PREVIEW
OF UNITED STATES SUPREME COURT CASES

2013–14 Wrap Up
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The following chart shows the breakdown of majority opinion authorship by justice.

![Opinion Authorship Chart](chart.png)
The Story of the 2013–2014 Term: Agreeing to Disagree

On its face, the 2013–2014 U.S. Supreme Court session was a highly agreeable one. About two-thirds of the decisions were decided unanimously, which some commentators have pointed out represents the highest unanimity percentage in more than 70 years. However, this statistic is somewhat misleading. While the justices may have been unanimous in result, how they got there in some cases was markedly different. The majority opinion was at times drawn very narrowly, confined to the issues of general agreement, with concurrences that read more like dissents.

Another fact that undercuts placing too much significance on the surface unanimity of the Court in so many cases is that it was on some of the most controversial cases that the Court showed deepest divisions, splitting 5-4. This was the case in Burwell v. Hobby Lobby (holding that closely held corporations with sincerely held religious beliefs can deny contraceptive coverage), McCutcheon v. FEC (striking down the aggregate limits on campaign contributions), and Town of Greece v. Galloway (allowing public prayers at town meetings).

One of the Court’s most sweeping opinions issued this year was a unanimous one, Riley v. California, which held that police need to get a warrant for most cell phone searches. It was a surprisingly broad ruling from a Court that just a few years ago decided a case involving the GPS-tracking of an automobile based on the ancient trespass-to-chattels legal theory (U.S. v. Jones, 2012). Any lingering doubts about the Court’s technology chops were dispelled by a highly techno-savvy ruling that displayed an acute awareness for the state-of-the-art wizardry available to law enforcement to preserve evidence in cases where a warrant is called for.

In short, it was a fascinating session with lots to interest veteran Court watchers and Supreme Court novices alike. We hope you enjoy this issue and, if you are not already, will become a regular PREVIEW subscriber!

Sincerely,

—Mark Cohen,
PREVIEW contributing editor, mark.cohen@americanbar.org

P.S. A note of congratulations goes out to PREVIEW editor Cathie Hawke, who was on leave this summer with her new daughter, Maggie Rose. Cathie will be back in time for Issue 1 of the upcoming term, which is all the more reason to subscribe now!
Once again, the justices of the U.S. Supreme Court were highly quotable as they grappled with some of the most controversial legal issues of the day. The following are ten noteworthy quotes taken from the Supreme Court opinions issued in 2013–2014 term.

1. **On Cell Phones and the Fourth Amendment**
   “Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans ‘the privacies of life.’ The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought. Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant.”

   — Chief Justice John Roberts, writing for the majority in *Riley v. California* (in which the Court held that warrantless searches of the cell phones of arrestees violate the Fourth Amendment)

2. **Corporations Can Find Religion Too**
   “For-profit corporations, with ownership approval, support a wide variety of charitable causes, and it is not at all uncommon for such corporations to further humanitarian and other altruistic objectives. Many examples come readily to mind. So long as its owners agree, a for-profit corporation may take costly pollution-control and energy-conservation measures that go beyond what the law requires. A for-profit corporation that operates facilities in other countries may exceed the requirements of local law regarding working conditions and benefits. If for-profit corporations may pursue such worthy objectives, there is no apparent reason why they may not further religious objectives as well.”

   — Justice Samuel Alito, writing for the majority in *Burwell v. Hobby Lobby* (in which the Court held that a for-profit company with sincerely held religious beliefs against certain forms of contraception could not be compelled to cover those methods of contraception under the Religious Freedom Restoration Act)

3. **Exemptions for Religious For-Profit “a Minefield”**
   “Would the exemption the Court holds [the Religious Freedom Restoration Act] demands for employers with religiously grounded objections to the use of certain contraceptives extend to employers with religiously grounded objections to blood transfusions (Jehovah’s Witnesses); antidepressants (Scientologists); medications derived from pigs, including anesthesia, intravenous fluids, and pills coated with gelatin (certain Muslims, Jews, and Hindus); and vaccinations (Christian Scientists, among others)? … The Court, I fear, has ventured into a minefield.”

   — Justice Ruth Bader Ginsburg, dissenting in *Burwell v. Hobby Lobby*

4. **Recess Appointments and “Aggrandizing” the Presidency**
   “Sad, but true: The Court’s embrace of the adverse-possession theory of executive power (a characterization the majority resists but does not refute) will be cited in diverse contexts, including those presently unimagined, and will have the effect of aggrandizing the Presidency beyond its constitutional bounds and undermining respect for the separation of powers.”

   — Justice Antonin Scalia, concurring in *NLRB v. Noel Canning* (in which the Court held the president can make presidential appointments without Senate involvement during intra-session recesses, but those recesses must be of sufficient length)

5. **The Death Penalty and Human Dignity**
   “The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution. Florida’s law contravenes our Nation’s commitment to dignity and its duty to teach human decency as the mark of a civilized world. The States are laboratories for experimentation, but those experiments may not deny the basic dignity the Constitution protects.”

   — Justice Anthony Kennedy
Justice Anthony Kennedy, writing for the majority in *Hall v. Florida* (in which the Court held that Florida’s requirement that individuals must have an IQ score of 70 or below to present intellectual-disability evidence in death-penalty cases was unconstitutional)

6. Religious Freedom and Civic Responsibility

“For centuries now, people have come to this country from every corner of the world to share in the blessing of religious freedom. Our Constitution promises that they may worship in their own way, without fear of penalty or danger, and that in itself is a momentous offering. Yet our Constitution makes a commitment still more remarkable—that however those individuals worship, they will count as full and equal American citizens. A Christian, a Jew, a Muslim (and so forth)—each stands in the same relationship with her country, with her state and local communities, and with every level and body of government. So that when each person performs the duties or seeks the benefits of citizenship, she does so not as an adherent to one or another religion, but simply as an American.”

— Justice Elena Kagan, dissenting in *Town of Greece v. Galloway* (in which the Court held that a town’s practice of starting legislative sessions with a prayer did not violate the Establishment Clause)

7. Affirmative Action: Who Gets to Decide?

“This case is not about how the debate about racial preferences should be resolved. It is about who may resolve it. There is no authority in the Constitution of the United States or in this Court’s precedents for the Judiciary to set aside Michigan laws that commit this policy determination to the voters. … Deliberative debate on sensitive issues such as racial preferences all too often may shade into rancor. But that does not justify removing certain court-determined issues from the voters’ reach. Democracy does not presume that some subjects are either too divisive or too profound for public debate.”

— Justice Anthony Kennedy, *Schuette v. Coalition to Defend Affirmative Action* (in which the Court held that Michigan did not violate the Equal Amendment Clause by amending its Constitution to prohibit race- and sex-based admissions preferences at its public universities)

8. Ensuring Political Access for All

“While our Constitution does not guarantee minority groups victory in the political process, it does guarantee them meaningful and equal access to that process. It guarantees that the majority may not win by stacking the political process against minority groups permanently, forcing the minority alone to surmount unique obstacles in pursuit of its goals.”

— Justice Sonia Sotomayor, dissenting in *Schuette v. Coalition to Defend Affirmative Action*

9. Striking Down Aggregate Contribution Limits Not Enough

“I regret only that the plurality does not acknowledge that today’s decision, although purporting not to overrule [*Buckley v. Valeo*, a 1976 U.S. Supreme Court case upholding aggregate limits in campaign expenditures], continues to chip away at its footings. … In sum, what remains of *Buckley* is a rule without a rationale. Contributions and expenditures are simply ‘two sides of the same First Amendment coin,’ and our efforts to distinguish the two have produced mere ‘word games’ rather than any cognizable principle of constitutional law.”

— Justice Clarence Thomas, concurring in *McCutcheon v. Federal Election Commission*

10. When Campaign Contributions Become Corrosive

“Where enough money calls the tune, the general public will not be heard. Insofar as corruption cuts the link between political thought and political action, a free marketplace of political ideas loses its point. That is one reason why the Court has stressed the constitutional importance of Congress’ concern that a few large donations not drown out the voices of the many.”

— Justice Stephen Breyer, dissenting in *McCutcheon v. Federal Election Commission*
Q. What was the most interesting case of the 2013–2014 Supreme Court term and why?
McCullen v. Coakley, the abortion protest zones case from Massachusetts, seemed to present fascinating and important issues and voting lineups. On its face it looks like a 9-0 decision, but that masks deep and important divisions within the Court. Chief Justice John Roberts wrote the ruling, joined fully by the more liberal Justices Ginsburg, Breyer, Sotomayor, and Kagan. Of significance, the liberals joined an opinion striking down a law creating buffer zones around abortion clinics although they surely believe in protecting women entering clinics. Also of significance, the Roberts opinion rejected the long-advanced argument that regulation of speech outside abortion clinics is content-based and subject to the most rigorous scrutiny, finding instead that the speech is content-neutral. Justice Antonin Scalia, joined by Justices Anthony Kennedy and Clarence Thomas, and separately Justice Samuel Alito, concurred only in the judgment, arguing that the law is clearly based on content and viewpoint.

Q. Did the 2013–2014 term fit neatly into your preexisting notions of the Roberts Court?
The mold for the Roberts Court has never been one size fits all, and this term was no different. There was a surprising amount of unanimity but not very many surprising outcomes, so overall the—always somewhat malleable—held true to form.

Q. What are a couple of cases that may not have gotten huge media attention, but may be “hidden gems” in terms of their significance or impact?
Hall v. Florida—This important ruling written by Justice Kennedy reinforces the 2002 ruling in Atkins v. Virginia that the Eighth Amendment prohibits executing what the Court then called the “mentally retarded” and now adopts the terminology of “intellectually disabled.” Even if by a 5-4 vote, I think this is an important reaffirmation.

Lane v. Franks—The scope of free speech rights of many thousands of public employees were unclear after Garcetti v. Ceballos in 2006, but this ruling, authored by Justice Sotomayor, seems to make clear that the older standard of Pickering v. Board of Education from 1968 still applies, that public employees may speak on matters of public concern.

Q. Was there anything particularly surprising this term in the blocs of justices who voted together or in who was the “swing justice” on various issues?
There were fewer 5-4 decisions than in any previous term of the Roberts Court, both in raw numbers and as a percentage of total decisions. Justice Anthony Kennedy remained in the majority in every one of the ten decisions by a 5-4 vote this term.

Q. Did you have a favorite quote from the 2013–2014 session? If so, what was the quote, and by which justice and in which case?
While I don’t necessarily agree with the description, Justice Scalia had a great line in the recess appointments case: “What the majority needs to sustain its judgment is an ambiguous text and a clear historical practice. What it has is a clear text and an at-best ambiguous historical practice.”

Q. What three adjectives most aptly describe the 2013–2014 term (and, if necessary, why)?
Assertive—striking down acts of Congress, president, state legislatures;
Agreeable—since there were more unanimous decisions than usual;
Deceptive—since some unanimous decisions masked strong disagreements.

Q. As a Supreme Court expert and veteran Court watcher, you no doubt have a few things you will be watching for in the 2014–2015 session. What are a few things you will be looking for?
It will be very interesting to see if, as seems quite possible, the Court takes up a same-sex marriage case that has no questions of jurisdiction or standing. There is a potentially very important new election redistricting case from Alabama and other election law disputes may follow.
Next year, the media is likely to unleash a flurry of insight and retrospective pieces about the Roberts Court, which will turn 10 on Sept. 29, 2015. Nine years in, we can safely say that the Court seems to have found its stride. The cases decided in the 2013–2014 term display many characteristics that are becoming attributes of the Court: a respect for precedent; a tendency toward consensus-building on result, even when rationales differ; a proclivity toward taking a narrow path when it helps build that consensus; a concern for public perception of the Court; and a willingness to tackle tough issues.

During the 2013–2014 term, the 75 opinions issued by the Court included cases on the intersection of religion and health care coverage, statutory limits on contributions in political campaigns, buffer zones at reproductive health care facilities, the appointment power of the president, and cell phone privacy rights. In his concurrence in McCullen v. Coakley (the buffer zone case), Justice Antonin Scalia derisively called the majority opinion, as “an opinion that has Something for Everyone.” It could be said (without any derision) that the 2013–2014 Supreme Court term had something for everyone.

Akin Gump’s Pratik Shah, who has argued 13 cases before the Supreme Court and spent five years in the Solicitor General’s Office, shared the following insights on the 2013–2014 term with PREVIEW:

- The Court reached levels of unanimity this term—about two-thirds of the cases—not seen since World War II. At times, however, that unanimity in judgment masked significant disagreements in reasoning, as demonstrated by vehement opinions concurring in the judgment in the Recess Appointments case (NLRB v. Noel Canning) and the securities class-action case (Halliburton v. Erica P. John Fund).

- Even in divided cases, the Roberts Court embraced a somewhat incremental approach in several major cases, stopping short of overruling precedents in areas such as First Amendment/union activity (Harris v. Quinn) and Equal Protection/political process (e.g., Schuette v. Coalition to Defend Affirmative Action) albeit undermining the vitality of those precedents.

- The Court showed it is not afraid of technology. It decided six patent cases (unanimously reversing the Federal Circuit in all but one), a big copyright case involving new Internet-based technology (American Broadcasting Companies, Inc. v. Aereo, Inc.), and a landmark Fourth Amendment case limiting searches of cell phones and smartphones due to privacy implications (Riley v. California).

Of course, how significant the cases decided are to you also depends on what issues are important to you. For example, Williams & Connolly’s Kannon Shanmugam, who has argued 14 cases before the Supreme Court, said that “from the perspective of the business community, this wasn’t a particularly earth-shaking term.” However, he continued, the Court was very active on the intellectual property front. “The biggest trend was the Court’s continued interest in patent law and the work of the Federal Circuit,” he explained. “The Court heard six patent cases and unanimously reversed the Federal Circuit in five of them. Given the importance and the stakes of those cases, I don’t think that trend is likely to abate anytime soon.”

There were, of course a few stand-out cases during the term that, in addition to providing a perspective on the Roberts Court, made a splash in the media, changed an area of law significantly, and/or had repercussions likely to reverberate well into the future. Experts who discussed the term with PREVIEW were remarkably consistent in naming off what they thought the blockbusters of the term were. The following are the decisions (listed alphabetically) that seemed to make everyone’s short list. If you think we’ve left anything off, we’d love to hear from you. A final note: This list is only intended as a recap. For a detailed analysis of each case, see the PREVIEW issue that reported on it.

The Term’s Ten Blockbusters

In Burwell v. Hobby Lobby, the Court concluded 5-4 that closely held corporations with sincerely held religious beliefs are entitled to protection under the Religious Freedom Restoration Act of 1993. Thus, Hobby Lobby could not be compelled to offer its employees health care coverage for certain types of contraception pursuant to the Patient Protection and Affordable Care Act. In a strongly worded dissent, Justice Ginsburg warned that the court had “ventured into...
a minefield” by allowing for-profit corporations to assert religious rights in denying employees certain types of health coverage.

Putting *Halliburton Co. et al. v. Erica P. John Fund* on this list of blockbusters is something of a cheat because its chief importance was not in what it did, but in what it did not do. In *Halliburton*, the Court was asked to jettison its investor-friendly fraud-on-the-market theory, but declined to do so. This theory makes it easier for investors in public companies to recover for material misrepresentations by presuming that they relied on the misrepresentation when they bought or sold their stock in a market where the stock price was artificially inflated or depressed by the misinformation. The Court opted not to overturn the 1988 case that recognized this theory, *Basic v. Levinson*. However, the Court went on to make it a little harder to get class actions certified in misrepresentation cases by allowing the defendant to present evidence prior to certification seeking to rebut the reliance presumption.

In *Hall v. Florida*, the Court rejected a strict standard requiring a showing of an IQ score of 70 or below for a death row inmate to present evidence of intellectual disability. “Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution. Florida’s law contravenes our nation’s commitment to dignity and its duty to teach human decency as the mark of a civilized world,” Justice Anthony Kennedy wrote for the Court.

In *McCullen v. Coakley*, the Court concluded that Massachusetts’s 35-foot buffer zone around reproductive health care facilities violated the First Amendment. A couple of interesting points about this case are that it was unanimous, and that the Court chose not to overturn its 2000 decision in *Hill v. Colorado* in which the Court upheld an eight-foot buffer zone at health care facilities.

In *McCutcheon v. Federal Election Commission*, the Court found that aggregate limits on campaign contributions were a violation of the First Amendment. Notably, the majority left in place a 1975 decision, *Buckley v. Valeo*, which upheld campaign expenditure limits. While *Buckley* was left alive, its continuing vitality in light of *McCutcheon* remains to be seen.

In *Navarette v. California*, the Court upheld a traffic stop made on suspicion of intoxicated driving even though all the information came from an anonymous tip. Under the totality of the circumstances, the officer’s conduct was reasonable, the Court found. In her dissent, Justice Ginsburg warned this case is an open invitation for police to base more stops on anonymous information.

In *NLRB v. Noel Canning*, the Court held that it is unconstitutional for the president to make recess appointments during a three-day recess of the Senate. However, the Court left open the door for recess appointments to be made during intra-session Senate recesses that are of longer duration.

In *Town of Greece v. Galloway*, a divided Court voted 5-4 to uphold a town’s practice of opening town board meetings with a prayer. Most of the prayers were Christian, but the town had a policy that allowed other denominations the same opportunity to offer the invocation. In finding the practice constitutional, the majority cited the long-held practice of lawmakers starting legislative sessions with prayer, a custom that stretches back to the Founders. This ruling was essentially a reaffirmation of a 1983 ruling, *Marsh v. Chambers*, which upheld prayer before state legislative sessions.

In *Riley v. California*, the Court issued one of its most sweeping Fourth Amendment decisions in years. The Court concluded that police will almost always need a warrant to search a cell phone. With an estimated 90 percent of adults in the United States possessing cell phones, the decision has a huge potential impact. As a side note, *Riley* may also be the first U.S. Supreme Court decision ever to use the phrase, “There’s an app for that.”

In *Schuette v. Coalition to Defend Affirmative Action*, the Court found a state constitution provision approved by Michigan voters that banned race- and sex-based discrimination in public university admissions did not violate the Equal Protection Clause and 14th Amendment of the U.S. Constitution. Writing for the majority, Justice Anthony Kennedy said it would be “demeaning to the democratic process” to presume that voters lacked the capacity to “decide an issue of this sensitivity on decent and rational grounds.” Writing in dissent, Justice Sonia Sotomayor said the decision “eviscerates an important strand of our equal protection jurisprudence.”

**Conclusion**

Once again the Court has made important decisions in a wide variety of legal areas. It was in the blockbuster cases that the justices seemed to disagree the most; perhaps because these were the cases where potentially the most was at stake. However, even these cases demonstrate an ingrained reluctance to upset precedents. In many of these cases, the Court eschewed the most sweeping paths for narrower ones, salvaging established theories and principles articulated in past cases, while discretely beginning to move in a new direction. Court watchers expect these trends to continue, as the Roberts Court continues to make its footprint one step at a time.
**NLRB v. Noel Canning** and the Receding Recess Appointment Power

by Steven D. Schwinn

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**Introduction**

A unanimous Supreme Court ruled in *NLRB v. Noel Canning* that President Obama exceeded his recess appointment power when he appointed three members to the National Labor Relations Board (NLRB) when Congress was on an extended break, punctuated by pro forma sessions every three days. The immediate effect of the ruling was to nullify the NLRB’s order against Noel Canning, a Pepsi-Cola bottler, arising out of a violation of the National Labor Relations Act. The longer-term effect is probably to shift some power away from the White House and toward Congress on executive appointments. In short, the case is a blow to the president’s recess appointment power.

But it’s easy to overstate the importance of this result. For example, the ruling was trumpeted by Republicans, who claimed that the NLRB appointments were only the latest example of President Obama’s constitutional overreaching. They also claimed victory against the NLRB. But these claims are shortsighted and wrong. That’s because separation-of-powers cases at the Supreme Court cannot be based on this kind of raw political calculation. One party’s control of the White House or Congress will probably change at some point in the future, so Court rulings shifting power one way or the other between branches will inevitably impact everyone. Moreover, the case was simply part of one move in a longer-running chess game between the political branches on appointments. In particular, the case merely legitimized a congressional gambit to foil the president’s use of the recess appointment power—which itself was a gambit to foil congressional obstruction of appointments.

While this case speaks to the latest move in this chess game, there are more moves to come; this game is not yet over.

On the other hand, it’s also easy to *understate* the importance of the Court’s *reasoning*. The Court’s unanimity on the judgment masks a deep division in constitutional interpretation within the Court. On one side, Justice Breyer led the five-justice majority in using history and practice to interpret an ambiguous clause in the Constitution. On the other, Justice Scalia led the four-justice concurrence in focusing narrowly on text. While the split is close, there is no question that this case is a clear victory for history and practice in constitutional interpretation. It sets a precedent that will drive constitutional interpretation on the Court (as early as next term) and in the other branches.

In short, the case on its face is a victory for Noel Canning (and against the NLRB) and probably shifted some appointment power to Congress (and away from the White House). But these results are temporary and muted. The real story of the case is about constitutional interpretation, and the triumph of history and practice over a narrow textual approach. In order to see why, it helps to have some broader background.

**Some Broader Background**

Typically, the president can appoint an officer to a vacancy in the executive branch only upon the approval of the Senate. This requirement comes from the Appointments Clause of the U.S. Constitution, which says that the president “shall have power … by and which the advice and consent of the Senate …” [10]
developed its own tactic in response. In particular, the Senate appointing a nominee during a Senate break. (Of course, the limit on advice and consent by using the recess appointment power and Senate fails to move a nomination, the president can bypass Senate Obama’s ability to fill certain vacancies. Either way, when the Senate Republicans used this strategy to frustrate President George W. Bush’s ability to fill certain vacancies. Alternatively, the Senate minority can filibuster a nominee, frustrate President Bush’s ability to fill certain vacancies. One of the Recess Appointments Clause made good sense when it was drafted in the late eighteenth century. After all, that was a time when the Senate did not meet regularly and when senators traveled between the Capitol and their home states by horse and buggy. In those days, the president could use the recess appointment power during long Senate recesses to appoint officers to ensure the continued operations of the government. The clause was a practical solution to a very practical problem.

Today, by contrast, the Senate meets far more regularly, and senators can travel easily and quickly to Washington, D.C. Indeed, the president can even recall senators to Washington and convene the Senate “on extraordinary occasions.” As a result, the president does not need a recess appointment power in order to address the practical problems of long Senate recesses and slow travel. Instead, modern presidents use the power to address a different problem—the Senate’s refusal even to consider certain presidential nominees based on objections to the nominee himself or herself, the nominee’s office, or some other consideration. For example, the Senate majority can decline to schedule a vote on a particular nominee, leaving the nominee in limbo and the office vacant. Senate Majority Leader Harry Reid used this strategy to frustrate President George W. Bush’s ability to fill certain vacancies. Alternatively, the Senate minority can filibuster a nominee, effectively scuttling the nomination and leaving the office vacant. Senate Republicans used this strategy to frustrate President Obama’s ability to fill certain vacancies. Either way, when the Senate fails to move a nomination, the president can bypass Senate advice and consent by using the recess appointment power and appointing a nominee during a Senate break. (Of course, the limit still applies: the appointment only lasts until the end of the next congressional session.)

The Senate, onto this use of the recess appointment power, developed its own tactic in response. In particular, the Senate began the practice of meeting in pro forma sessions every three days during every lengthy Senate break. These pro forma sessions consist of a single senator gaveling in a session and immediately adjourning. (The rules of the Senate assume that a quorum is present, unless a senator questions the quorum, so a single senator may open a session.) The effect of this tactic is that the Senate “meets” every three days, even during a lengthy break. These “meetings” mean that the Senate cannot be in recess, because three days is too short a time between sessions to constitute a recess. (If it were otherwise, the president could use the recess appointment power over, say, a weekend break. Everyone seems to agree that this would violate the Recess Appointments Clause.) And if the Senate is not in recess, the president cannot use the recess appointments power. The Senate majority, which controls the Senate’s schedule, can easily use this tactic to block the president’s recess appointments. Indeed, Senator Majority Leader Harry Reid pioneered this tactic to frustrate certain of President Bush’s nominees.

But the Senate minority can use this tactic, too. For example, the Senate minority can ask the House of Representatives to reject a Senate break of more than three days. That’s because Article I, Section 5, of the Constitution says that “[n]either House, during the session of Congress, shall, without the Consent of the other, adjourn for more than three days.” If the House agrees, the Senate cannot take a break of more than three days. And, again, three days is too short a time to constitute a recess. Senate Republicans effectively used this strategy to frustrate certain of President Obama’s nominees. (The House, of course, could employ this tactic directly, without a request from the Senate minority. And the Senate minority may have yet other procedural tools to force the Senate to stay in session.)

In 2011, Senate Republicans asked House Speaker John Boehner to refuse to pass a resolution that would allow the Senate to adjourn for more than three days, forcing the Senate to conduct pro forma sessions every three days during its breaks. Consistent with that request, the House passed no concurrent resolution of adjournment and thus denied House approval of a Senate recess for more than three days. So when the Senate left on break between Dec. 17, 2011, and Jan. 23, 2012, it operated pursuant to a unanimous consent agreement that provided that the Senate would meet in pro forma sessions only, “with no business conducted,” every three business days. (The Senate divided its break into two separate breaks, one from Dec. 17, 2011, to Jan. 3, 2012, and another from Jan. 3, 2012, to Jan. 23, 2012. January 3, 2012, marked the beginning of the second session of the 112th Congress. During the entire period, the Senate acted on only one measure: it passed a temporary extension to the reduced payroll tax on Dec. 23, 2011.)

President Obama’s Appointments

Republicans used this tactic to frustrate President Obama’s ability to fill vacancies with nominees that the Republicans opposed, or in offices or multimember boards that Republicans opposed. One of
Canning, and that the order was a nullity. The NLRB lacked a quorum when it issued its order against Noel.

The next day, on Jan. 4, 2012, President Obama filled the three board vacancies with recess appointments. President Obama appointed Sharon Block, Terence F. Flynn, and Richard F. Griffin to seats that had become vacant on Jan. 3, 2012, Aug. 27, 2010, and Aug. 27, 2011, respectively. The appointments completed the five-member Board.

On Feb. 8, 2012, a three-member panel of the board, composed of Block, Hayes, and Flynn, affirmed the findings of an NLRB administrative law judge that Noel Canning, a Pepsi-Cola distributor, refused to execute a written collective bargaining agreement incorporating terms, related to wages and pension, that the union and Noel Canning agreed upon during contract negotiations. The Administrative Law Judge found that Noel Canning’s refusal to execute an agreement violated §§ 8(a)(1) and (5) of the National Labor Relations Act. Noel Canning appealed to the U.S. Court of Appeals for the D.C. Circuit, challenging the NLRB’s decision on its merits, and arguing that the board did not act lawfully because it lacked a quorum. The court rejected Noel Canning’s arguments on the merits, but agreed that the NLRB lacked a quorum, and therefore did not act lawfully, because President Obama’s appointments violated the Recess Appointments Clause.

The board sought review in the Supreme Court, presenting two questions that had been decided by the court of appeals: whether the recess appointment power applies only when the Senate breaks between formal sessions of Congress (an inter-session recess), or also when it breaks during a session of Congress (an intra-session recess); and whether the president may use the recess appointment power only to fill vacancies that first came into existence during a recess, or also to vacancies that arose prior to a recess but continue during the recess. The Supreme Court granted review and, upon the request of Noel Canning, directed the parties also to address a third question, “whether the President’s recess-appointment power may be exercised when the Senate is convening every three days in pro forma sessions.”

The Supreme Court ruled unanimously in favor of Noel Canning. The Court held that President Obama exceeded his recess appointment authority in appointing the three members to the NLRB, and that his appointments were therefore invalid. In particular, all nine justices agreed that the Senate’s pro forma sessions between Dec. 17, 2011, and Jan. 23, 2013, were real, working sessions of the Senate, and that the three-day periods between these sessions were too short to constitute recesses for the purpose of the Recess Appointments Clause. This meant that the NLRB lacked a quorum when it issued its order against Noel Canning, and that the order was a nullity.

This sounds like a clear victory for Noel Canning (and the Senate) and resounding defeat for the president. But not so fast. As in several other major decisions this term, the justices’ agreement on the judgment masks much deeper, and more significant, disagreements in their reasoning. And in this case as much as any, it is the reasoning, not the judgment, that matters.

One sharp disagreement involved the scope of the recess appointment power. The majority opinion, written by Justice Breyer and joined by Justices Kennedy, Ginsburg, Sotomayor, and Kagan, reflected a remarkably broad Recess Appointments Clause, at least in theory. On the first two questions presented, the majority held that the president’s recess appointment power applied during both inter- and intra-session breaks of Congress, and that it applied both to vacancies that first came into existence during a recess and to those that arose prior to the break. This reading reflected the broadest possible meaning of the phrases “the recess” and “vacancies that may happen during the recess.” It was a clear victory for the president and a flat rejection of the much narrower reading proposed by Noel Canning and the D.C. Circuit.

The concurrence, written by Justice Scalia and joined by Chief Justice Roberts and Justices Thomas and Alito, argued for a much narrower reading. Justice Scalia wrote that the plain language of the Recess Appointments Clause meant that it applied only to inter-session recesses and only to vacancies that arose during the inter-session recess. Those situations are few and far between, so this reading would have dramatically restricted the president’s recess appointment power. (Indeed, this reading would have meant that scores of presidential recess appointments since the founding were invalid.) Justice Scalia also took the majority to task for crafting a presumption, not rooted in the text, that a 10-day break between sessions is too short to constitute a recess.

A second, more significant disagreement on the Court involved the method of constitutional construction. This was particularly important in this case, because the Court had never interpreted the Recess Appointments Clause; this was a case of first impression.

The majorit y emphasized history and practice, that is, how the branches have actually behaved over time with regard to recess appointments. Justice Breyer deliberately made the case for using historical practice as the principal method of constitutional interpretation, arguing that James Madison himself understood that historical practice was an important tool, and that the Court has turned to historical practice since its early days. Justice Breyer wrote that “this Court has treated practice as an important interpretive factor even when the nature or longevity of that practice is subject to dispute, and even when that practice began after the founding era.” He went on to exhaustively document the recess-appointment practices between the president and Congress since the founding, concluding that these practices reflect the broader understanding of the clause, even if they also reflect an understanding that a three-day break is not sufficient to constitute a recess and that a ten-day break is usually not sufficient to constitute a recess.

Justice Scalia, in contrast, focused on the “plain meaning” of the text and, to a lesser degree, his interpretation of the original understanding of the text. As a result, he gave an exceptionally narrow interpretation to the clause. He concluded that the plain
meaning of “the recess” refers only to inter-session recesses, and
that the plain meaning of “happen during the Recess” meant only
those vacancies that arose during an inter-session recess. (Justice
Scalia also challenged Justice Breyer’s interpretation of historical
practice on both points, but, because he said the clause was
unambiguous, he denied that it was necessary to turn to historical
practice at all.) Importantly, Justice Scalia’s concurrence did not join
any portion of Justice Breyer’s majority opinion, even though they
agreed on certain points and on the overall judgment. Indeed, but
for the bottom line, Justice Scalia’s concurrence reads like a dissent,
underscoring the fact that the real story of this case is about
constitutional interpretation.

Significance
On its face, the ruling is a blow to the executive appointments
power, in particular, the president’s ability to fill vacancies when
the Senate moves to obstruct the president by conducting pro forma
sessions during breaks. The ruling invites this kind of obstruction,
during both inter- and intra-sessions of the Senate and for all
vacancies, despite the majority’s otherwise very broad reading of the
clause. In short, the case could all but foreclose the president’s use
of the recess appointment power.

Viewed from the other end of Pennsylvania Avenue, the case
augments the congressional role in executive appointments.
The Senate already plays a significant role in regular, nonrecess
appointments. As described above, in the normal course of
things, the Senate has to approve presidential appointments to
executive offices. In the regular course, the Senate can frustrate
the president’s ability to fill vacancies by voting no, refusing
to schedule a vote, or filibustering

a nominee. (More on that last option below.) This case means that
the Senate can more easily use its power to check the executive’s
use of recess appointments, too. And more, it means that both the
Senate majority and minority can play a determinative role in recess
appoints. The majority can schedule pro forma sessions during
breaks, and the minority can ask the House to refuse to consent to
a Senate break of more than three days. (In this way, the case gives
power to the House, too, to check the president’s use of the recess
appointments power.)

But while the case represents a net shift of power to Congress on
executive appointments, it is not clear how important that is in
today's politics and constitutional practice. For one, the Senate
minority recently lost its principal tool for obstruction of executive
nominees when the Senate revised its filibuster rule. The new
practice prohibits the minority from filibusters on nominees for
executive office and the federal bench (except the Supreme Court).
This likely means that the president will have a much easier time
getting Senate approval for nominees in the ordinary course of
things (especially when the president’s party also controls the
Senate), and not have to resort to the recess appointment power.
Indeed, some high-profile nominees that the minority filibustered in
the regular appointments process were subsequently approved after
the rules change. (The Senate approved President Obama’s three
new nominees to the NLRB (but not Block, Hayes, or Flynn) through
the ordinary appointment process on July 30, 2013, well before the
rules change. The board, now with a quorum, is currently reviewing
its contested cases decided between Jan. 4, 2012, and Aug. 5, 2013,
the period when it lacked a quorum. The board could reissue,
modify, or set aside those decisions.) We will soon see all-too-
directly how this all plays out, when the Senate considers President
Obama’s nominee for the next NLRB vacancy, Sharon Block—the
same one—renominated on July 10, 2014.

For another, the Senate and the president may have options that
could restrict the Senate’s use of pro forma sessions to frustrate
the president’s use of the recess appointments power. For example,
under Senate rules, a single senator could probably move for a
quorum call during a pro forma session. (Remember that the Senate
usually lacks a quorum during a pro forma session, but that the
Senate rules presume a quorum is present, unless challenged by
a senator.) If the Senate cannot muster a quorum in response to a
quorum call, then a senator may move for adjournment. Depending
on the timing, this tactic might allow a single senator, or small
group of senators, to force the Senate out of a pro forma session
and back into recess, allowing the president to use the recess
appointments power.

As for the president, he or she has the constitutional authority to
call a session of Congress in an emergency. The president could
use this power to force the Senate back into a working session. But
the president probably could not force a vote on a nominee.
(When push comes to shove, the president probably could
not physically force senators to attend the session, anyway.)

But if the impact of the judgment might be muted, the Noel
Canning reasoning may have a tremendous impact on the way the
Court decides separation-of-powers cases, especially in areas, like
the Recess Appointments Clause, that it has not previously explored.
Given the opinions and the lineups, it is hard to overstate this. For
one, Justice Breyer’s majority opinion makes an explicit argument
for this approach—contested at length by Justice Scalia. It also
reads like an instruction manual on using history and practice (not
just text) in giving meaning to separation-of-powers provisions in
the Constitution. Given the explicit arguments between the two
opinions, and the lengthy and detailed reasoning in each, it is clear
that the justices themselves saw this case principally as a struggle
over constitutional interpretation.

Moreover, the case represents a classic bout between the Court’s
two heavyweights on constitutional interpretation. Justices Breyer
and Scalia are the two most vocal members of the Court on issues
of constitutional interpretation, each having written widely in
both academic and popular publications about their approaches.
They even have a road show, in which they argue publicly about
their competing approaches. As a result, Justice Breyer’s approach
should not have surprised anyone, given his prior writings, public
statements, and opinions. In particular, it should not have surprised
Justice Kennedy, who not only joined Justice Breyer’s opinion
in full, but, under the Court’s practice, almost certainly assigned
Justice Breyer to write it. Similarly, Justice Scalia’s approach
should not have surprised anyone. In particular, it should not

This case means that the Senate can more easily use its power to check the executive’s use of recess appointments. ... And more, it means that both the Senate majority and minority can play a determinative role in recess appoints.
have surprised Chief Justice Roberts, who not only joined Justice Scalia’s opinion in full, but probably assigned Justice Scalia to write it. (Under the Court’s practice, the senior justice in the majority assigns the opinion. Here, the judgment was unanimous, but the opinions were sharply split. The senior justice in the majority on the reasoning was Justice Kennedy; the senior justice in the concurrence was Chief Justice Roberts.) In short, the lineups in the opinions and likely assignors of each opinion suggest that the division on the Court is sharp and real—and that Justice Breyer’s approach clearly prevailed.

Justice Scalia summed it up:

The Court’s embrace of the adverse-possession theory of executive power (a characterization the majority resists but does not refute) will be cited in diverse contexts, including those presently unimagined, and will have the effect of aggrandizing the Presidency beyond its constitutional bounds and undermining respect for the separation of powers.

Indeed, we will see the Court return to constitutional interpretation in a separation-of-powers case as early as next term, when the Court considers Zivotofsky v. Kerry. That case asks which branch has the authority to designate the country of birth on a U.S. passport issued to a child born to U.S. citizens overseas. (The case has much deeper meaning and impact with respect to the U.S. recognition of sovereignty over Jerusalem.) The majority’s reasoning in Noel Canning will undoubtedly drive the Court’s approach in that case. And, as Justice Scalia wrote, it will undoubtedly influence the Court’s approach, and the political branches’ practices, in many cases, “including those presently unimagined,” for many years to come.

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When:
Sept. 22, 2014; 5 p.m.—7 p.m.

Where:
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Ronald Reagan Building and International Trade Center
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Four Supreme Court experts will provide their insights about the Court and what to expect in the upcoming session.

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For more details, please visit www.supremecourtpreview.org.
The U.S. Supreme Court’s 2013–2014 term was an important one for the First Amendment and the Roberts Court. This term, the Court continued its pattern of invalidating certain provisions in the Bipartisan Campaign Reform Act and campaign finance reform; limited the reach of an influential but controversial public employee speech decision from 2006; invalidated a state law restricting speech outside abortion clinics; applied qualified immunity to protect Secret Service agents; and addressed a pure Establishment Clause case for the first time in years.

**Campaign Finance**

A consistent feature of the Roberts Court has been the systematic dismantling of different provisions of the Bipartisan Campaign Reform Act (BCRA) and campaign finance reform. This term the Court invalidated the so-called aggregation limits in the BCRA, which set limits on the total amount of money a person could contribute to different federal and other political candidates.

The Court’s lineup in *McCutcheon v. FEC* (Docket No. 12-536) was a familiar one in this area with the five more-conservative justices—Chief Justice John Roberts and Associate Justices Antonin Scalia, Anthony Kennedy, Clarence Thomas, and Samuel Alito—voting to invalidate the aggregate limits. The other four justices—Justices Stephen Breyer, Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan—voted to uphold the measure.

Chief Justice Roberts authored a plurality opinion, as he often seems to do in free-speech cases. He emphasized the idea that speech in political campaigns is a core type of speech the First Amendment is designed to protect. “If the First Amendment protects flag burning, funeral protests, and Nazi parades—despite the profound offense such spectacles cause—it surely protects political campaign speech despite popular opposition,” he wrote. Roberts narrowly defined corruption as quid pro quo corruption and noted that the case involved a challenge to so-called “base” limits—i.e., limits on the amount of money a person can contribute to a specific candidate or committee—which remain in place.

Chief Justice Roberts refused to address whether the Court’s seminal campaign finance, free-speech case, *Buckley v. Valeo*, 424 U.S. 1 (1976), should be overruled. This inspired a separate concurring opinion from Justice Clarence Thomas, who for years has called for *Buckley* to be overruled.

Chief Justice Roberts refused to address whether the Court’s seminal campaign finance, free-speech case, *Buckley v. Valeo*, 424 U.S. 1 (1976), should be overruled. This inspired a separate concurring opinion from Justice Clarence Thomas, who for years has called for *Buckley* to be overruled. Justice Thomas continued his questioning of whether there should be differential treatment for political contributions and expenditures and lamented that the Court missed another opportunity to lift itself out of a “halfway house of its own design.”

Justice Breyer and his three colleagues warned that the plurality defined corruption too narrowly and ignored that campaign finance regulations “strengthen, rather than weaken, the First Amendment.” The dissenters warned that the “risk of special access and influence remains real” and a threat to democracy.

The Court remains deeply divided in this area of First Amendment jurisprudence, and more 5-4 rulings are likely in the near future unless there is a change in the Court’s composition.

**Public Employee Speech**

For many years the Court had a settled approach to public employee First Amendment cases. Public employees first had to show that their speech touched on a matter of public concern or importance, rather than merely being a private grievance. If an employee’s speech touched on a matter of public concern, then the Court balanced the employee’s right to free speech against the employer’s efficiency interests. This was known as the *Pickering-Connick* test after the Court’s precedents in *Pickering v. Bd. of Education*, 391 U.S. 563 (1968) and *Connick v. Myers*, 461 U.S. 138 (1983).

The Court changed the game in *Garcetti v. Ceballos* (2006), adding an additional threshold prong to the analysis by creating a categorical rule. Under *Garcetti*, if a public employee engaged in official, job-duty speech, then he or she has no First Amendment protection. Under *Garcetti*, it doesn’t matter how important the speech is or how much corruption the speech exposes, if the employee was speaking as an employee rather than as a citizen, then the employee has no First Amendment claim. Some plaintiffs’ attorneys referred to this phenomenon as being “Garcettized.”

The Court revisited public employee speech in *Lane v. Franks* (Docket No. 13-483), examining the case of a former community college official who was fired after he was subpoenaed and gave testimony in a criminal case of a former state representative that the subpoenaed employee had terminated. The former community college employee sued in federal court, contending that he was fired in retaliation for his firing of the former state representative and for his testimony in court. A federal district court in Alabama and the 11th U.S. Circuit Court of Appeals rejected the employee’s claims based in part on the rule from *Garcetti*. These courts reasoned that the employee was acting in his official capacity when he testified in court and was testifying about speech that he learned in his job.
The U.S. Supreme Court unanimously reversed in an opinion by Justice Sonia Sotomayor. The Court reasoned that the lower courts had applied Garcetti too broadly and noted that testifying in court was not part of the employee’s regular job duties. “Truthful testimony under oath by a public employee outside the scope of his ordinary job duties is speech as a citizen for First Amendment purposes,” Justice Sotomayor wrote. “That is so even when the testimony relates to his public employment or concerns information learned during that employment.”

Justices Scalia and Alito also concurred and noted that “the government should not have to tailor laws to accommodate speech by public employees, but rather the law should accommodate the employment interests of the public employer.”

However, the Court did grant the defendant qualified immunity, noting that the lower courts in the 11th Circuit were divided on how far Garcetti stretched.

Justice Clarence Thomas—joined by Justices Scalia and Alito—authored a concurring opinion that reiterated the narrow nature of the Court’s holding. Justice Thomas even wrote that the Court was not deciding whether the same result would occur in the case of public employees, such as police officers, who have to testify in court regularly as part of their duties.

Despite the qualified immunity aspect of the ruling and the concurring opinion, the opinion was a definite victory for public employees and a welcome move by the Court in light of how broadly Garcetti has been applied in some lower courts.

### Abortion

The Court unanimously determined that a 2007 Massachusetts law imposing a 35-foot buffer zone outside abortion clinics violated the First Amendment. Five members of the Court—in another opinion by Chief Justice Roberts—reasoned in McCullen v. Coakley (Docket No. 12-1168) that the 35-foot buffer zone to reproductive health facilities was not narrowly tailored to protect free-speech interests.

Chief Justice Roberts noted that the law prohibited speech—including the peaceful speech of the petitioners—on public streets, places reserved for heightened free-speech protections. The chief justice determined that the law was content-neutral and thus not subject to the strict scrutiny reserved for content and viewpoint-based laws. Applying intermediate scrutiny, the chief justice wrote that “the buffer zones burden substantially more speech than necessary to achieve the Commonwealth’s asserted interests.”

This inspired an impassioned concurrence from Justice Scalia—joined by Justices Kennedy and Thomas—who insisted that the Massachusetts law was content-based and should be evaluated under strict scrutiny. Justice Scalia continued his criticism of the Court’s jurisprudence in this area, writing “[i]t here is an entirely separate, abridged edition of the First Amendment applicable to speech against abortion.” He railed against the Court’s “abortion-speech-only jurisprudence.” Scalia noted the law applied to abortion clinics only and in effect impacted the speech of those who oppose abortion.

Justice Alito wrote a separate concurring opinion and went even further than Scalia. Alito reasoned that the law should be evaluated under strict scrutiny because it discriminates on the basis of viewpoint: “Speech in favor of the clinic and its work by employees and agents is permitted; speech criticizing the clinic and its work is a crime. This is blatant viewpoint discrimination.”

Thus, the Court was unanimous that the Massachusetts law was unconstitutional but bitterly divided over the proper standard of review to apply. Still, the chief justice’s recognition that even such a content-neutral law can violate the First Amendment may be important to litigants who file challenges to other laws the government defends as content-neutral.

### Qualified Immunity

Perhaps the most fundamental of all First Amendment free-speech principles is that the government must not engage in viewpoint discrimination by favoring some private speakers over others. A group of political protestors advanced a claim of viewpoint discrimination when they were removed further from then President George W. Bush than another group of pro-Bush supporters in Oregon on orders from Secret Service agents.

The Secret Service agents, however, advanced another important doctrine in constitutional law—qualified immunity. Under this principle, government officials are not liable for violations of constitutional rights unless they violated clearly established law. In Wood v. Moss (Docket No. 13-115), the U.S. Supreme Court unanimously ruled that two Secret Service agents were entitled to qualified immunity for their actions.

Justice Ginsburg reasoned that it was not clearly established to the Secret Service agents when they had to make an on-the-spot security determination that they had to keep anti-Bush and pro-Bush demonstrators equidistant from the president. She explained that “the fundamental right to speak secured by the First Amendment does not leave people at liberty to publicize their views whenever and however and wherever they please.”

### Freedom of Religion

The U.S. Supreme Court finally addressed a pure Establishment Clause case, affording the justices the opportunity what one commentator has called “ten tortured words”—“Congress shall make no law respecting an establishment of religion.” The area of church-state separation has proven divisive for decades, and this case was no exception.

In Town of Greece v. Galloway (Docket No. 12-696), the Court examined the constitutionality of a New York town’s practice of having prayer before town council meetings. Two women challenged the practice of having these largely Christian prayers before meetings before citizens.
A divided Court ruled 5-4 that the practice was constitutional under its precedent in *Marsh v. Chambers*, 463 U.S. 783 (1983). In *Marsh*, the Court ruled that chaplain-led prayer in the Nebraska Legislature—a practice conducted for well over a hundred years—did not violate the Establishment Clause. History and tradition carried the day in *Marsh* and did so again in the *Galloway* case.

In his majority opinion, Justice Kennedy emphasized history and the fact that the ratifiers of the First Amendment—the First Congress—approved of prayer in their halls in 1791. “*Marsh* stands for the proposition that it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted,” he explained. “Any test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change.”

Justice Thomas authored a concurring opinion in which he maintained his view that the Establishment Clause is a federalism provision and should not have been incorporated decades ago in *Ecclesiastical Corporations v. Bd. of Educ.*, 347 U.S. 1 (1954).

Justice Kagan authored the principal dissent. She noted that unlike prayer in the U.S. Congress or the state legislative prayer approved by the Court in *Marsh*, the prayers offered in the Town of Greece are specifically directed at citizens. She contended that “Greece’s prayers cannot simply ride on the constitutional coattails of the legislative tradition *Marsh* described.” The sectarian prayers offered before the town’s meeting come in a country of increasing religious pluralism.

On the last day of term, the Court decided another religion case—*Barrett v. Hobby Lobby, Inc.* (Docket No. 13-354) with the same 5-4 split. The majority ruled that for-profit corporations could opt out of the federal healthcare law’s mandate that they provide insurance coverage for all forms of approved birth control. Several corporations that have sincere religious objections to abortion contended that mandating them to provide coverage against their religious beliefs violates the Religious Freedom Restoration Act (RFRA), a 1993 law that provides that the government may not impose a substantial burden on a person’s religious liberty rights unless the government meets strict scrutiny.

While the decision involved the interpretation of a statute (the RFRA) rather than the First Amendment, the decision is significant not only for how the justices view religious liberty but also how they view the treatment of corporations versus individuals. Justice Alito in his majority opinion explained that RFRA applies to closely held corporations. “The companies in the cases before us are closely held corporations, each owned and controlled by members of a single family, and no one has disputed the sincerity of their religious beliefs,” he wrote.

Justice Ginsburg contended in her dissent that RFRA should not apply to for-profit corporations. She invoked the words of Chief Justice John Marshall that a corporation is “an artificial being, invisible, intangible, and existing only in contemplation of law.” She warned that the majority’s decision would cause “havoc.”

**Union Fees**

The U.S. Supreme Court returned once again to the area of mandatory union fees, this time in the context of an Illinois law that required home health care providers that took care of Medicaid patients to contribute union dues. In *Harris v. Quinn* (Docket No. 11-681), the Court invalidated the provision 5-4 on First Amendment grounds.

The state argued that the case should be governed by the “*Abood* principle” from the Court’s decision in *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977). In *Abood*, the Court ruled that unions could charge dues to nonmembers as long as the funds were germane to the collective-bargaining process and purely ideological.

In *Harris*, the Court refused to adopt “what amounts to a very significant expansion of *Abood*—so that it applies, not just to full-fledged public employees, but also to others who are deemed to be public employees solely for the purpose of unionization and the collection of an agency fee.” The majority stopped short of overruling *Abood*, but its continuing vitality remains to be seen.

**Conclusion**

The term’s First Amendment decisions reveal a Court at times united and at many times divided.


By early June of 2014, near the end of the Supreme Court’s October 2013 term, the Court’s criminal procedure docket remained relatively low profile. The Court had decided some interesting Fourth Amendment cases concerning third-party consent and anonymous 911 reports, as well as cases involving forfeiture and self-incrimination issues. But these decisions were fairly discrete and did not promise major shifts in criminal procedure jurisprudence.

But then Riley happened. A unanimous Supreme Court decided in Riley v. California, 134 S.Ct. 2473 (June 25, 2014), that the police cannot search an individual’s cell phone without a warrant incident to arrest—an important doctrinal question that had divided lower courts. Riley’s reasoning, moreover, suggests that the Court may protect digital privacy robustly under the Fourth Amendment, potentially inviting a new era of search and seizure jurisprudence. Riley alone, therefore, made this term a blockbuster for criminal procedure.

**Forfeiture**  
*Kaley v. United States*, 134 S Ct. 1090 (Feb. 25, 2014), considered two defendants’ procedural right to challenge a pre-trial forfeiture order that prevented access to property the defendants needed to retain counsel. A fairly complex body of law authorizes the government to forfeit a defendant’s property if it was acquired through criminal activity. The Supreme Court has held that the government may freeze a defendant’s property prior to trial by showing probable cause that the property is forfeitable, even if the seizure prevents the defendant from retaining counsel of choice. See United States v. Monsanto, 491 U.S. 600 (1989).

In *Kaley* the government relied on a grand jury indictment to seize the defendants’ property prior to trial. The defendants sought the right to challenge the grand jury’s probable cause determination at an adversarial judicial hearing. Otherwise, the defendants argued, they could not independently challenge the evidence that the government used to deprive them of property necessary to pay for a lawyer.

The Supreme Court rejected the defendants’ argument. The Court noted that the grand jury has the “inviolable” authority to determine whether probable cause exists for a person to be charged and held for trial. Unimpressed by the defendants’ concern for erroneous judgments and prosecutorial abuses, the Court perceived no reason why the grand jury’s probable cause determination should lose its presumptive authority on the question of forfeiture. On the contrary, the Court observed, the defendants’ proposed rule would create a unique niche for adversarial testing of probable cause, and could pit the judge against the grand jury on probable cause judgments, producing “strange and destructive consequences.” Accordingly, “the grand jury gets the final word.”

Although the Court characterized its decision as “straightforward,” the defendants’ position did find support in Chief Justice John Roberts’s dissent, which was joined by Justices Stephen Breyer and Sonia Sotomayor. Chief Justice Roberts expressed concern that this case will permit the government to hobble a defendant’s “primary weapon of defense—the attorney he seeks and trusts—by freezing assets he needs to pay his lawyer.” Unpersuaded by the downside of judicial hearings, Chief Justice Roberts instead emphasized “the importance of an independent bar as a check on prosecutorial abuse and government overreaching.”

Chief Justice Roberts’s concerns reflect the reality that a defendant has no right to testify before a federal grand jury and the government has no legally enforceable obligation to present exculpatory evidence to the grand jury. Yet, *Kaley* precludes judicial review of a grand jury’s finding of probable cause for forfeiture purposes.

**Self-Incrimination**  
Mental health experts frequently evaluate a defendant’s mental condition in criminal cases. The Supreme Court has held that the Fifth Amendment right against compelled self-incrimination

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**Other Criminal Procedure Decisions in the 2013 Term**

- A lawyer provided ineffective assistance of counsel to a client in a capital murder case when, because of the lawyer’s mistake about the availability of funding, the lawyer failed to request funding to replace an expert the lawyer himself deemed inadequate. See *Hinton v. Alabama*, 134 S Ct. 1081 (Feb. 24, 2014).
- A defendant was not entitled to federal habeas corpus relief over a state trial court’s refusal to give a no-adverse-inference instruction after the defendant failed to testify at the penalty phase of a capital case. See *White v. Woodall*, 134 S Ct. 1697 (April 23, 2014).
- A police officer was entitled to qualified immunity against a § 1983 claim for entering a plaintiff’s home without a warrant, because the law was not clearly established that the Fourth Amendment precluded police from entering the home without a warrant while in hot pursuit of a fleeing misdemeanant. See *Stanton v. Sims*, 134 S Ct. 3 (Nov. 4, 2013).
- A police officer did not use excessive force in violation of the Fourth Amendment by firing 15 shots into the vehicle of a fleeing suspect who engaged in “outrageously reckless driving” and who continued to flee even while the shots were fired. See *Plumhoff v. Rickard*, 134 S Ct. 2012 (May 27, 2014).

— Brooks Holland
prevents the prosecution from introducing evidence at trial from a court-ordered competency examination of the defendant. See Estelle v. Smith, 451 U.S. 454 (1981). But, if a defendant raises his or her mental condition as a defense at trial, the prosecution may rebut that evidence with evidence obtained during the pretrial mental health examination. See Buchanan v. Kentucky, 483 U.S. 402 (1987).

In Kansas v. Cheever, 134 S.Ct. 596 (Dec. 11, 2013), a procedurally complex capital murder case, Scott Cheever argued at his state trial that heavy methamphetamine use prevented him from premeditating when he killed a sheriff. Prior to trial, a federal court ordered Cheever to undergo a psychiatric examination because he filed notice that he planned to introduce expert evidence that methamphetamine intoxication negated his mens rea. The prosecution was permitted to introduce evidence from this examination at trial to rebut Cheever’s own expert evidence.

On appeal, the Kansas Supreme Court agreed with Cheever that this evidence violated Cheever’s self-incrimination rights, because the mental health examination was court-ordered and Cheever’s voluntary intoxication defense did not involve a “mental disease or defect” defense. A unanimous U.S. Supreme Court reversed.

When a defendant testifies in a criminal case, the Supreme Court observed, “the Fifth Amendment does not allow him to refuse to answer related questions on cross-examination.” This rule extends to Cheever’s case, where a defense expert testified that Cheever lacked the requisite mental state to commit the crime, thus permitting the prosecution to offer psychiatric evidence in rebuttal. “Any other rule,” the Court concluded, “would undermine the adversarial process, allowing the defendant to provide the jury, through an expert acting as a proxy, with a one-sided and potentially inaccurate view of his mental state.”

The Supreme Court rejected Cheever’s argument that the prosecution’s rebuttal right turns on the defendant’s request for the mental health examination, or whether the defense evidence at trial sought to establish a “mental disease or defect” defense. Rather, the right to rebuttal arises when the defendant introduces trial evidence of any “mental status” defense, including Cheever’s mens rea defense.

The Supreme Court in Cheever did not decide the constitutionally permissible scope of this rebuttal evidence—the Court remanded for this potential determination. But the Court made clear that in this context it will prioritize “the core truth-seeking function of the trial” over the privilege against self-incrimination.

Search and Seizure
The Supreme Court decided a pair of Fourth Amendment cases before deciding Riley. And unlike the unanimous decision in Riley, these two cases illustrated divisions on the Court over search and seizure issues.

In Fernandez v. California, 134 S.Ct. 1126 (Feb. 24, 2014), the Supreme Court returned to the topic of third-party consent—where someone other than the defendant consents to a warrantless search of the defendant’s premises. Fernandez narrowed a previous ruling that the consent of one person with common authority over premises does not justify a warrantless search if another occupant is present and objects. See Georgia v. Randolph, 547 U.S. 103 (2006).

The police came to Walter Fernandez’s home because they suspected him in a recent robbery. When the police arrived, they heard screams inside. The police knocked, and Fernandez’s girlfriend answered with Fernandez present. Fernandez refused the police request for consent to search. But the police removed Fernandez from the scene to arrest him for the robbery and for domestic assault, because his girlfriend exhibited injuries. When the police returned to the apartment an hour later, Fernandez’s girlfriend consented to a search, and the police found evidence from the robbery.

Fernandez argued that his objection to the search while present governed the police search an hour later, despite his girlfriend’s consent. The Supreme Court disagreed. Fernandez’s prior objection could not override his girlfriend’s later consent, the Court reasoned, because this rule would contravene a widely shared social expectation: in the absence of another occupant, the present occupant controls access to premises. Moreover, a continuing-objection rule would present too many practical problems about duration and scope. The police removal of Fernandez from the scene did not substitute for Fernandez’s required presence to object, because the police removal of Fernandez itself was “objectively reasonable”—to arrest Fernandez for domestic abuse and robbery. Therefore, the girlfriend’s consent obviated the need for a warrant.

Justice Ruth Bader Ginsburg dissented, joined by Justices Sotomayor and Elena Kagan. In the dissenters’ view, because Fernandez was present and refused to consent, “[t]his case calls for a straightforward application of Randolph.” Instead, the majority’s analysis “shrinks [Randolph] to petite size,” and “disparages the warrant requirement as inconvenient, burdensome, [and] entailing delay.” Noting the “specter of domestic abuse” in this case, the dissenters emphasized that exigent circumstances “would justify immediate removal of the abuser from the premises, as happened here,” but not the warrantless search over the once-present occupant’s objection.

Fernandez thus narrows the right of an occupant to veto a consent search to circumstances where the occupant remains physically present. The full breadth of occupant “presence,” however, may need to be clarified; presence could mean at the front door or, more broadly, on or near the premises.
has required evidence that corroborates the report’s reliability, such as an accurate prediction of the suspect’s future behavior.

In Navarette, the highway patrol received an anonymous 911 report that a pickup truck with a particular description and license plate had run the 911 caller off the road. A short time later, officers passed a truck that matched the description in the 911 report. The officers followed the truck for five minutes before stopping it, despite observing no erratic driving. A search revealed 30 pounds of marijuana in the truck. The officers arrested the driver of the truck, petitioner Lorenzo Prado Navarette, and the passenger, petitioner Jose Prado Navarette. The petitioners moved to suppress the marijuana, arguing that the anonymous 911 report did not suffice in reliability or detail to justify stopping him.

Writing for a majority, Justice Clarence Thomas found that the anonymous 911 report established reasonable suspicion of drunk driving sufficient to stop the vehicle. The 911 report, although anonymous, was more reliable than the bare-bones report in J.L. For instance, the caller reported eyewitness knowledge of the dangerous driving. In addition, the circumstances indicated the caller reported the incident soon after being run off the road. Plus, the 911 system “has some features that allow for identifying and tracing callers, and thus provide some safeguards against making false reports with immunity.”

The content of the 911 report further established reasonable suspicion that the reported driver was driving drunk. As the majority observed, “the accumulated experience of thousands of officers suggests these sorts of erratic behaviors are strongly correlated with drunk driving.” The officers’ failure to observe erratic driving did not negate this inference. Therefore, the anonymous 911 report authorized the officers to stop the truck.

Justice Antonin Scalia dissented, in an opinion joined by Justices Ginsburg, Sotomayor, and Kagan. Viewing this case as much more than a narrow decision about a traffic stop, Justice Scalia wrote:

> The Court’s opinion serves up a freedom-destroying cocktail consisting of two parts patent falsity: (1) that anonymous 911 reports of traffic violations are reliable so long as they correctly identify a car and its location, and (2) that a single instance of careless or reckless driving necessarily supports a reasonable suspicion of drunkenness … [¶] After today’s opinion, all of us on the road, and not just drug dealers, are at risk of having our freedom of movement curtailed on suspicion of drunkenness, based on a phone tip, true or false, of a single instance of careless driving.

Justice Scalia’s claim that this case “serves up a freedom-destroying cocktail” may or may not prove accurate. At a minimum, however, prosecutors will have broader authority to argue that a Terry stop based on an anonymous 911 report was reasonable.

**Cell Phones and Digital Privacy**

A case involving the power of the police to search an individual’s cell phone, **Riley** addressed a subject so embedded in modern life that the decision is difficult to characterize solely as a Fourth Amendment holding. But, invoking the Fourth Amendment right to be secure against unreasonable searches and seizures, the Supreme Court protected cell phones from routine warrantless searches following an arrest. As search and seizure expert Professor Orin Kerr observed, “This is a bold opinion.” A. Liptak, “Major Ruling Shields Privacy of Cellphones,” N.Y. Times (June 25, 2014).

**Riley** consolidated two cases where the police searched an individual’s cell phone without a warrant following his arrest. David Leon Riley had a modern “smartphone,” with comprehensive mobile computing capability, on which the police found photos and other evidence linking Riley to a shooting. Brima Wurie had a lower-tech “flip phone.” The police used address book information from Wurie’s phone to obtain a search warrant to search Wurie’s apartment for drugs and related evidence. Riley and Wurie each argued that the police needed a warrant to search the cell phones.

The outcome hinged on one of the most common sources of police authority for a warrantless search: the search incident to arrest rule. Under this rule, the police, without a warrant, may search any person who is lawfully arrested, and also may search any containers immediately associated with the arrestee—such as a wallet or a purse. The Supreme Court has based this categorical search authority on an individual’s reduced expectation of privacy at arrest, and on law enforcement’s interests in ensuring that arrested persons cannot destroy or hide evidence or access weapons.

The question in **Riley** was whether cell phone searches implicate unique privacy interests that outweigh the justifications supporting this categorical search authority, and instead require case-by-case judicial approval through a search warrant. The Supreme Court had not previously distinguished between types of “containers” in upholding this search authority, see New York v. Belton, 453 U.S. 454 (1981), but recent decisions suggested the Court could go either way in **Riley**. For example, emphasizing an arrestee’s reduced privacy expectations, the Court has upheld strip searches at jails following arrest for even minor offenses, see Florence v. Bd. of Chosen Freeholders, 132 S.Ct. 1520 (2012), and approved DNA testing with felony arrests. See Maryland v. King, 133 S.Ct. 1958 (2013). On the other hand, the Court has required a warrant for a compelled blood-alcohol test incident to a drunk driving arrest, Missouri v. McNeely, 133 S.Ct. 1552 (2013), and constrained the search incident to arrest rule as applied to vehicles. See Arizona v. Gant, 556 U.S. 350 (2009). Moreover, Justices have raised privacy concerns regarding comprehensive governmental surveillance. See e.g., United States v. Jones, 132 S.Ct. 945 (2012) (Sotomayor, J., concurring).

In a unanimous opinion authored by Chief Justice Roberts, the Supreme Court held in **Riley** that the search incident to arrest rule does not justify a warrantless search of an arrestee’s cell phone. In reaching this decision, the Court emphasized both law enforcement’s reduced interests in warrantless searches of cell phones incident to arrest and the significant privacy interests that individuals maintain in a cell phone.
Regarding law enforcement’s interests, the Supreme Court observed that once an officer has secured a cell phone from an arrestee, “digital data on a cell phone itself cannot be used as a weapon.” An officer’s authority to secure the cell phone at arrest also undermines the concern about lost or destroyed evidence on the phone. The arrestee will not be able to delete data from a secured cell phone. And, the police have ready means of ensuring that the secured cell phone is not remotely wiped, such as by using “Faraday bags” or disconnecting the cell phone from the network.

Against these diminished law enforcement interests, the Supreme Court identified unique privacy interests in a cell phone. Rejecting the government’s position that a cell phone search is materially indistinguishable from searches of personal items previously upheld during searches incident to arrest, the Court commented:

That is like saying a ride on horseback is materially indistinguishable from a flight to the moon. Both are ways of getting from point A to point B, but little else justifies lumping them together. Modern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse … [¶] Cell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee’s person.

Quantitatively, modern cell phones can store vast amounts of diverse and comprehensive data spanning months or years of a person’s life. Moreover, cell phone use has become tremendously pervasive, according to polling data. “Allowing the police to search such records on a routine basis,” the Court surmised, “is quite different from allowing them to search a personal item or two in the occasional case.”

Qualitatively, cell phones differ in the kind of personal information they reveal, such as financial information, medical history, political views, religious practices, romantic life, and detailed location history. Cell phones “can form a revealing montage of the user’s life,” the Court explained, that “would typically expose the government to far more than the most exhaustive search of a house.”

Showing some techie chops, the Supreme Court also highlighted the importance of cloud computing to cell phone privacy expectations. The government’s analogy to other “containers” subject to search incident to arrest, the Court asserted, “crumbles entirely when a cell phone is used to access data located elsewhere, at the tap of a screen.” Apparently accepting that this remotely stored data is protected under the Fourth Amendment, the Court rejected the government’s proposals for compartmentalizing law enforcement searches of locally and remotely stored data.

In light of this balance of interests, the Supreme Court’s “answer to the question of what police must do before searching a cellphone seized incident to arrest is accordingly simple: get a warrant.” The Court acknowledged that cell phones have become a common repository for criminal evidence, and even a tool for criminality itself. Yet, the Court concluded, “[p]rivacy comes at a cost.”

Riley therefore clarifies the much-debated landscape of cell phone searches incident to arrest. Riley also appears to apply directly to searches of tablets, laptops, and other comparable digital devices. The police still may search these devices, but presumptively first must obtain judicial approval through a warrant.

Importantly, Riley is limited to searches incident to arrest. Other exceptions to the warrant requirement may justify a warrantless cell phone search. For instance, the Supreme Court repeatedly emphasized that a case-specific exigency would permit a warrantless cell phone search. These devices potentially may be searched without a warrant at the border, at airports, and at other sensitive locations where routine security searches are permitted. Riley also did not address whether the police may search a cell phone without a warrant under the “automobile exception,” which permits a warrantless search of a vehicle and any containers in the vehicle due not to an individual’s arrest, but rather probable cause that the vehicle or container holds seizable evidence. See California v. Acevedo, 500 U.S. 565 (1991).

Riley further did not indicate how the Supreme Court will rule on other digital privacy claims, such as challenges to NSA surveillance programs. Professor Kerr opined that Riley “says we are in a new digital age. You can’t apply the old rules anymore.” Liptak, “Major Ruling,” supra. In a footnote to Riley, however, the Supreme Court noted carefully, “[T]hese cases do not implicate the question whether the collection or inspection of aggregated digital information amounts to a search under other circumstances.” Nevertheless, privacy advocates have read Riley’s strong language about digital privacy to signal that the Fourth Amendment will govern surveillance programs. See e.g., Josh Gerstein, “SCOTUS Cellphone Ruling Resonates in NSA Fight,” Politico (June 25, 2014).

Time will tell about the full impact of Riley. But Riley at a minimum has decisively reshaped a major Fourth Amendment rule to meet modern privacy expectations in cell phones and other personal digital devices.

Conclusion
The Supreme Court’s October 2013 term had its share of high-profile decisions that were contentious and complex. Riley, however, gave us that much rarer creature of a high-profile decision that was unanimous and clear, at least in its immediate result. Future cases will reveal whether and how this unanimity may fracture as the Court decides the full nature and breadth of digital privacy. Justice Samuel Alito, for one, indicated in Riley that he may defer to legislative expertise in this area. But for now, the Court boldly has endorsed digital privacy under the Fourth Amendment.

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Looking Ahead: What’s on the Docket for the 2014–2015 Term?
by Mark A. Cohen

At press time, the U.S. Supreme Court had accepted review of a little more than three dozen cases for the 2014–2015 term. Assuming the Court issues roughly the same number of cases this term as it did last term (i.e., 75), that means that roughly half of the Court’s dance card is full.

A quick review of the 2014–2015 docket reveals a potpourri of interesting cases, but nothing yet with the heft of a Burwell v. Hobby Lobby, McCutcheon v. Federal Election Commission, or Schuette v. Coalition to Defend Affirmative Action. But fear not, the docket is young, and it’s not unusual for the bigger cases to be added a little farther down the pike.

Meanwhile, there are some tasty tidbits for Court watchers to feed on. The following is just a sampling of interesting cases on the 2014–2015 docket. As always, PREVIEW will have detailed expert analysis of every single case argued.

Religion and Prisoners’ Rights
The Court will once again explore the thorny area of what happens when a law that appears neutral on its face clashes with a sincerely held religious belief. Holt v. Hobbs involves a claim by a devout Muslim prisoner against the Arkansas Department of Corrections over its policy against beards.

The prisoner, arguing he should be able to grow a beard as dictated by his sincere religious beliefs, has asked the corrections facility to waive its policy and allow him to grow a beard. The prisoner, who has limited his request to growing a half-inch beard, brought his claim under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C., Sec. 2000cc et seq. RLUIPA’s text says that a substantial burden on a prisoner’s exercise of religion can be justified only if imposition of that burden on the prisoner is the least restrictive means of furthering a compelling government interest.

In response, prison officials offer a number of reasons in support of the no-beard policy, including assertions that prisoners may hide contraband in their beards and that an escaped prisoner may shave off facial hair to alter his appearance. The prisoner countered that a half-inch beard would be too short to hide anything in and that there is no record of an escaped prisoner ever using the appearance-changing trick prison officials say they are concerned about.

The RLUIPA’s standard of “substantial burden” and requirement that the restriction be “the least restrictive alternative” echo provisions in the Religious Freedom Restoration Act applied in Burwell v. Hobby Lobby. … The cases—one involving the religious rights of prisoners and the other the religious rights of closely held corporations—provide an interesting juxtaposition.

Criminal Procedure
In Heien v. North Carolina, the Court has been called on to decide whether a police officer’s mistake of law can provide the individualized suspicion required under the Fourth Amendment to justify a traffic stop.

The defendant was pulled over by police in North Carolina for driving a vehicle with a faulty brake light. During the traffic stop, the officer became suspicious that the vehicle contained contraband. He asked to search the car and was given permission. The officer found, among other things, cocaine. Noting that state law requires only one operational brake light and does not make it a violation for one of the brake lights to be nonoperational, the defendant argued the stop violated his Fourth Amendment rights, and that the evidence seized as a result must be suppressed.

The North Carolina Supreme Court rejected the Fourth Amendment claim. “After considering the totality of the circumstances, we hold that [the officer’s] mistake of law was objectively reasonable and that he had reasonable suspicion to stop the vehicle in which defendant was a passenger,” the state court said.

If the U.S. Supreme Court agrees that police officers’ objectively reasonable belief that they are acting legally is enough to validate a search, such a holding could have broad implications that stretch beyond a traffic stop. The defendant points to the ancient maxim that ignorance of the law is no excuse.

Employment Cases
Integrity Staffing Solutions, Inc. v. Busk is a case likely to be watched closely by any hourly worker who is forced to undergo screening procedures as part of his or her job. The question is whether time spent in those screenings is compensable under the Fair Labor Standards Act (FLSA). The Busk case was brought by hourly employees at a warehouse who had to go through post-shift checks of roughly 25 minutes so that their employer could check for employee theft. The Ninth Circuit allowed the FLSA claim to proceed.

This case comes on the heels of another FLSA case decided last term, Sandifer v. United States Steel Corp. In Sandifer, the U.S. Supreme Court unanimously held that employees need not be compensated for time spent donning and doffing safety clothing.

In another employment-related action, Young v. United Parcel, the Court has been asked to consider whether a female UPS driver can pursue a pregnancy discrimination claim for being placed on unpaid leave because she was regarded as disabled. UPS drivers have to be able to lift moderately heavy loads. The driver argued that she should have been given the option of transfer to lighter duty, as some UPS workers regarded as disabled are allowed to do, but not pregnant workers. The Court has not heard a lot of pregnancy discrimination claims, so it will be interesting to see how it handles this one.
Foreign Policy Brouhaha
The case of Zivotofsky v. Kerry has the words “political hot potato” written all over it. The case was brought by the parents of Menachem Binyamin Zivotofsky, who was born in Jerusalem on Oct. 17, 2002. The State Department, pursuant to a long-standing presidential policy, only puts the city name as the place of birth when issuing passports for those born in Jerusalem. The parents want their son’s passport to indicate that he was born in Israel.

Typically the parents would be out of luck because the executive enjoys broad discretion over passports and foreign policy matters. However, in early 2002, Congress passed a law that requires the recording of “Israel” as the birthplace of a child born to American citizens in Jerusalem upon request. The Zivotofskys argue that the secretary of state must comply with that law and issue a passport with “Israel” listed at Menachem’s birthplace.

Predictably, this has turned into a separation-of-powers case pitting the executive branch against the legislative one. The executive branch argues that Congress unconstitutionally infringed on the president’s power to recognize foreign sovereigns when it passed the law—Section 214(d) of the Foreign Relations Authorization Act.

This case has the potential to garner a lot of media attention, particularly given the current geopolitical climate.

Dental Dispute
North Carolina Board of Dental Examiners v. Federal Trade Commission involves a Federal Trade Commission action against a state dental examiner’s board for driving nondenistry providers out of the teeth-whitening service market. The board, composed mostly, but not entirely, of dentists, contended that those services were dental in nature, and sent cease-and-desist letters to the non-dentists accusing them of engaging in the unlicensed practice of dentistry.

The question the Supreme Court has been called on to resolve is whether, for purposes of the state-action exemption from federal antitrust law, an official state regulatory board may properly be treated as a “private” actor simply because, pursuant to state law, a majority of the board’s members are also market participants who are elected in their official positions by other market participants.

Depending on how the Court rules, this case could have significant implications for state regulatory boards. The American Dental Association and numerous other medical associations argue in their amicus brief: “If this case is permitted to stand, the foreseeable result is that many highly qualified practitioners who would otherwise be willing to serve on boards will either resign or refuse to accept office lest they face significant personal antitrust exposure.”

National Security and Whistleblowing
Department of Homeland Security v. MacLean would be a classic whistleblower claim if the employee blowing the whistle had not been a federal air marshal and had the information he revealed not been sensitive security information about cuts to the number of marshals on certain flights. Robert J. MacLean argued he was acting out of concern for public safety when he leaked to a reporter the story about the reductions in marshals on flights. When the TSA discovered MacLean was the leaker, the agency removed him from his job. MacLean argued his rights were violated under the Whistleblower Protection Act (WPA).

The Supreme Court has been asked to decide whether the statutory protections of the WPA, which are inapplicable when an employee intentionally makes a disclosure specifically prohibited by law, can bar an agency from taking an enforcement action against an employee who discloses Sensitive Security Information (SSI). (The Federal Circuit found that the disclosure of SSI violates an agency regulation rather than a law, and therefore MacLean was not precluded from pursuing a whistleblower action.)

Enron and Shredding Fish
What does Enron’s meltdown have to do with a commercial fisherman in Florida carrying a load of red grouper? A lot to John Yates, a commercial fisherman in Florida charged with violating the anti-shredding provision of the Sarbanes-Oxley Act.

When Enron was under investigation for the fraud that would eventually lead to its downfall, its auditor, accounting firm Arthur Andersen, engaged in a document-shredding campaign to destroy evidence. To avoid that sort of thing in the future, Congress included in the Sarbanes-Oxley Act strict penalties for evidence destruction committed to thwart federal investigations.

Enter Mr. Yates, who, while commercially fishing off the Florida Coast had his boat boarded by a fish and wildlife official to have the boat inspected for safety equipment. The official identified 72 of the 3,000 fish catch as undersized and ordered Yates to return the boat with the fish to dock for further inspection. Prior to the inspection, no one was supposed to tamper with the fish. When the boat arrived at port, only 69 of the 72 undersized fish could be located.

Yates was later charged with destruction of evidence to impede a federal investigation in violation of 18 U.S.C. § 1519, which makes it a crime for anyone who “knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object” with the intent to impede or obstruct a federal investigation. The question for the Supreme Court is whether Yates was deprived of fair notice that the statute applied to conduct with fish.

Sum Up
There are a lot of intriguing cases already on the docket. The question remains which major social issues the Court might choose to tackle this term. A second question is whether the Court will retain its high unanimity percentage in issuing opinions (this year about two-thirds of cases were decided unanimously). Stay tuned, fasten your seat belt, and, of course, keep reading PREVIEW!
CASE HIGHLIGHTS:
SUMMARIES OF ALL
OPINIONS ISSUED IN THE
2013–2014 TERM
Docket No. 12-1182
Reversed and Remanded:
The District of Columbia Circuit

Argued: December 10, 2013
Decided: April 29, 2014
Analysis: See ABA PREVIEW 112 Issue 3

Overview: The Clean Air Act directs the EPA to establish national ambient air quality standards (NAAQS) for pollutants at levels that will protect public health. A group of state and local governments, joined by industry and labor groups, petitioned for review of the Transport Rule in the D.C. Circuit. The rule curbs the release of certain pollutants in 27 upwind states. The D.C. Circuit vacated the rule in its entirety, holding that the EPA's actions exceeded the agency's statutory authority in two respects. Acknowledging that the EPA's federal implementation plan (FIP) authority is generally triggered when the agency disapproves a state implementation plan (SIP), the court was nevertheless concerned that states would without prior EPA guidance be incapable of fulfilling the Good Neighbor Provision, which requires that SIPs contain “adequate” provisions prohibiting emissions that will “contribute significantly” to another state's nonattainment of health-based air quality standards. The court thus concluded that the EPA must give states a reasonable opportunity to allocate their emission budgets before issuing FIPs. The court also found the agency's two-part interpretation of the Good Neighbor Provision unreasonable, concluding that the EPA must disregard costs and consider exclusively each upwind State's physically proportionate responsibility for air quality problems downwind.

Issue: Does the Clean Air Act command that states be given a second opportunity to file a SIP after the EPA has quantified the state's interstate pollution obligations?
No. The text of the statute supports the EPA's position.

From the opinion by Justice Ginsburg (joined by Chief Justice Roberts, and Justices Kennedy, Breyer, Sotomayor, and Kagan): The D.C. Circuit … found an unwritten exception to this strict time prescription for SIPs aimed at implementing the Good Neighbor Provision. Expecting any one State to develop a “comprehensive solution” to the “collective problem” of interstate air pollution without first receiving EPA's guidance was, in the Court of Appeals' assessment, “set[ting] the States up to fail.” … The D.C. Circuit therefore required EPA, after promulgating each State's emission budget, to give the State a “reasonable” period of time to propose SIPs implementing its budget. … However sensible (or not) the Court of Appeals' position, a reviewing court's “task is to apply the text [of the statute], not to improve upon it.”

Dissenting: Justice Scalia (joined by Justice Thomas)
Justice Alito took no part in the decision of this case.

Arbitration
BG Group PLC v. Republic of Argentina

Docket No. 12-138
Reversed: The District of Columbia Circuit

Argued: December 2, 2013
Decided: March 5, 2014
Analysis: See ABA PREVIEW 128 Issue 3

Overview: A bilateral investment treaty was signed by Argentina and the United Kingdom to ensure foreign investors would be treated fairly and equitably. BG Group PLC, a United Kingdom company, invested in an Argentina-based gas transportation and distribution company. In this case, the Supreme Court was asked to determine whether an arbitral panel had authority to determine whether an investment treaty dispute between BG Group PLC and the Republic of Argentina was arbitrable.

Issue: In disputes involving a multistage dispute resolution process, does a court or an arbitral panel determine whether a precondition to arbitration has been satisfied?

No. A court of the United States, in reviewing an arbitration award made under the treaty, should interpret and apply “threshold” provisions concerning arbitration using the framework developed for interpreting similar provisions in ordinary contracts. Under that framework, the local litigation requirement is a matter for arbitrators primarily to interpret and apply. Courts should review their interpretation with deference.

From the opinion by Justice Breyer (joined by Justices Scalia, Thomas, Ginsburg, Alito, and Kagan and joined by Justice Sotomayor except for Part IV-A-1): A treaty may contain evidence that shows the parties had an intent contrary to our ordinary presumptions about who should decide threshold issues related to arbitration. But the treaty before us does not show any such contrary intention.

Concurring in part: Justice Sotomayor
Dissenting: Chief Justice Roberts (joined by Justice Kennedy)

Aviation and Transportation Security Act
Air Wisconsin Airlines Corp. v. Hoeper

Docket No. 12-315
Reversed and Remanded:
The Supreme Court of Colorado

Argued: December 9, 2013
Decided: January 27, 2014
Analysis: See ABA PREVIEW 125 Issue 3

Overview: Petitioner contacted the Transportation Security Administration (TSA) to report that one of petitioner's employees posed a potential threat. After investigating, the TSA concluded that the employee was, in fact, not a threat. The employee then sued petitioner in Colorado state court for defamation, among other things. The trial court rejected petitioner's claim to be immune from the suit under the Aviation and Transportation Security Act (ATSA), and a jury found in the employee's favor. The decision was affirmed on appeal. Granting certiorari, the Supreme Court limited the issue to whether a court may deny an air carrier statutory immunity under ATSA for reporting a potential threat.
without first determining that the air carrier’s report was materially false.

**Issue:** When an air carrier reports suspicious actions regarding air safety to appropriate authorities, may the immunity provided to such a carrier under the ATSA be denied without a determination that the report was materially false?

No. ATSA immunity may not be denied to materially true statements; in this case, Air Wisconsin is entitled to immunity as a matter of law.

**From the opinion by Justice Sotomayor** (joined by Chief Justice Roberts and Justices Kennedy, Ginsburg, Breyer, and Alito and in which Justices Scalia, Thomas, and Kagan joined as to Parts I, II, and III-A): By incorporating the actual malice standard into § 44941(b), Congress meant to give air carriers the “breathing space” to report potential threats to security officials without fear of civil liability for a few inaptly chosen words. … To hold Air Wisconsin liable for minor misstatements or loose wording would undermine that purpose and disregard the statutory text.

**Concurring in part and dissenting in part:** Justice Scalia (joined by Justices Thomas and Kagan)

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**Bankruptcy**

**Executive Benefits Insurance Agency v. Arkison**

**Docket No. 12-1200**

**Affirmed: The Ninth Circuit**

**Argued:** January 14, 2014

**Decided:** June 9, 2014

**Analysis:** See ABA *PREVIEW* 156 Issue 4

**Overview:** Bellingham Insurance Agency, Inc. (BIA), filed a voluntary chapter 7 bankruptcy petition. Respondent Peter Arkison, the bankruptcy trustee, filed a complaint in the Bankruptcy Court against petitioner Executive Benefits Insurance Agency (EBIA) and others alleging the fraudulent conveyance of assets from BIA to EBIA. The Bankruptcy Court granted summary judgment for the trustee. EBIA appealed to the District Court, which affirmed the Bankruptcy Court’s decision after de novo review and entered judgment for the trustee. While EBIA’s appeal to the Ninth Circuit was pending, this Court, in *Stern v. Marshall*, held that Article III did not permit a Bankruptcy Court to enter final judgment on a counterclaim for tortious interference, even though final adjudication of that claim by the Bankruptcy Court was authorized by statute. EBIA moved to dismiss its appeal for lack of jurisdiction. The Ninth Circuit reversed EBIA’s motion and affirmed. It acknowledged the trustee’s claims as “Stern claims,” i.e., claims designated for final adjudication in the bankruptcy court as a statutory matter, but prohibited from proceeding in that way as a constitutional matter. The Court of Appeals nevertheless concluded that EBIA had impliedly consented to jurisdiction. The Court of Appeals also observed that the Bankruptcy Court’s judgment could instead be treated as proposed findings of fact and conclusions of law, subject to de novo review by the District Court.

**Issues:** Does Article III permit the exercise of the judicial power of the United States by bankruptcy courts on the basis of litigant consent, and, if so, is “implied consent” based on a litigant’s conduct sufficient to satisfy Article III?

**Yes.** Here, the District Court’s de novo review of the Bankruptcy Court’s order and entry of its own valid final judgment cured any potential error in the Bankruptcy Court’s entry of judgment.

**From the unanimous opinion by Justice Thomas:** At bottom, EBIA argues that it was entitled to have an Article III court review de novo and enter judgment on the fraudulent conveyance claims asserted by the trustee. In effect, EBIA received exactly that.

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**Bankruptcy**

**Law v. Siegel**

**Docket No. 12-5196**

**Reversed and Remanded:**

**The Ninth Circuit**

**Argued:** January 13, 2014

**Decided:** March 4, 2014

**Analysis:** See ABA *PREVIEW* 196 Issue 4

**Overview:** In Chapter 7 bankruptcy, a debtor keeps certain statutorily defined “exempt” assets, while all other assets are sold to pay creditors. In exchange, most of the debtor’s debts are discharged. In this case, the Court was asked to decide whether a debtor may be sanctioned by the loss of exempt assets as an equitable remedy for trying to fraudulently claim excess exemptions or hide assets, with the forfeited assets awarded to the bankruptcy estate to recover litigation costs arising from the debtor’s misconduct.

**Issue:** Does a bankruptcy court have the authority, under Bankruptcy Code § 105 or its inherent power to prevent abuse of the judicial process, to sanction a debtor who engages in egregious misconduct by
attempting to wrongly inflate exemptions or hide assets during the bankruptcy case, by surcharging the debtor’s exempt assets to compensate the bankruptcy trustee for the costs of litigation arising directly from the debtor’s misconduct?

No. A Bankruptcy Court exceeds the limits of its authority when it orders the loss of a debtor’s exempt assets as an equitable remedy; in this case, the court exceed its authority in ordering that the debtor’s $75,000 homestead exemption be made available to pay the bankruptcy trustee’s attorney’s fees.

From the unanimous opinion by Justice Scalia: We acknowledge that our ruling forces Siegel to shoulder a heavy financial burden resulting from Law’s egregious misconduct, and that it may produce inequitable results for trustees and creditors in other cases. We have recognized, however, that in drafting the provisions of § 522, “Congress balanced the difficult choices that exemption limits impose on debtors with the economic harm that exemptions visit on creditors.” Schwab v. Reilly, 560 U.S. 770 (2010). The same can be said of the limits imposed on recovery of administrative expenses by trustees. For the reasons we have explained, it is not for courts to alter the balance struck by the statute.

Campaign Finance
McCutcheon et al. v. Federal Election Commission

Docket No. 12-536
Reversed and Remanded:
The U.S. District Court for the District of Columbia

Argued: October 8, 2013
Decided: April 2, 2014
Analysis: See ABA PREVIEW 28 Issue 1

Overview: The Federal Election Campaign Act of 1971 (FECA), as amended by the Bipartisan Campaign Reform Act of 2002 (BCRA), imposes two types of limits on campaign contributions. Base limits restrict how much money a donor may contribute to a particular candidate or committee while aggregate limits restrict how much money a donor may contribute in total to all candidates or committees. 2 U.S.C. § 441a. In the 2011–2012 election cycle, appellant McCutcheon contributed to 16 different federal candidates, complying with the base limits applicable to each. He alleges that the aggregate limits prevented him from contributing to 12 additional candidates and to a number of noncandidate political committees. He also alleges that he wishes to make similar contributions in the future, all within the base limits. McCutcheon and appellant Republican National Committee filed a complaint before a three-judge District Court, asserting that the aggregate limits were unconstitutional under the First Amendment. The District Court denied their motion for a preliminary injunction and granted the Government’s motion to dismiss. Assuming that the base limits appropriately served the Government’s anticorruption interest, the District Court concluded that the aggregate limits survived First Amendment scrutiny because they prevented evasion of the base limits.

Issue: Are the aggregate contribution limits a violation of First Amendment Rights?

Yes. To require one person to contribute at lower levels because he wants to support more candidates or causes is to penalize that individual for robustly exercising his First Amendment rights.

From the opinion by Chief Justice Roberts (joined by Justices Scalia, Kennedy, and Alito): The Government has a strong interest … in combatting corruption and its appearance. We have, however, held that this interest must be limited to a specific kind of corruption—quid pro quo corruption—in order to ensure that the Government’s efforts do not have the effect of restricting the First Amendment right of citizens to choose who shall govern them.

Concurring: Justice Thomas

From the dissenting opinion by Justice Breyer (joined by Justices Ginsburg, Sotomayor, and Kagan): Where enough money calls the tune, the general public will not be heard. Insofar as corruption cuts the link between political thought and political action, a free marketplace of political ideas loses its point. That is one reason why the Court has stressed the constitutional importance of Congress’ concern that a few large donations not drown out the voices of the many.
the first place. In all but the most unusual cases, therefore, “the interest of justice” is served by holding parties to their bargain.

**Civil Procedure**

*DaimlerChrysler AG v. Bauman*

Docket No. 11–965
Reversed: The Ninth Circuit

Argued: October 15, 2013
Decided: January 14, 2014
Analysis: See ABA PREVIEW 23 Issue 1

**Overview:** This appeal arose out of alleged human rights violations committed in Argentina between 1976 and 1983. The case at issue concerned the extraterritorial reach of American courts in litigation brought by foreign plaintiffs for acts committed by foreign defendants in foreign countries. The Court was asked to evaluate whether an American state court, consistent with the Due Process Clause of the Fourteenth Amendment, can exert general personal jurisdiction over a foreign corporation for alleged human rights violations in another country, based on the fact that an indirect corporate subsidiary performs services on behalf of the corporation in an American state.

**Issue:** Can an American state court, consistent with the Due Process Clause of the Fourteenth Amendment, exert general personal jurisdiction over a foreign corporation for alleged human rights violations in a foreign country, based on the fact that the defendant’s indirect corporate subsidiary performs services on behalf of the foreign corporation in an American state?

**No.** DaimlerChrysler is not amenable to suit in American state court for injuries allegedly caused by the conduct of an indirect corporate subsidiary that took place entirely outside the United States.

**From the opinion by Justice Ginsburg**

(joined by Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, Breyer, Alito, and Kagan): Here, neither Daimler nor MBUSA is incorporated in California, nor does either entity have its principal place of business there. If Daimler’s California activities sufficed to allow adjudication of this Argentina-rooted case in California, the same global reach would presumably be available in every other State in which MBUSA’s sales are sizable. Such exorbitant exercises of all-purpose jurisdiction would scarcely permit out-of-state defendants “to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.”

**Concurring in judgment:** Justice Sotomayor

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**Civil Procedure**

*Halliburton Co. et al. v. Erica P. John Fund*

Docket No. 13–317
Vacated and Remanded: The Fifth Circuit

Argued: March 5, 2014
Decided: June 23, 2014
Analysis: See ABA PREVIEW 216 Issue 5

**Overview:** Investors can recover damages in a private securities fraud action only if they prove that they relied on the defendant’s misrepresentation in deciding to buy or sell a company’s stock. In *Basic Inc. v. Levinson*, 485 U.S. 224, the Supreme Court held that investors could satisfy this reliance requirement by invoking a presumption that the price of stock traded in an efficient market reflects all public, material information—including material misrepresentations. The Court also held, however, that a defendant could rebut this presumption by showing that the alleged misrepresentation did not actually affect the stock price—that is, that it had no “price impact.” Respondent Erica P. John Fund, Inc. (EPJ Fund), filed a putative class action against Halliburton and one of its executives (collectively Halliburton), alleging that they made misrepresentations designed to inflate Halliburton’s stock price, in violation of § 10(b) of the Securities Exchange Act of 1934 and Securities and Exchange Commission Rule 10b–5. Halliburton argued that class certification was inappropriate because of evidence it had introduced to disprove loss causation also showed that its alleged misrepresentations had not affected its stock price. By demonstrating the absence of any “price impact,” Halliburton contended, it had rebutted the Basic presumption. And without the benefit of that presumption, investors would have to prove reliance on an individual basis, meaning that individual issues would predominate over common ones and class certification would be inappropriate. The District Court rejected Halliburton’s argument and certified the class. The Fifth Circuit affirmed, concluding that Halliburton could use its price impact evidence to rebut the Basic presumption only at trial, not at the class certification stage.

**Issues:** Will the holding of Basic Inc. *v. Levinson*, 485 U.S. 224 (1988), be upheld to the extent that it recognizes a presumption of class-wide reliance derived from the fraud-on-the-market theory? May, in a case where the plaintiff invokes the presumption of reliance to seek class certification, the defendant rebut the presumption and prevent class certification by introducing evidence that the alleged misrepresentations did not distort the market price of its stock?

**Yes (to both).** Halliburton has not shown a “special justification” for overruling Basic’s presumption of reliance. However, the Court agreed with Halliburton that defendants must be afforded an opportunity to rebut the presumption of reliance before class certification with evidence of a lack of price impact.

**From the opinion by Chief Justice Roberts**

(joined by Justices Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan): The principle of stare decisis has “special force” in respect to statutory interpretation because “Congress remains free to alter what we have done.” … So too with Basic’s presumption of reliance. Although the presumption is a judicially created doctrine designed to implement a judicially created cause of action, we have described the presumption as “a substantive doctrine of federal securities-fraud law.”

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

**Concurring in judgment:** Justice Thomas (joined by Justice Alito)
Civil Procedure

**Stanton v. Sims**

Docket No. 12-1217
Reversed and Remanded:
The Ninth Circuit

Argued: N/A
Decided: November 4, 2013
Analysis: N/A

**Overview:** In the pursuit of an individual suspected of gang violence, police officer Mike Stanton knocked down the gate to Drendolyn Sims’s yard, in the process injuring Sims. Sims brought a § 1983 claim against Stanton alleging that he unreasonably searched her home without a warrant in violation of the Fourth Amendment. The district court granted summary judgment in favor of Stanton, finding that the entrance into Sims’s yard was justified and, further, that even if a constitutional violation occurred, Stanton had qualified immunity. The Ninth Circuit reversed, holding that the entrance into Sims’s yard was unconstitutional and that Stanton was not entitled to immunity.

**Issue:** Is a police officer entitled to qualified immunity where he pursued a suspect, fleeing the officer’s attempt to arrest him for a jailable misdemeanor committed in the officer’s presence, into the front yard of a residence through a gate?

**No.** Because the officer’s actions were not “plainly incompetent” given the disagreement in the lower courts over the constitutionality of such actions, the officer is not foreclosed from being covered by qualified immunity.

**From the per curiam opinion:** We do not express any view on whether Officer Stanton’s entry into Sims’s yard in pursuit of Patrick was constitutional. But whether or not the constitutional rule applied by the court below was correct, it was not “beyond debate.” Stanton may have been mistaken in believing his actions were justified, but he was not “plainly incompetent.”

Civil Procedure

**State of Mississippi, ex rel. Jim Hood, Attorney General v. AU Optronics Corp.**

Docket No. 12-1036
Reversed and Remanded:
The Fifth Circuit

Argued: November 6, 2013
Decided: January 14, 2014
Analysis: See ABA PREVIEW 62 Issue 2

**Overview:** The Mississippi attorney general instituted an action under Mississippi antitrust and consumer protection statutes against liquid crystal display panel manufacturers. After the defendants removed the litigation to federal court under the Class Action Fairness Act (CAFA), the Fifth Circuit held that the litigation was properly removable. This appeal concerned whether such state “pares patriae” actions are an exception to CAFA removal provisions.

**Issue:** Is a state pares patriae action brought by a state attorney general on behalf of the state’s citizens, that includes monetary claims for restitution, removable to federal court as a “mass action” under the Class Action Fairness Act?

**No.** Because in a state pares patriae action the state is the only named plaintiff, such a suit does not constitute a mass action under the Class Action Fairness Act.

From the unanimous opinion by Justice Sotomayor:

**To start,** the statute says “100 or more persons,” not “100 or more named or unnamed real parties in interest.” Had Congress intended the latter, it easily could have drafted language to that effect. Indeed, when Congress wanted a numerosity requirement in CAFA to be satisfied by counting unnamed parties in interest in addition to named plaintiffs, it explicitly said so: CAFA provides that in order for a class action to be removable, “the number of members of all proposed plaintiff classes” must be 100 or greater, § 1332(d)(5)(B), and it defines “class members” to mean “the persons (named or unnamed) who fall within the definition of the proposed or certified class,” § 1332(d)(1)(D). Congress chose not to use the phrase “named or unnamed” in CAFA’s mass action provision, a decision we understand to be intentional.

Civil Procedure

**Walden v. Fiore**

Docket No. 12-574
Reversed: The Ninth Circuit

Argued: November 4, 2013
Decided: February 25, 2014
Analysis: See ABA PREVIEW 98 Issue 2

**Overview:** In 2006, a Drug Enforcement Administration agent at Atlanta’s Hartsfield-Jackson airport seized $97,000 in cash from Gina Fiore and Keith Gipson when these professional gamblers were making a connecting flight from Puerto Rico to Las Vegas, Nevada. After they sued in Nevada, alleging a Bivens complaint, the agent challenged personal jurisdiction and venue. The Court was asked to determine whether the Ninth Circuit’s decision upholding personal jurisdiction and venue in Nevada was erroneous.

**Issue:** May a federal court in Nevada assert personal jurisdiction over a nonresident defendant, consistent with due process, where the defendant causes an intentional tort injury to Nevada residents?

**No.** A district court lacks personal jurisdiction over a nonresident defendant in an intentional tort suit when the defendant’s conduct fails to rise to the standard of “minimal contacts” with the state.

From the unanimous opinion by Justice Thomas:

**Respondents’** claimed injury does not evince a connection between petitioner and Nevada. Even if we consider the continuation of the seizure in Georgia to be a distinct injury, it is not the sort of effect that is tethered to Nevada in any meaningful way. Respondents (and only respondents) lacked access to their funds in Nevada not because anything independently occurred there, but because Nevada is where respondents chose to be at a time when they desired to use the funds seized by petitioner. Respondents would have experienced this same lack of access in California, Mississippi, or wherever else they might have traveled and found themselves wanting more money than they had. Unlike the broad...
Constitutional Law
Kaley v. United States
Docket No. 12-464
Affirmed and Remanded: The Eleventh Circuit

Argued: October 16, 2013
Decided: February 25, 2014
Analysis: See ABA PREVIEW 14 Issue 1

Overview: The government indicted defendants Kerri and Brian Kaley for health care fraud and obtained an ex parte protective order freezing assets it sought to forfeit from the Kalesys. The Kalesys sought to vacate the order, asserting the order prevented them from retaining counsel of their choice in violation of their constitutional rights. The district court denied their motion, but the Eleventh Circuit reversed with instructions to reconsider certain factors. On remand, the Kalesys argued they were entitled to challenge the indictment itself. The district court disagreed, holding the only relevant question was whether the restrained assets were traceable to the alleged criminal conduct. Because the Kalesys did not challenge traceability, the court denied their renewed motion. The Eleventh Circuit affirmed. The circuits were split on the issue.

Issue: Do the Fifth and Sixth Amendments require a hearing at which a criminal defendant may challenge the underlying indictment after the government obtains a post-indictment, ex parte order freezing assets needed by the defendant to retain counsel of choice?

No. When challenging the legality of a § 853(e)(1) pre-trial asset freeze, a criminal defendant who has been indicted is not constitutionally entitled to contest a grand jury’s determination of probable cause to believe the defendant committed the crimes charged.

From the opinion by Justice Kennedy (joined by Chief Justice Roberts and Justice Alito): The Kalesys here demand a do-over, except with a different referee. They wish a judge to decide anew the exact question the grand jury has already answered—whether there is probable cause to think the Kalesys committed the crimes charged. But suppose the judge performed that task and came to the opposite conclusion. Two inconsistent findings would then govern different aspects of one criminal proceeding: Probable cause would exist to bring the Kalesys to trial (and, if otherwise appropriate, hold them in prison), but not to restrain their property. And assuming the prosecutor continued to press the charges, the same judge who found probable cause lacking would preside over a trial premised on its presence. That legal dissonance, if sustainable at all, could not but undermine the criminal justice system’s integrity—and especially the grand jury’s integral, constitutionally prescribed role. For in this new world, every prosecution involving a pre-trial asset freeze would potentially pit the judge against the grand jury as to the case’s foundational issue.

Dissenting: Chief Justice Roberts (joined by Justices Breyer and Sotomayor)

Constitutional Law
Schuette v. Coalition to Defend Affirmative Action et al.
Docket No. 12-682
Reversed: The Sixth Circuit

Argued: October 15, 2013
Decided: April 22, 2014
Analysis: See ABA PREVIEW 9 Issue 1

Overview: After the Supreme Court decided that the University of Michigan’s undergraduate admissions plan’s use of race-based preferences violated the Equal Protection Clause, Gratz v. Bollinger, 539 U.S. 244, 270, but that the law school admission plan’s more limited use did not, Grutter v. Bollinger, 539 U.S. 306, 343, Michigan voters adopted Proposal 2, now Art. I, § 26, of the State Constitution, which prohibits the use of race-based preferences as part of the admissions process for state universities. In consolidated challenges, the District Court granted summary judgment to Michigan, thus upholding Proposal 2,

but the Sixth Circuit reversed, concluding that the proposal violated the principles of Washington v. Seattle School Dist. No. 1, 458 U.S. 457.

Issue: Does a state violate the Equal Protection Clause by amending its constitution to prohibit race and sex-based discrimination or preferential treatment in public-university admissions decisions?

No. The court reversed the judgment of the Sixth Circuit.

From the opinion by Justice Kennedy (joined by Chief Justice Roberts and Justice Alito): It is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds. The process of public discourse and political debate should not be foreclosed even if there is a risk that during a public campaign there will be those, on both sides, who seek to use racial division and discord to their own political advantage. An informed public can, and must, rise above this. The idea of democracy is that it can, and must, mature. Freedom embraces the right, indeed the duty, to engage in a rational, civic discourse in order to determine how best to form a consensus to shape the destiny of the Nation and its people. These First Amendment dynamics would be disserved if this Court were to say that the question here at issue is beyond the capacity of the voters to debate and then to determine.

Concurring: Chief Justice Roberts
Concurring in judgment: Justice Scalia (joined by Justice Thomas)
Concurring in judgment: Justice Breyer

From the dissenting opinion by Justice Sotomayor (joined by Justice Ginsburg): Today’s decision eviscerates an important strand of our equal protection jurisprudence. For members of historically marginalized groups, which rely on the federal courts to protect their constitutional rights, the decision can hardly bolster hope for a vision of democracy that preserves for all the right to participate meaningfully and equally in self-government.

Justice Kagan took no part in the consideration or decision of this case.
From the opinion by Justice Breyer (joined by Chief Justice Roberts and Justice Kennedy): Aereo is not simply an equipment provider. Rather, Aereo, and not just its subscribers, “perform[s]” (or “transmit[s]”). Aereo’s activities are substantially similar to those of the CATV companies that Congress amended the Act to reach.

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

From the opinion by Justice Ginsburg (joined by Justices Scalia, Thomas, Alito, Sotomayor, and Kagan): [T]he courts below erred in treating laches as a complete bar to Petrella’s copyright infringement suit. The action was commenced within the bounds of § 507(b), the Act’s time-to-sue prescription, and does not present extraordinary circumstances.

Dissenting: Justice Breyer (joined by Chief Justice Roberts and Justice Kennedy)
reading of section 229 that would sweep in everything from the detergent under the kitchen sink to the stain remover in the laundry room. Yet no one would ordinarily describe those substances as “chemical weapons.” … In sum, the global need to prevent chemical warfare does not require the Federal Government to reach into the kitchen cupboards, or to treat a local assault with a chemical irritant as the deployment of a chemical weapon.

**Concurring in judgment:** Justice Scalia (joined by Justice Thomas, and, as to Part I, Justice Alito)

**Concurring in judgment:** Justice Thomas (joined by Justice Scalia, and, as to Parts I, II, and III, Justice Alito)

**Concurring in judgment:** Justice Alito

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**Criminal Law**

*Burrage v. United States*

**Docket No. 12-7515**

**Reversed and Remanded:**

**The Eighth Circuit**

Argued: November 12, 2013
Decided: January 27, 2014
Analysis: See ABA *PREVIEW* 71 Issue 2

**Overview:** A federal jury trial resulted in the conviction of Marcus Andrew Burrage for distribution of heroin and distribution of heroin resulting in the death of Joshua Banka. Regarding the second count, the judge instructed the jury that it could convict the defendant if it found that the heroin he provided to Banka was a contributing cause of his death. Burrage sought reversal of the conviction, asserting the conviction was invalid due to the absence of proof that the death was foreseeable and that the heroin was the sole cause of death. On appeal, the Eighth Circuit affirmed. The Supreme Court agreed to hear the challenge to the jury instructions.

**Issue:** Can a person be convicted for distribution of heroin causing death utilizing jury instructions that allow a conviction when the heroin “contributed to” death by “mixed drug intoxication,” but was not the sole cause of death?

No. At least where use of the drug distributed by the defendant is not an independently sufficient cause of the victim’s death or serious bodily injury, a defendant cannot be liable for penalty enhancement under § 841(b)(1)(C) unless such use is a but-for cause of the death or injury.

**From the opinion by Justice Scalia** (joined by Chief Justice Roberts and Justices Kennedy, Thomas, Breyer, and Kagan and joined by Justice Alito as to all but Part III-B): This but-for requirement is part of the common understanding of cause. Consider a baseball game in which the visiting team’s leadoff batter hits a home run in the top of the first inning. If the visiting team goes on to win by a score of 1 to 0, every person competent in the English language and familiar with the American pastime would agree that the victory resulted from the home run. This is so because it is natural to say that one event is the outcome or consequence of another when the former would not have occurred but for the latter. It is beside the point that the victory also resulted from a host of other necessary causes, such as skillful pitching, the coach’s decision to put the leadoff batter in the lineup, and the league’s decision to schedule the game. By contrast, it makes little sense to say that an event resulted from or was the outcome of some earlier action if the action merely played a nonessential contributing role in producing the event. If the visiting team wound up winning 5 to 2 rather than 1 to 0, one would be surprised to read in the sports page that the victory resulted from the leadoff batter’s early, non-dispositive home run.

**Concurring in judgment:** Justice Ginsburg (joined by Justice Sotomayor)

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**Criminal Law**

*Rosemond v. United States*

**Docket No. 12-895**

**Vacated and Remanded:**

**The Tenth Circuit**

Argued: November 12, 2013
Decided: March 5, 2014
Analysis: See ABA *PREVIEW* 74 Issue 2

**Overview:** Justus Rosemond was convicted after a jury trial in federal court of various offenses committed during an attempted drug transaction. He objected that the jury instruction given regarding the crime of using or brandishing a weapon during a drug trafficking offense did not require the government to prove that he facilitated or
encouraged the use of the weapon. Rather, the given instructions allowed Rosemond’s conviction merely upon proof that he engaged in the underlying drug crime and that he knew that a gun had been used by another person. He asked the Supreme Court to resolve a split among the appellate courts on this issue and to reject the Tenth Circuit minority position.

**Issue:** In order to convict a defendant of aiding and abetting the use of a firearm during a crime of violence or drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A), does the state need to show that the defendant either intentionally facilitated or encouraged the use of the firearm during the underlying offense?

**Yes.** In order for the government to establish that a defendant aided and abetted a drug trafficking crime, it must prove that the defendant actively participated in the crime with advanced knowledge that a confederate would use or carry a gun during the commission; in this case, the jury instructions were erroneous in that they failed to require that Rosemond knew in advance that one of his confederates would be armed.

**From the opinion by Justice Kagan** (joined by Chief Justice Roberts and Justices Kennedy, Ginsburg, Breyer, and Sotomayor and joined by Justice Scalia in all but footnotes 7 and 8): [T]he § 924(c)(1)(A) defendant’s knowledge of a firearm must be advance knowledge—or otherwise said, knowledge that enables him to make the relevant legal (and indeed, moral) choice. When an accomplice knows beforehand of a confederate’s design to carry a gun, he can attempt to alter that plan or, if unsuccessful, withdraw from the enterprise; it is deciding instead to go ahead with his role in the venture that shows his intent to aid an armed offense. But when an accomplice knows nothing of a gun until it appears at the scene, he may already have completed his acts of assistance; or even if not, he may at that late point have no realistic opportunity to quit the crime. And when that is so, the defendant has not shown the requisite intent to assist a crime involving a gun.

**Concurring in part and dissenting in part:** Justice Alito (joined by Justice Thomas)

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**Criminal Law**

**United States v. Castleman**

**Docket No. 12-1371**

**Reversed and Remanded:**

**The Sixth Circuit**

**Argued:** January 15, 2014  
**Decided:** March 26, 2014  
**Analysis:** See ABA PREVIEW 166 Issue 4

**Overview:** Section 922(g)(9) of Title 18, United States Code, makes it a crime for any person convicted of a “misdemeanor crime of domestic violence” to possess a firearm. The phrase “misdemeanor crime of domestic violence” is defined to include any federal, state, or tribal misdemeanor offense, committed by a person with a specified domestic relationship to the victim that “has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon.” 18 U.S.C. § 921(a)(33)(A).

**Issue:** Does the respondent James Alvin Castleman’s Tennessee conviction for misdemeanor domestic assault by intentionally or knowingly causing bodily injury to the mother of his child qualify as a conviction for a “misdemeanor crime of domestic violence?”

**Yes.** The respondent’s conviction qualifies as a “misdemeanor crime of domestic violence.”

**From the opinion by Justice Sotomayor** (joined by Chief Justice Roberts, and Justices Kennedy, Ginsburg, Breyer, and Kagan): Because Castleman’s indictment makes clear that the use of physical force was an element of his conviction, that conviction qualifies as a “misdemeanor crime of domestic violence.”

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

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**Criminal Procedure**

**Burt v. Titlow**

**Docket No. 12-414**

**Reversed:** The Sixth Circuit

**Argued:** October 8, 2013  
**Decided:** November 5, 2013  
**Analysis:** See ABA PREVIEW 51 Issue 1

**Overview:** Vonlee Nicole Titlow was involved in the death of her uncle, Donald Rogers. The state offered a plea agreement, which Titlow initially accepted. But Titlow’s second attorney later advised her to withdraw from the plea because Titlow maintained her innocence. As a result, Titlow went to trial, was convicted, and received a sentence longer than the recommended sentence in the plea. The state appellate court affirmed the conviction and rejected Titlow’s claim that her second attorney provided constitutionally ineffective assistance of counsel in advising her to withdraw from the plea agreement. Titlow filed a writ of habeas corpus in federal court. The district court denied her petition in October 2010. The Sixth Circuit reversed, ruled in her favor on the ineffective-assistance-of-counsel claim, and ordered the state to re-offer the plea agreement.

**Issue:** Did the Sixth Circuit fail to give appropriate deference to a state appellate court by holding that defense counsel was constitutionally ineffective for advising Titlow to withdraw from a plea agreement?

**Yes.** The Sixth Circuit failed to apply the “doubly deferential” standard of review recognized by the Court’s case law when it refused to credit the state court’s reasonable factual finding and assumed that counsel was ineffective where the record was silent.

**From the opinion by Justice Alito** (joined by Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, Breyer, Sotomayor, and Kagan): The Michigan Court of Appeals, however—unlike the Sixth Circuit—also correctly recognized that there is nothing inconsistent about a defendant’s asserting innocence on the one hand and refusing to plead guilty to manslaughter accompanied by higher-than-normal punishment on the other. Indeed, a defendant convinced of his or her own innocence may have a particularly optimistic view of the likelihood
of acquittal, and therefore be more likely to drive a hard bargain with the prosecution before pleading guilty. Viewing the record as a whole, we conclude that the Sixth Circuit improperly set aside a “reasonable state-court determination” of fact in favor of its own debatable interpretation of the record.

Concurring: Justice Sotomayor
Concurring in judgment: Justice Ginsburg

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**Criminal Procedure**

**Fernandez v. California**

**Docket No. 12-7822**

**Affirmed: The California Court of Appeals**

Argued: November 13, 2013
Decided: February 25, 2014
Analysis: See ABA PREVIEW 90 Issue 2

**Overview:** This case was the fourth in a series of consent search cases concerning cotenants or apparent cotenants and the home. In the first two cases, the Court found police were given valid consent from an actual or apparent cotenant when the other tenant was either not on the premises or nearby and not consulted when consent was asked for and given. Only in **Georgia v. Randolph**, 547 U.S. 103 (2006), when police searched in the face of a physically present and objecting cotenant, has the Court found the other cotenant’s consent ineffective. This case asked the court to decide how critical continual physical presence by the objecting tenant is to blocking the other’s express consent.

**Issue:** Is a defendant’s previously stated objection, while physically present, to a warrantless search a continuing assertion of Fourth Amendment rights that cannot be overridden by a cotenant?

**No.** **Georgia v. Randolph** does not apply when a cotenant provides consent to a search well after the suspect has been removed from the premise; consequently, such searches may qualify as warrantless consent searches.

**From the opinion by Justice Alito** (joined by Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Breyer): The rule that petitioner would have us adopt would produce a plethora of practical problems. For one thing, there is the question of duration.

Petitioner argues that an objection, once made, should last until it is withdrawn by the objector, but such a rule would be unreasonable. Suppose that a husband and wife owned a house as joint tenants and that the husband, after objecting to a search of the house, was convicted and sentenced to a 15-year prison term. Under petitioner’s proposed rule, the wife would be unable to consent to a search of the house 10 years after the date on which her husband objected. We refuse to stretch **Randolph** to such strange lengths.

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

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**Fishbaker v. Speed Queen**

**Docket No. 12-7822**

**Affirmed: The California Court of Appeals**

Argued: November 13, 2013
Decided: February 25, 2014
Analysis: See ABA PREVIEW 90 Issue 2

**Overview:** This case was the fourth in a series of consent search cases concerning cotenants or apparent cotenants and the home. In the first two cases, the Court found police were given valid consent from an actual or apparent cotenant when the other tenant was either not on the premises or nearby and not consulted when consent was asked for and given. Only in **Georgia v. Randolph**, 547 U.S. 103 (2006), when police searched in the face of a physically present and objecting cotenant, has the Court found the other cotenant’s consent ineffective. This case asked the court to decide how critical continual physical presence by the objecting tenant is to blocking the other’s express consent.

**Issue:** Is a defendant’s previously stated objection, while physically present, to a warrantless search a continuing assertion of Fourth Amendment rights that cannot be overridden by a cotenant?

**No.** **Georgia v. Randolph** does not apply when a cotenant provides consent to a search well after the suspect has been removed from the premise; consequently, such searches may qualify as warrantless consent searches.

**From the opinion by Justice Alito** (joined by Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Breyer): The rule that petitioner would have us adopt would produce a plethora of practical problems. For one thing, there is the question of duration.

Petitioner argues that an objection, once made, should last until it is withdrawn by the objector, but such a rule would be unreasonable. Suppose that a husband and wife owned a house as joint tenants and that the husband, after objecting to a search of the house, was convicted and sentenced to a 15-year prison term. Under petitioner’s proposed rule, the wife would be unable to consent to a search of the house 10 years after the date on which her husband objected. We refuse to stretch **Randolph** to such strange lengths.

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

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**Criminal Procedure**

**Kansas v. Cheever**

**Docket No. 12-609**

**Vacated and Remanded:**

**The Supreme Court of Kansas**

Argued: October 16, 2013
Decided: December 11, 2013
Analysis: See ABA PREVIEW 46 Issue 1

**Overview:** The issues in this case rest at the intersection of the substantive areas of criminal law, criminal procedure, and evidence but mainly concern the Fifth Amendment privilege against self-incrimination. The Fifth Amendment provides in part that no person “shall be compelled in any criminal case to be a witness against himself.” This is commonly called the privilege against self-incrimination. While the privilege applies in any setting, not just trials, this case concerned how the privilege may be waived in criminal trial proceedings and what the state may do after a waiver.

**Issue:** When a criminal defendant affirmatively introduces expert testimony that he lacked the requisite mental state to commit capital murder of a law enforcement officer due to the alleged temporary and long-term effects of the defendant’s methamphetamine use, does the state violate the defendant’s Fifth Amendment privilege against self-incrimination by rebutting the defendant’s mental state defense with evidence from a court-ordered mental evaluation of the defendant?

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**Criminal Procedure**

**Loughrin v. United States**

**Docket No. 13-316**

**Affirmed: The Tenth Circuit**

Argued: April 1, 2014
Decided: June 23, 2014
Analysis: See ABA PREVIEW 237 Issue 6

**Overview:** A part of the federal bank fraud statute, 18 U.S.C. § 1344(2), makes it a crime to “knowingly execut[e] a scheme … to obtain” property owned by, or under the custody of, a bank “by means of false and fraudulent pretenses.” Defendant Kevin Loughrin was charged with bank fraud after he was caught forging stolen checks, using them to buy goods at a Target store, and then returning the goods for cash. The District Court declined to give Loughrin’s proposed jury instruction that a conviction under § 1344(2) required proof of “intent to defraud a financial institution.” The jury convicted Loughrin, and the Tenth Circuit affirmed.

**Issue:** Must the government prove that the defendant intended to defraud a bank and expose it to risk of loss in every prosecution under 18 U.S.C. § 1344?

**No.** Section 1344(2) requires only that the defendant intend to obtain bank property
and that this end is accomplished “by means of” a false statement.

From the opinion by Justice Kagan (joined by Chief Justice Roberts and Justices Kennedy, Ginsburg, Breyer, and Sotomayor, and Justices Scalia and Thomas as to I and II, Part III-A, with the exception of the last paragraph, and the last footnote of Part III-B): [I]n claiming that we must … recognize an invisible element, Loughrin fails to take account of a significant textual limitation on § 1344(2)’s reach. Under that clause, it is not enough that a fraudster scheme to obtain money from a bank and that he make a false statement. The provision as well includes a relational component: The criminal must acquire (or attempt to acquire) bank property “by means of” the misrepresentation.

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

Criminal Procedure

Martinez v. Illinois

Docket No. 13-5967
Reversed and Remanded:
The Supreme Court of Illinois

Argued: N/A
Decided: May 27, 2014
Analysis: N/A

Overview: The trial of petitioner Esteban Martinez was set to begin on May 17, 2010. His counsel was ready; the state was not. When the court swore in the jury and invited the state to present its first witness, the state declined to present any evidence. So Martinez moved for a directed not-guilty verdict, and the court granted it. The State appealed, arguing that the trial court should have granted its motion for a continuance.

Issue: Does the Double Jeopardy Clause of the U.S. Constitution bar the state’s attempt to appeal in the hope of subjecting Martinez to a new trial?

Yes. The Illinois Supreme Court manifestly erred in allowing the state’s appeal, on the theory that jeopardy never attached because Martinez “was never at risk of conviction.”

From the per curiam opinion: Here, the State knew, or should have known, that an acquittal forever bars the retrial of the defendant when it occurs after jeopardy has attached. The Illinois Supreme Court’s holding is understandable, given the significant consequence of the State’s mistake, but it runs directly counter to our precedents and to the protection conferred by the Double Jeopardy Clause.

Criminal Procedure

Navarette et al. v. California

Docket No. 12-9490
Affirmed: Court of Appeal of California, First Appellate District

Argued: January 21, 2014
Decided: April 22, 2014
Analysis: See ABA PREVIEW 174 Issue 4

Overview: A California Highway Patrol officer stopped the pickup truck occupied by petitioners because it matched the description of a vehicle that a 911 caller had recently reported as having run her off the road. As he and a second officer approached the truck, they smelled marijuana. They searched the truck’s bed, found 30 pounds of marijuana, and arrested petitioners. Petitioners moved to suppress the evidence, arguing that the traffic stop violated the Fourth Amendment. Their motion was denied, and they pleaded guilty to transporting marijuana. The California Court of Appeal affirmed, concluding that the officer had reasonable suspicion to conduct an investigative stop.

Issue: Does an anonymous tip that a specific vehicle ran someone off the road provide reasonable suspicion to stop a vehicle, where the detaining officer was only advised to be on the lookout for a reckless driver, and the officer could not corroborate dangerous driving despite following the suspect vehicle for several miles?

Yes. The traffic stop complied with the Fourth Amendment because, under the totality of the circumstances, the officer had reasonable suspicion that the truck’s driver was intoxicated.

From the dissenting opinion by Justice Scalia (joined by Justice Ginsburg, Sotomayor, and Kagan): Law enforcement agencies follow closely our judgments on matters such as this, and they will identify at once our new rule: So long as the caller identifies where the car is, anonymous claims of a single instance of possibly careless or reckless driving, called in to 911, will support a traffic stop. This is not my concept, and I am sure would not be the Framers’, of a people secure from unreasonable searches and seizures.

Criminal Procedure

Williams v. Johnson

Docket No. 13-9085
Vacated and Remanded: The Ninth Circuit

Argued: N/A
Decided: July 1, 2014
Analysis: N/A

Overview: The defendant, Tara Sheneva Williams, was convicted and received a life sentence. A state appellate court ruled against the defendant on appeal, but did not expressly address her federal Sixth Amendment claim. On habeas review, the Ninth Circuit addressed the claim de novo, and granted relief. In an earlier ruling in this case, the Supreme Court ruled that a rebuttable presumption existed that the federal claim, although not expressly addressed by the state court, had been adjudicated by the state court when it issued a decision on the merits. On remand, the Ninth Circuit concluded that it did not have jurisdiction to hear the case, basing its ruling on language in the Supreme Court decision.

Issue: Did the Supreme Court mean to bar a deferential review on remand?
The denial of rehearing simply reflects that disputes regarding the scope of the Court’s mandate should be resolved on remand.

From the per curiam opinion: The motion for leave to proceed in forma pauperis and the petition for a writ of certiorari are granted. The judgment of the United States Court of Appeals for the Ninth Circuit is vacated, and the case is remanded for consideration of petitioner’s Sixth Amendment claim under the standard set forth in 28 U.S.C. § 2254(d).

Eighth Amendment
Hall v. Florida

Docket No. 12-10882
Reversed and Remanded:
The Supreme Court of Florida

Argued: March 3, 2014
Decided: May 27, 2014
Analysis: See ABA PREVIEW 212 Issue 5

Overview: After the Supreme Court held that the Eighth and 14th Amendments forbid the execution of persons with intellectual disability in Atkins v. Virginia, 536 U.S. 304, 321, petitioner Freddie Lee Hall asked a Florida state court to vacate his sentence, presenting evidence that included an IQ test score of 71. The court denied his motion, determining that a Florida statute mandated that he show an IQ score of 70 or below before being permitted to present any additional intellectual disability evidence. The State Supreme Court rejected Hall’s appeal, finding the State’s 70-point threshold constitutional.

Issue: Is the Florida scheme for identifying mentally retarded defendants in capital cases unconstitutional?

Yes. The State’s strict threshold requirement of 70 is unconstitutional.

From the opinion by Justice Kennedy (joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan): The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution. Florida’s law contravenes our Nation’s commitment to dignity and its duty to teach human decency as the mark of a civilized world. The States are laboratories for experimentation, but those experiments may not deny the basic dignity the Constitution protects.

From the dissenting opinion by Justice Alito (joined by Chief Justice Roberts, and Justices Scalia and Thomas): We have been presented with no solid evidence that the longstanding reliance on multiple IQ test scores as a measure of intellectual functioning is so unreasonable or outside the ordinary as to be unconstitutional. The Court has certainly not supplied any such information.

Employment Law
Lawson v. FMR LLC

Docket No. 12-3
Reversed and Remanded:
The First Circuit

Argued: November 12, 2013
Decided: March 4, 2014
Analysis: See ABA PREVIEW 103 Issue 2

Overview: Sarbanes-Oxley was passed in the wake of the Enron scandal. Part of the purpose of this law was to protect whistleblowers in the financial securities industry from retaliation. The antiretaliation provision included some dispute as to whether it applies only to employees of publicly held companies or whether it also applies to employees of privately held contractors or subcontractors who do work for public companies. The Supreme Court was asked to examine the meaning and scope of this antiretaliation provision.

Issue: Does the antiretaliation provision of Sarbanes-Oxley protect the employees of privately held contractors or subcontractors who do work for public companies?

Yes. Sarbanes-Oxley § 1514A’s whistleblower protection includes employees of a public company’s private contractors and subcontractors.

From the opinion by Justice Ginsburg (joined by Chief Justice Roberts and Justices Breyer and Kagan; joined in principal part by Justices Scalia and Thomas): There would be a huge hole, on the other hand, were the dissent’s view of § 1514A’s reach to prevail: Contractors’ employees would be disarmed; they would be vulnerable to retaliation by their employers for blowing the whistle on a scheme to defraud the public company’s investors, even a scheme engineered entirely by the contractor. Not only would mutual fund advisers and managers escape § 1514A’s control. Legions of accountants and lawyers would be denied § 1514A’s protections. Instead of indulging in fanciful visions of whistleblowing babysitters and the like, the dissent might pause to consider whether a Congress, prompted by the Enron debacle, would exclude from whistleblower protection countless professionals equipped to bring fraud on investors to a halt.

Concurring in principal part and in judgment: Justice Scalia (joined by Justice Thomas)
Dissenting: Justice Sotomayor (joined by Justices Kennedy and Alito)

Employment Law
Madigan v. Levin

Docket No. 12-872
Dismissed: The Seventh Circuit

Argued: October 7, 2013
Decided: October 15, 2013
Analysis: See ABA PREVIEW 4 Issue 1

Overview: Harvey Levin, a former Illinois assistant attorney general, alleges that his former supervisors terminated him because of his age. Levin cannot sue under the Age Discrimination in Employment Act (ADEA) because his former job duties exclude him from the ADEA’s scope. Nonetheless, the Seventh Circuit held that 42 U.S.C. § 1983 provides Levin a vehicle to allege that his former supervisors engaged in unconstitutional age discrimination. His former supervisors appealed, contending that the ADEA impliedly extinguishes § 1983 claims for age discrimination.

Issue: Does the Age Discrimination in Employment Act foreclose § 1983 claims alleging unconstitutional age discrimination?

Dismissed as Improvidently Granted by a Per Curiam Court.
Employment Law
Sandifer v. United States Steel Corp.

Docket No. 12-417
Affirmed: The Seventh Circuit

Argued: November 4, 2013
Decided: January 27, 2014
Analysis: See ABA PREVIEW 82 Issue 2

Overview: Eight hundred current and former steelworkers argued that the Fair Labor Standards Act requires U.S. Steel to compensate them for time spent donning and doffing personal protective equipment and traveling between company locker rooms and their workstations. U.S. Steel argued that this activity constitutes “changing clothes” and thus may be lawfully excluded from the compensable workday by collective bargaining agreement.

Issue: Is donning and doffing personal protective equipment “changing clothes” within the meaning of 29 U.S.C. § 203(o)?

Yes. Donning and doffing personal protective equipment constitutes “changing clothes” under 29 U.S.C. § 203(o) and is therefore not compensable.

From the opinion by Justice Scalia (joined by Chief Justice Roberts and Justices Kennedy, Thomas, Ginsburg, Breyer, Alito, and Kagan and in which Justice Sotomayor joined except as to footnote 7): Petitioners contend that any attempt at a general definition of “clothes” will cast a net so vast as to capture all manner of marginal things—from bandoliers to barrettes to bandages. Yet even acknowledging that it may be impossible to eliminate all vagueness when interpreting a word as wide-ranging as “clothes,” petitioners’ fanciful hypotheticals give us little pause. The statutory context makes clear that the “clothes” referred to are items that are integral to job performance; the donning and doffing of other items would create no claim to compensation under the Act, and hence no need for the § 203(o) exception. Moreover, even with respect to items that can be regarded as integral to job performance, our definition does not embrace the view, adopted by some Courts of Appeals, that “clothes” means essentially anything worn on the body—including accessories, tools, and so forth. See, e.g., Salazar v. Butterball, LLC, 644 F. 3d 1130, 1139–1140 (CA10 2011) (“clothes” are “items or garments worn by a person” and include “knife holders”). The construction we adopt today is considerably more contained. Many accessories—necklaces and knapsacks, for instance—are not “both designed and used to cover the body.” Nor are tools “commonly regarded as articles of dress.” Our definition leaves room for distinguishing between clothes and wearable items that are not clothes, such as some equipment and devices.

Employment Law
Unite Here Local 355 v. Mulhall

Docket No. 12-99
Dismissed: The Eleventh Circuit

Argued: November 13, 2013
Decided: December 10, 2013
Analysis: See ABA PREVIEW 86 Issue 2

Overview: This case looked at the effect of a neutrality agreement between management and labor governing union organization efforts under § 302 of the Labor Management Relations Act (LMRA), a/k/a the Taft-Hartley law, 29 U.S.C. 186. Although the Third and Fourth Circuits had each upheld such agreements, the Eleventh Circuit did not. The law makes it a crime for an employer “to pay, lend, or deliver … any money or other thing of value” to a labor union that seeks to represent its employees, and prohibits the labor union from receiving the same. Here, the employer-respondent promised to remain neutral during the organizing process, allow the union petitioner access to its employees, allow election by card check, and arbitrate if necessary. The union agreed not to strike, boycott, or otherwise put pressure on the business. The union also agreed to support a ballot initiative benefiting the respondent. After the ballot initiative passed, respondent filed a neutrality agreement with the NLRB. The union argued that the agreement and solicitation of employees violated § 302. The Court reversed. The Court was asked to determine whether neutrality agreements are enforceable under the LMRA.


Environmental Law
CTS Corp. v. Waldburger et al.

Docket No. 13-339
Reversed: The Fourth Circuit

Argued: April 23, 2014
Decided: June 9, 2014
Analysis: See ABA PREVIEW 277 Issue 7

Overview: Federal law pre-empts state-law statutes of limitations in certain tort actions involving personal injury or property damage arising from the release of a hazardous substance, pollutant, or contaminant into the environment. 42 U.S.C. § 9658.

Petitioner CTS Corporation sold property on which it had stored chemicals as part of its operations as an electronics plant. Twenty-four years later, respondents, the owners of portions of that property and adjacent landowners, sued, alleging damages from the stored contaminants. CTS moved to dismiss, citing a state statute of repose that...
prevented subjecting a defendant to a tort suit brought more than 10 years after the defendant’s last culpable act. Because CTS’s last act occurred when it sold the property, the District Court granted the motion. Finding § 9658 ambiguous, the Fourth Circuit reversed, holding that the statute’s remedial purpose favored pre-emption.

**Issue:** Did the Fourth Circuit correctly interpret 42 U.S.C. § 9658 to apply to state statutes of repose in addition to state statutes of limitations?

Yes. Where Congress chose to leave many areas of state law untouched, respondents have not shown that statutes of repose pose an unacceptable obstacle to the attainment of statutory purposes.

**From the opinion by Justice Kennedy, who delivered the opinion of the Court except as to II-D** (joined in full by Justices Sotomayor and Kagan, and joined in all but Part II-D by Chief Justice Roberts and Justices Scalia, Thomas, and Alito): In light of the distinct purpose for statutes of repose, the definition of “applicable limitations period” (and thus also the definition of “commencement date”) in § 9658(b)(2) is best read to encompass only statutes of limitations, which generally begin to run after a cause of action accrues and so always limit the time in which a civil action “may be brought.”

**Concurring in part and concurring in judgment:** Justice Scalia (joined by Chief Justice Roberts and Justices Thomas and Alito)

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

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**Environmental Law**

**Utility Air Regulatory Group v. Environmental Protection Agency et al.**

**Docket No. 12-1146**

**Affirmed in Part and Reversed in Part: The District of Columbia Circuit**

**Argued:** February 24, 2014  
**Decided:** June 23, 2014  
**Analysis:** See ABA PREVIEW 205 Issue 5  
**Overview:** The Clean Air Act imposes permitting requirements on stationary sources, such as factories and power plants. The Act’s “Prevention of Significant Deterioration” (PSD) provisions make it unlawful to construct or modify a “major emitting facility” in “any area to which [the PSD program] applies” without a permit. A “major emitting facility” is a stationary source with the potential to emit 250 tons per year of “any air pollutant” (or 100 tons per year for certain types of sources). Facilities seeking to qualify for a PSD permit must, inter alia, comply with emissions limitations that reflect the “best available control technology” (BACT) for “each pollutant subject to regulation under” the Act. In addition, Title V of the Act makes it unlawful to operate any “major source,” wherever located, without a permit. A “major source” is a stationary source with the potential to emit 100 tons per year of “any air pollutant. In response to *Massachusetts v. EPA*, 549 U.S. 497, EPA promulgated greenhouse-gas emission standards for new motor vehicles, and made stationary sources subject to the PSD program and Title V on the basis of their potential to emit greenhouse gases. It recognized, however, that requiring permits for all sources with greenhouse-gas emissions above the statutory thresholds would radically expand those programs and render them unworkable. So EPA purported to “tailor” the programs to accommodate greenhouse gases by providing, among other things, that sources would not become newly subject to PSD or Title V permitting on the basis of their potential to emit greenhouse gases in amounts less than 100,000 tons per year. Numerous parties, including several states, challenged EPA’s actions in the D.C. Circuit, which dismissed some of the petitions for lack of jurisdiction and denied the remainder.

**Issues:** Was the EPA correct in its belief that it was compelled under the Clean Air Act to include greenhouse gases in its interpretation of the PSD and Title V triggers, and, if so, was it entitled to use its administrative discretion to “tailor” the statutory enforcement levels?  
No. There is no insuperable textual barrier to EPA’s interpreting “any air pollutant” in the permitting triggers of PSD and Title V to encompass only pollutants emitted in quantities that enable them to be sensibly regulated at the statutory thresholds, and to exclude those atypical pollutants that, like greenhouse gases, are emitted in such vast quantities that their inclusion would radically transform those programs and render them unworkable as written.

**From the opinion by Justice Scalia** (joined by Chief Justice Roberts and Justice Kennedy in full; Justices Thomas and Alito as to Parts I, II-A, II-B-1; and Justices Ginsburg, Sotomayor, and Kagan as to Part II-B-2): The power to require permits for the construction and modification of tens of thousands, and the operation of millions, of small sources nationwide falls comfortably within the class of authorizations that we have been reluctant to read into ambiguous statutory text. Moreover, in EPA’s assertion of that authority, we confront a singular situation: an agency laying claim to extravagant statutory power over the national economy while at the same time strenuously asserting that the authority claimed would render the statute “unrecognizable to the Congress that designed” it.

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

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**ERISA**

**Fifth Third Bancorp et al. v. Dudenhoefner et al.**

**Docket No. 12-751**

**Vacated and Remanded:** The Sixth Circuit

**Argued:** April 2, 2014  
**Decided:** June 25, 2014  
**Analysis:** See ABA PREVIEW 244 Issue 6  
**Overview:** Fifth Third employees and employee stock ownership plan (ESOP) participants, filed this lawsuit against Fifth Third and several of its officers who are alleged to be fiduciaries of the ESOP. The complaint alleges that the defendants breached the fiduciary duty of prudence imposed by the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, the complaint alleges that the defendants should have known—on the basis of both publicly available information and inside information available to the defendants because they were Fifth Third...
of written loss to file an ERISA suit. She filed suit almost two years after the plan’s deadline, claiming that the limitations period was tolled while she exhausted her internal remedies. The district court granted the plan’s motion to dismiss on the basis that the case was time-barred. The Second Circuit affirmed.

**Issue:** Is a disability plan provision enforceable if it provides that the statute of limitations for an ERISA benefits action begins to run on the date proof of loss is due?

**Yes.** A disability plan statute of limitations for an ERISA benefit is enforceable and is not tolled while a participant exhausts internal appeals.

**From the unanimous opinion by Justice Thomas:** We must give effect to the Plan’s limitations provision unless we determine either that the period is unreasonably short, or that a “controlling statute” prevents the limitations provision from taking effect. … Neither condition is met here.

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**Federal Criminal Law**

**Abramski v. United States**

**Docket No. 12-1493**

**Affirmed:** The Fourth Circuit

**Argued:** January 22, 2014  
**Decided:** June 16, 2014  
**Analysis:** See ABA PREVIEW 162 Issue 4

**Overview:** Petitioner Bruce Abramski offered to purchase a handgun for his uncle. The form that federal regulations required Abramski to fill out (Form 4473) asked whether he was the “actual transferee/buyer” of the gun, and clearly warned that a straw purchaser (namely, someone buying a gun on behalf of another) was not the actual buyer. Abramski falsely answered that he was the actual buyer. Abramski was convicted for knowingly making false statements “with respect to any fact material to the lawfulness of the sale” of a gun, 18 U.S.C. § 922(a)(6), and for making a false statement “with respect to the information required … to be kept” in the gun dealer’s records, § 924(a)(1)(A). The Fourth Circuit affirmed.

**Issues:** Is a gun buyer’s intent to sell a firearm to another lawful buyer in the future a fact “material to the lawfulness of the sale” of the firearm under 18 U.S.C. § 922(a)(6)? Is a gun buyer’s intent to sell a firearm to another lawful buyer in the
future a piece of information “required … to be kept” by a federally licensed firearm dealer under § 924 (a)(1)(A)?

Yes (to both). Abramski’s misrepresentation is material under § 922(a)(6) and concerned information required to be kept in the gun dealer’s records under § 924(a)(1)(A).

From the opinion by Justice Kagan (joined by Justices Kennedy, Ginsburg, Breyer, and Sotomayor): No piece of information is more important under federal firearms law than the identity of a gun’s purchaser—the person who acquires a gun as a result of a transaction with a licensed dealer. Had Abramski admitted that he was not that purchaser, but merely a straw—that he was asking the dealer to verify the identity of, and run a background check on, the wrong individual—the sale here could not have gone forward. That makes Abramski’s misrepresentation on Question 11.a. material under § 922(a)(6). And because that statement pertained to information that a dealer must keep in its permanent records under the firearms law, Abramski’s answer to Question 11.a. also violated § 924(a)(1)(A).

From the dissenting opinion by Justice Scalia (joined by Chief Justice Roberts and Justices Thomas and Alito): In ordinary usage, a vendor sells (or delivers, or transfers) an item of merchandise to the person who physically appears in his store, selects the item, pays for it, and takes possession of it. So if I give my son $10 and tell him to pick up milk and eggs at the store, no English speaker would say that the store “sells” the milk and eggs to me. And even if we were prepared to let “principles of agency law” trump ordinary English usage in the interpretation of this criminal statute, those principles would not require a different result. … The majority contends, however, that the Gun Control Act’s “principal purpose” of “curb[ing] crime by keeping firearms out of the hands of those not legally entitled to possess them” demands the conclusion that Abramski’s uncle was the “person” to whom the dealer “s[old]” the gun.

Federal Jurisdiction
Michigan v. Bay Mills Indian Community et al.

Docket No. 12-515
Affirmed and Remanded: The Sixth Circuit

Argued: December 2, 2013
Decided: May 27, 2014
Analysis: See ABA PREVIEW 135 Issue 3

Overview: The State of Michigan, petitioner, entered into a compact with respondent Bay Mills Indian Community pursuant to the Indian Gaming Regulatory Act (IGRA). See 25 U.S.C. § 2710(d)(1)(C). The compact authorizes Bay Mills to operate a casino on Indian lands located within the State’s borders, but prohibits it from doing so outside that territory. Bay Mills later opened a second casino on land it had purchased through a congressionally established land trust. The Tribe claimed it could operate a casino there because the property qualified as Indian land. Michigan disagreed and sued the Tribe under § 2710(d)(7)(A)(ii), which allows a state to enjoin “class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact.” The District Court granted the injunction, but the Sixth Circuit vacated. It held that tribal sovereign immunity barred the suit unless Congress provided otherwise, and that § 2710(d)(7)(A)(ii) only authorized suits to enjoin gaming activity located “on Indian lands,” whereas Michigan’s complaint alleged the casino was outside such territory.

Issue: Does tribal sovereign immunity bar a state from suing in federal court to enjoin a tribe from violating IGRA outside of Indian lands?

Yes. Michigan’s suit against Bay Mills is barred by tribal sovereign immunity.

From the opinion by Justice Kagan (joined by Chief Justice Roberts , and Justices Kennedy, Breyer, and Sotomayor): If Congress had authorized this suit, Bay Mills would have no valid grounds to object. But Congress has not done so: The abrogation of immunity in IGRA applies to gaming on, but not off, Indian lands. We will not rewrite Congress’s handiwork. Nor will we create a freestanding exception to tribal immunity for all off reservation commercial conduct. This Court has declined that course once before. To choose it now would entail both overthrowing our precedent and usurping Congress’s current policy judgment.

From the dissenting opinion by Justice Thomas (joined by Justices Scalia, Ginsburg, and Alito): As long as tribal immunity remains out of sync with this reality, it will continue to invite problems, including de facto deregulation of highly regulated activities; unfairness to tort victims; and increasingly fractious relations with States and individuals alike.

Dissenting: Justice Scalia
Dissenting: Justice Ginsburg
Concurring: Justice Sotomayor

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First Amendment
Harris v. Quinn

Docket No. 11-681
Reversed in Part, Affirmed in Part and Remanded: The Seventh Circuit

Argued: January 21, 2014
Decided: June 30, 2014
Analysis: See ABA PREVIEW 192 Issue 4

Overview: Illinois’ Home Services Program (Rehabilitation Program) allows Medicaid recipients who would normally need institutional care to hire a “personal assistant” (PA) to provide homecare services. Under state law, the homecare recipients and the state both play some role in the employment relationship with the PAs (although the state’s role is limited). Acting pursuant to an Illinois labor law, the state designated SEIU Healthcare Illinois & Indiana (SEIU—III) as the exclusive union representative for Rehabilitation Program employees, including PAs. Even PAs who did not want to join the union were required to pay fees for the costs of certain union activities, including those tied to the collective-bargaining process. The PAs filed a federal class action alleging the state law allowing for the collection of fees violated their First Amendment rights.

Issue: May a state, consistent with the First and Fourteenth Amendments to the...
U.S. Constitution, compel personal care providers to accept and financially support a private organization as their exclusive representative to petition the state for greater reimbursements from its Medicaid programs?

No. The First Amendment prohibits the collection of an agency fee from personal assistants in the Rehabilitation Program who do not want to join or support the union.

From the opinion by Justice Alito (joined by Chief Justice Roberts and Justice Scalia, Kennedy, and Thomas): If we accepted Illinois’ argument, we would approve an unprecedented violation of the bedrock principle that, except perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support.

From the dissenting opinion by Justice Kagan (joined by Justices Ginsburg, Breyer, and Sotomayor): The majority does not deny the State’s legitimate interest in ensuring that union representatives have funds necessary to carry out their responsibilities on behalf of in-home caregivers. The majority does so against the weight of all precedent, and based on “empirical assumption[s].”

First Amendment
Lane v. Franks et al.

Docket No. 13-483
Affirmed in Part, Reversed in Part, and Remanded:
The Eleventh Circuit

Argued: April 28, 2014
Decided: June 19, 2014
Analysis: See ABA PREVIEW 298 Issue 7

Overview: As Director of Community Intensive Training for Youth (CITY), a program for underprivileged youth operated by Central Alabama Community College (CACC), petitioner Edward Lane conducted an audit of the program’s expenses and discovered that Suzanne Schmitz, an Alabama State Representative on CITY’s payroll, had not been reporting for work. Lane eventually terminated Schmitz’ employment. Shortly thereafter, federal authorities indicted Schmitz on charges of mail fraud and theft concerning a program receiving federal funds. Lane testified, under subpoena, regarding the events that led to his terminating Schmitz. Schmitz was convicted and sentenced to 30 months in prison. Meanwhile, CITY was experiencing significant budget shortfalls. Respondent Franks, then CACC’s president, terminated Lane along with 28 other employees in a claimed effort to address the financial difficulties. A few days later, however, Franks rescinded all but 2 of the 29 terminations—those of Lane and one other employee. Lane sued Franks in his individual and official capacities under 42 U.S.C. § 1983, alleging that Franks had violated the First Amendment by firing him in retaliation for testifying against Schmitz.

Issue: Is the government categorically free under the First Amendment to retaliate against a public employee for truthful sworn testimony that was compelled by subpoena and was not a part of the employee’s ordinary job responsibilities?

No. Lane’s sworn testimony outside the scope of his ordinary job duties is entitled to First Amendment protection. However, respondent Franks in this case is entitled to qualified immunity, so the claims against him in his individual capacity cannot proceed.

From the unanimous opinion by Justice Sotomayor: Truthful testimony under oath by a public employee outside the scope of his ordinary job duties is speech as a citizen for First Amendment purposes. That is so even when the testimony relates to his public employment or concerns information learned during that employment. … The importance of public employee speech is especially evident in the context of this case: a public corruption scandal. … [However,] Franks argues that even if Lane’s testimony is protected under the First Amendment, the claims against him in his individual capacity should be dismissed on the basis of qualified immunity. We agree. … The relevant question for qualified immunity purposes is this: Could Franks reasonably have believed, at the time he fired Lane, that a government employer could fire an employee on account of testimony the employee gave, under oath and outside the scope of his ordinary job responsibilities? Eleventh Circuit precedent did not preclude Franks from reasonably holding that belief. And no decision of this Court was sufficiently clear to cast doubt on the controlling Eleventh Circuit precedent.

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

First Amendment
McCullen v. Coakley

Docket No. 12-1168
Affirmed: The First Circuit

Argued: January 15, 2014
Decided: June 26, 2014
Analysis: See ABA PREVIEW 180 Issue 4

Overview: In 2007, Massachusetts amended its Reproductive Health Care Facilities Act to make it a crime to knowingly stand on a “public way or sidewalk” within 35 feet of an entrance or driveway to any “reproductive health care facility,” defined as “a place, other than within or upon the grounds of a hospital, where abortions are offered or performed.” The Act exempts from this prohibition four classes of individuals, including “employees or agents of such facility acting within the scope of their employment.” Another provision of the Act proscribes the knowing obstruction of access to an abortion clinic. The petitioners are individuals who attempt to engage women approaching Massachusetts abortion clinics in “sidewalk counseling,” which involves offering information about alternatives to abortion and help exploring those options. They claim that the 35-foot buffer zones have displaced them from their previous positions outside the clinics, considerably hampering their counseling efforts.

Issue: Did the First Circuit err in upholding Massachusetts’s selective exclusion law under the First and Fourteenth Amendments, on its face and as applied to petitioners?

Yes. The Massachusetts Act violates the First Amendment. Although the Act is content neutral, it is not narrowly tailored because it burden[s] substantially more speech than is necessary to further the government’s legitimate interests.
From the opinion by Chief Justice Roberts (joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan): It is no accident that public streets and sidewalks have developed as venues for the exchange of ideas. Even today, they remain one of the few places where a speaker can be confident that he is not simply preaching to the choir. With respect to other means of communication, an individual confronted with an uncomfortable message can always turn the page, change the channel, or leave the Web site. Not so on public streets and sidewalks. There, a listener often encounters speech he might otherwise tune out.

From the concurring opinion by Justice Scalia (joined by Justices Kennedy and Thomas): Today's opinion carries forward this Court's practice of giving abortion-rights advocates a pass when it comes to suppressing the free-speech rights of their opponents. There is an entirely separate, abridged edition of the First Amendment applicable to speech against abortion. ... The second half of the Court's analysis today, invalidating the law at issue because of inadequate "tailoring," is certainly attractive to those of us who oppose an abortion-speech edition of the First Amendment. But think again. This is an opinion that has Something for Everyone, and the more significant portion continues the onward march of abortion-speech-only jurisprudence.

From the concurring opinion by Justice Alito: The obvious purpose of the challenged portion of the Massachusetts Reproductive Health Facilities Act is to "protect" prospective clients of abortion clinics from having to hear abortion-opposing speech on public streets and sidewalks. The provision is thus unconstitutional root and branch and cannot be saved, as the majority suggests, by limiting its application to the single facility that has experienced the safety and access problems to which it is quite obviously not addressed.

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First Amendment
Susan B. Anthony List et al. v. Driehaus et al.
Docket No. 13-193
Reversed and Remanded: The Sixth Circuit

Argued: April 22, 2014
Decided: June 16, 2014
Analysis: See ABA PREVIEW 301 Issue 7

Overview: Respondent Steve Driehaus, a former Congressman, filed a complaint with the Ohio Elections Commission alleging that petitioner Susan B. Anthony List (SBA) violated an Ohio law that criminalizes certain false statements made during the course of a political campaign. Specifically, Driehaus alleged that SBA violated the law when it stated that his vote for the Patient Protection and Affordable Care Act (ACA) was a vote in favor of "taxpayer funded abortion." After Driehaus lost his reelection bid, the complaint was dismissed, but SBA continued to pursue a separate suit in Federal District Court challenging the law on First Amendment grounds. Petitioner Coalition Opposed to Additional Spending and Taxes (COAST) also filed a First Amendment challenge to the Ohio law, alleging that it had planned to disseminate materials presenting a similar message but refrained due to the proceedings against SBA. The District Court consolidated the two lawsuits and dismissed them as nonjusticiable, concluding that neither suit presented a sufficiently concrete injury for purposes of standing or ripeness. The Sixth Circuit affirmed on ripeness grounds.

Issue: To challenge a speech-suppressive law, must a party whose speech is arguably proscribed prove that authorities would certainly and successfully prosecute him?

No. The threatened commission proceedings are of particular concern because of the burden they impose on electoral speech. Moreover, the target of a complaint may be forced to divert significant time and resources to hire legal counsel and respond to discovery requests in the crucial days before an election.

From the unanimous opinion by Justice Thomas: One recurring issue in our cases is determining when the threatened enforcement of a law creates an Article III injury. When an individual is subject to such a threat, an actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging the law. ... Although the threat of Commission proceedings is a substantial one, we need not decide whether that threat standing alone gives rise to an Article III injury. The burdensome Commission proceedings here are backed by the additional threat of criminal prosecution. We conclude that the combination of those two threats suffices to create an Article III injury under the circumstances of this case.

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First Amendment
Town of Greece, New York v. Galloway et al.
Docket No. 12-696
Reversed: The Second Circuit

Argued: November 6, 2013
Decided: May 5, 2014
Analysis: See ABA PREVIEW 56 Issue 2

Overview: In Marsh v. Chambers, 463 U.S. 783 (1983), the Supreme Court upheld the practice of starting legislative sessions with an invocation, based on an "unambiguous and unbroken history" of legislative prayer dating back to the First Congress. The prayers in Marsh were offered for 16 years by the same paid Presbyterian minister and frequently contained explicitly Christian themes. Nonetheless, the Court held that such prayers are "simply a tolerable acknowledgment of beliefs widely held among the people of this country," and constitutional unless the selection of prayer-givers "stem[s] from an impermissible motive" or "the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." In this case, the Second Circuit held that the town of Greece violated the Establishment Clause by allowing volunteer private citizens to open town board meetings with a prayer. Though the town had never regulated the content of the prayers, had permitted any citizen from any religious tradition to volunteer to be a prayer-giver, and did not discriminate in selecting prayer-givers, the court struck down the town's prayer practice, applying an "endorsement" test.
Issue: Did the Second Circuit err in holding that the town of Greece’s legislative prayer practice violates the Establishment Clause?

Yes. From the Nation’s earliest days, invocations have been addressed to assemblies comprising many different creeds, striving for the idea that people of many faiths may be united in a community of tolerance and devotion, even if they disagree as to religious doctrine. The prayers delivered in Greece do not fall outside this tradition.

From the opinion by Justice Kennedy, which, except as to Part II-B is the opinion of the Court (joined in full by Chief Justice Roberts and Justice Alito; joined except as to part II-B by Justices Scalia and Thomas): To hold that invocations must be nonsectarian would force the legislatures that sponsor prayers and the courts that are asked to decide these cases to act as supervisors and censors of religious speech, a rule that would involve government in religious matters to a far greater degree than is the case under the town’s current practice of neither editing or approving prayers in advance nor criticizing their content after the fact. … The First Amendment is not a majority rule, and government may not seek to define permissible categories of religious speech. Once it invites prayer into the public sphere, government must permit a prayer giver to address his or her own God or gods as conscience dictates, unfettered by what an administrator or judge considers to be nonsectarian.

Concurring in part and concurring in judgment: Justice Thomas (joined by Justice Scalia as to Part II)

Dissenting: Justice Breyer

From the dissenting opinion by Justice Kagan (joined by Justices Ginsburg, Breyer, and Sotomayor): In arranging for clergy members to open each meeting, the Town never sought (except briefly when this suit was filed) to involve, accommodate, or in any way reach out to adherents of non-Christian religions. So month in and month out for over a decade, prayers steeped in only one faith, addressed toward members of the public, commenced meetings to discuss local affairs and distribute government benefits. In my view, that practice does not square with the First Amendment’s promise that every citizen, irrespective of her religion, owns an equal share in her government.

First Amendment
United States v. Apel

Docket No. 12-1038
Vacated and Remanded: The Ninth Circuit

Argued: December 4, 2013
Decided: February 26, 2014
Analysis: See ABA PREVIEW 132 Issue 3

Overview: Federal law allows the government to punish individuals who come onto military installations after having been ordered not to reenter. The law contains no requirement on its face that the federal government have exclusive control of the land. However, the law was applied to a man who peacefully protested in a designated protest zone near a public highway. Local and state officials have concurrent jurisdiction with the federal government over this land. The case raised interesting statutory and constitutional arguments over the application of this law to a peaceful protester in a designated protest zone.

Issue: May 18 U.S.C. § 1382, which prohibits a person from reentering a military installation after a commanding officer has ordered him not to reenter, be enforced on a portion of a military installation that is subject to a public roadway easement?

Yes. Under § 1382, a military installation includes the commanding officer’s entire area of responsibility, which in this case, includes the public roadway and protest area.

From the unanimous opinion by Chief Justice Roberts: Today, as throughout our Nation’s history, there is significant variation in the ownership status of U.S. military sites around the world. Some are owned in fee, others are leased. Some are routinely open to the public, others are open for specific occasions or purposes, and no public access whatsoever is permitted on others. Many, including such well-known places as the Washington Navy Yard and the United States Air Force Academy, have roads running through them that are used freely by the public. Nothing in § 1382 or our history suggests that the statute does not apply to a military base under the command of the Air Force, merely because the Government has conveyed a limited right to travel through a portion of the base or to assemble in a particular area.

Concurring: Justice Ginsburg (joined by Justice Sotomayor)
Concurring: Justice Alito

First Amendment
Wood et al. v. Moss et al.

Docket No. 13-115
Reversed: The Ninth Circuit

Argued: March 26, 2014
Decided: May 27, 2014
Analysis: See ABA PREVIEW 255 Issue 6

Overview: Petitioners are Secret Service agents who, while protecting President George W. Bush, are alleged to have required that a group of 200 to 300 anti-Bush demonstrators be moved away from an alley next to an outdoor patio where the President was making a last-minute, unscheduled stop to dine. After they were moved, the anti-Bush demonstrators were less than one block farther from the alley than a group of pro-Bush demonstrators (who had not been adjacent to the alley at the outset). They were also two blocks farther from the route that the President’s motorcade subsequently took when he left the restaurant. The court of appeals held that petitioners are not entitled to qualified immunity from a claim under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), of viewpoint discrimination in violation of the First Amendment.

Issue: Did the Ninth Circuit err in denying qualified immunity to Secret Service agents protecting the president by evaluating the claim of viewpoint discrimination at a high level of generality and concluding that pro- and anti-Bush demonstrators needed to be positioned an equal distance from the president while he was dining on the outdoor patio and then while he was traveling by motorcade?

Yes. Individual government officials cannot be held liable in a Bivens suit unless they themselves acted unconstitutionally, and the Court declined to infer from alleged
instances of misconduct on the part of particular agents an unwritten Secret Service policy to suppress unfounded expression, and then attribute that supposed policy to all field-level operatives.

From the unanimous opinion by Justice Ginsburg: No decision of which we are aware … would alert Secret Service agents engaged in crowd control that they bear a First Amendment obligation “to ensure that groups with different viewpoints are at comparable locations at all times.” … Nor would the maintenance of equal access make sense in the situation the agents confronted.

**Foreign Sovereign Immunity**

*Republic of Argentina v. NML Capital, LTD*

Docket No. 12-842
Affirmed: The Second Circuit

Argued: April 21, 2014
Decided: June 16, 2014
Analysis: See ABA PREVIEW 273 Issue 7

**Overview:** After petitioning Republic of Argentina defaulted on its external debt, respondent NML Capital, Ltd. (NML), one of Argentina’s bondholders, prevailed in 11 debt-collection actions that it brought against Argentina in the Southern District of New York. In aid of executing the judgments, NML sought discovery of Argentina’s property, serving subpoenas on two nonparty banks for records relating to Argentina’s global financial transactions. The District Court granted NML’s motions to compel compliance. The Second Circuit affirmed, rejecting Argentina’s argument that the District Court’s order transgressed the Foreign Sovereign Immunities Act of 1976 (FSIA or Act).

**Issue:** Can postjudgment discovery in aid of enforcing a judgment against a foreign state be ordered with respect to all assets of a foreign state regardless of their location or use?

**Yes.** The Act contains no provision limiting discovery in aid of execution of a foreign-sovereign judgment debtor’s assets.

**From the opinion by Justice Scalia** (joined by Justices Kennedy, Thomas, Breyer, Alito, and Kagan): Argentina and the United States urge us to consider the worrisome international-relations consequences of siding with the lower court. Discovery orders as sweeping as this one, the Government warns, will cause “a substantial invasion of foreign states’ sovereignty,” … and will “[u]ndermine[e] international comity.” … Worse, such orders might provoke “reciprocal adverse treatment of the United States in foreign courts,” … and will “threaten harm to the United States’ foreign relations more generally.” … These apprehensions are better directed to that branch of government with authority to amend the Act.”

**Dissenting:** Justice Ginsburg
Justice Sotomayor took no part in the consideration or decision.

**Fourth Amendment**

*Riley v. California*

Docket No. 13-132
Reversed and Remanded: The Court of Appeal of California, Fourth Appellate District, Division One

Argued: April 29, 2014
Decided: June 25, 2014
Analysis: See ABA PREVIEW 294 Issue 7

**Overview:** This case involves two consolidated lower court rulings. In one case, petitioner David L. Riley was stopped for a traffic violation, which eventually led to his arrest on weapons charges. An officer searching Riley incident to the arrest seized a cell phone from Riley’s pants pocket. The officer accessed information on the phone and noticed the repeated use of a term associated with a street gang. At the police station two hours later, a detective specializing in gangs further examined the phone’s digital contents. Based in part on photographs and videos that the detective found, the State charged Riley in connection with a shooting that had occurred a few weeks earlier and sought an enhanced sentence based on Riley’s gang membership. In No. 13–212, respondent Brima Wurie was arrested after police observed him participate in an apparent drug sale. At the police station, the officers seized a cell phone from Wurie’s person and noticed that the phone was receiving multiple calls from a source identified as “my house” on its external screen. The officers opened the phone, accessed its call log, determined the number associated with the “my house” label, and traced that number to what they suspected was Wurie’s apartment. They secured a search warrant and found drugs, a firearm and ammunition, and cash in the ensuing search. Wurie was then charged with drug and firearm offenses. In each of their underlying proceedings, the petitioners moved to suppress. In both cases, the motion was denied and the petitioner convicted. The California appellate court reversed the denial of the suppression motions and vacated the convictions.

**Issue:** May the police, without a warrant, generally search digital information on a cell phone seized from an individual who has been arrested?

No. A warrant is generally required before a search. The warrant requirement is an important component of the Court’s Fourth Amendment jurisprudence, and warrants may be obtained with increasing efficiency.

**From the opinion by Chief Justice Roberts** (joined by Justices Scalia, Kennedy, Thomas, Ginsburg, Breyer, Sotomayor, and Kagan): Although the data stored on a cell phone is distinguished from physical records by quantity alone, certain types of data are also qualitatively different. An Internet search and browsing history, for example, can be found on an Internet-enabled phone and could reveal an individual’s private interests or concerns—perhaps a search for certain symptoms of disease, coupled with frequent visits to WebMD. Data on a cell phone can also reveal who a person has been. Historic location information is a standard feature on many smartphones and can reconstruct someone’s specific movements down to the minute, not only around town but also within a particular building. … Mobile application software on a cell phone, or “apps,” offer a range of tools for managing detailed information about all aspects of a person’s life. There are apps for Democratic Party news and Republican Party news; apps for alcohol, drug, and gambling addictions; apps for sharing prayer requests; apps for tracking pregnancy symptoms; apps for planning your budget; apps for every conceivable hobby or pastime; apps for improving your romantic life. There are popular apps for buying or selling just
about anything, and the records of such transactions may be accessible on the phone indefinitely. There are over a million apps available in each of the two major app stores; the phrase “there’s an app for that” is now part of the popular lexicon.

Concurring in part and in judgment: Justice Alito

Habeas Corpus
White v. Woodall
Docket No. 12-794
Reversed and Remanded: The Sixth Circuit

Argued: December 11, 2013
Decided: April 23, 2014
Analysis: See ABA PREVIEW 143 Issue 3

Overview: Respondent Robert Keith Woodall pled guilty to kidnapping, raping, and murdering a 16-year-old child. At the penalty phase trial, the prosecutor elected to present evidence of guilt and the circumstances of the crimes. Woodall did not testify; and his request that the jury be instructed not to draw any adverse inference from his decision not to testify (a “no adverse inference instruction”) was denied. He was sentenced to death by a Kentucky jury. The Kentucky Supreme Court affirmed. The Sixth Circuit granted habeas relief to Woodall on the ground that the trial court’s failure to provide no adverse inference instruction at the sentencing phase of a trial violated his Fifth Amendment right against self-incrimination.

Issue: Did the Sixth Circuit violate 28 U.S.C. § 2254(d)(1) by granting habeas relief on the trial court’s failure to provide a no adverse inference instruction even though the Supreme Court has not “clearly established” that such an instruction is required in a capital penalty phase when a nontestifying defendant has pled guilty to the crimes and aggravating circumstances?

Yes. Because the Kentucky Supreme Court’s rejection of respondent’s Fifth Amendment claim was not objectively unreasonable, the Sixth Circuit erred in granting the writ.

From the opinion by Justice Scalia (joined by Chief Justice Roberts, and Justices Kennedy, Thomas, Alito, and Kagan): Perhaps the logical next step from [the Court’s recent precedent] would be to hold that the Fifth Amendment requires a penalty-phase no-adverse-inference instruction in a case like this one; perhaps not. Either way, we have not yet taken that step, and there are reasonable arguments on both sides—which is all Kentucky needs to prevail in this AEDPA case. The appropriate time to consider the question as a matter of first impression would be on direct review, not in a habeas case governed by § 2254(d) (1).

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

Immigration Law
Scialabba v. Cuellar de Osorio et al.
Docket No. 12-930
Reversed and Remanded: The Ninth Circuit

Argued: December 10, 2013
Decided: June 9, 2014
Analysis: See ABA PREVIEW 121 Issue 3

Overview: The Immigration and Nationality Act (INA) permits United States citizens and lawful permanent resident (LPR) aliens to petition for certain family members to obtain visas to immigrate to the United States or to adjust their status in the United States to that of a lawful permanent resident alien. The family member sponsored by the petitioner is known as the primary beneficiary. The primary beneficiary’s “spouse or child” may be a derivative beneficiary of the petition, entitled to the same status and the same order of consideration as the primary beneficiary. 8 U.S.C. 1153(d). Section 203(h)(3) of the INA, 8 U.S.C. 1153(h)(3), grants relief to certain persons who reach age 21 (“age out”), and therefore lose “child” status, after the filing of visa petitions as to which they are beneficiaries.

Issue: Does § 1153(h)(3) unambiguously grant relief to all aliens who qualify as “child” derivative beneficiaries at the time a visa petition is filed but age out of qualification by the time the visa becomes available to the primary beneficiary?

No. The ambiguity created by § 1153(h)(3)’s ill-fitting clauses left the Board of Immigration Appeals to choose how to reconcile the statute’s different commands. It reasonably opted to abide by the inherent limits of § 1153(h)(3)’s remedial clause rather than go beyond those limits so as to match the sweep of the first clause’s condition.

From the dissenting opinion by Justice Sotomayor (joined by Justice Breyer, and Justice Thomas except as to footnote 3): Congress faced a difficult choice when it enacted § 1153(h)(3). Given the “zero-sum world of allocating a limited number of visas,” … Congress could have required aged-out children like Ruth Uy to lose their place in line and wait many additional years (or even decades) before being reunited with their parents, or it could have enabled such immigrants to retain their place in line—albeit at the cost of extending the wait for other immigrants by some shorter amount. Whatever one might think of the policy arguments on each side, however, this much is clear: Congress made a choice. The plurality’s contrary view—that Congress actually delegated the choice to the BIA in a statute that unambiguously encompasses aged-out children in all five preference categories and commands that they “shall retain the [ir] original priority date[s],” § 1153(h)(3)—is untenable.

International Family Law
Lozano v. Alvarez
Docket No. 12-820
Affirmed: The Second Circuit

Argued: December 11, 2013
Decided: March 5, 2014
Analysis: See ABA PREVIEW 139 Issue 3

Overview: The United States and 89 other nations have adopted the 1980
Hague Convention on the Civil Aspects of International Child Abduction, which establishes procedures for returning abducted children to the nations of their prior habitual residence. If the proceeding for return under the Convention was commenced a year or more after the child was abducted, return is not mandatory if the court finds that “the child is now settled in its new environment.” This case, involving a claim for return of a child abducted from the United Kingdom to the United States, turned on whether “equitable tolling” applies to the computation of time in the “now settled” defense, and how illegal immigrant status impacts that defense—issues that split the lower federal courts.

**Issue:** Is the “now settled” defense to a Hague Abduction Convention claim for return of a child to the country from which she was abducted subject to equitable tolling?

**No.** The Hague Abduction Convention’s Article 12’s 1-year period is not subject to equitable tolling.

**From the unanimous opinion by Justice Thomas:** We conclude that the parties to the Hague Convention did not intend equitable tolling to apply to the 1-year period in Article 12. Unlike federal statutes of limitations, the Convention was not adopted against a shared background of equitable tolling. Even if the Convention were subject to a presumption that statutes of limitations may be tolled, the 1-year period in Article 12 is not a statute of limitations. And absent a presumption in favor of equitable tolling, nothing in the Convention warrants tolling the 1-year period.

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

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**Jurisdiction**

Ray Haluch Gravel Co. v. Central Pension Fund

Docket No. 12-992

Reversed and Remanded: The First Circuit

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Argued: December 9, 2013
Decided: January 15, 2014
Analysis: See ABA PREVIEW 119 Issue 3

**Overview:** The petitioner, Ray Haluch Gravel Co., and the respondent, Central Pension Fund, had a collective bargaining agreement that obligated the petitioner to contribute to the respondent’s union pension funds. Respondent sued to collect the amount owed under the contract as well as attorney’s fees and costs under both the contract and the Employee Retirement Income Security Act of 1974. The district court issued a damages award on June 17, 2011, and an attorney’s fee award on July 25, 2011; the awards were for much less than the respondent had originally sought. The respondent appealed on August 15, 2011, within the 12 U.S.C. 2107 30-day time limit from the award on fees (July 25) but not the first award (June 17). The First U.S. Circuit Court of Appeals held that it had jurisdiction to review both the district court orders, vacated each of them, and remanded.

**Issue:** Is a district court’s decision on the merits that leaves unresolved a request for contractual attorney’s fees a final decision for purposes of appealing under 12 U.S.C. 1291?

**Yes.** A decision on the merits that leaves unresolved contractual attorney’s fees is a final decision for the purposes of appealing under 12 U.S.C. 1291; in this case, the appeal of the June 17 decision was untimely.

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Docket No. 12-873

Affirmed: The Sixth Circuit

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Argued: December 3, 2013
Decided: March 25, 2014
Analysis: See ABA PREVIEW 108 Issue 3

**Overview:** Petitioner Lexmark sells the only style of toner cartridges that work with the company’s laser printers, but “remanufacturers” acquire and refurbish used Lexmark cartridges to sell in competition with Lexmark’s own new and refurbished ones. Lexmark’s “Prebate” program gives customers a discount on new cartridges if they agree to return empty cartridges to the company. Each Prebate cartridge has a microchip that disables the empty cartridge unless Lexmark replaces the chip. Respondent Static Control, a maker and seller of components for the remanufacture of Lexmark cartridges, developed a microchip that mimicked Lexmark’s. Lexmark sued for copyright infringement, but Static Control counterclaimed, alleging that Lexmark engaged in false or misleading advertising in violation of § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), and that its misrepresentations had caused Static Control lost sales and damage to its business reputation. The District Court held that Static Control lacked “prudential standing” to bring the Lanham Act claim, applying a multifactor balancing test the court attributed to Associated Gen. Contractors of Cal., Inc. v. Carpenters, 459 U.S. 519. In reversing, the Sixth Circuit relied on the Second Circuit’s “reasonable interest” test.

**Issue:** Did Static Control adequately plead the elements of a Lanham Act cause of action for false advertising?

**Yes.** Static Control comes within the class of plaintiffs authorized to sue under § 1125(a). Its alleged injuries—lost sales and damage to its business reputation—fall within the zone of interests protected by the Act, and Static Control sufficiently alleged that its injuries were proximately caused by Lexmark’s misrepresentations.
**Patent Law**

**Alice Corporation Pty. LTD v. CLS Bank International et al.**

**Docket No. 13-298**

**Affirmed: The United States Court of Appeals for the Federal Circuit**

Argued: March 31, 2014  
Decided: June 19, 2014  
Analysis: See ABA PREVIEW 240 Issue 6

Overview: Petitioner Alice Corporation is the assignee of several patents that disclose a scheme for mitigating "settlement risk," i.e., the risk that only one party to an agreed-upon financial exchange will satisfy its obligations. In particular, the patent claims are designed to facilitate the exchange of financial obligations between two parties by using a computer system as a third-party intermediary. The patents in suit claim (1) a method for exchanging financial obligations, (2) a computer system configured to carry out the method for exchanging obligations, and (3) a computer-readable medium containing program code for performing the method of exchanging obligations. Respondents (together, CLS Bank), who operate a global network that facilitates currency transactions, filed suit against petitioner, alleging that the patent claims at issue are invalid, unenforceable, or not infringed. Petitioner countered, alleging infringement. After *Bilski v. Kappos*, 561 U.S. 593, was decided, the District Court held that all of the claims were ineligible for patent protection under 35 U.S.C. § 101 because they are directed to an abstract idea. The en banc Federal Circuit affirmed.

**Issue:** Are claims to computer-implemented inventions-including claims to systems and machines, processes, and items of manufacture directed to patent-eligible subject matter within the meaning of 35 U.S.C. § 101?

No. Because the claims are drawn to a patent-ineligible abstract idea, they are not patent eligible under § 101.

**From the unanimous opinion by Justice Thomas:** The method claims recite the abstract idea implemented on a generic computer; the system claims recite a handful of generic computer components configured to implement the same idea. This Court has long "warn[ed] … against interpreting § 101 "in ways that make patent eligibility 'depend simply on the draftsman's art.'" Holding that the system claims are patent eligible would have exactly that result. … Because petitioner's system and media claims add nothing of substance to the underlying abstract idea, we hold that they too are patent ineligible under § 101.

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

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**Lanham Act**

**POM Wonderful, LLC v. Coca Cola Co.**

**Docket No. 12-761**

**Reversed and Remanded: The Ninth Circuit**

Argued: April 21, 2014  
Decided: June 12, 2014  
Analysis: See ABA PREVIEW 270 Issue 7

Overview: Petitioner POM Wonderful, LLC, which produces, markets, and sells, a pomegranate-blueberry juice blend, filed a Lanham Act suit against respondent Coca-Cola Company, alleging that the name, label, marketing, and advertising of one of Coca-Cola's juice blends mislead consumers into believing the product consists predominantly of pomegranate and blueberry juice when in fact consists predominantly of less expensive apple and grape juices, and that the ensuing confusion causes POM to lose sales. The District Court granted partial summary judgment to Coca-Cola, ruling that the Food, Drug, and Cosmetic Act (FDCA) and its regulations preclude Lanham Act challenges to the name and label of Coca-Cola's juice blend. The Ninth Circuit affirmed in relevant part.

**Issue:** Can a private party bring a Lanham Act claim challenging a product label regulated under the FDCA?

**Yes.** Competitors may bring Lanham Act claims like POM's challenging food and beverage labels regulated by the FDCA.

**From the opinion by Justice Kennedy** (joined by all of the justices except Justice Breyer, who took no part in the decision): The structures of the FDCA and the Lanham Act reinforce the conclusion drawn from the text. When two statutes complement each other, it would show disregard for the congressional design to hold that Congress nonetheless intended one federal statute to preclude the operation of the other.

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**Patent Law**

**Highmark, Inc. v. Allcare Health Management System, Inc.**

**Docket No. 12-1163**

**Vacated and Remanded: The Federal Circuit**

Argued: February 26, 2014  
Decided: April 29, 2014  
Analysis: See ABA PREVIEW 226 Issue 5


**Issue:** Is a district court's exceptional-case finding under 35 U.S.C. § 285, based on its judgment that a suit is objectively baseless, entitled to deference?

Yes. All aspects of a district court's exceptional-case determination under § 285 should be reviewed for abuse of discretion.

**From the unanimous opinion by Justice Sotomayor:** We … hold that an appellate court should apply an abuse-of-discretion standard in reviewing all aspects of a district court's § 285 determination. Although questions of law may in some cases be relevant to the § 285 inquiry, that inquiry generally is, at heart, "rooted in factual determinations."
fundamentally misunderstands what it means to infringe a method patent. A method patent claims a number of steps; under this Court’s case law, the patent is not infringed unless all the steps are carried out. … This principle follows ineluctably from what a patent is: the conferral of rights in a particular claimed set of elements.

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**Patent Law**

**Limelight Networks, Inc. v. Akamai Technologies, Inc.**

**Docket No. 12-786**

**Reversed and Remanded: The Federal Circuit**

Argued: April 30, 2014  
Decided: June 2, 2014  
Analysis: See ABA PREVIEW 262 Issue 7

**Overview:** Respondent Akamai Technologies, Inc., is the exclusive licensee of a patent that claims a method of delivering electronic data using a content delivery network (CDN). Petitioner Limelight Networks, Inc. also operates a CDN and carries out several of the steps claimed in the patent, but its customers, rather than Limelight itself, perform a step of the patent known as “tagging.” Under Federal Circuit case law, liability for direct infringement under 35 U.S.C. § 271(a) requires performance of all steps of a method patent to be attributable to a single party. This position was most recently refined in *Manuviaction, Inc. v. Thomson Corp.*, 532 F. 3d 1318. The District Court concluded that Limelight could not have directly infringed the patent at issue because performance of the tagging step could not be attributed to it. The en banc Federal Circuit reversed, holding that a defendant who performed some steps of a method patent and encouraged others to perform the rest could be liable for inducement of infringement even if no one was liable for direct infringement. The en banc court concluded that the evidence could support liability for Limelight on an inducement theory and remanded for further proceedings.

**Issue:** May a defendant be held liable for inducing patent infringement under 35 U.S.C. § 271(b) even though no one has committed direct infringement under § 271(a)?

**No.** A defendant is not liable for inducing infringement under § 271(b) when no one has directly infringed under § 271(a) or any other statutory provision.

**From the unanimous opinion by Justice Alito:** The Federal Circuit’s analysis fundamentally misunderstands what it means to infringe a method patent. A method patent claims a number of steps; under this Court’s case law, the patent is not infringed unless all the steps are carried out. … This principle follows ineluctably from what a patent is: the conferral of rights in a particular claimed set of elements.

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**Patent Law**

**Medtronic, Inc. v. Boston Scientific Corp.**

**Docket No. 12-1128**

**Reversed and Remanded: The Federal Circuit**

Argued: November 5, 2013  
Decided: January 22, 2014  
Analysis: See ABA PREVIEW 78 Issue 2

**Overview:** Supreme Court precedent establishes that a patent licensee may file a declaratory judgment action against the licensor to obtain adjudication of the patent’s validity, enforceability, and infringement without breaching the license agreement and risking liability for infringement of the patent. In this case, the Court was asked to determine whether, after a patent licensee files such a declaratory judgment action, the licensor bears the burden of proving infringement or whether the licensee bears the burden of proving noninfringement.

**Issue:** In a declaratory judgment action brought by a patent licensee who has not breached the license, does the patentee bear the burden of proving that the licensee’s products infringe the patent?

**Yes.** When a licensee seeks a declaratory judgment against a patentee that its product does not infringe the licensed patent, the patentee bears the burden of proof on the issue of infringement.

**From the unanimous opinion by Justice Breyer:** The Federal Circuit’s burden shifting rule does not deprive Medtronic of the right to seek a declaratory judgment. But it does create a significant obstacle to use of that action. It makes the declaratory judgment procedure—compared to, say, just refusing to pay royalties—disadvantageous. To that extent it recreates the dilemma that the Declaratory Judgment Act sought to avoid. … We are unaware of any strong reason for creating that obstacle.

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**Patent Law**

**Nautilus v. Biosig Instruments, Inc.**

**Docket No. 13-369**

**Vacated and Remanded: The Federal Circuit**

Argued: April 28, 2014  
Decided: June 2, 2014  
Analysis: See ABA PREVIEW 285 Issue 7

**Overview:** The Patent Act requires that a patent specification “conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as [the] invention.” 35 U.S.C. § 112, ¶2. Biosig filed this patent infringement suit, alleging that Nautilus, Inc., without obtaining a license, sold exercise machines containing Biosig’s patented technology. The District Court, after conducting a hearing to determine the proper construction of the patent’s claims, granted Nautilus’ motion for summary judgment on the ground that the claim term “in spaced relationship with each other” failed § 112, ¶2’s definiteness requirement. The Federal Circuit reversed and remanded, concluding that a patent claim passes the § 112, ¶2 threshold so long as the claim is “amenable to construction,” and the claim, as construed, is not “insolubly ambiguous.” Under that standard, the court determined, the patent at issue survived indefiniteness review.

**Issue:** Does the Federal Circuit’s acceptance of ambiguous patent claims with multiple reasonable interpretations—so long as the ambiguity is not “insoluble” by a court—defeat the statutory requirement of particular and distinct patent claiming?

**Yes.** The Federal Circuit’s standard, which tolerates some ambiguous claims but not others, does not satisfy the statute’s definiteness requirement.

**From the unanimous opinion by Justice Ginsburg:** The Federal Circuit invoked a standard more amorphous than the statutory definiteness requirement allows.
Preemption
Northwest, Inc., et al. v. Ginsberg

Docket No. 12-462
Reversed and Remanded:
The Ninth Circuit

Argued: December 3, 2013
Decided: April 2, 2014
Analysis: See ABA PREVIEW 116 Issue 3

Overview: The Airline Deregulation Act of 1978 (“ADA”) includes a preemption provision providing that States “may not enact or enforce a law, regulation or other provision having the force and effect of law related to a price, route, or service of an air carrier.” 49 U.S.C. § 41713(b). Respondent was a participant in Northwest Airlines’ frequent flyer program, which by its terms permitted Northwest to remove participants from the program in Northwest’s “sole judgment.” After respondent was removed from the frequent flyer program, he filed suit against Northwest alleging that Northwest breached both its contractual obligations and an implied covenant of good faith and fair dealing under Minnesota law when it exercised its discretion to terminate respondent’s membership in the program. Although the district court dismissed the contract claim for failure to state a claim and the implied covenant of good faith claim as preempted by the ADA, the Ninth Circuit reversed as to the implied covenant claim, finding such claims categorically unrelated to a price, route or service under a line of Ninth Circuit cases that have been recognized by other Circuits as inconsistent with Supreme Court precedent, especially American Airlines, Inc. v. Wolens, 513 U.S. 219 (1995).

Issue: Is the respondent’s implied covenant of good faith and fair dealing claim preempted under the Airline Deregulation Act of 1978?

Yes. The ADA preempts a state-law claim for breach of the implied covenant of good faith and fair dealing if it seeks to enlarge the contractual obligations that the parties voluntarily adopt.

From the unanimous opinion by Justice Alito: Exempting common-law claims would … disserve the central purpose of the ADA. The Act eliminated federal regulation of rates, routes, and services in order to allow those aspects of air transportation to be set by market forces, and the pre-emption provision was included to prevent the States from undoing what the Act was meant to accomplish.

Qualified Immunity
Plumhoff et al. v. Rickard

Docket No. 12-1117
Reversed and Remanded:
The Sixth Circuit

Argued: March 4, 2014
Decided: May 27, 2014
Analysis: See ABA PREVIEW 222 Issue 5

Overview: Donald Rickard led police officers on a high-speed car chase that came to a temporary halt when Rickard spun out into a parking lot. Rickard resumed maneuvering his car, and as he continued to use the accelerator even though his bumper was flush against a patrol car, an officer fired three shots into Rickard’s car. Rickard managed to drive away, almost hitting an officer in the process. Officers fired 12 more shots as Rickard sped away, striking him and his passenger, both of whom died from some combination of gunshot wounds and injuries suffered when the car eventually crashed. Respondent, Rickard’s minor daughter, filed a 42 U.S.C. § 1983 action, alleging that the officers used excessive force in violation of the Fourth and Fourteenth Amendments. The District Court denied the officers’ motion for summary judgment based on qualified immunity, holding that their conduct violated the Fourth Amendment and was contrary to clearly established law at the time in question. After finding that it had appellate jurisdiction, the Sixth Circuit held that the officers’ conduct violated the Fourth Amendment. It affirmed the District Court’s order, suggesting that it agreed that the officers violated clearly established law.

Issue: Did the Sixth Circuit err in denying qualified immunity by finding the use of force was not reasonable as a matter of law?
Yes. The officers’ conduct did not violate the Fourth Amendment.

From the opinion by Justice Alito
(joined by Chief Justice Roberts, and Justices Scalia, Kennedy, Thomas, Sotomayor, Kagan, and, as to Parts I, II, and III-C, Justice Ginsburg, and, except for Part III-B-2, Justice Breyer): Under the circumstances present in this case, we hold that the Fourth Amendment did not prohibit petitioners from using the deadly force that they employed to terminate the dangerous car chase that Rickard precipitated. In the alternative, we note that petitioners are entitled to qualified immunity for the conduct at issue because they violated no clearly established law.

Qualified Immunity
Tolan v. Cotton

Docket No. 13-551
Vacated and Remanded: The Fifth Circuit

Argued: N/A
Decided: May 5, 2014
Analysis: N/A

Overview: During the early morning hours of New Year’s Eve, 2008, police sergeant Jeffrey Cotton fired three bullets at Robert Tolan; one of those bullets hit its target and punctured Tolan’s right lung. At the time of the shooting, Tolan was unarmed on his parents’ front porch about 15 to 20 feet away from Cotton. Tolan sued, alleging that Cotton had exercised excessive force in violation of the Fourth Amendment. The District Court granted summary judgment to Cotton, and the Fifth Circuit affirmed, reasoning that regardless of whether Cotton used excessive force, he was entitled to qualified immunity because he did not violate any clearly established right.

Issue: Did the Fifth Circuit err in finding as a matter of law that Officer Cotton was entitled to qualified immunity?

Yes. In cases alleging unreasonable searches or seizures, the Supreme Court has instructed that courts should define the “clearly established” right at issue on the basis of the “specific context of the case.”

From the per curiam opinion: In articulating the factual context of the case, the Fifth Circuit failed to adhere to the axiom that in ruling on a motion for summary judgment, “[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.” … For that reason, we vacate its decision and remand the case for further proceedings consistent with this opinion.

Concurring: Justice Alito (joined by Justice Scalia)

Real Property Law
Marvin M. Brandt Revocable Trust and Marvin M. Brandt, Trustee v. United States

Docket No. 12-1173
Reversed and Remanded: The Tenth Circuit

Argued: January 14, 2014
Decided: March 5, 2014
Analysis: See ABA PREVIEW 186 Issue 4

Overview: In 1908, the United States government donated to a Wyoming railroad a 28-mile-long “right of way” to build its tracks through the Medicine Bow National Forest. Later, a sawmill was built in the forest next to the railroad. Marvin Brandt’s family bought the sawmill property, crossed by the railroad right of way, from the government. Around 2004, the railroad was abandoned. The government claimed that because it was the original owner of the railroad right of way, ownership reverted to the government when the railroad was abandoned, and it could now use the right of way for a hiking and biking trail. Brandt claimed that when the railroad was abandoned, the right of way “easement” legally disappeared, and the trail could not run through his property unless the government paid him for it. Although this case involved only a few acres of property, the Court’s decision may help determine the ownership of thousands of miles of railroad rights of way granted by the federal government, all over the western United States, worth potentially millions of dollars. The Supreme Court agreed to hear the case in part because the federal courts of appeals were split as to the correct answer.

Issue: Did the United States retain an implied reversionary interest in rights-of-ways created by the General Railroad Right of Way Act of 1875 after the underlying lands were patented into private ownership?

No. Such rights-of-ways are easements that are terminated by the railroad’s abandonment, leaving the land unburdened.

From the opinion by Chief Justice Roberts
(joined by Justices Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, and Kagan): When the United States patented the Fox Park parcel to Brandt’s parents in 1976, it conveyed fee simple title to that land, “subject to those rights for railroad purposes” that had been granted to the LHP&P. The United States did not reserve to itself any interest in the right of way in that patent. Under Great Northern, the railroad thus had an easement in its right of way over land owned by the Brandts. The essential features of easements—including, most important here, what happens when they cease to be used—are well settled as a matter of property law. An easement is a “nonpossessory right to enter and use land in the possession of another and obligates the possessor not to interfere with the uses authorized by the easement.” Restatement (Third) of Property: Servitudes § 1.2(1) (1998). … In other words, if the beneficiary of the easement abandons it, the easement disappears, and the landowner resumes his full and unencumbered interest in the land.

Dissenting: Justice Sotomayor

Recess Appointments
National Labor Relations Board v. Noel Canning

Docket No. 12-1281
Affirmed: The District of Columbia Circuit

Argued: January 13, 2014
Decided: June 26, 2014
Analysis: See ABA PREVIEW 169 Issue 4

Overview: Noel Canning, a Pepsi-Cola distributor, asked the D. C. Circuit to set aside an order of the National Labor Relations Board, claiming that the Board lacked a quorum because three of the five Board members had been invalidly appointed. The nominations of the three members in question were pending in the Senate when it passed a December 17, 2011, resolution providing for a series of
“pro forma session[s],” with “no business … transacted,” every Tuesday and Friday through January 20, 2012. Invoking the Recess Appointments Clause—which gives the President the power “to fill up all Vacancies that may happen during the Recess of the Senate,” Art. II, § 2, cl. 3—the president appointed the three members in question between the January 3 and January 6 pro forma sessions. Noel Canning argued primarily that the appointments were invalid because the three-day adjournment between those two sessions was not long enough to trigger the Recess Appointments Clause.

**Issue:** May the president’s recess-appointment power be exercised during a recess that occurs within a session of the Senate?

**Yes.** The Recess Appointments Clause empowers the president to fill any existing vacancy during any recess—intra-session or inter-session—of sufficient length. However, a three-day recess does not meet that length requirement.

**From the opinion of Justice Breyer** (joined by Justices Kennedy, Ginsburg, Sotomayor, and Kagan): The upshot is that restricting the Clause to inter-session recesses would frustrate its purpose. It would make the President’s recess-appointment power dependent on a formalistic distinction of Senate procedure. Moreover, the President has consistently and frequently interpreted the word “recess” to apply to intra-session recesses, and has acted on that interpretation. The Senate as a body has done nothing to deny the validity of this practice for at least three-quarters of a century. … [However, the] Adjournments Clause reflects the fact that a 3-day break is not a significant interruption of legislative business. … A Senate recess that is so short that it does not require the consent of the House is not long enough to trigger the President’s recess-appointment power.

**From the concurring opinion by Justice Scalia** (joined by Chief Justice Roberts, and Justices Thomas and Alito): [T]he Constitution’s text and structure unambiguously refute the majority’s freewheeling interpretation of “the Recess.” It is not plausible that the Constitution uses that term in a sense that authorizes the President to make unilateral appointments during any break in Senate proceedings, subject only to hazy, atextual limits crafted by this Court centuries after ratification.

### Religious Freedom and Free Exercise

**Burwell v. Hobby Lobby**

**Docket No. 13-354**

**Affirmed: The Tenth Circuit**

**Argued:** March 25, 2014  
**Decided:** June 30, 2014  
**Analysis:** See ABA *PREVIEW* 247 Issue 6

**Overview:** The Religious Freedom Restoration Act of 1993 (RFRA) prohibits the “Government [from] substantially burden[ing] a person’s exercise of religion even if the burden results from a rule of general applicability” unless the government “demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” The Department of Health and Human Services (HHS), under the Patient Protection and Affordable Care Act of 2010 (ACA), requires specified employers’ group health plans to furnish “preventive care and screenings” for women without “any cost sharing requirements,” 42 U.S.C. § 300gg-13(a)(4). Included within that HHS mandate are certain types of contraceptives that Hobby Lobby argues violate its rights under the RFRA to be forced to provide coverage for its employees. HHS provides exemptions for religious nonprofit organizations, but no exemptions for for-profit companies that object to the provision on religious grounds. Hobby Lobby (and several other closely held companies) argue that for-profit status does not preclude their assertion of rights under the RFRA.

**Issue:** Does the RFRA allow a for-profit corporation to deny its employees the health coverage for contraceptives to which the employees are otherwise entitled by federal law, based on the religious objections of the corporation’s owners?

**Yes.** The contraceptive mandate, as applied to closely held corporations, violates RFRA.

**From the opinion by Justice Alito** (joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas): For-profit corporations, with ownership approval, support a wide variety of charitable causes, and it is not at all uncommon for such corporations to further humanitarian and other altruistic objectives. Many examples come readily to mind. So long as its owners agree, a for-profit corporation may take costly pollution-control and energy-conservation measures that go beyond what the law requires. A for-profit corporation that operates facilities in other countries may exceed the requirements of local law regarding working conditions and benefits. If for-profit corporations may pursue such worthy objectives, there is no apparent reason why they may not further religious objectives as well.

**From the concurring opinion by Justice Kennedy:** [I]n a complex society and an era of pervasive governmental regulation, defining the proper realm for free exercise can be difficult. In these cases the plaintiffs deem it necessary to exercise their religious beliefs within the context of their own closely held, for-profit corporations.

**From the dissenting opinion by Justice Ginsburg** (joined by Justices Sotomayor, and Justices Breyer and Kagan in all but in Part III-C-1): Would the exemption the Court holds RFRA demands for employers with religiously grounded objections to the use of certain contraceptives extend to employers with religiously grounded objections to blood transfusions (Jehovah’s Witnesses); antidepressants (Scientologists); medications derived from pigs, including anesthesia, intravenous fluids, and pills coated with gelatin (certain Muslims, Jews, and Hindus); and vaccinations (Christian Scientists, among others)? … The Court, I fear, has ventured into a minefield.

### Restitution

**Robers v. United States**

**Docket No. 12-9012**

**Affirmed: The Seventh Circuit**

**Argued:** February 25, 2014  
**Decided:** May 5, 2014  
**Analysis:** See ABA *PREVIEW* 202 Issue 5

**Overview:** Petitioner Robers was convicted of a federal crime for submitting fraudulent mortgage loan applications to two banks. On appeal, he argued that the District Court had miscalculated his restitution obligation under the Mandatory Victims Restitution Act of 1996, 18 U.S.C. §§ 3663A–3664, a...
provision of which requires property crime offenders to pay “an amount equal to … the value of the property” less “the value (as of the date the property is returned) of any part of the property that is returned,” § 3663A(b)(1)(B). The District Court had ordered Robers to pay the difference between the amount lent to him and the amount the banks received in selling the houses that had served as collateral for the loans. Robers claimed that the District Court should have instead reduced the restitution amount by the value of the houses on the date the banks took title to them since that was when “part of the property” was “returned.” The Seventh Circuit rejected Robers’ argument.

Issue: Does a defendant, who has fraudulently obtained a loan and thus owes restitution for the loan under 18 U.S.C. § 3663A(b)(1)(B), return “any part” of the loan money by giving the lenders the collateral that secures the money?

No. The phrase “any part of the property … returned” refers to the property the banks lost, namely, the money they lent to Robers, and not to the collateral the banks received, namely, the houses.

From the unanimous opinion by Justice Breyer: [W]e are left with no such ambiguity or uncertainty here. The statutory provision refers to the money lost, not to the collateral received.

Concurring: Justice Ginsburg (joined by Justice Sotomayor)

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Securities Class Action
Chadbourne & Parke LLP, Willis of Colorado, Inc., Proskauer Rose LLP v. Troice

Docket Nos. 12-79, 12-86, and 12-88
Affirmed: The Fifth Circuit

Argued: October 7, 2013
Decided: February 26, 2014
Analysis: See ABA PREVIEW 33 Issue 1
Overview: Investors in the highly publicized $7 billion financial Ponzi scheme perpetrated by R. Allen Stanford sued various law firms, insurance, and financial service companies in four state and federal securities fraud class actions. In this consolidated appeal, the Court was asked to consider whether the Securities Litigation Uniform Standards Act (SLUSA) precludes these state law class actions against third-party actors where the complaints allege a scheme of fraudulent misrepresentation about transactions in connection with SLUSA covered securities.

Issue: Does the preclusion provision of the Securities Litigation Uniform Standards Act of 1998 (SLUSA) prevent state and federal courts from adjudicating state law class action claims against third-party actors where the complaints allege that the defendants made misrepresentations in connection with the purchase or sale of a covered security under the act?

No. The SLUSA does not preclude state law class action claims against third-party actors.

From the opinion by Justice Breyer (joined by Chief Justice Roberts and Justices Scalia, Thomas, Ginsburg, Sotomayor, and Kagan): We find it surprising that the dissent worries that our decision will “narrow[w] and constrict[t] essential protection for our national securities market,” and put “frais like the one here … not within the reach of federal regulation”. That would be news to Allen Stanford, who was sentenced to 110 years in federal prison after a successful federal prosecution, and to Stanford International Bank, which was ordered to pay billions in federal fines, after the same. Frauds like the one here—including this fraud itself—will continue to be within the reach of federal regulation because the authority of the SEC and Department of Justice extends to all “securities,” not just to those traded on national exchanges. … When the fraudster peddles an uncovered security like the CDs here, the Federal Government will have the full scope of its usual powers to act. The only difference between our approach and that of the dissent, is that we also preserve the ability for investors to obtain relief under state laws when the fraud bears so remote a connection to the national securities market that no person actually believed he was taking an ownership position in that market.

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

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Sixth Amendment
Hinton v. Alabama

Docket No. 13-6440
Vacated and Remanded: The Court of Criminal Appeals of Alabama

Argued: N/A
Decided: February 24, 2014
Analysis: N/A
Overview: Anthony Ray Hinton was charged with two counts of murder; during his trial, the prosecution tried to link Hinton to an uncharged, robbery and shooting. The state’s case relied on an expert witness making a connection between the two murders, the uncharged robbery and shooting, and a revolver found at Hinton’s residence. Hinton’s attorney asked the trial court for funding to hire its own rebuttal expert; the trial judge granted $1,000, based on his mistaken belief that he could grant $500 for each case, and noted that Hinton’s attorney could file a request for more funding. Hinton’s attorney did not ask for more funding as he too was mistaken about the statutory limit. The lower court held that Hinton’s attorney’s failures were not unreasonable and therefore did not violate the Sixth Amendment.

Issue: Did the lower court correctly apply Strickland v. Washington when it decided that the defendant’s attorney’s conduct in representing his client was reasonable even though the attorney failed to ask for additional funds to hire an appropriate, qualified expert witness?

No. The attorney’s failure to investigate whether he could obtain additional funds to hire an adequate expert, and instead, to hire an expert the attorney knew to be incompetent, was unreasonable under Strickland v. Washington such that the lower court should have reviewed whether such actions prejudiced the defendant.

From the per curiam opinion: “Criminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence.” Harrington v. Richter, 562 U.S. ___, ___ (2011). This was such a case. As Hinton’s trial attorney recognized, the core of the prosecution’s case was the state experts’ conclusion that the six bullets
had been fired from the Hinton revolver, and effectively rebutting that case required a competent expert on the defense side. Hinton’s attorney also recognized that Payne was not a good expert, at least with respect to toolmark evidence. Nonetheless, he felt he was “stuck” with Payne because he could not find a better expert willing to work for $1,000 and he believed that he was unable to obtain more than $1,000 to cover expert fees. As discussed above, that belief was wrong: Alabama law in effect beginning more than a year before Hinton was arrested provided for state reimbursement of “any expenses reasonably incurred in such defense to be approved in advance by the trial court.” Ala. Code § 15–12–21(d). And the trial judge expressly invited Hinton’s attorney to file a request for further funds if he felt that more funding was necessary. Yet the attorney did not seek further funding. The trial attorney’s failure to request additional funding in order to replace an expert he knew to be inadequate because he mistakenly believed that he had received all he could get under Alabama law constituted deficient performance.

Tax Law

Ford Motor Company v. United States

Docket No. 13-113
Vacated and Remanded: The Sixth Circuit

Argued: N/A
Decided: December 2, 2013
Analysis: N/A

Overview: The Internal Revenue Service notified Ford Motor Company that it underpaid its taxes, and Ford subsequently made a series of deposits to the IRS totaling $875 million while auditing of the underpayments took place. An advanced payment like this stopped the accrual of interest Ford would otherwise owe. The parties eventually agreed that Ford had overpaid its taxes, entitling Ford to a return of the overpayment as well as interest starting on the “date of overpayment.” Ford argued that the overpayments started the date the first deposit was made to the IRS; the IRS countered that the overpayment date was the date Ford requested the IRS to treat the deposits as payments of tax. Ford sued, and the IRS claimed it was immune from such a suit; the Sixth Circuit ruled that the waiver of immunity must be strictly construed in favor of the government.

Issue: Should the Supreme Court uphold the Sixth Circuit’s ruling that the § 6611 is a waiver of sovereign immunity that must be construed strictly in favor of the government?

No. Because the government did not raise its jurisdiction argument until the current appeal, the Court should not allow the lower court to review it fully as it may impact the construction of § 6611.

From the per curiam opinion: The Sixth Circuit should have the first opportunity to consider the Government’s new contention with respect to jurisdiction in this case. Depending on that court’s answer, it may also consider what impact, if any, the jurisdictional determination has on the merits issues, especially whether or not § 6611 is a waiver of sovereign immunity that should be construed strictly.
reasons for issuing a summons when he points to specific facts or circumstances plausibly raising an inference of bad faith.

From the unanimous opinion by Justice Kagan: As part of the adversarial process concerning a summons’s validity, the taxpayer is entitled to examine an IRS agent when he can point to specific facts or circumstances plausibly raising an inference of bad faith. Naked allegations of improper purpose are not enough: The taxpayer must offer some credible evidence supporting his charge.

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**Tax Law**  
**United States v. Quality Stores, Inc., et al.**  
**Docket No. 12-1408**  
**Reversed and Remanded: The Sixth Circuit**

Argued: January 14, 2014  
Decided: March 25, 2014  
Analysis: See ABA PREVIEW 183 Issue 4

**Overview:** Respondent Quality Stores, Inc., and its affiliates (collectively Quality Stores) made severance payments to employees who were involuntarily terminated as part of Quality Stores’ Chapter 11 bankruptcy. Payments—which were made pursuant to plans that did not tie payments to the receipt of state unemployment insurance—varied based on job seniority and time served. Quality Stores paid and withheld taxes required under the Federal Insurance Contributions Act (FICA), 26 U.S.C. § 3101 et seq. Later believing that the payments should not have been taxed as wages under FICA, Quality Stores sought a refund on behalf of itself and about 1,850 former employees. When the Internal Revenue Service (IRS) did not allow or deny the refund, Quality Stores initiated proceedings in the Bankruptcy Court, which granted summary judgment in its favor. The District Court and Sixth Circuit affirmed, concluding that severance payments are not wages under FICA.

**Issue:** Are severance payments made to employees whose employment was involuntarily terminated taxable under the Federal Insurance Contributions Act, 26 U.S.C. § 3101 et seq.?

**Yes.** The severance payments at issue are taxable wages for FICA purposes.

From the opinion by Justice Kennedy (joined by Chief Justice Roberts, and all of the justices, except for Justice Kagan, who took no part in the consideration or decision of the case): The severance payments here were made to employees terminated against their will, were varied based on job seniority and time served, and were not linked to the receipt of state unemployment benefits. Under FICA’s broad definition, these severance payments constitute taxable wages.

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**Tax Law**  
**United States v. Woods**  
**Docket No. 12-562**  
**Reversed: The Fifth Circuit**

Argued: October 9, 2013  
Decided: December 3, 2013  
Analysis: See ABA PREVIEW 43 Issue 1

**Overview:** Respondent Gary Woods and another individual, Billy Joe McComb, participated in two separate transactions involving an abusive tax shelter that allowed them to offset gains by inflating their basis in assets, which in turn resulted in substantially lower tax liabilities. The Internal Revenue Service (IRS) subsequently disallowed the tax treatment and subjected Woods to a penalty for gross valuation misstatement. Woods challenged the determination and the penalties. The Supreme Court was asked to determine whether a district court has jurisdiction under 26 U.S.C. § 6226 to consider application of a gross valuation misstatement penalty in instances in which a taxpayer’s outside basis in a partnership is affected by the IRS’s determination that partnership transactions lack economic substance. Further, the Court was asked whether a transaction lacks economic substance because the sole purpose of the transaction was to artificially inflate the taxpayer’s basis in property to generate a tax loss permit application of the gross valuation misstatement penalty of 26 U.S.C. § 6662.

**Issues:** Does the United States District Court have jurisdiction under 26 U.S.C. § 6226 to consider application of a gross valuation misstatement penalty in instances in which a taxpayer’s outside basis in a partnership is affected by the Internal Revenue Service’s determination that partnership transactions lack economic substance? Does a determination that a transaction lacks economic substance because the sole purpose of the transaction was to artificially inflate the taxpayer’s basis in property to generate a tax loss permit application of the gross valuation misstatement penalty of 26 U.S.C. § 6662?

**Yes (to both).** The District Court has jurisdiction to determine the application of the gross valuation misstatement penalty; further, the penalty applies in the current case when the court determines that a transaction lacks economic substance because the sole purpose of the transaction was to artificially inflate the taxpayer’s basis in property to generate a tax loss.

From the unanimous opinion by Justice Scalia: The penalty’s plain language makes it applicable here. As we have explained, the COBRA transactions were designed to generate losses by enabling the partners to claim a high outside basis in the partnerships. But once the partnerships were deemed not to exist for tax purposes, no partner could legitimately claim an outside basis greater than zero. Accordingly, if a partner used an outside basis figure greater than zero to claim losses on his tax return, and if deducting those losses caused the partner to underpay his taxes, then the resulting underpayment would be “attributable to” the partner’s having claimed an “adjusted basis” in the partnerships that exceeded “the correct amount of such … adjusted basis.” 26 U.S.C. § 6662(e)(1)(A).
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**Fourth Amendment Cases**
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**Q&A with an Expert**
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**Recess Appointment Power**
Analyzed by Steven D. Schwinn, an associate professor of law at The John Marshall Law School.

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