROA is silent on whether such claims can proceed in an arbitrable forum, and as such, the Federal Arbitration Act requires the arbitration agreement to be enforced according to its terms.

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

Applying the national average weekly wage at the time of onset of disability avoids disparate treatment of similarly situated employees. Under Roberts’ reading, two employees who earn the same salary and suffer the same injury on the same day could be entitled to different rates of compensation based on the happenstance of their obtaining orders in different fiscal years. We can imagine no reason why Congress would have intended, by choosing the words “newly awarded compensation,” to differentiate between employees based on such an arbitrary criterion.

Concurring in part and dissenting in part:
Justice Ginsburg
the disclosure provision provides consumers with a right to bring an action in a court of law. It does not. Rather, it imposes an obligation on credit repair organizations to supply consumers with a specific statement set forth (in quotation marks) in the statute. The only consumer right it creates is the right to receive the statement, which is meant to describe the consumer protections that the law elsewhere provides.

Concurring: Justice Sotomayor (joined by Justice Kagan)

Dissenting: Justice Ginsburg

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**Bankruptcy**

*Hall v. United States*

Docket No. 10-875

Affirmed: The Ninth Circuit

Argued: November 29, 2011

Decided: May 14, 2012

Analysis: See ABA PREVIEW 122 ISSUE 3

**Overview:** Lynwood and Brenda Hall filed for Chapter 12 bankruptcy, which provides for debt relief plans for family farmers. During their case, they sold their farm at a profit, resulting in a taxable capital gain. The Halls contend that the tax was incurred by the “estate,” that is, assets they owned before bankruptcy but which were administered during the case for the benefit of creditors. If they are right, the Bankruptcy Code would permit a plan paying part of the tax and discharging the rest. However, the Internal Revenue Code provides that a Chapter 12 bankruptcy estate is not a separate taxable entity. The lower court therefore held that the Halls, not the estate, incurred the tax. On that basis, the Bankruptcy Code would not permit a plan discharging them from their tax debt.

**Issue:** When family farmers sell their farms at a profit during their Chapter 12 bankruptcies, are the resulting capital gains taxes incurred by the estate?

**No.** The federal income tax liability resulting from petitioners’ post-petition farm sale is not “incurred by the estate” under § 503(b) of the Bankruptcy Code and thus is neither collectible nor dischargeable in the Chapter 12 plan.

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

Certainly, there may be compelling policy reasons for treating postpetition income tax liabilities as dischargeable. But if Congress intended that result, it did not so provide in the statute. Given the statute’s plain language, context, and structure, it is not for us to rewrite the statute, particularly in this complex terrain of interconnected provisions and exceptions enacted over nearly three decades.

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

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**Bankruptcy**

*RadLAX Gateway Hotel, LLC v. Amalgamated Bank*

Docket No. 11-166

Affirmed: The Seventh Circuit

Argued: April 23, 2012

Decided: May 29, 2012

Analysis: See ABA PREVIEW 248 ISSUE 7

**Overview:** A bankruptcy plan can only be confirmed over the objection of a secured creditor if the plan is found to be “fair and equitable.” The fair and equitable standard requires, at a minimum, that (i) the creditor may retain its lien on its collateral; (ii) the collateral will be sold subject to the creditor’s right to credit bid its debt; or (iii) the creditor will receive the “indubitable equivalent” of its claim. The Supreme Court was presented with the question of whether a plan can provide for the sale of collateral without granting the creditor the right to credit bid (as required under clause (ii)) by providing the creditor with the proceeds of the sale as the “indubitable equivalent” of its claim, under (iii).

**Issue:** May a debtor confirm a Chapter 11 plan of reorganization under which it sells its assets free of a lien without providing the secured creditor with the right to credit bid as specified in 11 U.S.C. § 1129(b)(2)(A)(ii), instead of providing the secured creditor with the proceeds of the sale as the “indubitable equivalent” of its claim under 11 U.S.C. § 1129(b)(2)(A)(iii)?

No. Debtors may not obtain confirmation of a Chapter 11 cramdown plan that provides for the sale of collateral free and clear of the creditor’s lien, but does not permit the creditor to credit-bid at the sale.

**From the opinion by Justice Scalia** (joined by all other members of the Court, except for Justice Kennedy who took no part in the decision):

The structure here suggests, to the contrary, that (i) is the rule for plans under which the creditor’s lien remains on the property, (ii) is the rule for plans under which the property is sold free and clear of the creditor’s lien, and (iii) is a residual provision covering dispositions under all other plans—for example, one under which the creditor receives the property itself, the “indubitable equivalent” of its secured claim. Thus, debtors may not sell their property free of liens under § 1129(b)(2)(A) without allowing lien holders to credit-bid, as required by clause (ii).

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**Civil Procedure**

*Kiobel v. Royal Dutch Petroleum Co.*

Docket No. 10-1491

From: The Second Circuit

Argued: February 28, 2012

Order Date: March 5, 2012

Analysis: See ABA PREVIEW 197 ISSUE 5

**Overview:** In this case, the Supreme Court must determine whether corporations may be held liable for international human rights violations, under the Alien Tort Statute (Kiobel v. Royal Dutch Petroleum Co.).

**Issue:** In *Kiobel*, is corporate liability under the Alien Tort Statute (ATS) a merits question or an issue of subject-matter jurisdiction, and does the ATS authorize suits against corporations?

The Court ordered additional briefing on this issue after oral argument on:

Whether and under what circumstances the Alien Tort Statute, 28 U.S.C. § 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.
Civil Procedure

Mohamad v. Palestinian Authority

Docket No. 11-88
Affirmed: The District of Columbia

Argued: February 28, 2012
Decided: April 18, 2012
Analysis: See ABA PREVIEW 197 ISSUE 5

Overview: In this case, the Supreme Court must determine whether corporations may be held liable for international human rights violations under the Torture Victim Protection Act (TVPA). The petitioner sued the Palestinian Authority under the TVPA alleging that it was responsible for the petitioner’s father’s torture and extrajudicial killing.

Issue: Does the TVPA authorize actions only against natural persons?

Yes. As used in the TVPA, the term “individual” encompasses only natural persons. Consequently, the Act does not impose liability against organizations.

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

As a noun, “individual” ordinarily means “[a] human being, a person.” 7 Oxford English Dictionary 880 (2d ed. 1989) … After all, that is how we use the word in everyday parlance. We say “the individual went to the store,” “the individual left the room,” and “the individual took the car,” each time referring unmistakably to a natural person.

And no one, we hazard to guess, refers in normal parlance to an organization as an “individual.” Evidencing that common usage, this Court routinely uses “individual” to denote a natural person, and in particular to distinguish between a natural person and a corporation.

From the concurring opinion by Justice Breyer:
The word “individual” is open to multiple interpretations, permitting it, linguistically speaking, to include natural persons, corporations, and other entities. Thus, I do not believe that word alone is sufficient to decide this case. The legislative history of the statute, however, makes up for whatever interpretive inadequacies remain after considering language alone.

Concurring: Justice Breyer

Civil Procedure

Taniguchi v. Kan Pacific Saipan, Ltd.

Docket No. 10-1472
Vacated and Remanded: The Ninth Circuit

Argued: February 21, 2012
Decided: May 21, 2012
Analysis: See ABA PREVIEW 194 ISSUE 5

Overview: Kouichi Taniguchi, a Japanese citizen, sued the owner of a resort, Kan Pacific Saipan, Ltd., for injuries suffered when he fell through a deck. As part of its defense, the resort spent $5,500 translating medical records and other documents into English. After the resort won the case, the district court taxed the translator’s expense as a cost. Taniguchi contends that 28 U.S.C. § 1920(6), which permits a court to tax as a cost the “compensation of interpreters,” does not allow a prevailing party to recover money paid to translate documents.

Issue: Does “compensation of interpreters” under 28 U.S.C. § 1920(6) include compensation for those who translate documents used in litigation?

No. Because the ordinary meaning of “interpreter” is someone who translates orally from one language to another, the category “compensation of interpreters” in § 1920(6) does not include the cost of document translation.

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

Although the Oxford English Dictionary, one of the most authoritative on the English language, recognized that “interpreter” can mean one who translates writings, it expressly designated that meaning as obsolete. Were the meaning of “interpreter” that respondent advocates truly common or ordinary, we would expect to see more support for that meaning. We certainly would not expect to see it designated as obsolete in the Oxford English Dictionary. Any definition of a word that is absent from many dictionaries and is deemed obsolete in others is hardly a common or ordinary meaning.

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

Civil Rights

Minneeci v. Pollard

Docket No. 10-1104
Reversed: The Ninth Circuit

Argued: November 1, 2011
Decided: January 10, 2012
Analysis: See ABA PREVIEW 66 ISSUE 2

Overview: Respondent Richard Lee Pollard, a federal prisoner held in a private prison operating under contract with the federal government, alleges that prison officers violated his Eighth Amendment rights. He therefore brought a Bivens action against those officers. The Supreme Court has held that such an action is available to prisoners suing federally employed prison officers.

Private-employee petitioners argue that they are differently situated than federal employees, and that the respondent should be required to pursue state law remedies in lieu of federal remedies.

Issue: Should the Supreme Court infer a cause of action under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), against individual employees of private companies that contract with the federal government to provide prison services, where the plaintiff has adequate alternative remedies for the harm alleged and the defendants have no employment or contractual relationship with the government?

No. Because in the circumstances of this case, state tort law authorizes adequate alternative damages actions, providing both significant deterrence and compensation, no Bivens remedy can be implied here.

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

Pollard cannot assert a Bivens claim. That is primarily because Pollard’s Eighth Amendment claim focuses upon a kind of conduct that typically falls within the scope of traditional state tort law. And in the case of a privately employed defendant, state tort law provides an “alternative, existing process” capable of protecting the constitutional interests at stake. The existence of that alternative here constitutes a “convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages.”

PREVIEW of United States Supreme Court Cases
Howards' arrest. Otherwise clearly established at the time of by probable cause; nor was such a right from a retaliatory arrest that is supported satisfied here. This Court has never recog-

The "clearly established" standard is not

Issues: Does probable cause bar a First Amendment retaliatory arrest claim? Should Secret Service agents be protected by qualified or absolute immunity under these facts?

Yes. Petitioners, the Secret Service agents, are entitled to qualified immunity because, at the time of Howards' arrest, it was not clearly established that an arrest supported by probable cause could give rise to a First Amendment violation.

From the opinion by Justice Thomas (joined by Chief Justice Roberts and Justices Scalia, Kennedy, Alito, and Sotomayor): The "clearly established" standard is not satisfied here. This Court has never recog-

No. Suits against states under the FMLA self-care provision are barred by sovereign immunity.

From the opinion by Justice Kennedy (joined by Chief Justice Roberts and Justices Thomas and Alito): Subjecting States to suits for damages pursuant to § 5 requires more than a theory for why abrogating the States' immunity aids in, or advances, a stated congressional purpose. To abrogate the States' immunity from suits for damages under § 5, Congress must identify a pattern of constitutional viola-

Congressional Authority Coleman v. Court of Appeals of Maryland

Docket No. 10-1016 Affirmed: The Fourth Circuit

Decided: January 11, 2012
Analysis: See ABA PREVIEW 165 ISSUE 4
Overview: David Coleman sued the Maryland Court of Appeals, his employer, for violating the Family and Medical Leave Act (FMLA) by firing him for requesting sick leave. The state moved to dismiss the case, arguing that it was immune from suit for money damages under the Eleventh Amendment, and that Congress did not validly abrogate the states’ Eleventh Amendment immunity through the “self-care” provision of the act.

Issue: Did Congress validly abrogate the states’ sovereign immunity under the Eleventh Amendment through the “self-care” provision of the FMLA?

Yes. The parties should be allowed to argue before the Ninth Circuit in the first instance the question of whether the respondents may maintain Supremacy Clause actions.

From the opinion by Justice Breyer (joined by Justices Kennedy, Ginsburg, Sotomayor, and Kagan): While the cases are not moot, they are now in a different posture. The federal agency charged with administering the Medicaid program has determined that the challenged rate reductions comply with federal law. That agency decision does not change the underlying substantive question, namely whether California’s statutes are consistent with a specific federal statutory provision.
(requiring that reimbursement rates be “sufficient to enlist enough providers”). But it may change the answer. And it may require respondents now to proceed by seeking review of the agency determination under the Administrative Procedure Act (APA), 5 U.S.C. § 701 et seq., rather than in an action against California under the Supremacy Clause.

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

Copyright

Golan v. Holder

Docket No. 10-545
Affirmed: The Tenth Circuit

Argued: October 5, 2011
Decided: January 18, 2012
Analysis: See ABA PREVIEW 46 ISSUE 1

Overview: This case arose out of U.S. treaty obligations to restore copyright to foreign authors who had failed to comply with the pre-1989 formalities in the law. Section 514 of the Uruguay Round Agreement Act (URAA) restores those copyrights and, in so doing, allowed thousands of widely disseminated works to be removed from the public domain. Petitioners challenged the law, arguing that the law overreaches constitutional authority and violates speech rights protected by the First Amendment.

Issue: Does the Copyright Clause of the United States Constitution prohibit Congress from taking works out of the public domain?

No. The text of the Copyright Clause does not exclude application of copyright protection to works in the public domain.

Issue: Does Section 514 of the URAA violate the First Amendment of the United States Constitution?

No. The First Amendment does not inhibit the restoration authorized by Section 514. Section 514 leaves undisturbed the idea/expression distinction and the fair use defense. Nothing in the historical record, subsequent congressional practice, or the Court’s jurisprudence warrants exceptional First Amendment solicitude for copyrighted works that were once in the public domain.

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

Congress determined that U.S. interests were best served by our full participation in the dominant system of international copyright protection. Those interests include ensuring exemplary compliance with our international obligations, securing greater protection for U.S. authors abroad, and remedying unequal treatment of foreign authors. The judgment § 514 expresses lies well within the ken of the political branches. It is our obligation, of course, to determine whether the action Congress took, wise or not, encounters any constitutional shoal. For the reasons stated, we are satisfied it does not.

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

Criminal Law

Miller v. Alabama and Jackson v. Hobbs

Docket Nos. 10-9646 and 10-9647
Reversed and Remanded: The Court of Criminal Appeals of Alabama

Argued: March 20, 2012
Decided: June 25, 2012
Analysis: See ABA PREVIEW 246 ISSUE 6

Overview: In 2005, the Supreme Court ruled that juveniles could not receive the death penalty. In 2010, the Court ruled that juveniles could not receive life in prison without the possibility of parole (LWOP) for non-homicide offenses. Now, the Court examines whether two young juveniles—14-year-olds at the time of their offenses—can receive LWOP sentences for homicide offenses.

Issue: Does the mandatory imposition of a life-without-parole sentence on a 14-year-old child convicted of homicide violate the Eighth and Fourteenth Amendments’ prohibition against cruel and unusual punishments, when the extreme rarity of such sentences in practice reflects a national consensus regarding the reduced criminal culpability of young children?

Yes. The Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile homicide offenders.

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

By removing youth from the balance—by subjecting a juvenile to the same life-without-parole sentence applicable to an adult—these laws prohibit a sentencing authority from assessing whether the law’s harshest term of imprisonment proportionately punishes a juvenile offender. That contravenes Graham’s (and also Roper’s) foundational principle: that imposition of a State’s most severe penalties on juvenile offenders cannot proceed as though they were not children.

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

What today’s decision shows is that our Eighth Amendment cases are no longer tied to any objective indicia of society’s standards. Our Eighth Amendment case law is now entirely inward looking. After entirely disregarding objective indicia of our society’s standards in Graham, the Court now extrapolates from Graham. Future cases may extrapolate from today’s holding, and this process may continue until the majority brings sentencing practices into line with whatever the majority views as truly evolved standards of decency.

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

Criminal Law

Perry v. New Hampshire

Docket No. 10-8974
Affirmed: The Supreme Court of New Hampshire

Argued: November 2, 2011
Decided: January 11, 2012
Analysis: See ABA PREVIEW 80 ISSUE 2

Overview: When a witness in a criminal case identifies a suspect out of court under
Issue: Do the due process protections against unreliable identification evidence apply to all identifications made under suggestive circumstances, as held by the First Circuit Court of Appeal and other federal courts of appeal, not only when the police have orchestrated the suggestive circumstances, as held by the New Hampshire Supreme Court and other courts?

No. The Due Process Clause does not require a preliminary judicial inquiry into the reliability of an eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement.

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

We have not extended pretrial screening for reliability to cases in which the suggestive circumstances were not arranged by law enforcement officers. Petitioner requests that we do so because of the grave risk that mistaken identification will yield a miscarriage of justice. Our decisions, however, turn on the presence of state action and aim to deter police from rigging identification procedures, for example, at a lineup, show-up, or photograph array. When no improper law enforcement activity is involved, we hold, it suffices to test reliability through the rights and opportunities generally designed for that purpose, notably, the presence of counsel at post indictment lineups, vigorous cross-examination, protective rules of evidence, and jury instructions on both the fallibility of eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt.

Concurring: Justice Thomas
Dissenting: Justice Sotomayor

Criminal Procedure
Gonzalez v. Thaler

Docket No. 10-895
Affirmed: The Fifth Circuit

Argued: November 2, 2011
Decided: January 10, 2012
Analysis: See ABA PREVIEW 88 ISSUE 2

Overview: In 2005, Rafael Gonzalez was charged with a murder that occurred in 1995. Gonzalez argued that the delay in bringing charges (mostly due to him being out of the country) violated his rights to a speedy trial under the Sixth and Fourteenth Amendments. The trial court disagreed and Gonzalez was convicted. During subsequent appeals, Gonzalez missed various filing deadlines. The Supreme Court was asked to determine first, whether the lower court had jurisdiction to hear Gonzalez’s appeal, and, second, whether the appeal was timely.

Issue: Does a defect in a certificate of appealability (COA), required to appeal a district court’s order, deprive the Court of Appeals of the power to adjudicate Gonzalez’s appeal?

No. Section 2253(c)(3) is a mandatory but nonjurisdictional rule. A COA’s failure to “indicate” a constitutional issue does not deprive a Court of Appeals of jurisdiction to adjudicate the appeal.

Issue: Does, under AEDPA, the “conclusion of direct review” occur upon expiration of the time for seeking discretionary review in the state’s highest court, as the Fifth Circuit has held?

Yes. For a state prisoner who does not seek review in a State’s highest court, the judgment becomes “final” for purposes of § 2244(d)(1)(A) on the date that the time for seeking such review expires.

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

Treating § 2253(c)(3) as jurisdictional also would thwart Congress’ intent in AEDPA “to eliminate delays in the federal habeas review process.” The COA process screens out issues unworthy of judicial time and attention and ensures that frivolous claims are not assigned to merits panels. Once a judge has made the determination that a COA is warranted and resources are deployed in briefing and argument, however, the COA has fulfilled that gatekeeping function.

Dissenting: Justice Scalia

Criminal Procedure
Smith v. Cain

Docket No. 10-8145
Reversed and Remanded: The Criminal District Court of Louisiana, Orleans Parish

Argued: November 8, 2011
Decided: January 10, 2012
Analysis: See ABA PREVIEW 91 ISSUE 2

Overview: Juan Smith was convicted of multiple murders almost solely on the testimony of one eyewitness. Besides this witness’s testimony, no other evidence placed Smith at the crime scene, including no scientific evidence. Although he received a life sentence in this case, Smith’s murder convictions were used as aggravating factors in another capital case where he received the death penalty. Smith alleged that, although his counsel requested discovery before trial, the state failed to produce conflicting statements from the one eyewitness that questioned the validity of his identification testimony. Smith also alleged that the state did not produce statements from other persons that would have undermined the state’s case. Smith claimed that the failure to produce this information violated his due process right to a fair trial and that he should receive a new trial.

Issue: Is the failure of the Orleans Parish district attorney’s office to produce for the defense certain information before trial a violation of Smith’s right to due process because the information not produced was material to Smith’s guilt?

Yes. Under Brady v. Maryland, evidence is material if there is a “reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.” Here, the eyewitness’s testimony was the only evidence linking Smith to the crime, and the eyewitness’s undisclosed statements contradicted his testimony. The eyewitness’s statements were plainly material, and the State’s failure to disclose those statements to the defense thus violated Brady.
From the opinion by Chief Justice Roberts (joined by Justices Scalia, Kennedy, Ginsburg, Breyer, Alito, Sotomayor, and Kagan):

We have observed that evidence impeaching an eyewitness may not be material if the State's other evidence is strong enough to sustain confidence in the verdict. See United States v. Agurs, 427 U.S. 97 (1976). That is not the case here. Boatner's testimony was the only evidence linking Smith to the crime. And Boatner's undisclosed statements directly contradict his testimony: Boatner told the jury that he had "[n]o doubt" that Smith was the gunman he stood "face to face" with on the night of the crime, but Ronquillo's notes show Boatner saying that he "could not ID anyone because [he] couldn't see faces" and "would not know them if [he] saw them." Boatner's undisclosed statements were plainly material.

From the dissenting opinion by Justice Thomas:

Smith is not entitled to a new trial simply because the jury could have accorded some weight to Boatner's undisclosed statements. Smith's burden is to show a reasonable probability that the jury would have accorded those statements sufficient weight to alter its verdict. In light of the record as a whole—which the Court declines to consider—Smith has not carried that burden.

Dissenting: Justice Thomas

Criminal Procedure
Southern Union Company v. United States

Docket No. 11–94
Reversed and Remanded:
The First Circuit

Argued: March 19, 2012
Decided: June 21, 2012
Analysis: See ABA PREVIEW 214 ISSUE 6

Overview: Southern Union Company, a corporation, was tried by a jury and convicted of knowingly storing substantial quantities of mercury, a hazardous waste. The statute permitted the imposition of a fine of up to $50,000 for each day that the violation existed. After the jury found the corporation guilty, the judge determined the number of days that the violation occurred and imposed a fine of $6 million and payments to community groups of an additional $12 million. Affirming the conviction, the First Circuit rejected the company's challenges to the conviction and to the fine. As to the fine, the court ruled that Apprendi v. New Jersey, 530 U.S. 466 (2000), which held that facts which increase the penalty imposed after a criminal conviction must be determined by a jury beyond a reasonable doubt rather than by a judge under a less rigorous standard, was inapplicable to the imposition of the fine.

Issue: Do the Fifth and Sixth Amendment principles governing Apprendi v. New Jersey, 530 U.S. 466 (2000), and subsequent cases, requiring a jury to determine any facts increasing a criminal penalty, apply to the imposition of fines following a criminal conviction of a corporation?

Yes. The principles of Apprendi, requiring a jury to determine any facts increasing a criminal penalty, apply to the imposition of criminal fines.

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

[W]e see no principled basis under Apprendi for treating criminal fines differently. Apprendi’s “core concern” is to reserve to the jury “the determination of facts that warrant punishment for a specific statutory offense.” That concern applies whether the sentence is a criminal fine or imprisonment or death. Criminal fines, like these other forms of punishment, are penalties inflicted by the sovereign for the commission of offenses. Fines were by far the most common form of noncapital punishment in colonial America. They are frequently imposed today, especially upon organizational defendants who cannot be imprisoned. And the amount of a fine, like the maximum term of imprisonment or eligibility for the death penalty, is often calculated by reference to particular facts.

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

Death Penalty
Maples v. Thomas

Docket No. 10–63
Reversed and Remanded:
The Eleventh Circuit

Argued: October 4, 2011
Decided: January 18, 2012
Analysis: See ABA PREVIEW 15 ISSUE 1

Overview: Cory R. Maples is an Alabama prisoner sentenced to death who claimed that his trial lawyers rendered ineffective assistance. Maples tried to present these claims in his state postconviction petition, but the petition was dismissed. Copies of the dismissal order were sent to Maples’s lawyers in New York but they returned undeliverable because the lawyers had moved to new jobs. As a result, Maples’s appeal was untimely filed in the state courts, and the federal courts ruled that his claims were procedurally defaulted. Maples claimed that his attorneys abandoned him, and that the abandonment constitutes cause to excuse his procedural default.

Issue: Did the Eleventh Circuit properly hold that there was no “cause” to excuse any procedural default where an Alabama capital prisoner was blameless for the default, the state’s own conduct contributed to the default, and the prisoner’s attorneys of record were no longer functioning as his agents at the time of any default?

No. Maples has shown the requisite cause to excuse his procedural default. Through no fault of his own, he lacked the assistance of any authorized attorney during the 42-day appeal period. And he had no reason to suspect that, in reality, he had been reduced to pro se status.

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

[U]nder agency principles, a client cannot be charged with the acts or omissions of an attorney who has abandoned him. Nor can a client be faulted for failing to act on his own behalf when he lacks reason to believe his attorneys of record, in fact, are not representing him. We therefore inquire whether Maples has shown that his attorneys of record abandoned him, thereby supplying...
the “extraordinary circumstances beyond his control,” necessary to lift the state procedural bar to his federal petition.

From the dissenting opinion by Justice Scalia (joined by Justice Thomas): But if the interest of fairness justifies our excusing Maples’ procedural default here, it does so whenever a defendant’s procedural default is caused by his attorney. That is simply not the law—and cannot be, if the states are to have an orderly system of criminal litigation conducted by counsel.

Concurring: Justice Alito
Dissenting: Justice Scalia (joined by Justice Thomas)

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**Death Penalty**

**Martel v. Clair**

**Docket No. 10-1265**

Reversed and Remanded: The Ninth Circuit

Argued: December 6, 2011
Decided: March 5, 2012
Analysis: See ABA PREVIEW 138 ISSUE 3

**Overview:** Federal law guarantees the appointment of counsel for indigent capital defendants filing habeas corpus petitions. This case raises the question of how a district court should evaluate a capital habeas corpus petitioner’s request that the district court appoint new lawyers to represent him because of an alleged “total breakdown of communication” stemming from the lawyers’ failure to sufficiently investigate new evidence of his innocence.

**Issue:** Does a district court abuse its discretion when it fails to conduct any inquiry before ruling on a capital defendant’s request for appointment of new habeas corpus counsel under the federal statute requiring appointment of counsel in capital habeas corpus cases?

**No.** When evaluating motions to substitute counsel in capital cases under 18 U.S.C. § 3599, courts should employ the same “interests of justice” standard that applies in non-capital cases under § 3006A. Here, the District Court did not abuse its discretion in denying Clair’s second request for new counsel under § 3599’s “interests of justice” standard.

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

We know that before § 3599’s passage, courts used an “interests of justice” standard to decide substitution motions in all cases—and that today, they continue to do so in all non-capital proceedings. We know, too, that in spinning off § 3599, Congress enacted a set of reforms to improve the quality of lawyering in capital litigation. With all those measures pointing in one direction, we cannot conclude that Congress silently prescribed a substitution standard that would head the opposite way. Adopting a more stringent test than § 3006A’s would deprive capital defendants of a tool they formerly had, and defendants facing lesser penalties still have, to handle serious representational problems. That result clashes with everything else § 3599 does. By contrast, utilizing § 3006A’s standard comports with the myriad ways that § 3599 seeks to promote effective representation for persons threatened with capital punishment.

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**Double Jeopardy**

**Blueford v. Arkansas**

**Docket No. 10-1320**

Affirmed: The Supreme Court of Arkansas

Argued: February 22, 2012
Decided: May 24, 2012
Analysis: See ABA PREVIEW 187 ISSUE 5

**Overview:** This case involves questions concerning lesser-included offenses, partial verdicts, and the possibility these verdicts are sometimes constitutionally required. The Supreme Court was asked whether, when a jury deadlocks on a lesser-included offense, does the Double Jeopardy Clause bar reprosecution on two greater offenses after a jury foreperson announces in response to the trial judge’s inquiry that the jury has unanimously voted against guilt on them.

**Issue:** If a jury deadlocks on a lesser-included offense, does the Double Jeopardy Clause bar reprosecution of a greater offense after the jury announces that it has voted against guilt on the greater offense?

**No.** The Double Jeopardy Clause does not bar reprosecution of a greater offense after a jury announces that it has deadlocked on the lesser-included offense but voted against guilt on the greater offense.

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**From the opinion by Chief Justice Roberts** (joined by Justices Scalia, Kennedy, Thomas, Breyer, and Alito): Blueford’s argument assumes, however, that the votes reported by the foreperson did not change, even though the jury deliberated further after that report. That assumption is unjustified, because the reported votes were, for the reasons noted, not final. Blueford thus overlooks the real distinction between the cases: In Green and Price, the verdict of the jury was a final decision; here, the report of the foreperson was not.

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

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**Employment Law**

**Christopher v. SmithKline Beecham Corp.**

**Docket No. 11-204**

Affirmed: The Ninth Circuit

Argued: April 16, 2012
Decided: June 18, 2012
Analysis: See ABA PREVIEW 260 ISSUE 7

**Overview:** This case required the Supreme Court to determine whether pharmaceutical sales representatives are exempt outside salesmen or nonexempt employees entitled to overtime pay under the Fair Labor Standards Act (FLSA). To resolve the question, the Court was also asked to determine whether the Secretary of Labor’s current interpretation of the regulatory term “sale,” as requiring employees to consummate the sale of goods, is a permissible construction of the regulation.

**Issue:** Is deference owed to the Secretary of Labor’s interpretation of the FLSA’s outside sales exemption and its related regulations?

**No.** The DOL’s current interpretation is not entitled to deference because to do so would be an “unfair surprise” for the pharmaceutical industry given the DOL’s past lack of enforcement.

**Issue:** Does the FLSA’s outside sales exemption apply to pharmaceutical sales representatives who promote but do not sell their company’s drugs to physicians?
Yes. Pharmaceutical sales representatives do qualify as outside salespeople under the most reasonable reading of the DOL’s regulations and were not the type of employees intended to be protected by the FLSA.

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

Given our interpretation of “other disposition,” it follows that petitioners made sales for purposes of the FLSA and therefore are exempt outside salesmen within the meaning of the DOL’s regulations. Obtaining a nonbinding commitment from a physician to prescribe one of respondent’s drugs is the most that petitioners were able to do to ensure the eventual disposition of the products that respondent sells. This kind of arrangement, in the unique regulatory environment within which pharmaceutical companies must operate, comfortably falls within the catch-all category of “other disposition.”

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

Employment Law
Elgin v. Department of Treasury

Docket No. 11-45
Affirmed: The First Circuit

Argued: February 27, 2012
Decided: June 11, 2012
Analysis: See ABA PREVIEW 191 ISSUE 5

Overview: Petitioners want a federal district court to adjudicate the constitutionality of 5 U.S.C. § 3328, the federal statute that caused their termination from federal employment. However, the government argues that the Civil Service Reform Act of 1978 precludes federal district court reviews. In the government’s view, the petitioners must bring their constitutional arguments before the Merit Systems Protection Board, which lacks authority to adjudicate them, and then seek appellate review of those claims in the Federal Circuit Court of Appeals.

Issue: Does the Civil Service Reform Act of 1978 prevent terminated federal employees from obtaining federal district court review of the constitutionality of a federal statute that caused their termination?

Yes. The Civil Service Reform Act precludes district court jurisdiction over these claims because it is reasonable to determine that Congress intended the statute’s review process to provide the exclusive avenue for judicial review of covered employees, even when those employees are arguing that a federal statute is unconstitutional.

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

Finally, we note that a jurisdictional rule based on the nature of an employee’s constitutional claim would deprive the aggrieved employee, the MSPB, and the district court of clear guidance about the proper forum for the employee’s claims at the outset of the case. For example, petitioners contend that facial and as-applied constitutional challenges to statutes may be brought in district court, while other constitutional challenges must be heard by the MSPB. But, as we explain below, that line is hazy at best and incoherent at worst.

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

Equal Protection
Armour v. City of Indianapolis

Docket No. 11-161
Affirmed: The Supreme Court of Indiana

Argued: February 29, 2012
Decided: June 4, 2012
Analysis: See ABA PREVIEW 208 ISSUE 5

Overview: The city of Indianapolis issued a special assessment on property owners to hook up to the city’s sewage system. The city allowed property owners to pay the assessment up front or in installments over time. About a year after the city issued the special assessment, it changed its system of financing public improvements and forgave all future payments under the sewer programs. However, it did not refund payments already made. Property owners who paid up front sued, arguing that the city’s action violated equal protection.

Issue: Does the government violate the Equal Protection Clause by issuing a special assessment, allowing taxpayers to choose to pay up front or in installments, and later forgiving future payments for those who elected to pay in installments but declining to refund amounts paid by those who paid up front?

No. Because the City of Indianapolis had a rationale basis for implementing such a payment scheme there is no Equal Protection Clause violation.

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

Finally, the rationality of the distinction draws support from the fact that the line that the City drew—distinguishing past payments from future obligations—is a line well known to the law. Sometimes such a line takes the form of an amnesty program, involving, say, mortgage payments, taxes, or parking tickets. E.g., 26 U.S.C. § 108(a) (1)(E) (2006 ed., Supp. IV) (federal income tax provision allowing homeowners to omit from gross income newly forgiven home mortgage debt); United States v. Martin, 523 F.3d 281, 284 (CA4 2008) (tax amnesty program whereby State newly forgave penalties and liabilities if taxpayer satisfied debt); Horn v. Chicago, 860 F.2d 700, 704, n. 9 (CA7 1988) (city parking ticket amnesty program whereby outstanding tickets could be newly settled for a fraction of amount specified). This kind of line is consistent with the distinction that the law often makes between actions previously taken and those yet to come.

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

Federal Courts
Mims v. Arrow Financial Services, LLC

Docket No. 10-1195
Reversed and Remanded: The Eleventh Circuit

Argued: November 28, 2011
Decided: January 18, 2012
Analysis: See ABA PREVIEW 104 ISSUE 3

Overview: In this appeal, the Supreme Court was asked to decide whether consumers have a right to sue in federal court for violations of the Telephone Consumer Protection Act (TCPA), or whether consumer remedies are confined solely to state courts.

Issue: Did Congress, in creating a private right of action for violations of the TCPA, confer jurisdiction on state courts and divest federal courts of federal question jurisdiction over such claims?
No. The TCPA's permissive grant of jurisdiction to state courts does not deprive the U.S. district courts of federal-question jurisdiction over private TCPA suits.

From the unanimous opinion by Justice Ginsburg: Nothing in the text, structure, purpose, or legislative history of the TCPA calls for displacement of the federal question jurisdiction U.S. district courts ordinarily have. When Congress wants to make federal claims instituted in state court non-removable, it says just that. In the absence of direction from Congress stronger than any Arrow has advanced, we apply the familiar default rule: Federal courts have § 1331 jurisdiction over claims that arise under federal law.

Federal Preemption

**Kurns v. Railroad Friction Products Corporation**

**Docket No. 10-879**

**Argued:** November 9, 2011

**Decided:** February 29, 2012

**Analysis:** See ABA PREVIEW 63 ISSUE 2

**Overview:** The plaintiffs in this case were the widow and the estate executor of George Corson, who worked as a machinist repairing and maintaining locomotives. During his employment, George Corson was exposed to asbestos and in 2005 was diagnosed with malignant mesothelioma, a cancer generally attributed to asbestos. He died in 2007, shortly after the lawsuit was commenced. The claims relevant to this appeal include state-law tort claims for products liability and negligent failure to warn of the dangers of the asbestos. The district court granted the respondents' motion for summary judgment on the grounds that the federal Locomotive Inspection Act preempts state claims. The Third Circuit Court of Appeals affirmed.

**Issue:** Does the Locomotive Inspection Act preempt the field of state common-law claims by workers injured in railroad maintenance facilities against manufacturers of locomotives and locomotive parts?

**Yes.** The Locomotive Inspection Act preempts the field of state-law design-defect and failure to warn claims.

From the opinion by Justice Thomas (joined by Chief Justice Roberts and Justices Scalia, Kennedy, Alito, and Kagan): Petitioners' proposed rule is also contrary to common sense. Under petitioners' approach, a State could not require railroads to equip their locomotives with parts meeting state-imposed specifications, but could require manufacturers of locomotive parts to produce only parts meeting those state-imposed specifications. We rejected a similar approach in an express pre-emption context in Engine Mfrs. Assn. v. South Coast Air Quality Management Dist., 541 U.S. 246 (2004).

**Concurring:** Justice Kagan

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

Fifth Amendment

**Howes v. Fields**

**Docket No. 10-680**

**Argued:** October 4, 2011

**Decided:** February 21, 2012

**Analysis:** See ABA PREVIEW 11 ISSUE 1

**Overview:** Randall Lee Fields, serving a prison sentence for sexual contact with a minor, sought a writ of habeas corpus on the ground that admissions he made to police officers who questioned him should not have been allowed into evidence because they violated his right against compelled self-incrimination. He claims that the failure of police interrogators to advise him, when he was in jail on an unrelated matter, of his rights under Miranda v. Arizona made those statements inadmissible. The trial court granted the writ and the Sixth Circuit affirmed. Michigan asked the Supreme Court to reverse, asserting that the Sixth Circuit improperly applied precedent in determining that Fields was in custody for Miranda purposes.

**Issue:** Is a prisoner always “in custody” for purposes of Miranda v. Arizona, 384 U.S. 436 (1966), when the prisoner is isolated from the general prison population for questioning about conduct that occurred outside the prison?

No. The Sixth Circuit’s categorical rule—that imprisonment, questioning in private, and questioning about events in the outside world create a custodial situation for Miranda purposes—is not supported by Supreme Court precedent and is an incorrect application of Miranda.

**From the opinion by Justice Alito** (joined by Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Kagan): Not only does the categorical rule applied below go well beyond anything that is clearly established in our prior decisions, it is simply wrong. The three elements of that rule—(1) imprisonment, (2) questioning in private, and (3) questioning about events in the outside world—are not necessarily enough to create a custodial situation for Miranda purpose.

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

**Dissenting:** Justice Ginsburg

First Amendment

**FCC v. Fox Television Stations, Inc.**

**Docket No. 10-1293**

**Vacated and Remanded:** The Second Circuit

**Argued:** January 10, 2012

**Decided:** June 21, 2012

**Analysis:** See ABA PREVIEW 147 ISSUE 4

**Overview:** This case comes back to the Supreme Court following a 2009 decision in which the Court upheld the Federal Communications Commission’s (FCC’s) indecency enforcement policy under the Administrative Procedure Act, but declined to reach the constitutional questions. The constitutional questions are now fully before the Court, which must decide whether the FCC’s regulation of indecent, but not obscene, speech in broadcast media comports with the First and Fifth Amendments.

**Issue:** Is the FCC’s indecency policy unconstitutionally vague in violation of the Fifth Amendment Due Process Clause?

No. The Commission’s standards as applied to these broadcasts were unconstitutionally vague as they failed to give the broadcasters fair notice that fleeting expletives and momentary nudity could be found indecent.
From the opinion by Justice Kennedy (joined by Chief Justice Roberts and Justices Scalia, Thomas, Breyer, Alito, and Kagan):

This regulatory history, however, makes it apparent that the Commission policy in place at the time of the broadcasts gave no notice to Fox or ABC that a fleeting expletive or a brief shot of nudity could be actionably indecent; yet Fox and ABC were found to be in violation. The Commission’s lack of notice to Fox and ABC that its interpretation had changed so the fleeting moments of indecency contained in their broadcasts were a violation of § 1464 as interpreted and enforced by the agency “fail[ed] to provide a person of ordinary intelligence fair notice of what is prohibited.” United States v. Williams, 553 U.S. 285, 304 (2008). This would be true with respect to a regulatory change this abrupt on any subject, but it is surely the case when applied to the regulations in question, regulations that touch upon “sensitive areas of basic First Amendment freedoms,” Baggett v. Bullitt, 377 U.S. 360, 372 (1964); see also Reno v. American Civil Liberties Union, 521 U.S. 844, 870–871 (1997) (“The vagueness of [a content-based regulation of speech] raises special First Amendment concerns because of its obvious chilling effect”).

From the concurring opinion by Justice Ginsburg:

In my view, the Court’s decision in FCC v. Pacifica Foundation, 438 U. S. 726 (1978), was wrong when it issued. Time, technological advances, and the Commission’s untenable rulings in the cases now before the Court show why Pacifica bears reconsideration.

Concurring in judgment: Justice Ginsburg

Taking no part in consideration: Justice Sotomayor

First Amendment
Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC

Docket No. 10-553
Reversed: The Sixth Circuit

Argued: October 5, 2011
Decided: January 11, 2012
Analysis: See ABA PREVIEW 39 ISSUE 1

Overview: The ministerial exception generally prohibits courts from intervening in employment suits involving ministers and priests. The courts recognize that the exception, rooted in the First Amendment religious liberty clauses, prohibits an entanglement between government and religion, keeping the government from interfering with ecclesiastical matters. But does the ministerial exception extend so far as to apply to a teacher at a religious school who teaches primarily secular subjects?

Issue: Does the ministerial exception bar a suit under the Americans with Disabilities Act brought by a former teacher at a religious school who taught primarily secular subjects but also performed some religious functions?

Yes. The Establishment and Free Exercise Clauses of the First Amendment bar suits brought on behalf of ministers against their churches, claiming termination in violation of employment discrimination laws.

From the unanimous opinion by Chief Justice Roberts:

Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group’s right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.

Concurring: Justice Thomas
Concurring: Justice Alito (joined by Justice Kagan)

First Amendment
Knox v. Service Employees International Union

Docket No. 10-1121
Reversed and Remanded: The Ninth Circuit

Argued: January 10, 2012
Decided: June 21, 2012
Analysis: See ABA PREVIEW 168 ISSUE 4

Overview: The Service Employees International Union Local 1000, the exclusive bargaining representative for California state employees, issued a special, midyear fee assessment to members and nonmembers to raise funds to oppose ballot initiatives and for other purposes, including bargaining-related purposes. The union did not provide nonmembers with a separate and distinct notice and opportunity to object to the assessment, as it did with its regular, annual fee assessments. The plaintiffs claim that this violates their First Amendment rights.

Issues: May a state, consistent with the First and Fourteenth Amendments, condition employment on the payment of a special union assessment designed to support the union’s opposition to ballot initiatives without first providing notice that includes information about the assessment and an opportunity to opt out of it? May a state, consistent with the First and Fourteenth Amendments, condition continued public employment on the payment of fees designed to support a union’s opposition to public ballot initiatives?

No. The First Amendment prohibits a public-sector union special assessment on nonmembers without proper notice and consent of the nonmembers.

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

By authorizing a union to collect fees from nonmembers and permitting the use of an opt-out system for the collection of fees levied to cover nonchargeable expenses, our prior decisions approach, if they do not cross, the limit of what the First Amendment can tolerate. The SEIU, however, asks us to
go farther. It asks us to approve a pro-
dure under which (a) a special assessment
billed for use in electoral campaigns was
assessed without providing a new opportu-
nity for nonmembers to decide whether they
wished to contribute to this effort and (b)
nonmembers who previously opted out were
nevertheless required to pay more than
half of the special assessment even though
the union had said that the purpose of the
fund was to mount a political campaign and
that it would not be used for ordinary union
expenses. This aggressive use of power by
the SEIU to collect fees from nonmembers is
indefensible.

Concurring in judgment: Justice
Sotomayor (joined by Justice Ginsburg)
Dissenting: Justice Breyer (joined by
Justice Kagan)

First Amendment
United States v. Alvarez
Docket No. 11-210
Affirmed: The Ninth Circuit

Argued: February 22, 2012
Decided: June 28, 2012
Analysis: See ABA PREVIEW 182 ISSUE 5

Overview: Admittedly, Xavier Alvarez is
a liar. He bragged publicly that he had
been “wounded many times” and had
been “awarded the Congressional Medal of Honor.” He never served in the
Armed Forces. The Stolen Valor Act, 18 U.S.C.
§ 704(b), makes it a federal crime to falsely
claim to be a decorated military hero. Alva-
rez pleaded guilty to violating the act on the
condition that he could appeal its constituti-
onality. The Supreme Court had to decide
if this kind of liar has a First Amendment
right to that kind of a lie.

Issue: Is the Stolen Valor Act, which makes
it a crime for anyone to “falsely represent
himself or herself, verbally or in writing,
to have been awarded any decoration or
medal authorized by Congress for the Armed
Forces of the United States,” constitutional
on its face under the Free Speech Clause of
the First Amendment?

No. The Stolen Valor Act infringes upon
speech protected by the First Amendment.

From the opinion by Justice Kennedy
(joined by Chief Justice Roberts and Just-
tices Ginsburg and Sotomayor):
Were the Court to hold that the interest in
truthful discourse alone is sufficient to sus-
tain a ban on speech, absent any evidence
that the speech was used to gain a mate-
rial advantage, it would give government a
broad censorial power unprecedented in this
Court’s cases or in our constitutional tradi-
tion. The mere potential for the exercise
of that power casts a chill, a chill the First
Amendment cannot permit if free speech,
thought, and discourse are to remain a
foundation of our freedom.

From the concurring opinion by Justice
Breyer (joined by Justice Kagan):
The dangers of suppressing valuable ideas are
lower where as here, the regulations
concern false statements about easily verifi-
able facts that do not concern such subject
matter. Such false factual statements are
less likely than are true factual statements
to make a valuable contribution to the
marketplace of ideas. And the government
often has good reasons to prohibit such
false speech. See infra, at 5-7 (listing ex-
amples of statutes and doctrines regulating
false factual speech). But its regulation can
nonetheless threaten speech-related harms.
Those circumstances lead me to apply
what the Court has termed “intermediate
scrutiny” here.

From the dissenting opinion by Justice
Alito (joined by Justices Scalia and
Thomas):
Building on earlier efforts to protect the
military awards system, Congress responded
to this problem by crafting a narrow statute
that presents no threat to the freedom of
speech. The statute reaches only knowingly
false statements about hard facts directly
within a speaker’s personal knowledge.
These lies have no value in and of them-
selves, and proscribing them does not chill
any valuable speech.

Concurring: Justice Breyer (joined by
Justice Kagan)
Dissenting: Justice Alito (joined by Jus-
tices Scalia and Thomas)

Fourth Amendment
Florence v. Board of Chosen
Freeholders
Docket No. 10-945
Affirmed: The Third Circuit

Argued: October 12, 2011
Decided: April 2, 2012
Analysis: See ABA PREVIEW 19 ISSUE 1

Overview: Albert W. Florence was arrested
on a warrant for failure to pay an outstanding
fine. After the arrest, Florence was
taken to two different jails while he waited
for a judge to review the warrant. Each jail
strip-searched Florence during intake. After
a judge dismissed the warrant, Florence
sued both jails. Florence claims that the
jails violated his Fourth Amendment right
against unreasonable searches and seizures
when they strip-searched him following his
arrest for a minor offense without reason-
able suspicion that he presented a security
risk to the jails.

Issue: May jails adopt a policy of strip-
searching all arrestees who are going to be
admitted to the general jail population?

Yes. The search procedures at the county
jails struck a reasonable balance between
inmate privacy and the needs of the institu-
tions; the Fourth and Fourteenth Amend-
ments do not require reasonable suspicion
for the strip searches of arrestees who are
going to be admitted to the general jail
population.

From the opinion by Justice Kennedy
except as to Part IV
(joined by Chief Justice Roberts and Justice Scalia in full and Justice Thomas to all but Part IV):
Maintaining safety and order at these in-
stitutions requires the expertise of correc-
tional officials, who must have substantial
discretion to devise reasonable solutions
to the problems they face. The Court has
confirmed the importance of deference to
correctional officials and explained that a
regulation imposing on an inmate’s
constitutional rights must be upheld “if it is
reasonably related to legitimate penological
interests”[1]
From the dissenting opinion by Justice Breyer:
In my view, such a search of an individual arrested for a minor offense that does not involve drugs or violence—say a traffic offense, a regulatory offense, an essentially civil matter, or any other such misdemeanor—is an “unreasonable search” forbidden by the Fourth Amendment, unless prison authorities have reasonable suspicion to believe that the individual possesses drugs or other contraband.

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

Fourth Amendment
United States v. Jones
Docket No. 10-1259
Affirmed: The District of Columbia Circuit

Argued: November 8, 2011
Decided: January 23, 2012
Analysis: See ABA PREVIEW 95 ISSUE 2

Overview: The police installed a GPS device on Antoine Jones’s car and used it to monitor the movements of his vehicle for a four-week period. The Supreme Court was asked to determine whether such use of a GPS device is a search within the meaning of the Fourth Amendment and whether putting it on a car without the owner’s consent should be regarded as a search or seizure within the meaning of the Fourth Amendment?

Issue: Does the warrantless use of a GPS tracking device on respondent’s vehicle to monitor its movements on public streets constitute a search or seizure within the meaning of the Fourth Amendment?

Yes. The Government’s attachment of the GPS device to the vehicle and its use of that device to monitor the vehicle’s movements constitutes a search under the Fourth Amendment.

From the opinion by Justice Scalia (joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Sotomayor): It is important to be clear about what occurred in this case: The Government physically occupied private property for the purpose of obtaining information. We have no doubt that such a physical intrusion would have been considered a “search” within the meaning of the Fourth Amendment when it was adopted.

From the concurring opinion by Justice Sotomayor:
More fundamentally, it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. E.g., Smith, 442 U.S., at 742; United States v. Miller, 425 U.S. 435, 443 (1976). This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks. People disclose the phone numbers that they dial or text to their cellular providers; the URLs that they visit and the e-mail addresses with which they correspond to their Internet service providers; and the books, groceries, and medications they purchase to online retailers.

From the concurring opinion by Justice Alito (joined by Justices Ginsburg, Breyer, and Kagan):
To date, however, Congress and most States have not enacted statutes regulating the use of GPS tracking technology for law enforcement purposes. The best that we can do in this case is to apply existing Fourth Amendment doctrine and to ask whether the use of GPS tracking in a particular case involved a degree of intrusion that a reasonable person would not have anticipated. Under this approach, relatively short-term monitoring of a person’s movements on public streets accords with expectations of privacy that our society has recognized as reasonable. See United States v. Knotts, 460 U.S. 276, 281-282 (1983). But the use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy.

Concurring: Justice Sotomayor
Concurring in the judgment: Justices Alito (joined by Justices Ginsburg, Breyer, and Kagan)
Government Regulation
Sackett v. EPA

Docket No. 10-1062
Reversed and Remanded:
The Ninth Circuit

Argued: January 9, 2012
Decided: March 21, 2012
Analysis: See ABA PREVIEW 151 ISSUE 4

Overview: The Sacketts are Idaho landowners who received a compliance order from the United States Environmental Protection Agency (EPA), asserting their land was a wetland subject to the Clean Water Act, and that they had violated the act by filling their property with dirt and rock in preparation for building a house. The Sacketts sued the EPA, seeking injunctive and declaratory relief. The action was dismissed, and the dismissal upheld on appeal on the ground that the Clean Water Act precluded preenforcement judicial review of administrative compliance orders, and that such preclusion does not violate the process.

Issue: May persons seek preenforcement judicial review of an administrative compliance order under the Clean Water Act?

Yes. Landowners may bring civil actions under the Administrative Procedures Act to challenge EPA compliance orders such as the one at issue here.

From the unanimous opinion by Justice Scalia:
The APA’s presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all. And there is no reason to think that the Clean Water Act was uniquely designed to enable the strong-arm enforcement of regulated parties into “voluntary compliance” without the opportunity for judicial review—even judicial review of the question whether the regulated party is within the EPA’s jurisdiction. Compliance orders will remain an effective means of securing prompt voluntary compliance in those many cases where there is no substantial basis to question their validity.

Concurring: Justice Ginsburg
Concurring: Justice Alito

Habeas Corpus
Greene v. Fisher

Docket No. 10-637
Affirmed: The Third Circuit

Argued: October 11, 2011
Decided: November 8, 2011
Analysis: See ABA PREVIEW 23 ISSUE 1

Overview: Petitioner Eric Greene is a state prisoner who sought federal habeas corpus relief for a Confrontation Clause violation that occurred when his codefendants’ redacted statements were introduced against him at trial. After the last non-discretionary state court decision affirming his direct appeal on the merits, but before Greene’s conviction became final on direct appeal, the Supreme Court decided Gray v. Maryland, 523 U.S. 185 (1998), which arguably established that Greene’s right to confrontation was violated. The Third Circuit declined to apply Gray because it construed 28 U.S.C. § 2254(d), which precludes habeas corpus relief based upon claims adjudicated on the merits in state court unless the adjudication resulted in a decision that was “contrary to” or an “unreasonable application of clearly established Federal law, as determined by the Supreme Court,” to hold that a cause is not “clearly established Federal law” unless it is announced by the Court before the last nondiscretionary state court decision on the merits.

Issue: For purposes of adjudicating a state prisoner’s petition for federal habeas corpus, does a decision from the Supreme Court qualify as “clearly established Federal law” under 28 U.S.C. § 2254(d) only if it is announced by the Court before the last nondiscretionary state court decision on the merits?

Yes. Under 28 U.S.C. § 2254(d)(1), “clearly established Federal law” as determined by the Supreme Court of the United States includes only the Court’s decisions as of the time of the relevant state-court adjudication on the merits.

From the unanimous opinion by Justice Scalia:
We held last Term, in Cullen v. Pinholster, that review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the prisoner’s claim on the merits. We said that the provision’s “backward-looking language requires an examination of the state-court decision at the time it was made.” The reasoning of Cullen determines the result here. As we explained, § 2254(d)(1) requires federal courts to “focus[s] on what a state court knew and did,” and to measure state-court decisions “against this Court’s precedents as of ‘the time the state court renders its decision.’

Habeas Corpus
Wood v. Milyard

Docket No. 10-9995
Reversed and Remanded:
The Tenth Circuit

Argued: February 27, 2012
Decided: April 24, 2012
Analysis: See ABA PREVIEW 205 ISSUE 5

Overview: When petitioner filed his federal habeas corpus petition, the state informed the district court that it “[w]ould not challenge, but [d]id not conced[e]” the timelessness of the petition. The district court then rejected petitioner’s claims on the merits. On appeal, the Tenth Circuit sua sponte directed the parties to brief the timelessness issue and ultimately dismissed the petition as untimely. Petitioner argues that the state waived this defense and that the Tenth Circuit lacked authority to raise it sua sponte.

Issue: Does an appellate court have the authority to raise sua sponte a 28 U.S.C. § 2254(d) statute of limitations defense?

Yes. Appellate courts have the authority, but not the obligation, to raise forfeited timeliness defenses on their own initiative.

Issue: Does the state’s declaration before the district court that it “will not challenge, but [is] not conceding, the timelessness of Wood’s habeas corpus petition,” amount to a deliberate waiver of any statute of limitations defense the state may have had?

Yes. The state deliberately waived the statute of limitations defense and the Tenth Circuit abused its discretion when it dismissed the defendant’s petition as untimely.

From the opinion by Justice Ginsburg
(joined by Chief Justice Roberts and Justices Kennedy, Breyer, Alito, Sotomayor, and Kagan):
Our precedent establishes that a court may consider a statute of limitations or other
Harmless Error

Vasquez v. United States

Docket No. 11-199

Dismissed: The Seventh Circuit

Argued: March 21, 2012
Decided: April 2, 2012
Analysis: See ABA PREVIEW 241 ISSUE 6

Overview: During petitioner Alexander Vasquez’s federal drug conspiracy trial, the government introduced second-hand hearsay evidence that Vasquez’s trial counsel had advised him to plead guilty. The district court overruled Vasquez’s hearsay objection and admitted the hearsay statements into substantive evidence. On appeal, all panel members agreed that admitting the statements for the truth of the matter asserted was erroneous. But the majority concluded that the error was harmless based on its view that the other evidence of guilt was overwhelming. The Supreme Court must now decide whether the Seventh Circuit’s harmless error analysis is consistent with its harmless error precedents.

Issues: Did the Seventh Circuit violate the Supreme Court’s precedent on harmless error when it focused its harmless error analysis solely on the weight of the untainted evidence without considering the potential effect of the error on the jury?

Does the Seventh Circuit violate the Sixth Amendment right to a jury trial by determining that a defendant should have been convicted without considering the effects of the district court’s error on the jury that heard the case?

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

Immigration Law

Holder v. Gutierrez and
Holder v. Sawyers

Docket Nos. 10-1542 and 10-1543
Reversed and Remanded:
The Ninth Circuit

Argued: January 18, 2012
Decided: May 21, 2012
Analysis: See ABA PREVIEW 177 ISSUE 4

Overview: This consolidated case takes up a narrow but potentially significant issue of statutory interpretation upon which the Ninth Circuit has read the Immigration and Nationality Act’s cancellation of removal provision to permit an otherwise removable alien to take advantage of a parent’s status as a lawful permanent resident and time in residence in calculating the removable alien’s eligibility for discretionary cancellation of removal (despite the contrary Board of Immigration Appeals’ interpretation arguably owed deference). The Third and Fifth Circuits have both rejected this reading. The Ninth Circuit was the circuit of origin for more than 40 percent of cancellation-of-removal applications in 2010.

Issues: Did the Ninth Circuit err by overturning the Board of Immigration Appeals ruling that a parent’s years of lawful permanent resident (LPR) status and years of residence may not be imputed to an alien who resided with that parent as an unemancipated minor, for the purpose of satisfying in 8 U.S.C. § 1229b(a)(1)’s requirement that the alien seeking cancellation of removal has “been an alien lawfully admitted for permanent residence for not less than five years” and 8 U.S.C. § 1229b(a) (2)’s requirement that the alien seeking cancellation of removal has “resided in the United States continuously for seven years after having been admitted in any status”?

Yes. The BIA’s rejection of imputation meets that standard, and so we need not decide if the statute permits any other construction.

Immigration Law

Judulang v. Holder

Docket No. 10-694
Reversed and Remanded:
The Ninth Circuit

Argued: October 12, 2011
Decided: December 12, 2011
Analysis: See ABA PREVIEW 27 ISSUE 1

Overview: Joel Judulang, a legal permanent resident of the United States who is deportable for his conviction of an aggravated felony, asserted that he is eligible for relief from removal under former § 212(c) of the Immigration and Nationality Act (INA). Section 212(c) provides discretionary relief from removal for certain legal permanent residents who are found inadmissible in the United States upon their return from a temporary absence. Even though 212(c), by its terms, provides relief only to an alien facing removal under a ground of inadmissibility, Judulang argued that 212(c) also applies to an alien who is deportable based on a conviction that would have rendered him inadmissible if he had left and attempted to reenter the United States.

Issue: Is a lawful permanent resident who was convicted by guilty plea of an offense that renders him deportable and inadmissible under differently phrased statutory subsections, and who did not depart and reenter the United States between the conviction and the commencement of removal proceedings, categorically foreclosed from seeking discretionary relief from removal under former § 212(c) of the INA?

No. The policy of the Board of Immigration Appeals (BIA) for applying § 212(c) in deportation cases is “arbitrary and capricious” under the Administrative Procedure Act (APA).
From the unanimous opinion by Justice Kagan:
The BIA has flunked that test here. By hanging a deportable alien’s eligibility for discretionary relief on the chance correspondence between statutory categories—a matter irrelevant to the alien’s fitness to reside in the country—the BIA has failed to exercise its discretion in a reasoned manner.

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**Immigration Law**

**Kawashima v. Holder**

**Docket No. 10-577**

**Affirmed: The Ninth Circuit**

Argued: November 7, 2011  
Decided: February 21, 2012  
Analysis: See ABA PREVIEW 73 ISSUE 2

**Overview:** A noncitizen who commits an aggravated felony is deportable. Aggravated felonies include crimes of “fraud or deceit” in which the loss to the victim exceeds $10,000. This case considered the question of whether making or subscribing to a false tax return qualifies as an aggravated felony when the $10,000 loss threshold is met.

**Issue:** Are the petitioners’ convictions of filing, and aiding and abetting in filing, a false statement on a corporate tax return in violation of the criminal provisions of the Internal Revenue Code (26 U.S.C. § 7206(1) and (2)) aggravating felonies as defined in 8 U.S.C. § 1101(a)(43)(M)(i), thereby rendering the petitioners deportable?

**Yes.** Convictions under 26 U.S.C. § 7206(1) and (2) in which the Government’s revenue loss exceeds $10,000 qualify as aggravated felonies pursuant to Clause (i).

From the opinion by Justice Thomas (joined by Chief Justice Roberts and Justices Scalia, Kennedy, Alito, and Sotomayor): Although the words “fraud” and “deceit” are absent from the text of § 7206(1) and are not themselves formal elements of the crime, it does not follow that his offense falls outside of Clause (i). The scope of that clause is not limited to offenses that include fraud or deceit as formal elements. Rather, Clause (i) refers more broadly to offenses that “involve[d]” fraud or deceit—meaning offenses with elements that necessarily entail fraudulent or deceitful conduct.

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

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**Immigration Law**

**Vartelas v. Holder**

**Docket No. 10-1211**

**Reversed and Remanded:** The Second Circuit

Argued: January 18, 2012  
Decided: March 28, 2012  
Analysis: See ABA PREVIEW 175 ISSUE 4

**Overview:** The Supreme Court reviewed whether a law that takes away a lawful permanent resident’s right to reenter the country can be applied retroactively. The law in question states that an alien can be denied entry into the United States if the alien has committed an offense of so-called moral turpitude. In this case, the petitioner is fighting to stay in the United States after being denied reentry following a 2003 trip to Greece. In 1994, he pled guilty after playing a small part in a counterfeiting scheme. The petitioner claims that the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which came into effect in 1996, cannot be applied retroactively to his 1994 guilty plea.

**Issue:** Can 8 U.S.C. § 1101(a)(13)(C)(v), which denies a lawful permanent resident the right to make “innocent, casual and brief” trips across international borders without the threat of being denied entry back into the United States under Rosenberg v. Fleuti, 374 U.S. 449 (1963), be applied retroactively to a guilty plea made before the IIRIRA (1996) came into effect?

**No.** The impact of a lawful permanent resident’s brief travel abroad on his residency status is determined not by the IIRIRA, but by the legal regimen in force at the time of the conviction.

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

Vartelas’ brief trip abroad post-IIRIRA involved no criminal infraction. IIRIRA disabled him from leaving the United States and returning as a lawful permanent resident. That new disability rested not on any continuing criminal activity, but on a single crime committed years before IIRIRA’s enactment. The antiretroactivity principle instructs against application of the new proscription to render Vartelas a first-time arrival at the country’s gateway.

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

This case raises a plain-vanilla question of statutory interpretation, not broader questions about frustrated expectations or fairness. Our approach to answering that question should be similarly straightforward: We should determine what relevant activity the statute regulates (here, reentry); absent a clear statement otherwise, only such relevant activity which occurs after the statute’s effective date should be covered (here, post-1996 re-entries). If, as so construed, the statute is unfair or irrational enough to violate the Constitution, that is another matter entirely, and one not presented here. Our interpretive presumption against retroactivity, however, is just that—a tool to ascertain what the statute means, not a license to rewrite the statute in a way the Court considers more desirable.

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

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**Ineffective Assistance of Counsel**

**Lafler v. Cooper**

**Docket No. 10-209**

**Vacated and Remanded:** The Sixth Circuit

Argued: October 31, 2011  
Decided: March 21, 2012  
Analysis: See ABA PREVIEW 52 ISSUE 2

**Overview:** Anthony Cooper faced assault with intent to murder charges. Based on an erroneous understanding of Michigan law, his counsel advised him to reject a plea bargain, which he did; and, after a fair trial, he was convicted and received a longer sentence. The Supreme Court will decide whether this constitutes actionable ineffective assistance of counsel, and, if so, what remedy, if any, would be appropriate for Cooper’s lost opportunity to plead guilty and accept a lesser sentence.

**Issue:** Is a defendant’s Sixth Amendment right to effective assistance of counsel violated when defense counsel’s erroneous advice causes the defendant to decline a favorable plea offer and then, after a fair trial, the defendant is convicted and sentenced to a longer term?

**Yes.** If a defendant can show that but for counsel’s deficient performance there is a
reasonable probability he and the trial court would have accepted a guilty plea, the correct remedy is to reoffer the plea.

From the opinion by Justice Kennedy (joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan):
As a remedy, the District Court ordered specific performance of the original plea agreement. The correct remedy in these circumstances, however, is to order the State to reoffer the plea agreement. Presuming respondent accepts the offer, the state trial court can then exercise its discretion in determining whether to vacate the convictions and sentence respondent pursuant to the plea agreement, to vacate only some of the convictions and sentence respondent accordingly, or to leave the convictions and sentence from trial undisturbed.

From the dissenting opinion by Justice Scalia (joined by Justice Thomas; joined in part by Chief Justice Roberts):
Anthony Cooper received a full and fair trial, was found guilty of all charges by a unanimous jury, and was given the sentence that the law prescribed. The Court nonetheless concludes that Cooper is entitled to some sort of habeas corpus relief (perhaps) because his attorney's allegedly incompetent advice regarding a plea offer caused him to receive a full and fair trial. That conclusion is foreclosed by our precedents. Even if it were not foreclosed, the constitutional right to effective plea-bargainers that it establishes is at least a new rule of law, which does not undermine the Michigan Court of Appeals’ decision and therefore cannot serve as the basis for habeas relief. And the remedy the Court announces—namely, whatever the state trial court in its discretion prescribes, down to and including no remedy at all—is unheard-of and quite absurd for violation of a constitutional right.

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

Ineffective Assistance of Counsel
Missouri v. Frye
Docket No. 10-444
Vacated and Remanded:
The Court of Appeals of Missouri, Western District

Argued: October 31, 2011
Decided: March 21, 2012
Analysis: See ABA PREVIEW 58 ISSUE 2
Overview: Galin E. Frye was charged with driving with a revoked license. The prosecutor offered a plea bargain, which included an option for a 90-day prison sentence, but Frye’s attorney failed to tell Frye about it. The offer expired. Frye then pleaded guilty to a new charge of driving with a revoked license and received a three-year prison sentence. Frye filed a postconviction claim arguing that he was denied effective assistance of counsel when his attorney failed to tell him about the initial plea offer.

Issue: Does the Sixth Amendment right to effective assistance of counsel extend to the consideration of plea offers that lapse or are rejected?

Yes. Plea bargains have become so central to today’s criminal justice system that defense counsel must meet responsibilities in the plea bargain process to render the adequate assistance of counsel that the Sixth Amendment requires at critical stages of the criminal process.

From the opinion by Justice Kennedy (joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan):
Because ours “is for the most part a system of pleas, not a system of trials, it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process. “To a large extent … horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it is the criminal justice system.”

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

Intellectual Property
Mayo Collaborative Services v. Prometheus Laboratories, Inc.
Docket No. 10-1150
Reversed: The Court of Appeals for the Federal Circuit

Argued: December 7, 2011
Decided: March 20, 2012
Analysis: See ABA PREVIEW 108 ISSUE 3
Overview: Prometheus is the licensee of two patents encompassing methods for determining the optimal dosage of thiopurine drugs used to treat certain autoimmune diseases. Mayo wishes to market a diagnostic test that uses the same methods. Prometheus sued Mayo for infringement. Mayo then filed a motion for summary judgment of invalidity of Prometheus’ patents under 35 U.S.C. § 101. The Supreme Court was asked to determine whether methods that utilize correlations related to natural phenomena are patentable subject matter under § 101.

Issue: Are diagnostic method claims that involve a specific application of natural phenomena in a specific process patentable subject matter under 35 U.S.C. § 101?

No. Prometheus’ process is not patent eligible; the laws of nature recited in Prometheus’ patent claims are not themselves patentable, and consequently, the claimed processes are not patentable.

From the unanimous opinion by Justice Breyer:
The presence here of the basic underlying concern that those patents tie up too much future use of laws of nature simply reinforce our conclusion that the processes described in the patents are not patent eligible, while eliminating any temptation to depart from case law precedent.

Jurisdiction
Editor’s Note: For the jurisdiction issue presented by the Affordable Care Act challenges, see “Taxing Power.”
Official Immunity
Rehberg v. Paulk

Docket No. 10-788
Affirmed: The Eleventh Circuit

Argued: November 1, 2011
Decided: April 2, 2012
Analysis: See ABA PREVIEW’70 ISSUE 2

Overview: James P. Paulk, an investigator for the district attorney, falsely testified to three grand juries and thus secured indictments against Charles A. Rehberg. Rehberg sued Paulk for malicious prosecution. Paulk moved to dismiss, arguing that he was entitled to absolute immunity from liability.

Issue: Does a government official who acts as a “complaining witness” against a defendant, and who provides false testimony to a grand jury about that defendant, enjoy absolute immunity from liability in that defendant’s later civil rights suit?

Yes. A witness in a grand jury proceeding is entitled to the same absolute immunity from suit under § 1983 as a witness who testifies at trial.

From the unanimous opinion by Justice Alito:
For these reasons, we conclude that grand jury witnesses should enjoy the same immunity as witnesses at trial. This means that a grand jury witness has absolute immunity from any § 1983 claim based on the witness’s testimony. In addition, as the Court of Appeals held, this rule may not be circumvented by claiming that a grand jury witnessed conspired to present fake testimony or by using evidence of the witness’s testimony to support any other § 1983 claims concerning the initiation or maintenance of a prosecution. Were it otherwise, “A criminal defendant turned civil plaintiff could simply reframe a claim to attack the preparation instead of the absolutely immune actions themselves.”

Patent Law
Caraco Pharmaceutical v. Novo Nordisk A/S

Docket No. 10-844
Reversed and Remanded: The Federal Circuit

Argued: December 5, 2011
Decided: April 17, 2012
Analysis: See ABA PREVIEW 141 ISSUE 3

Overview: This case examined whether Section 355(j)(5)(C)(ii)(I) of the Hatch-Waxman Act should be interpreted to require that a patentee submit additional information, beyond the patent number and patent expiration date, in submissions to the Food and Drug Administration.

Issue: Does Section 355(j)(5)(C)(ii)(I) of the Hatch-Waxman Act permit a generic drug challenger to raise a counterclaim to correct or delete patent information, on an approved method of using a drug, submitted by the patentee during the process of seeking drug approval?

Yes. A generic manufacturer may employ the counterclaim provision to force correction of a use code that inaccurately describes the brand’s patent as covering a particular method of using a drug.

From the unanimous opinion by Justice Kagan:
[T]he mere possibility of clearer phrasing cannot defeat the most natural reading of a statute; if it could (with all due respect to Congress), we would interpret a great many statutes differently than we do.

Concurring: Justice Sotomayor

Patent Law
Kappos v. Hyatt

Docket No. 10-1219
Affirmed and Remanded: The Federal Circuit

Argued: January 9, 2012
Decided: April 18, 2012
Analysis: See ABA PREVIEW 156 ISSUE 4

Overview: When the United States Patent and Trademark Office (PTO) refuses to grant a patent, the applicant has two options for obtaining judicial review of the agency’s final decision. The applicant may pursue an appeal on the agency record in the Federal Circuit under 35 U.S.C. §§ 141–144. As an alternative, the applicant may bring a civil action against the director of the PTO in federal district court under 35 U.S.C. § 145.

The Supreme Court is now asked to determine whether an applicant in a § 145 action can introduce new evidence that it could have submitted to the PTO during the patent examination process, and to what extent the district court should conduct a de novo review of the PTO’s factual determinations.

Issues: Can the plaintiff in a § 145 action introduce new evidence that could have been presented to the agency in the first instance? And, if so, when such new evidence is introduced in a § 145 action, may the district court decide de novo the factual questions to which the evidence pertains without giving deference to the prior decisions of the PTO?

Yes. There are no limitations on a patent applicant’s ability to introduce new evidence in a § 145 proceeding beyond those already present in the Federal Rules of Evidence and the Federal Rules of Civil Procedure. If new evidence is presented on a disputed question of fact, the district court must make de novo factual findings that take account of both the new evidence and the administrative record before the PTO.

From the unanimous opinion by Justice Thomas:
Section 145 grants a disappointed patent applicant a “remedy by civil action against the Director.” The section further explains that the district court “may adjudge that such applicant is entitled to receive a patent for his invention, as specified in any of his claims involved in the decision of the [PTO], as
the facts in the case may appear and such adjudication shall authorize the Director to issue such patent on compliance with the requirements of law.” By its terms, § 145 neither imposes unique evidentiary limits in district court proceedings nor establishes a heightened standard of review for factual findings by the PTO.

Concurring: Justice Sotomayor

Preemption
Arizona v. United States

Docket No. 11-182
Affirmed in Part, Reversed in Part, and Remanded: The Ninth Circuit

Argued: April 25, 2012
Decided: June 25, 2012
Analysis: See ABA PREVIEW 268 ISSUE 7

Overview: The state of Arizona enacted S.B. 1070 in order to address problems related to illegal immigration in the state. But the federal government claimed that four provisions in S.B. 1070 intrude on and frustrate the purposes and objectives of the comprehensive federal immigration regulatory scheme. Under the Supremacy Clause, federal law preempts state law when federal law occupies the field or when state law stands as an obstacle to its purposes or objectives. The issue here was whether federal immigration law preempts four provisions of S.B. 1070.

Issues: Does federal immigration law preempt all or part of Arizona’s law that (i) requires Arizona law enforcement officers, upon reasonable suspicion, to determine the immigration status of any person lawfully stopped, detained, or arrested; (ii) makes it a state crime for an unauthorized immigrant to violate federal registration laws; (iii) criminalizes work, or the attempt to work, by any unlawfully present alien; and (iv) authorizes Arizona law enforcement officers to make a warrantless arrest whenever they have probable cause to believe that a person has committed an offense that makes that person removable. However, a provision requiring Arizona law enforcement officers, upon reasonable suspicion, to determine the immigration status of any person lawfully stopped, detained, or arrested has not been shown to be preempted.

From the opinion by Justice Kennedy (joined by Chief Justice Roberts and Justices Ginsburg, Breyer, and Sotomayor): The National Government has significant power to regulate immigration. With power comes responsibility, and the sound exercise of national power over immigration depends on the Nation’s meeting its responsibility to base its laws on a political will informed by searching, thoughtful, rational civic discourse. Arizona may have understandable frustrations with the problems caused by illegal immigration while that process continues, but the State may not pursue policies that undermine federal law.

From the concurring in part and dissenting in part opinion by Justice Scalia: Arizona has moved to protect its sovereignty—not in contradiction of federal law, but in complete compliance with it. The laws under challenge here do not extend or revise federal immigration restrictions, but merely enforce those restrictions more effectively. If securing its territory in this fashion is not within the power of Arizona, we should cease referring to it as a sovereign State.

Concurring in part and dissenting in part: Justice Scalia
Concurring in part and dissenting in part: Justice Thomas
Concurring in part and dissenting in part: Justice Alito
Taking no part in consideration or decision: Justice Kagan

Privacy Act
Federal Aviation Administration v. Cooper

Docket No. 10-1024
Reversed and Remanded: The Ninth Circuit

Argued: November 30, 2011
Decided: March 28, 2012
Analysis: See ABA PREVIEW 129 ISSUE 3

Overview: Stanmore Cawthon Cooper sued the government for violation of the Privacy Act after the Federal Aviation Administration and the U.S. Social Security Administration shared his medical records with each other, causing him mental and emotional distress. Cooper sought relief for his nonpecuniary (nonmonetary) damages, but not for any out-of-pocket economic loss, under a provision of the act that authorized “actual damages.”

Preemption
National Meat Association v. Harris

Docket No. 10-224
Reversed and Remanded: The Ninth Circuit

Argued: November 9, 2011
Decided: January 23, 2012
Analysis: See ABA PREVIEW 77 ISSUE 2

Overview: After the Humane Society released a video depicting a slaughterhouse’s inhumane treatment of nonambulatory livestock, California passed a law criminalizing the slaughter of nonambulatory livestock for human consumption and requiring the swift euthanasia of downed animals. The National Meat Association sued to enjoin enforcement of the law, claiming that the Federal Meat Inspection Act preempted the California law. The district court issued a preliminary injunction and the Ninth Circuit vacated the injunction. The issue before the Supreme Court was whether the federal law preempts state criminal law.

Issue: Does the Federal Meat Inspection Act preempt a California law that criminalizes the slaughter of nonambulatory livestock for human consumption and requires the swift euthanasia of downed animals?

Yes. The FMIA expressly preempts the California law’s application against federally inspected swine slaughterhouses.

From the unanimous opinion by Justice Kagan: The FMIA regulates slaughterhouses’ handling and treatment of nonambulatory pigs from the moment of their delivery through the end of the meat production process. California’s [law] endeavors to regulate the same thing, at the same time, in the same place—except by imposing different requirements. The FMIA expressly preempts such a state law.
Issue: Does the Privacy Act authorize damages for mental and emotional distress?

No. The Privacy Act does not unequivocally authorize damages for mental or emotional distress and therefore does not waive the Government’s sovereign immunity from liability for such harms.

From the opinion by Justice Alito (joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas):
When waiving the Government’s sovereign immunity, Congress must speak unequivocally. … Here, we conclude that it did not. As a consequence, we adopt an interpretation of “actual damages” limited to proven pecuniary or economic harm. To do otherwise would expand the scope of Congress’ sovereign immunity waiver beyond what the statutory text clearly requires.

From the dissenting opinion by Justice Sotomayor (joined by Justices Ginsburg and Breyer):
Today the Court holds that “actual damages” is limited to pecuniary loss. Consequently, individuals can no longer recover what our precedents and common sense understand to be the primary, and often only, damages sustained as a result of an invasion of privacy, namely mental or emotional distress. That result is at odds with the text, structure, and drafting history of the Act. And it cripples the Act’s core purpose of repressing and deterring violations of privacy interests.

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

Qualified Immunity
Filarisky v. Delia
Docket No. 10-1018
Reversed: The Ninth Circuit

Argued: January 17, 2012
Decided: April 17, 2012
Analysis: See ABA PREVIEW 172 ISSUE 4

Overview: Steve A. Filarisky, a private attorney, was retained by the city of Rialto to investigate whether Nicholas B. Delia, a city firefighter, took off work under false pretenses. In the course of the investigation, Filarisky ordered Delia to produce personal items from his home. Delia produced the items but then sued Filarisky for violating his Fourth Amendment rights. Filarisky argued that he is entitled to qualified immunity.

Issue: Is a private attorney who was retained by the city to investigate a personnel matter entitled to qualified immunity against a suit under 42 U.S.C. § 1983 for a constitutional violation allegedly committed in the course of the investigation?

Yes. A private individual temporarily retained by the government to carry out its work is entitled to seek qualified immunity from suit under § 1983.

From the unanimous opinion by Chief Justice Roberts:
Because government employees will often be protected from suit by some form of immunity, those working alongside them could be left holding the bag—facing full liability for actions taken in conjunction with government employees who enjoy immunity for the same activity. Under such circumstances, any private individual with a choice might think twice before accepting a government assignment.

Concurring: Justice Ginsburg
Concurring: Justice Sotomayor

Qualified Immunity
Messerschmidt v. Millender
Docket No. 10-704
Reversed: The Ninth Circuit

Argued: December 5, 2011
Decided: February 22, 2012
Analysis: See ABA PREVIEW 133 ISSUE 3

Overview: Jerry Bowen assaulted Shelly Kelly and fired a sawed-off shotgun at her. Detective Curt Messerschmidt applied for a search warrant of Bowen’s residence that authorized the search and seizure of a broad class of items, including firearms, firearm-related materials, and gang-related materials, and not just the weapon used in the crime. Messerschmidt’s superiors, a deputy district attorney, and a magistrate, reviewed the warrant for probable cause and approved it. Officers executed the warrant and seized a shotgun and ammunition belonging to Augusta Millender, Bowen’s foster mother. (They did not find Bowen’s sawed-off shotgun.) Millender sued Messerschmidt and one of his superiors, Sergeant Lawrence, for violating her Fourth Amendment rights.

Messerschmidt and Lawrence argued that they were entitled to qualified immunity.

Issue: Are officers entitled to qualified immunity, where they obtained a warrant to search for firearms, firearm-related materials, and gang-related materials in the residence of a suspect who assaulted his girlfriend and fired a particular sawed-off shotgun at her?

Yes. Officers are entitled to qualified immunity. Under the circumstances set forth in the warrant, an officer could reasonably conclude that the scope of the warrant was supported by probable cause.

From the opinion by Chief Justice Roberts (joined by Justices Scalia, Kennedy, Thomas, Breyer, and Alito):
The question in this case is not whether the magistrate erred in believing there was sufficient probable cause to support the scope of the warrant he issued. It is instead whether the magistrate so obviously erred that any reasonable officer would have recognized the error. The occasions on which this standard will be met may be rare, but so too are the circumstances in which it will be appropriate to impose personal liability on a lay officer in the face of judicial approval of his actions. Even if the warrant in this case were invalid, it was not so obviously lacking in probable cause that the officers can be considered “plainly incompetent” for concluding otherwise.

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

Real Estate Settlement Procedures Act
First American Financial Corp. v. Edwards
Docket No. 10-708
Dismissed: The Ninth Circuit

Argued: November 28, 2011
Decided: June 28, 2012
Analysis: See ABA PREVIEW 125 ISSUE 3

Overview: The federal Real Estate Settlement Procedures Act of 1974 (RESPA) prohibits kickbacks between those who provide settlement services in residential
transactions. The statute provides that home buyers who purchase settlement services have a right to three times the amount they paid for title insurance when the antikickback provision is violated. In this case, the Supreme Court must decide whether Congress, in providing for this statutory remedy, created a sufficient basis for standing under Article III of the U.S. Constitution, or whether, as argued by the petitioners, the home buyer purchasing the insurance must have a specific injury from this conduct. If the answer is that the plaintiff only needs to be enforcing the statutory right, not showing he or she suffered specific harm, the next step in this case will be an attempt to certify a class action brought by all of those who paid charges to title insurance companies that participated in such prohibited activities.

**Issue:** Does a purchaser of residential real estate settlement services who is protected by federal statute—RESPA—have standing to sue under Article III, Section 2, of the U.S. Constitution, which provides that the federal judicial power is limited to “Cases” and “Controversies” and which the Supreme Court has interpreted to require the plaintiff to “have suffered an ‘injury in fact,’” *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)?

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

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**Real Estate Settlement Procedures Act**

*Freeman v. Quicken Loans, Inc.*

**Docket No. 10-1042**

**Affirmed:** The Fifth Circuit

Argued: February 21, 2012
Decided: May 24, 2012
Analysis: See ABA PREVIEW 202 ISSUE 5

**Overview:** The Real Estate Settlement Procedures Act of 1974 (RESPA) provides in § 2607(b) that “[n]o person shall give and no person shall accept any portion, split, or percentage of any charge made or received … other than for services actually performed.” The Supreme Court must decide whether this language prohibits a party from charging for services not actually performed if the party retains the entire charge, without splitting it with any other party.

**Issue:** Does RESPA bar unearned fees if they are not split between two or more providers?

**No.** In order to establish a violation of § 2607(b), a plaintiff must demonstrate that a charge for settlement services was divided between two or more persons.

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

By providing that no person “shall give” or “shall accept” a “portion, split, or percentage” of a “charge” that has been “made or received,” “other than for services actually performed,” § 2607(b) clearly describes two distinct exchanges. First, a “charge” is “made” to or “received” from a consumer by a settlement-service provider. That provider then “give[s],” and another person “accept[s],” a “portion, split, or percentage” of the charge. Congress’s use of different sets of verbs, with distinct tenses, to distinguish between the consumer-provider transaction (the “charge” that is “made or received”) and the fee-sharing transaction (the “portion, split, or percentage” that is “give[n]” or “accept[ed]”) would be pointless if, as petitioners contend, the two transactions could be collapsed into one.

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**Right to Counsel**

*Martinez v. Ryan*

**Docket No. 10-1001**

**Reversed and Remanded:** The Ninth Circuit

Argued: October 4, 2011
Decided: March 20, 2012
Analysis: See ABA PREVIEW 42 ISSUE 1

**Overview:** Luis Mariano Martinez filed a habeas corpus petition arguing that the state postconviction courts wrongly rejected his claim that his attorney in his original trial was ineffective. Those postconviction courts ruled that Martinez defaulted his claim after his first postconviction attorney effectively waived it. Martinez argues that this violated his fundamental right to effective assistance of counsel in his postconviction case, thus excusing any default and allowing the federal courts to hear his claim.

**Issue:** Can a criminal defendant file a federal habeas corpus petition, where his postconviction attorney effectively waived his underlying claim for ineffective assistance of counsel in his postconviction case?

**Yes.** A federal court can hear the defendant’s ineffective-assistance claim, but only if he can establish cause to excuse the procedural default and prejudice from a violation of federal law.

**From the opinion by Justice Kennedy**

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

To protect prisoners with a potentially legitimate claim of ineffective assistance of trial counsel, it is necessary to modify the unqualified statement in *Coleman* [v. Thompson, 501 U.S. 722], that an attorney’s ignorance or inadver tence in a postconviction proceeding does not qualify as cause to excuse a procedural default. This opinion qualifies *Coleman* by recognizing a narrow exception: Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner’s procedural default of a claim of ineffective assistance at trial.

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

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**Securities Regulation**

*Credit Suisse Securities (USA) LLC v. Simmonds*

**Docket No. 10-1261**

**Vacated and Remanded:** The Ninth Circuit

Argued: November 29, 2011
Decided: March 26, 2012
Analysis: See ABA PREVIEW 116 ISSUE 3

**Overview:** This is yet another case seeking to hold underwriters liable for the “dot-com” market crash of 2000. What makes this case novel is that the plaintiff is alleging that the underwriter defendants were “insiders” of the corporate issuers for purposes of a federal statute that makes “short-swing” profits by insiders subject to disgorgement. The district court and the Ninth Circuit disagreed as to whether the claim was time barred and the Supreme Court granted certiorari to resolve the issue.

**Issue:** Is the two-year time limit for bringing an action under Section 16(b) of the Securities Exchange Act of 1934 tolled until a § 16(a) statement is filed?

**No.** Even assuming that the two-year period can be extended (a question on which the
Court is equally divided), the Ninth Circuit erred in determining that it is tolled until a § 16(a) statement is filed.

From the unanimous opinion by Justice Scalia:
Moreover, § 16’s purpose is fully served by the rules outlined above, under which the limitations period would not expire until two years after a reasonably diligent plaintiff would have learned the facts underlying a § 16(b) action. The usual equitable-tolling inquiry will thus take account of the unavailability of sources of information other than the § 16(a) filing.

Taking no part in consideration or decision: Chief Justice Roberts

Sentencing
Dorsey v. United States and
Hill v. United States

Dockets Nos. 11-5683 and 11-5721
Vacated and Remanded: The Seventh Circuit

Argued: April 17, 2012
Decided: June 21, 2012
Analysis: See ABA PREVIEW 255 ISSUE 7

Overview: This case concerns whether defendants whose criminal conduct occurred before the enactment of the Fair Sentencing Act (FSA) should nevertheless obtain the benefit of its reduced penalties for crack cocaine offenses. Edward Dorsey Sr. and Corey A. Hill both committed crack cocaine distribution offenses before, but were sentenced after, the FSA’s lower penalties. The district courts disagreed, and the Seventh Circuit upheld both sentences. The circuits are split 3-1-1 on the issue.

Issue: Does the Fair Sentencing Act’s new, lower mandatory minimums apply to the post-Act sentencing of pre-Act offenders?

Yes. Congress intended the Fair Sentencing Act’s more lenient penalties to apply to offenders who committed crimes before the FSA’s August 3, 2010, effective date, but were sentenced after that date.

From the opinion by Justice Breyer (joined by Justices Kennedy, Ginsburg, Sotomayor, and Kagan):
Six considerations, taken together, convince us that Congress intended the Fair Sentencing Act’s more lenient penalties to apply to those offenders whose crimes preceded August 3, 2010, but who are sentenced after that date.

First, the 1871 saving statute permits Congress to apply a new Act’s more lenient penalties to pre-Act offenders without expressly saying so in the new Act. …

Second, the Sentencing Reform Act sets forth a special and different background principle. …

Third, language in the Fair Sentencing Act implies that Congress intended to follow the Sentencing Reform Act background principle here. …

Fourth, applying the 1986 Drug Act’s old mandatory minimums to the post-August 3 sentencing of pre-August 3 offenders would create disparities of a kind that Congress enacted the Sentencing Reform Act and the Fair Sentencing Act to prevent. …

Fifth, not to apply the Sentencing Act would do more than preserve a disproportionate status quo; it would make matters worse. …

Sixth, we have found no strong countervailing consideration.

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

Sentencing
Setser v. United States

Docket No. 10-7387
Affirmed: The Fifth Circuit

Argued: November 30, 2011
Decided: March 28, 2012
Analysis: See ABA PREVIEW 119 ISSUE 3

Overview: This case presents an issue of federal sentencing procedure layered on top of the reality that some defendants can face sentencing for the same essential conduct in both state and federal court. Federal statutory law gives a district court discretion to order that terms of imprisonment run consecutively or concurrently “if multiple terms of imprisonment are imposed on a defendant who is already subject to an undischarged term of imprisonment” (18 U.S.C. 3584(a)). This case concerned whether a federal district court has authority to order a federal sentence to run consecutively to an anticipated state sentence that a state court has not yet imposed.

Issue: Does a district court have authority to order a federal sentence to run consecutively to an anticipated, but not-yet-imposed, state sentence?

Yes. Even though the state sentence for a probation violation had not yet been imposed, the district court had discretion to order that a defendant’s federal sentence run consecutively to the anticipated state sentence.

From the opinion by Justice Scalia (joined by Chief Justice Roberts and Justices Thomas, Alito, Sotomayor, and Kagan): When § 3584(a) specifically addresses decisions about concurrent and consecutive sentences, and makes no mention of the Bureau’s role in the process, the implication is that no such role exists. And that conclusion is reinforced by application of the same maxim (properly, in this instance) to § 3621(b)—which is a conferal of authority on the Bureau of Prisons, but does not confer authority to choose between concurrent and consecutive sentences. Put to the choice, we believe it is much more natural to read § 3584(a) as not containing an implied “only,” leaving room for the exercise of judicial discretion in the situations not covered, than it is to read § 3621(b) as giving the Bureau of Prisons what amounts to sentencing authority.

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

Separation of Powers
Zivotofsky v. Clinton

Docket No. 10-699
Vacated and Remanded: The Distrcit of Columbia Circuit

Argued: November 7, 2011
Decided: March 26, 2012
Analysis: See ABA PREVIEW 83 ISSUE 2

Overview: Menachem Binyamin Zivotofsky was born in Jerusalem to two United States citizens. When Zivotofsky applied for a U.S. passport, the State Department, under its regulations, declined to designate “Israel” as Zivotofsky’s birthplace on his passport. The State Department regulations are based on a long-standing policy of the executive branch to recognize no state as having...
sovereignty over Jerusalem. Zivotofsky sued, arguing that the State Department regulation violated U.S. statutory law, which required the State Department to designate “Israel” as the birth place for anyone born in Jerusalem.

Issue: Does the political question doctrine deprive the federal courts of jurisdiction to enforce a federal statute that explicitly directs the Secretary of State about how to record the birthplace of an American citizen on a Consular Report of Birth Abroad and on a passport?

No. This case asks the courts to determine only whether the petitioner can vindicate his statutory right under § 214(d) of the Foreign Relations Authorization Act to choose to have Israel recorded as his place of birth on his passport.

From the opinion by Chief Justice Roberts (joined in by Justices Scalia, Kennedy, Thomas, Ginsburg, and Kagan): In this case, determining the constitutionality of § 214(d) involves deciding whether the statute impermissibly intrudes upon Presidential powers under the Constitution. If so, the law must be invalidated and Zivotofsky’s case should be dismissed for failure to state a claim. If, on the other hand, the statute does not trench on the President’s powers, then the Secretary must be ordered to issue Zivotofsky a passport that complies with § 214(d). Either way, the political question doctrine is not implicated.

Concurring: Justice Sotomayor
Concurring in Judgment: Justice Alito
Dissenting: Justice Breyer

Severability
Editor’s Note: For the severability issue presented by the Affordable Care Act challenges, see “Taxing Power.”
Standing
Match-E-Be-Nash-She-Wish Band
v. Patchak and Salazar v. Patchak

Docket Nos. 11-246 and 11-247
Affirmed and Remanded:
The District of Columbia Circuit

Argued: April 24, 2012
Decided: June 18, 2012
Analysis: See ABA PREVIEW 264 ISSUE 7

Overview: The Secretary of the Interior acquired Indian land in trust for a tribe to operate a gaming facility. Respondent David Patchak, a neighboring resident, alleged that the Secretary lacked authority under the Indian Reorganization Act (IRA) to take the land because the tribe was not under federal jurisdiction at the time the law was passed. The district court ruled that the respondent lacked “prudential standing” to sue because his alleged injuries were outside the “zone of interests” the IRA was intended to protect. On appeal, the panel reversed. It also rejected the government’s argument that, even if the respondent had standing, his suit was still barred by sovereign immunity, which the government had reserved through the Quiet Title Act’s “Indian lands exception,” despite its general waiver of immunity in § 702 of the Administrative Procedure Act.

Issues: Does the Quiet Title Act’s reservation of sovereign immunity in suits challenging government title to Indian trust lands apply to all suits involving such land? And, if not, does a lack of prudential standing preclude the action?

No. The Quiet Title Act is limited to actions where a plaintiff is actually asserting an ownership interest in his or her own right. The interests of neighbors living in the area arguably fall within the “zone of interests,” and are therefore sufficient to establish prudential standing to sue.

From the opinion by Justice Breyer
(joined by Chief Justice Roberts and Justices Kennedy, Thomas, Ginsburg, Breyer, and Alito):
[Ne]ighbors to the use (like Patchak) are reasonable—indeed, predictable—challengers of the Secretary’s decisions: Their interests, whether economic, environmental, or aesthetic, come within § 465’s regulatory ambit.

Dissenting: Justice Sotomayor

Standing
Reynolds v. United States
Docket No. 10-6549
Reversed and Remanded:
The Third Circuit

Argued: October 3, 2011
Decided: January 23, 2012
Analysis: See ABA PREVIEW 35 ISSUE 1

Overview: Billy Joe Reynolds is a convicted sex offender. But his conviction, prison sentence, and release all preceded the federal Sex Offender Registration and Notification Act (the Act). That Act requires sex offenders to register and makes failure to register a crime. Using his authority under the Act, the attorney general promulgated a rule specifying the applicability of the Act’s notification requirements to preenactment sex offenders. Reynolds was subsequently convicted of failing to register. Reynolds appealed, arguing that the attorney general’s rule violated the Constitution and federal law. In response, the government argues that Reynolds lacks standing to challenge the rule, because it was the Act, not the rule, that required him to register.

Issue: Can a preenactment sex offender challenge the attorney general’s rule, enacted under authority of the Act, that the Act’s registration requirements apply to preenactment offenders?

Yes. The Act does not require pre-Act offenders to register before the attorney general validly specifies that the Act’s registration provisions apply to preenactment offenders.

From the opinion by Justice Breyer
(joined by Chief Justice Roberts and Justices Kennedy, Thomas, Alito, Sotomayor, and Kagan):
[T]his reading of the Act efficiently resolves what Congress may well have thought were practical problems arising when the Act sought to apply the new registration requirements to pre-Act offenders. The problems arise out of the fact that the Act seeks to make more uniform a patchwork of preexisting state systems. Doing so could require newly registering or re-registering “a large number” of pre-Act offenders. That effort could prove expensive. And it might not prove feasible to do so immediately.

Dissenting: Justice Scalia (joined by Justice Ginsburg)

Tax Law
United States v. Home Concrete & Supply
Docket No. 11-139
Affirmed: The Fourth Circuit

Argued: January 17, 2012
Decided: April 25, 2012
Analysis: See ABA PREVIEW 161 ISSUE 4

Overview: The United States requested that the Supreme Court reverse the Fourth Circuit’s determination, based on The Colony, Inc. v. Commissioner, 357 U.S. 28 (1958), that a taxpayer’s overstatement of tax basis is not an omission from gross income that allows the IRS to assess a taxpayer within six years instead of the usually applicable three-year period. In addition, the United States asserts that the Court should permit application of the extended six-year period through application of a once temporary, now final, Treasury Regulation that defines an omission from gross income to include an understatement of gross income resulting from an overstatement of basis and applies to pending litigation.

Issue: Does the United States’s Supreme Court decision in Colony or Treasury Regulation § 301.6501(e) allow for application of the six-year limitations period on assessments set forth in 26 U.S.C. § 6501(e)(1)(A) where, according to the IRS, Home Concrete overstated its basis in certain assets sold in short sales?

No. Overstatements of basis, and the resulting understatement of gross income, do not trigger the extended six-year limitations period.

From the opinion by Justice Breyer
(joined by Chief Justice Roberts and Justices Thomas and Alito in full; joined by Justice Scalia in part):
In our view, Colony determines the outcome in this case. The provision before us is a 1954 reenactment of the 1939 provision that Colony interpreted. The operative language is identical. It would be difficult, perhaps impossible, to give the same language here a different interpretation without effectively overruling Colony, a course of action that basic principles of stare decisis wisely counsel us not to take. …

The Government’s argument about subsection (e)(2)’s use of the word “item”
instead of “amount” is yet weaker. … The word’s appearance in subsection (e)(2), we concede, is new. But to rely in the case before us on this solitary word change in a different subsection is like hoping that a new batboy will change the outcome of the World Series.

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

**Taxing Power**

**National Federation of Independent Business et al. v. Kathleen Sebelius et al.**

Docket Nos. 11-393, 11-398, and 11-400
Affirmed in Part and Reversed in Part: The Eleventh Circuit

Argued: March 26–28, 2012
Decided: June 28, 2012
Analysis: See ABA PREVIEW 229 ISSUE 6

Overview: The Anti-Injunction Act, 26 USC § 7421 (the AIA), says that “no suit for the purpose of restraining the assessment or collection of any tax may be maintained in any court by any person.” The Supreme Court, as a threshold matter, had to decide whether the AIA jurisdictionally bars a challenge to the minimum coverage provision of the Patient Protection and Affordable Care Act (ACA). The provision at issue requires that all Americans, with limited exceptions, maintain a base level of health care coverage or face a penalty assessed by the IRS. If the AIA is not a bar, the next question is whether the minimum coverage provision is a valid exercise of Congress’s constitutional authority. The Court also was asked to determine whether, in the event that the minimum coverage provision were to be found unconstitutional, that portion of the ACA could be severed from the rest of the law or whether the Court would have to strike down the ACA in its entirety. Finally, the Court was asked to determine the validity of a provision of the ACA requiring states to expand Medicaid coverage under the Tenth Amendment. Specifically, the ACA sets a new standard by expanding Medicaid eligibility to individuals with incomes up to 133 percent of the federal poverty level. While participating states must accede to the expansion, the federal government will pay for 100 percent of Medicaid costs associated with the expansion through 2016; the federal share then gradually decreases to 90 percent in 2020.

**Issue:** Does the AIA, which provides that “no suit for the purpose of restraining the assessment or collection of any tax may be maintained in any court by any person,” serve as a jurisdictional bar to a challenge to the ACA’s minimum coverage provision?

**No.** The ACA describes the payment as a “penalty,” not a “tax.” That label cannot control whether the payment is a tax for purposes of the Constitution, but it does determine the application of the Anti-Injunction Act.

**Issue:** Does Congress hold the power to mandate the purchase of health insurance?

**Yes.** The individual mandate is not a valid exercise of Congress’s power under the Commerce Clause and the Necessary and Proper Clause. However, the individual mandate may be upheld as within Congress’s power under the Taxing Clause.

**Issue:** Does Congress unconstitutionally compel states to expand Medicaid eligibility by conditioning receipt of federal Medicaid funds on the expansion of Medicaid eligibility, even when Congress pays for the expansion?

**Yes.** The Medicaid expansion violates the Constitution by threatening States with the loss of their existing Medicaid funding if they decline to comply with the expansion. However, the constitutional violation is fully remedied by precluding the withdrawal of existing Medicaid funds for failure to comply with the requirements set out in the expansion. The other provisions of the Affordable Care Act are not affected. Congress would have wanted the rest of the Act to stand, had it known that States would have a genuine choice whether to participate in the Medicaid expansion.

**From the opinion by Chief Justice Roberts** (joined in part by Justices Ginsburg, Breyer, Sotomayor, and Kagan): It is of course true that the Act describes the payment as a “penalty,” not a “tax.” But while that label is fatal to the application of the Anti-Injunction Act, it does not determine whether the payment may be viewed as an exercise of Congress’s taxing power. It is up to Congress whether to apply the Anti-Injunction Act to any particular statute, so it makes sense to be guided by Congress’s choice of label on that question. That choice does not, however, control whether an exaction is within Congress’s constitutional power to tax.

The Affordable Care Act’s requirement that certain individuals pay a financial penalty for not obtaining health insurance may reasonably be characterized as a tax. Because the Constitution permits such a tax, it is not our role to forbid it, or to pass upon its wisdom or fairness.

**From the concurring in part, concurring in the judgment in part, and dissenting in part opinion by Justice Ginsburg** (joined by Justice Sotomayor and in part by Justices Breyer and Kagan): Congress passed the minimum coverage provision as a key component of the ACA to address an economic and social problem that has plagued the Nation for decades: the large number of U.S. residents who are unable or unwilling to obtain health insurance. Whatever one thinks of the policy decision Congress made, it was Congress’ prerogative to make it. Reviewed with appropriate deference, the minimum coverage provision, allied to the guaranteed-issue and community-rating prescriptions, should survive measurement under the Commerce and Necessary and Proper Clauses.

**From the joint dissenting opinion of Justices Scalia, Kennedy, Thomas, and Alito:** Whatever may be the conceptual limits upon the Commerce Clause and upon the power to tax and spend, they cannot be such as will enable the Federal Government to regulate all private conduct and to compel the States to function as administrators of federal programs.

The Act before us here exceeds federal power both in mandating the purchase of health insurance and in denying noncomplying States all Medicaid funding. These parts of the Act are central to its design and operation, and all the Act’s other provisions would not have been enacted without them. In our view it must follow that the entire statute is inoperative. …

We never have classified a tax as an exaction imposed for violation of the law, and so too, we never have classified as a tax an exaction described in the legislation itself as a penalty.
Concurring in part, concurring in the judgment in part, and dissenting in part: Justices Ginsburg, Sotomayor, Breyer, and Kagan
Dissenting: Justices Scalia, Kennedy, Thomas, and Alito

Tenth Amendment
Editor’s Note: For the Tenth Amendment issue presented by the Affordable Care Act challenges, see “Taxing Power.”

Voting Rights
Perry v. Perez, Perry v. Davis, and Perry v. Perez

Docket Nos. 11-713, 11-714, and 11-715
Vacated and Remanded: The Western District Court of Texas

Argued: January 9, 2012
Decided: January 20, 2012
Analysis: See ABA PREVIEW 180 ISSUE 4

Overview: Texas adopted a congressional redistricting plan in response to population changes reflected in the 2010 census. Texas, a covered jurisdiction under the Voting Rights Act (VRA), sought preclearance for the plan. At the same time, a group of plaintiffs challenged the plan under the VRA in a federal court in Texas. When it became clear that the plan would not obtain preclearance before the start of the 2010 elections, the Texas court crafted and ordered an interim districting plan. Texas challenged the court’s authority to issue this interim plan.

Issue: Does a federal district court have authority to issue its own interim districting plan for an impending election when preclearance of the state’s plan is still pending?

Yes. However, in crafting the plan, the federal court must follow the guidance available from a state legislative plan that has not been precleared.

From the per curiam opinion: Because the District Court here had the benefit of a recently enacted plan to assist it, the District Court had neither the need nor the license to cast aside that vital aid.

Water Law
PPL Montana, LLC v. Montana

Docket No. 10-218
Reversed and Remanded: The Supreme Court of Montana

Argued: December 7, 2011
Decided: February 22, 2012
Analysis: See ABA PREVIEW 100 ISSUE 3

Overview: The Montana Supreme Court declared navigable at statehood three rivers that are currently home to hydroelectric dams. The stretches of river where the dams are located were previously thought not to have been navigable at the time of statehood, which meant the ownership of the beds beneath those river stretches would belong to the title holder of the adjacent riparian land. However, according to the Montana Supreme Court decision, the state of Montana is the owner of the beds and now seeks to charge tens of millions of dollars to the dam operators for past and future use of the state-owned beds. The Supreme Court was asked to review the Montana Supreme Court’s decision.

Issue: Does the constitutional test for determining whether a section of a river is navigable for title purposes require a trial court to determine, based on evidence, whether the relevant stretch of the river was navigable at the time the state joined the Union as directed by United States v. Utah, 283 U.S. 64 (1931)?

No. The Montana Supreme Court erred in its treatment of the question of river segments and portage; to determine riverbed title under the equal-footing doctrine, the State Supreme Court must consider the river on a segment-by-segment basis to assess whether the segment of the river, under which the riverbed in dispute lies, is navigable or not.

From the unanimous opinion by Justice Kennedy:
The Montana Supreme Court discounted the segment-by-segment approach of this Court’s cases, calling it a “piecemeal classification of navigability—with some stretches declared navigable, and others declared non-navigable.” That was error. The segment-by-segment approach to navigability for title is well settled, and it should not be disregarded. A key justification for sovereign ownership of navigable riverbeds is that a contrary rule would allow private riverbed owners to erect improvements on the riverbeds that could interfere with the public’s right to use the waters as a highway for commerce. …
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