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The following chart shows the breakdown of majority opinion authorship by justice.

### Opinion Authorship

- **Per Curiam**: 6 cases
- **Roberts**: 8 cases
- **Ginsburg**: 9 cases
- **Scalia**: 8 cases
- **Alito**: 8 cases
- **Thomas**: 8 cases
- **Kennedy**: 8 cases
- **Sotomayor**: 8 cases
- **Breyer**: 8 cases
- **Kagan**: 8 cases
A Supreme Irony: The Historic Is Becoming Commonplace

In my tenure with PREVIEW, I have noticed with increasing regularity in our session wrap-up issue commentators using words and phrases such as “historic,” “blockbuster,” and “one for the record books” to describe the preceding session. While one may suspect hyperbole or overgeneralization is the culprit when such sweeping terms become commonplace, a review of the weight and the breadth of issues addressed by the Supreme Court in recent sessions quickly dispels my skepticism.

The Roberts Court has consistently issued rulings on some of the most pressing social issues of the day and waded into the new technological frontiers of the law. Over the past 18 months alone, the Court has tackled Obamacare, immigration, same-sex marriage, affirmative action, human genes, DNA swabs, and voting rights. And, as the overview of next term’s cases included in this issue indicates, the Court shows no signs of taking it easy this fall.

Before we close the door on the 2012–2013 term, PREVIEW is taking a “deep-dive” into some of the thornier issues from this term. We are delighted to once again be offering a wrap-up issue featuring thoughtful articles by experts on the Court. This year, we focus on the same-sex marriage cases; the Court’s handling of civil rights challenges; the expanding class action docket; and the always interesting manner in which the Court disposes of the criminal cases before it.

A special note of thanks to Rachel Friedman, a 2L at The Ohio State University Moritz College of Law, who helped compile and draft the case summaries and statistics that round out this issue.

As always, the staff of the ABA Division for Public Education wishes you a quiet August, and we look forward to seeing you in October.

Sincerely,
Catherine Hawke
Editor, PREVIEW of United States Supreme Court Cases
catherine.hawke@americanbar.org
In two decisions on Wednesday, June 26, the Supreme Court significantly expanded the right to marriage equality for gays and lesbians. In United States v. Windsor, 133 S. Ct. ___ (2013), the Court invalidated § 3 of the Defense of Marriage Act (DOMA), which provided that for purposes of federal law marriage had to be between a man and a woman. Now, same-sex couples lawfully married in those 13 states that permit same-sex marriage will receive benefits that are accorded to married couples by more than 1,000 federal laws.

In Hollingsworth v. Perry, 133 S. Ct. ___ (2013), the Court dismissed the litigation concerning California’s Proposition 8, which had amended the state’s constitution to provide that marriage must be between a man and a woman. Two days later the United States Court of Appeals lifted the federal district court’s stay enjoining the enforcement of Proposition 8. As a result, same-sex couples immediately were able to marry in California.

Although the Court’s decisions were limited to these laws, the implications are enormous. Simply put, the Court took a major step towards a right to marriage equality for gays and lesbians in the United States.

The Decisions

United States v. Windsor. Edith Schlain Windsor and Thea Clara Spyer met in 1963 and lived together as a couple for over 40 years, until Dr. Spyer’s death in 2009. They bought a house together in Long Island and shared an apartment in Manhattan. They were married in Toronto in 2007.

Ms. Windsor and Dr. Spyer provided for one another in their wills. Dr. Spyer’s will made Ms. Windsor executor and sole primary beneficiary of her estate. Under the Internal Revenue Code, an estate like Dr. Spyer’s will made Ms. Windsor executor and sole primary beneficiary of her estate. Under the Internal Revenue Code, an estate like Dr. Spyer’s would qualify for an unlimited marital deduction and would therefore pass to the surviving spouse without imposition of the federal estate tax. New York law recognizes their marriage. But DOMA § 3 says that for purposes of federal law marriage must be between a man and a woman. The result is that Dr. Spyer’s estate owed $363,053 in federal estate taxes, which would not have been owed if not for § 3 of DOMA.

Ms. Windsor filed a lawsuit in federal district court challenging § 3 of DOMA. Shortly before the answer of the United States was due, Attorney General Holder stated that it was the position of the United States government that it would enforce § 3 of DOMA but not defend its constitutionality in the courts. The Bipartisan Legal Advisory Group of the House of Representatives (BLAG) voted 3-2 along party lines to participate. The district court allowed BLAG to intervene and granted summary judgment for Ms. Windsor. In October 2012, the United States Court of Appeals for the Second Circuit affirmed and declared § 3 of DOMA unconstitutional as denying equal protection to gays and lesbians.

The Supreme Court, in a 5-4 decision, declared § 3 of DOMA unconstitutional. Justice Kennedy wrote for the Court, and his opinion was joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan. Justice Kennedy began by addressing the issue of jurisdiction. Since the Obama administration agreed with the Second Circuit that § 3 of DOMA is unconstitutional, could the administration still seek Supreme Court review? The Court found that there was jurisdiction because there was a continuing dispute between the United States and Edith Windsor over whether she would need to pay $363,053. The Court concluded: “Windsor’s ongoing claim for funds that the United States refuses to pay thus establishes a controversy sufficient for Article III jurisdiction.” The Court found that BLAG’s “sharp adversarial presentation of the issues satisfies the prudential concerns that otherwise might counsel against hearing an appeal from a decision with which the principal parties agree.”

The Court then reached the merits and found that § 3 of DOMA denies equal protection to gays and lesbians. The Court began by noting that marriage has traditionally been defined by the states. The Court said that “DOMA seeks to injure the very class New York seeks to protect. By doing so it violates basic due process and equal protection principles applicable to the Federal Government.” The Court explained that DOMA is unconstitutional because it was based on impermissible hostility to gays and lesbians. Justice Kennedy quoted the House Report on DOMA, which said the act was based on “both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo–Christian) morality.”

The Supreme Court previously held that the government cannot base a law on disapproval of homosexuality. Romer v. Evans, 517 U.S. 620 (1996). Such animus is not a legitimate government purpose sufficient to justify a discriminatory statute.

Chief Justice Roberts and Justices Scalia and Alito each wrote dissenting opinions. The dissents argued that the Court should have dismissed the case on jurisdictional grounds and strongly disagreed with the Court’s invalidation of § 3 of DOMA. Each of these justices urged deference to Congress’s judgment to prohibit same-sex marriage.

Hollingsworth v. Perry. In May 2008, the California Supreme Court interpreted the California Constitution to create a right of marriage equality for gays and lesbians. In November 2008, California voters passed Proposition 8 to overturn this decision. Proposition 8 amended the California Constitution to say that marriage in the state had to be between a man and a woman.

Two same-sex couples seeking marriage licenses brought a lawsuit in the United States District Court for the Northern District of California challenging the constitutionality of Proposition 8. In the summer of 2010, federal district court Judge Walker declared...
Proposition 8 unconstitutional as violating the fundamental right to marry and denying equal protection to gays and lesbians. The defendants in the lawsuit, including the governor, the attorney general, and the registrar of records, decided not to appeal Judge Walker’s ruling. Supporters of Proposition 8 intervened to appeal.

After briefing and oral argument, the United States Court of Appeals for the Ninth Circuit certified to the California Supreme Court the question of whether under California law the supporters of an initiative have standing to appeal when state officials refuse to do so. The California Supreme Court said that the supporters of an initiative could represent the interests of the state to ensure that an initiative is defended in court. The Ninth Circuit, in February 2012, then found that the supporters of the initiative had standing to appeal and declared Proposition 8 unconstitutional. The Ninth Circuit emphasized that California had extended the right to marry to both same-sex and opposite-sex couples, but Proposition 8 took this right away only from same-sex couples; the court said that denied equal protection.

The Supreme Court, in a 5-4 decision, reversed and vacated the Ninth Circuit’s decision. Chief Justice Roberts, writing for the Court, held that the supporters of an initiative lack standing to appeal to defeat it when the defendant government officials refuse to do so. Chief Justice Roberts’s opinion was joined by Justices Scalia, Ginsburg, Breyer, and Kagan. The Court explained that standing to bring a suit or appeal requires that there be an injury. Those who support an initiative suffer only an ideological injury if the initiative is enjoined, and an ideological injury is never sufficient for standing.

Justice Kennedy wrote for the dissenters and stressed the need to have initiatives defended in court. The dissent complained that the majority’s approach allows elected officials to effectively nullify a voter initiative by choosing not to defend it.

The result is that the federal district court decision invalidating Proposition 8 stands. The two same-sex couples who sought marriage licenses and brought suit unquestionably had standing to sue. The district court declared Proposition 8 unconstitutional and enjoined its enforcement. The Ninth Circuit had issued a stay of the district court’s order while the appellate process was occurring. Within two days of the Supreme Court vacating the Ninth Circuit opinion, the Ninth Circuit lifted the stay and same-sex couples were able to marry in California.

**Implications**

In practical effect, these decisions are very important. Gay and lesbian couples who are married will get benefits under more than 1,000 federal laws that up until now have been reserved for heterosexual couples. Gay and lesbian couples are again marrying in California, making it the thirteenth and largest state to permit this.

The Supreme Court was explicit that it was declaring § 3 of DOMA unconstitutional and not ruling on any other law denying marriage equality. But the Court’s reasoning will have significant implications as to laws denying marriage equality for gays and lesbians. For example, § 2 of the DOMA, which says that no state must recognize a same-sex marriage from another state, is almost surely unconstitutional after the Court’s decision in *United States v. Windsor.* Justice Kennedy said that the DOMA is unconstitutional because it was based on impermissible hostility to gays and lesbians. Justice Kennedy quoted the House Report on DOMA, which said the act was based on “moral disapproval of homosexuality.”

The Supreme Court said that such animus is not a legitimate government purpose sufficient to justify a discriminatory law. This would seem to make all of DOMA unconstitutional, including § 2. A ruling that § 2 is unconstitutional would require states to recognize valid same-sex marriages from other states.

The next major wave of litigation will be challenges to state laws that prohibit same-sex marriage. In his vehement dissent in *Windsor,* Justice Scalia said that there is no way to distinguish these statutes from § 3 of DOMA, and it is just a matter of waiting for the other shoe to drop.

After *Windsor’s* conclusion that no legitimate government purpose is served by denying gays and lesbians the right to marry, it is difficult to see how the Court will uphold any law prohibiting same-sex marriage. Those who oppose same-sex marriage will argue that the language about federalism in Justice Kennedy’s opinion supports the ability of states to decide how marriage works within their borders, including to ban same-sex marriage. But the holding in *Windsor* was that § 3 of DOMA unconstitutionally denied equal protection to gays and lesbians. Its reasoning, that the failure to recognize same-sex marriages is based on animus and serves no legitimate purpose, will be the basis for challenging state laws throughout the country. It seems only a matter of a short time before this gets back to the Supreme Court, and it appears that there will be five votes—Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan—to strike down such laws.

*Windsor* establishes a simple proposition: gay and lesbian couples should be able to express love and commitment, to gain all of the legal benefits of marriage, to experience all of the joys and disappointments of marriage that heterosexual couples have always had. It now seems very likely that relatively soon that will be the law everywhere in the United States.
Building on the its heightened interest in class action litigation, the Court during the 2012–2013 term issued an unprecedented six decisions dealing with class action issues. However, scholars searching for coherent class action jurisprudence will have to await another day (maybe another decade); consistent with its other recent decisions, the Court rendered class action opinions that favored both sides of the docket. Plaintiff and defense counsel both may claim some large and small victories in this term’s class action decisions.

Nonetheless, the Court continues its plodding case-by-case approach to class litigation that fails to illuminate any overarching abstract theory of aggregate litigation. Instead, the Court’s attitude towards class action litigation is chiefly characterized by pragmatism and not-so-veiled policy concerns. Moreover, the 2013 class action decisions highlight the Court’s liberal and conservative division, with the Court’s conservative wing prevailing generally in its antipathy toward class litigation. As the Court’s conservatives incrementally make it more difficult to pursue class litigation, the Court’s liberals have become more vociferous in expressing their dismay over shrinking access to justice for large groups of claimants.

The Court’s six class action cases embraced a grab bag of issues. The two most closely watched cases, Amgen, Inc. v. Connecticut Retirement Plans and Trust Funds (Docket No. 11-1085) and Comcast v. Behrend (Docket No. 11-864), dealt with class certification requirements. In another pair of appeals the Court again returned to its fascination with problems of classwide arbitration clauses: Oxford Health Plans LLC v. Sutter (Docket No. 12-135) and American Express Co. v. Italian Colors Restaurant (Docket No. 12-123). Finally, two appeals addressed jurisdictional requirements for class actions: in Standard Fire Ins. Co. v. Knowles (Docket No. 11-1450), the Court considered pleading issues under the Class Action Fairness Act of 2005, and in Genesis HealthCare Corp. v. Symczyk (Docket No. 11-1059) the Court focused on standing issues for collective actions under the Fair Labor Standards Act.

**Class Certification Requirements I: Amgen, Inc. v. Connecticut Retirement Plans and Trust Funds**

In Amgen, the Court once again looked at what plaintiffs in a securities fraud class action need to plead and prove during class certification proceedings in order for a court to certify a class. In particular, the Court had to determine what proof was necessary for a plaintiff to rely on the “fraud-on-the-market” presumption to support class certification in a Rule 23(b)(3) action. In the longest of this set of decisions, the Court generally held that plaintiffs do not carry a burden to prove the materiality of the alleged fraudulent statements in order to take advantage of the fraud-on-the-market presumption in a Rule 23(b)(3) action for damages for alleged violations of § 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934. In so holding, the Court resolved a conflict among the circuit courts concerning whether district courts must require plaintiffs to prove, and allow defendants to present evidence to rebut, the element of materiality before certifying a securities fraud class action. The Court split 6-3, generating a series of separate opinions.

The Court’s decision follows closely on the heels of its 2012 decision in Erica P. Fund, Inc. v. Halliburton Co., 563 U.S. ___ (2011), in which the Court determined that plaintiffs do not need to demonstrate by a preponderance of the evidence “loss causation”—that alleged misrepresentations had an impact on a company’s stock price. Thus, Amgen and Erica P. Fund combined have saved the fraud-on-the-market presumption, and each represent victories for securities fraud plaintiffs.

The underlying Amgen litigation arose out of a federal securities fraud class action brought by the Connecticut Retirement Plans and Trust Funds against Amgen, Inc., and individual executives. The complaint alleged that the company artificially inflated the market price for Amgen stock by misrepresenting the safety of two Amgen drugs, Aranesp and Epogen. Connecticut Retirement alleged that the defendants had knowingly and recklessly made material misstatements and omissions about the drugs from April 2004 through May 2007, in violation of the Securities Exchange Act of 1934 and Rule 10b-5 of the federal securities laws.

In seeking class certification, the plaintiffs invoked the so-called “fraud-on-the-market” presumption endorsed by the U.S. Supreme Court in Basic v. Levinson, 485 U.S. 224 (1988), which permits a court to presume reliance by all stock purchasers in an efficient market. The use of this presumption allows plaintiff to satisfy the Rule 23(b)(3) predominance requirement without being subverted by a need to show individual reliance. At class certification the plaintiffs presented expert testimony to show that Amgen stock had been traded in an efficient market, but made no showing about the materiality of Amgen’s alleged misstatements.

Amgen opposed class certification on the grounds that Connecticut Retirement did not and could not establish the materiality of the alleged misstatements. Consequently, Amgen argued, Connecticut Retirement was not entitled to take advantage of the fraud-on-the-market presumption to bootstrap a classwide finding of reliance. In absence of this presumption of classwide reliance, Amgen argued, the court could not certify the class action under Rule 23(b)(3), which requires that common questions of law or fact predominate.
over individual questions. In addition, Amgen contended that it ought to be entitled to rebut the presumption by showing that the market was already privy to the truth, and therefore no alleged misrepresentation had any impact on its stock price.

The district court certified the class action, rejecting Amgen’s arguments. See In re Amgen, Inc. Sec. Litig., 544 F. Supp. 2d 1009 (C.D. Cal. 2008). The court held that Amgen’s arguments requiring proof of materiality did not concern Rule 23 requirements for class certification, but instead pertained to whether the plaintiffs would prevail on the merits of the underlying securities fraud claims. The court indicated that the class certification inquiry was not the appropriate time to consider whether a defendant’s statements were material so as to affect a market price. The court indicated that inquiries into issues such as materiality and loss causation—elements of a Rule 10b-5 claim—are properly taken up at a later stage of proceedings.

The Ninth Circuit Court of Appeals affirmed the district court’s class certification order, holding that Connecticut Retirement did not need to prove the element of materiality in order to avail itself of the fraud-on-the-market presumption of reliance. In re Amgen, Inc. Sec. Litig., 660 F.3d 1170 (9th Cir. 2012). The appellate court held that a plaintiff did not need to prove materiality at class certification because whether any alleged misstatements were material or immaterial, the class claims stood or fell together: thus, materiality was a question common to the class and affected investors alike.

Further, the Ninth Circuit held that in adopting the Basic presumption, the Supreme Court had not required proof of materiality for class certification. And, unlike the showing of an efficient market, a plaintiff need not prove the materiality of the alleged misstatements as a precondition for class certification. Instead, the Ninth Circuit agreed with the district court that materiality was an element of the merits of a security fraud claim, which should be addressed at trial or by a summary judgment motion. The appellate court held that the plaintiff had only to “allege materiality with sufficient plausibility to withstand a 12(b)(6) motion to dismiss.”

Finally, because the Ninth Circuit held that a plaintiff need not prove the materiality of alleged misstatements as a precondition for class certification, the court also upheld the district court’s refusal to consider Amgen’s rebuttal evidence on that issue. The appellate court rejected Amgen’s contention that it should be permitted to introduce evidence of the truth-on-the-market defense at class certification, reasoning that this defense is just a method of refuting the materiality of the alleged misrepresentations.

The Supreme Court, in a 6-3 decision by Justice Ginsburg, affirmed the Ninth Circuit’s conclusions. The Court’s four-member liberal wing, joined by Chief Justice Roberts and Justice Alito, united to save the fraud-on-the-market presumption from further inroads. However, Justice Alito filed a separate concurring opinion calling into question the continued vitality of the Basic presumption, which concurrence has set up a possible future wholesale attack on that precedent. Justices Scalia, Thomas, and Kennedy filed dissenting opinions.

In affirming the Ninth Circuit’s decision, Justice Ginsburg unpacked the merits of a securities fraud claim from what a plaintiff must demonstrate at the time of class certification. Thus, the majority concluded that while Connecticut Retirement would certainly have to prove the materiality of the alleged fraudulent statements at summary judgment or trial to prevail, such proof was not a prerequisite to class certification. Rule 23(b)(3) requires a showing that questions common to the class predominate, not that those questions will be answered in favor of the class on the merits. In a much quoted statement, Justice Ginsburg opined that: “Essentially, Amgen, also the dissenters from today’s decision, would have us put the cart before the horse. To gain certification under Rule 23(b)(3), Amgen and the dissenters urge, Connecticut Retirement must first establish that it will win the fray. But the office of a Rule 23(b)(3) certification ruling is not to adjudicate the case; rather, it is to select the ‘method’ best suited to adjudication of the controversy ‘fairly and efficiently.’”

The majority conceptualized the pivotal question as whether a plaintiff’s proof of materiality was needed to ensure that common questions of law or fact would predominate over individual class member questions. The Court concluded that, for two reasons, the answer was no. First, the question of materiality is objective and can be proved through evidence common to the class. Second, a plaintiff’s failure to prove materiality would end the case for all, and no claim would remain in which individual reliance issues would potentially predominate. “Because a failure of proof on the issue of materiality … does not give rise to any prospect of individual questions overwhelming common ones, materiality need not be proved prior to Rule 23(b)(3) class certification.”

In reaching these conclusions, the majority reaffirmed general principles of class certification jurisprudence. Thus, citing its 2011 decision in Wal-Mart Stores, Inc. v. Dukes, 564 U.S. ____ (2011), the Court restated that a court’s class certification analysis must be rigorous and may entail some overlap with the merits of the plaintiff’s underlying claims. The Court acknowledged that merits questions may be considered only to the extent that they are relevant to determining whether a plaintiff can satisfy the Rule 23 prerequisites for class certification. The Court rejected, however, Amgen’s policy arguments concerning the in terrorem effects and settlement pressure of class certification decisions. The majority suggested that Congress had addressed these problems legislatively in enacting the Private Securities Litigation Reform Act of 1995, while simultaneously repudiating calls to undo the Basic fraud-on-the-market presumption. The majority also rejected Amgen’s judicial efficiency argument, which sought to avoid the oversight of large class litigation where materiality cannot be proved in securities fraud actions. Instead, the majority noted that embracing Amgen’s argument would result in mini-trials on the issue of materiality at the class certification stage.

Finally, the majority concluded that the district and appellate courts did not err by disregarding Amgen’s rebuttal evidence intended to prove that the alleged misrepresentations were immaterial. The Court concluded that the potential immateriality was no barrier to finding that common questions predominated. Therefore, even a definitive rebuttal on the issue of materiality would not undermine the predominance of common questions to certify a Rule 23(b)(3) class. Proof of materiality was a matter for trial and the district court correctly reserved consideration of Amgen’s rebuttal evidence for summary judgment to trial.

Justice Alito filed a one paragraph concurrence to suggest that (as Justice Scalia’s dissent observed), that the fraud-on-the-market presumption may rest on a faulty economic premise. He concluded
that “In light of this development, reconsideration of the Basic presumption may be appropriate.”

Justice Thomas (joined by Justices Kennedy and Scalia) wrote the lengthy principal dissent, arguing that the majority’s approach was doctrinally incorrect under Basic. The nub of Justice Thomas’s dissent is that without demonstrating materiality at class certification, plaintiffs could not establish Basic’s fraud-on-the-market presumption, and without the presumption, plaintiffs could not demonstrate that the otherwise individual questions of reliance would predominate. Justice Thomas indicated that plaintiffs could not be excused of their burden to show at class certification that reliance questions were common merely because they might subsequently lose on the merits concerning the element of materiality. Turning Justice Ginsburg’s cart-before-the-horse metaphor on its head (an interesting visual), Justice Thomas counter-argued that it was the Court, and not Amgen, that would put the cart before the horse: by jumping chronologically to the § 10(b) merits of materiality. Rule 23 “as well as common sense” requires that the class certification issue be determined first. Therefore, a plaintiff who cannot prove materiality does not simply have a claim that is dead on arrival; the plaintiff has a class that never arrived at the merits because it failed Rule 23(b)(3) from the outset.

Justice Scalia separately dissented, joining Justice Thomas’s dissent in part. Justice Scalia argued that the Basic rule of fraud-on-the-market governs not only questions of the defendant’s substantive liability, but also whether class certification is proper. All of the elements of the rule, including materiality, must be established if it is relied on to justify class certification. Justice Scalia noted that class certification often is the prelude to substantial settlements, and that a broad reading of the Basic presumption, embraced by the majority’s approach, did an injustice to the Basic opinion. Justice Scalia contended that the Basic decision could not mean that all market-purchase and market-sale class actions would pass beyond certification, no matter what the alleged misrepresentation. Concluding, Justice Scalia suggested that: “Today’s holding does not merely accept that some consider the allegedly misrepresenting defendant to be a ‘bad actor’; rather, it expands those consequences from arguably regrettable to the unquestionably disastrous.”

Class Certification Requirements II: Comcast Corp. v. Behrend

Perhaps the most closely watched class action decision this term was the Court’s review of Comcast Corp. v. Behrend, implicating important questions relating to burdens of proof, expert witness testimony, and evidentiary standards at class certification. In this regard, the Court’s ultimate disposition of Comcast turned out to be something of a disappointing bust; the Court’s decision is significant less for what it informed about class certification requirements than for what it failed to decide. And, in almost a mirror image of the Amgen decision, in Comcast the five conservative justices aligned to form a majority affirming restrictive class certification principles, with the Court’s four-justice liberal contingent fighting a rearguard dissenting action. In contrast to Amgen, the defense bar chalked up a win on points in Comcast.

The major question, which the Court avoided, was whether district judges are required to apply Daubert principles to evaluate the offers of expert witness testimony during class certification proceedings. (Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993), laid out the general requirements for expert testimony in federal courts.) The Supreme Court left this issue open in Wal-Mart Stores, Inc. v. Dukes; the Court’s failure to address this issue in Comcast leaves this important question for another case and another day.

The Comcast appeal impelled the Court to return to the knotty question of what constitutes a merits inquiry at class certification (explored weeks earlier by Justice Ginsburg in Amgen). In the majority opinion by Justice Scalia, the Court held that the district court had improperly certified a Rule 23(b)(3) damage class action against Comcast when the court refused to consider the defendant’s arguments against the plaintiffs’ damage model, because the court incorrectly believed that those arguments bore on the merits of the litigation. The majority further held that, applying the proper standard for class certification, the plaintiffs’ damage model fell short of establishing that damages could be measured on a classwide basis.

The Comcast appeal arose in an antitrust class action brought by Caroline Behrend in the Eastern District of Pennsylvania on behalf of herself and other Comcast cable subscribers. The plaintiffs claimed that as a consequence of Comcast’s anticompetitive actions, they paid too much for their cable services. The complaint alleged that Comcast violated § 1 of the Sherman Act by agreeing with Time-Warner Cable and other cable operators to allocate video customers in the Philadelphia area to Comcast, and that Comcast violated § 2 of the Sherman Act by monopolizing and attempting to monopolize the Philadelphia market, which resulted in artificially inflated prices to Comcast consumers. The nub of the plaintiffs’ complaint centered on their contention that Comcast engaged in anticompetitive “clustering” in the Philadelphia area. The district court certified a Rule 23(b)(3) class action.

Comcast sought to decertify the class after the Third Circuit decided In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305 (3d Cir. 2008), which delineated comprehensive standards to govern a court’s rigorous analysis of class certification, including the court’s role in resolving disputed expert witness testimony. The Third Circuit conducted an evidentiary hearing in which the parties presented 32 expert reports relating to class certification and merits issues, including testimony from two economic experts relating to the model used to determine classwide damages. Comcast did not object to the admissibility of the plaintiffs’ experts in support of class certification under Daubert. Instead, Comcast argued that the plaintiffs had not proved by a preponderance of the evidence that the Rule 23(b)(3) predominance requirement was satisfied with regard to antitrust impact or the methodology for classwide damages.

The court recertified the class under Fed. R. Civ. P. 23(b)(3) pursuant to the rigorous analysis standards in Hydrogen Peroxide and the Third Circuit affirmed the recertification order. A divided panel held that the trial court had conducted a proper class certification
analysis. The court further held that the trial judge properly found that the plaintiffs could prove antitrust impact using evidence common to the class and affirmed the trial court’s endorsement of plaintiff’s expert damage model. The panel disagreed whether the plaintiffs had carried their burden of proof to show that their alleged damages were capable of classwide measurement using common proof. However, the majority suggested that Comcast’s attacks on the plaintiffs’ expert methodology had no place in the class certification inquiry because this trenched on a merits inquiry. Instead, the court examined only whether the proposed model “could evolve to become admissible evidence,” and accepted the plaintiffs’ assurances that it could. Moreover, the court noted that the Supreme Court in its Dukes decision, “require[d] a court to evaluate whether an expert is presenting a model which could evolve to become admissible evidence, and not requiring a district court to determine if a model is perfect at the certification stage.”

In reversing the Third Circuit’s decision, Justice Scalia found common ground with Justice Ginsburg’s general statements concerning class certification. Thus, in reaffirming the rigorous analysis standard, the Court noted that it had repeatedly emphasized that it may be necessary for a court to probe beyond the pleadings before coming to rest on the certification question, and that such an analysis frequently will overlap with the merits of the underlying claim. These same analytical principles govern Rule 23(b)(3) and, if anything, Rule 23(b)(3)’s predominance requirement was more demanding than Rule 23(a)’s threshold requirements.

The district court erred, then, by refusing to entertain the defendant’s arguments that the plaintiffs’ damage model bore on the propriety of class certification simply because those arguments were pertinent to a merits determination. Justice Scalia opined that the case turned on a straightforward application of class certification principles and provided no occasion for the dissenters’ extended analysis. For the Court’s majority, the plaintiffs’ damage model simply fell far short of demonstrating that damages were measurable on a classwide basis, and in absence of another model, the plaintiffs’ could not establish Rule 23(b)(3) predominance because questions of individual damages inevitably would overwhelm common class questions.

In a dissenting opinion Justice Ginsburg, joined by Justices Breyer, Sotomayor, and Kagan, argued that the Court should have dismissed the writ of certiorari as improvidently granted because the Court had reformulated the issues on appeal, and addressed a question other than the issue briefed by the parties: whether Daubert standards for the admissibility of evidence apply at class certification hearings. Justice Ginsburg further argued that Comcast’s failure to challenge the plaintiffs’ expert on Daubert grounds was reason enough to dismiss the writ as improvidently granted.

Turning to what the majority did decide, Justice Ginsburg conceded that the majority’s opinion broke no new ground on class certification standards for a Rule 23(b)(3) class. However, she urged that the majority decision should not be read to require that plaintiffs, as a prerequisite to class certification, demonstrate that damages attributable to classwide injury are measurable on a classwide basis. According to Justice Ginsburg, class action jurisprudence generally has recognized that individual damage calculations do not preclude Rule 23(b)(3) class certification. The dissenters would limit the Comcast holding to the “oddity of the case,” and hold that the black letter rule remained that plaintiffs can achieve Rule 23(b)(3) class certification where common liability questions predominate over damage questions unique to class members.

Classwide Arbitration I: Oxford Health Plans v. Sutter
In Oxford Health Plans, the Court returned to its recent fixation on classwide arbitration clauses. The Court issued two classwide arbitration decisions reflecting judicial schizophrenia. In Oxford Health Plans, plaintiffs won a unanimous victory for access to classwide arbitration proceedings; however, in American Express v. Italian Colors Restaurant, a divided Court—dominated by its conservative wing—reaffirmed the conservative justices distaste for and disapproval of classwide arbitration.

The Oxford Health Plans appeal was the fifth arbitration case before the Court in recent years. The case focused on problematic language in an arbitration clause that facially was silent regarding class arbitration. The Court was asked to decide whether an arbitrator exceeded his powers under the Federal Arbitration Act (FAA) by concluding that the parties authorized class arbitration based on a clause that contained language broadly precluding litigation of any dispute, arising under the contract, in any court.

In 2010, the Court in Stolt-Nielsen v. Animalfeeds Int’l. Corp., 130 S. Ct. 1758 (2010), held that the FAA prohibited arbitrators from imposing class arbitration on parties who had not previously consented to it.

In Oxford Health Plans, a unanimous Court upheld an arbitrator’s construction of an arbitration provision to permit classwide arbitration. Thus, the Court’s decision favored plaintiffs who desire that classwide arbitration be available to claimants. However, what the Court gave the plaintiffs’ bar in Oxford Health Plans would soon be qualified by what it took away in American Express v. Italian Colors Restaurant, the other classwide arbitration on the Court’s 2013 docket (discussed below).

In the underlying litigation, Oxford Health Plans LLC contracted with John Sutter, a pediatrician, for medical services. Sutter agreed to provide his services and be reimbursed at Oxford’s prescribed rates. Subsequently, Sutter filed a class action against Oxford in New Jersey state court, alleging that Oxford’s automated, computerized programs systematically discounted and undervalued his claims, resulting in underpayment estimated at $1,000 a year. The contract between Oxford and Sutter contained a short arbitration clause that specified: “No civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration in New Jersey, pursuant to the rules of the American Arbitration Association with one arbitrator.”

The Court issued two classwide arbitration decisions reflecting judicial schizophrenia. In Oxford Health Plans, plaintiffs won a unanimous victory for access to classwide arbitration proceedings; however, in American Express v. Italian Colors Restaurant, a divided Court—dominated by its conservative wing—reaffirmed the conservative justices distaste for and disapproval of classwide arbitration.
Sutter’s alleged class embraced as many as 20,000 New Jersey physicians who signed provider agreements with Oxford, over an eight-year period, with similar arbitration clauses. Sutter alleged that the individual physicians’ losses were too small to make it economically feasible to hire a lawyer to sue the defendant.

Oxford moved to compel arbitration while Sutter moved to certify the class. The court granted Oxford’s motion and left all other issues to the arbitrator. After the Court’s decision in Green Tree Financial Corp. v. Bazzle, 539 U.S. 444 (2003), the parties agreed that the arbitrator had the power to determine whether their agreement authorized class arbitration, which he did. The arbitrator concluded that “on its face, the arbitration clause ... expresses the parties’ intent that class action arbitration can be maintained.”

The arbitrator concluded that the arbitration clause was much broader than even the usual broad arbitration provision, because it prohibited any conceivable court action and required that all such disputes be sent to arbitration. Consequently, because a class action was plainly a form of civil action that could be brought in court, the clause must have been intended to permit class arbitration. Conversely, if the arbitration clause did not authorize class proceedings, then Sutter would not be able to pursue a class action in any forum. The arbitrator certified and defined the class, and delineated the class claims to be resolved in arbitration.

Oxford appealed to the District Court for New Jersey to vacate the arbitrator’s rulings, which the court denied. The Third Circuit affirmed, and the arbitrator began class arbitration proceedings. While class arbitration proceeded, the Court decided Stolt-Nielsen. There, the Court held that “[A] party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so.” In addition, the Court held that class arbitration is not a contract term that an arbitrator may infer solely from the parties’ agreement to arbitrate.

In light of Stolt-Nielsen, Oxford asked the arbitrator to reconsider his rulings, but he adhered to his original views. Oxford motioned the federal district court to vacate the reconsidered ruling, but the court denied this motion. Applying a highly deferential standard of review, the court concluded that the arbitrator performed the appropriate function under the FAA after Stolt-Nielsen: he examined the parties’ intent and gave effect to the arbitration agreement. The Third Circuit affirmed, noting that although the FAA § 10 permits an arbitrator’s award to be vacated on four narrow grounds, it does not authorize a federal court to entertain claims that an arbitrator made factual or legal errors.

The Supreme Court unanimously agreed, affirming the Third Circuit’s decision and concluding that the arbitrator had not exceeded his powers. The Court rejected Oxford’s contention that Stolt-Nielsen supported its position, distinguishing that case because the parties stipulated that they had not reached an agreement on classwide arbitration. In a short opinion by Justice Kagan, the Court held that the arbitrator’s decision to permit classwide arbitration survived appellate review under § 10. Citing Stolt-Nielsen, the Court indicated that a party seeking relief under § 10 bears a heavy burden; it is not enough to show that the arbitrator committed an error, even a serious error. A court may vacate an arbitrator’s decision only when the arbitrator strays from the delegated task of interpreting a contract, not when the arbitrator performs that task poorly. Thus, the sole question was whether the arbitrator interpreted the parties’ contract, not whether the arbitrator construed the contract correctly. In this case, the arbitrator considered the parties’ contract twice and decided whether it reflected an agreement to permit class proceedings.

In a concurring opinion, Justice Alito, joined by Justice Thomas—both hostile to class litigation generally—oddly sounded a precautionary note protective of absent class members. Justice Alito suggested that the Court’s conclusion was based on the premise that Oxford had conceded that the arbitrator should decide that the contract authorized classwide arbitration. However, he noted that absent class members never conceded this point; hence, “with no reason to think that the absent class members ever agreed to class arbitration, it is far from clear that they will be bound by the arbitrator’s ultimate resolution of this dispute.” Justice Alito further suggested that when absent class members have not been afforded an opportunity to opt-in, it was difficult to see how an arbitrator’s decision to conduct class proceedings could bind absent class members who had not authorized the arbitrator to decide which arbitration procedures were to be used on a classwide basis.

Classwide Arbitration II: American Express v. Italian Colors Restaurant
In the highly anticipated classwide arbitration case, the Court in Italian Colors Restaurant was asked to determine whether the “effective vindication rule” required access to class arbitration in federal antitrust litigation, where an individual plaintiff’s claim was too small to be litigated separately. A divided Court—led by its conservative wing—responded with a resounding “no.” In a 5-3 decision, the Court’s majority continued its harsh screed against classwide arbitration, notwithstanding its earlier decision in Oxford Health Plans. Italian Colors represented a resounding setback for the plaintiffs’ class action bar; the decision was immediately lambasted as a procorporate, antiplaintiff, anticlass action, denial-of-access-to-justice, ideologically based decision.

Italian Colors Restaurant
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The Italian Colors dispute arose out of an American Express contract with hundreds of retail merchants. Merchants that wished to offer consumers an American Express payment option were required to agree to an “Honor All Cards” policy: that is, to accept American Express charge cards as well as its credit cards. Italian Colors Restaurant, which signed a contract with this provision, filed a class action in the Southern District of New York alleging that American Express’s “Honor All Cards” policy constituted an unlawful tying agreement under the Sherman Antitrust Act. They alleged that American Express had monopoly power, forcing merchants to accept ordinary credit cards at 30 percent higher rates than the fees for identical bank-issued cards in competing networks. Each merchant agreement included an arbitration provision requiring bilateral rather than classwide arbitration.
American Express moved to compel arbitration, but the plaintiffs resisted, arguing that the arbitration clause precluded them from effectively vindicating their federal statutory rights under the Sherman Act in the arbitral forum. The plaintiffs contended that the small amount of each plaintiff’s claim made the costs of arbitration prohibitive because each needed a detailed antitrust market study to prevail on the tying claim. The plaintiffs’ expert testified that the cost of obtaining the necessary antitrust market study was between $300,000 and $1 million dollars, which greatly exceeded the potential median damages of $5,252 for individual plaintiffs. Asserting that such cost was prohibitive, the plaintiffs argued that they were effectively prevented from vindicating their federal statutory rights in arbitration. Nonetheless, the district court granted the defendant’s motion to compel arbitration, dismissed the plaintiffs’ lawsuits, and rejected the plaintiffs’ “prohibitive costs” and effective-vindication arguments.

The Second Circuit heard American Express appeals three times; while the litigation was pending, the Supreme Court issued opinions in two additional classwide arbitration cases: Stolt-Nielsen S.A. v. AnimalFeeds International Corp. and AT&T Mobility LLC v. Concepcion, 563 U.S. __ (2011). Notwithstanding these decisions, the Second Circuit declined to enforce the class action waiver. The court concluded that those decisions did not forestall courts from invalidating arbitration agreements that did not include a class arbitration provision, and that neither Stolt-Nielsen nor Concepcion undermined the effective vindication rule. The Second Circuit held that arbitration agreements providing for bilateral (but not classwide) arbitration were unenforceable if the claimants could demonstrate that the cost of individually arbitrating their dispute would be prohibitive. The court “declined to strip the plaintiffs of rights accorded to them by statute” by compelling an arbitration that would never occur due to prohibitive costs. The Second Circuit denied a rehearing en banc over the dissenting votes of five judges.

The Supreme Court, in an opinion by Justice Scalia, reversed, holding that the FAA did not permit district courts to invalidate a contractual waiver of classwide arbitration based on the effective vindication rule. That is, a contractual waiver of classwide arbitration could not be superseded by a plaintiff’s argument that the cost of arbitrating an individual claim would exceed the potential recovery. Construing the effective vindication exception as mere dictum derived from the Court’s decision in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985), the majority noted that the fact that it might not be worth the expense to prove a statutory remedy did not foreclose the right to pursue the remedy.

Instead, the majority relied on its recent controversial decision in AT&T Mobility LLC v. Concepcion as dispositive. Opining that Concepcion “all but resolves this case,” Justice Scalia suggested that the Court rejected the argument that classwide arbitration was necessary to prosecute claims that otherwise might slip through the legal system. The majority further indicated that congressional approval of Federal Rule of Civil Procedure 23 did not establish an entitlement to class proceedings to vindicate statutory rights.

Justice Scalia’s opinion rehearsed boilerplate propositions regarding arbitration in the Court’s recent classwide arbitration cases. Thus, the Court reiterated that arbitration agreements are a matter of contract law and must be rigorously enforced according to their terms, even for claims alleging violation of a federal statute. The FAA’s mandate to enforce arbitration might only be “overridden by a contrary congressional command.” Finding no such contrary congressional command in the Sherman Antitrust Act, the Court held that American Express’s agreement needed to be enforced according to its terms specifying bilateral arbitration only.

In a bluntly worded opinion by Justice Kagan, the three dissenters strenuously objected that the Court was entirely mistaken as to what the case was about. According to the dissent, the Court had simply used the Italian Colors appeal to further eviscerate class action litigation. In an eminently quotable opening passage Justice Kagan noted: “And here is the nutshell version of today’s opinion, admirably flautered than camouflaged: Too darn bad.” After traversing the myriad reasons why the majority’s decision was an insidious encroachment on plaintiffs’ access to justice, the dissenters concluded with the equally quotable rhetorical flourish: “To a hammer, everything looks like a nail. And to a Court bent on diminishing the usefulness of Rule 23, everything looks like a class action, ready to be dismantled.”

The dissenters argued that the majority’s opinion was a betrayal of the federal antitrust laws and the Court’s precedents in the arbitration arena. Thus, the Court had developed the effective vindication rule to prevent arbitration clauses from choking off a plaintiff’s ability to enforce congressionally created rights. The dissenters protested that the majority’s decision disregarded a central jurisprudential tenet: namely, that an arbitration clause may not thwart federal law. In order to reach a contrary conclusion, the dissenters argued, the majority had concocted a special exemption for class action arbitration waivers—ignoring the fact that the case concerned much more than that.

Invoking the effective vindication rule, the dissenters noted that in the decades since Mitsubishi, the Court repeatedly had admonished lower courts not to enforce arbitration agreements that effectively or explicitly foreclosed remedies for a violation of federal statutory rights. The Court’s decision in Green Tree Financial v. Randolph, 531 U.S. 79 (2000), applied this principle where an agreement thwarted federal law by making arbitration prohibitively expensive. Moreover, according to the dissenters, the effective vindication rule furthers the goals of the Sherman Act as well as the FAA.

The dissenters viewed American Express’s prohibition against classwide arbitration as only part of the problem. They balked that the agreement was insidious because it (1) additionally disallowed plaintiffs to aggregate their claims through other consolidation mechanisms; (2) restrained merchants from arranging a common expert report because of a restrictive confidentiality provision; and (3) failed to provide any avenue for cost sharing or cost shifting. Furthermore, American Express refused to stipulate to any facts that would have mitigated a need for an economic analysis to prove the merits of the claims. Consequently, “American Express has put Italian Colors to this choice: Spend way, way more money than your claim is worth, or relinquish your Sherman Act rights.”

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Finally, the dissenters disagreed that Concepcion was dispositive of Italian Colors; Concepcion, they pointed out, was about federal preemption of a state law prohibition and not about the effective vindication rule. The Court’s Concepcion decision nowhere cited the Court’s effective vindication precedents.

**Federal Jurisdiction I: Standard Fire Ins. Co. v. Knowles**

In the briefest of the class action decisions, a unanimous Court in *Standard Fire Ins. Co. v. Knowles* quickly dispatched the efforts of class counsel to avoid removal to federal court under the Class Action Fairness Act of 2005 (CAFA) through a class representative’s stipulation that he was seeking an amount in controversy less than the requisite jurisdictional amount under 28 U.S.C. § 1332(d). In a decision by Justice Breyer, the Court noted that the plaintiff’s individual precertification stipulation to damages was binding only on him; the stipulation could not bind class members before a court certified the class. In so holding, *Standard Fire* represented a victory for the defense bar seeking enforcement of CAFA’s removal provisions against manipulative pleadings strategies by class counsel to remain in state court and evade federal jurisdiction.

The Court’s liberal wing joined this decision, suggesting that to treat a nonbinding stipulation as binding on a class would exalt form over substance and run counter to CAFA’s objectives to ensure federal court consideration of interstate cases of national importance. Ironically, in supporting this interpretation of CAFA, the Court’s liberals endorsed a conclusion that is largely defendant-favoring.

In the underlying litigation, Greg Knowles filed a property damage claim under his homeowner’s insurance policy with Standard Fire, a Connecticut corporation, for compensation for hail damage to his house. Standard Fire reimbursed Knowles for the costs in repairing his house but did not include any amount associated with Knowles’s retaining a general contractor to supervise the repairs. A general contractor adds a percentage of the repair contract—known as the “general contractors’ overhead and profit,” which typically is 20 percent of the estimated job.

Knowles filed a class action alleging a breach of contract claim against Standard Fire in Miller County Circuit Court, Arkansas. Knowles’s complaint was filed on behalf of himself and all other Arkansas residents who received insurance payments for damage to their dwellings that did not include payment for a general contractor’s overhead and profit expense. The complaint alleged that Knowles and the class stipulated to limit their recovery to less than $5 million, and that this stipulation was binding to establish the amount in controversy. In addition, the complaint’s prayer for relief expressly limited damages to those amounts and stated that all damages, costs, and fees would not exceed $75,000 for the plaintiff or any class member individually, or $5 million for the entire class.

Standard Fire removed the case to the Western District of Arkansas based on CAFA. Standard Fire contended that the class action satisfied all the prerequisites for federal court jurisdiction because the action involved citizens of different states, involved more than 100 claimants, and exceeded the $5 million amount-in-controversy requirement for diversity class actions.

Knowles petitioned for remand, and at the hearing Standard Fire offered proof that the amount-in-controversy of all class members’ claims exceeded $5 million, including interest and attorney fees. Knowles did not introduce evidence of his own regarding the amount-in-controversy. The court agreed that Standard Fire satisfied its burden to demonstrate that the amount-in-controversy exceeded $5 million. However, the court then shifted the burden to Knowles to prove to a legal certainty that his claims fell under the threshold of $5 million. The court then concluded that the plaintiff’s stipulation was legally binding under state law and that he had shown to a legal certainty that the aggregate damages on behalf of the class would not in good faith exceed $5 million. The court also rejected Standard Fire’s argument that the plaintiff’s allegation of damages was made in bad faith. Consequently, the court ordered a remand to state court. The Eighth Circuit summarily denied Standard Fire’s petition to appeal the remand order and Standard Fire’s petition for rehearing.

The Court reversed and vacated the Eighth Circuit’s decision. The Court held that because class representative Knowles lacked the authority to concede the amount in controversy for absent class members, the district judge wrongly concluded that Knowles’s stipulation could overcome the court’s finding that the CAFA jurisdictional threshold was met. The majority characterized the plaintiff’s stipulation as nonbinding on the class, and indicated that such situations require federal judges to do what they must in cases with no stipulation: aggregate individual class members’ claims.

For proceduralists, the Court’s brief opinion was disappointing for its failure to engage with an array of potentially enticing and colorful arguments, including that of artful pleading, “master of the complaint doctrine,” *in terrorem* settlement blackmail, and “hell-hole” state court jurisdictions. Instead, the Court opted for a plain vanilla ho-hum resolution of this simple case.

**Federal Jurisdiction II: Genesis HealthCare Corp. v. Symczyk**

*Genesis HealthCare Corp.* involved a collective action under the Fair Labor Standards Act (FLSA), a form of aggregate litigation that mimics class litigation except that interested potential claimants must affirmatively elect to opt-in to an action initiated by the named plaintiff. The Court addressed whether a trial court’s dismissal of a plaintiff’s individual FLSA claim, where the plaintiff has not yet accepted the settlement offer and before the court certifies a collective FLSA action, moots the FLSA claims of other employees not yet joined in the action.

The Court divided 5-4, with the justices aligning along its conservative and liberal divide. The majority decision, by Justice Thomas and joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Alito, held that well-settled mootness principles controlled the outcome. Thus—concluding that the named plaintiff’s, Laura Symczyk’s, claim became moot by the doctrine of waiver—the entire lawsuit was moot because Symczyk no longer had any interest in representing the action. Importantly, the majority held that any contrary mootness principles derived from the Rule 23 class action jurisprudence were inapt because Rule 23 class actions are fundamentally different from FLSA collective actions. This conclusion—which resulted in reversal of the Third Circuit’s decision and dismissal of Symczyk’s collective FLSA action—represented yet another victory for the defendants in resisting aggregate litigation.

In the underlying litigation, Symczyk was a registered nurse employed by ElderCare Resources Corp., a subsidiary of Genesis HealthCare Corp. She filed a complaint in district court under FLSA. She alleged that the defendants had failed to properly pay her for work that she did during meal breaks and were improperly
deducting 30 minutes for meal breaks, regardless of whether the employees received these breaks. Symczyk brought the lawsuit individually and on behalf of other similarly situated individuals.

The defendants made Symczyk an offer of judgment under Fed. R. Civ. P. 68 for $7,500 as full settlement of all her claims. This offer constituted the entire amount Symczyk could recover under the FLSA. When Symczyk did not respond to the offer, the defendants moved to dismiss her FLSA lawsuit for lack of jurisdiction and the court dismissed the case. At that time, no other person had elected to opt-in to her FLSA lawsuit.

On appeal, the Third Circuit reversed. The court noted that the offer of judgment mooted Symczyk’s claim and her interest in the case. However, after reviewing the constitutional doctrine of mootness, the court held that when an offer is made to a plaintiff in a collective FLSA action, but before the plaintiff moves for certification or other claimants opt-in, the offer does not moot the entire case. The Third Circuit expressed concern that a contrary ruling would encourage manipulation of class and collective actions, inspiring defendants to pluck off individual plaintiffs with offers that thereby mooted their individual claims and defeated the collective action.

The Third Circuit relied on the Supreme Court’s class action jurisprudence relating to mootness doctrine when events moot a class representative’s claim. Analyzing the Court’s ruling in Sosna v. Iowa, 419 U.S. 393 (1975), the Third Circuit noted that when a class representative’s claim is mooted prior to class certification, courts may save the class action members’ similar claims by allowing the case to relate back to the original complaint when an issue would otherwise evade judicial review.

The Third Circuit, in accord with the Fifth Circuit, held that this relation-back doctrine applied to FLSA cases, as well. While recognizing the differences between class actions brought pursuant to Fed. R. Civ. P. 23 and collective actions under the FLSA, the Court indicated that the differences between these types of cases did not justify limiting the relation-back doctrine solely to Rule 23 class actions. The Third Circuit remanded the case back to the district court and the plaintiff then moved for conditional certification of the FLSA collective action.

Crucially, the Supreme Court’s majority declined to answer the question whether an unaccepted offer that fully satisfied a plaintiff’s claim is sufficient to render the claim moot, holding that the plaintiff had waived the argument in the lower courts. Thus, proceeding on the premise that the defendant’s offer mooted the plaintiff’s individual claim, the Court’s majority held that an FLSA case becomes nonjusticiable when the lone plaintiff’s individual claim becomes moot. It held that the defendant’s offer afforded the plaintiff complete relief and therefore mooted her FLSA claim.

The four liberal justices, attempting to salvage FLSA litigation from defensive maneuvers to pick off individual plaintiffs, objected that the Court’s majority had resolved an “imaginary” question based on the faulty premise that the plaintiff’s individual claim had become moot through waiver. In a decision by Justice Kagan, joined by Justices Breyer, Ginsburg, and Sotomayor, the dissenters argued that Symczyk’s individual claim was alive and well when the district court dismissed her case and that mootness doctrine did not defeat the action on behalf of others. In addition, the dissenters contended that the Court’s majority answered a question that should never apply, because the class action relation-back doctrine to solve mootness problems has no relevance in FLSA actions.

Ultimately, the Court’s split decision in Genesis HealthCare Corp. remains unsatisfying because of the muddled factual and procedural posture presented to the Court. The majority’s decision and analysis is clouded by the questionable proposition that the plaintiff’s claim was mooted where she did not answer the offer, a premise the majority accepted based on waiver doctrine. Nonetheless, the circuit courts disagree whether an unaccepted offer that fully satisfies a plaintiff’s claim is sufficient to render a claim moot, and the Supreme Court failed to determine this split in authority.

Linda S. Mullenix holds the Morris & Rita Atlas Chair in Advocacy at the University of Texas School of Law. She is the author of Leading Cases in Civil Procedure (2d ed. 2012) and Mass Tort Litigation (2d ed. 2008). She can be reached at lmullenix@law.utexas.edu.

The U.S. Supreme Court has concluded a blockbuster October 2012 term, with major decisions affecting voting rights, same-sex marriage, and affirmative action. Not lost on criminal law-minded Court watchers, however, were five Fourth Amendment cases. These cases addressed significant questions of seizures during search warrant executions, warrantless blood-alcohol tests in drunk driving cases, warrantless drug-detection dog searches, and warrantless DNA collection from arrestees.

Overall, defendants prevailed in three of these five cases, with four of the cases dividing the Court. This split illustrated how Fourth Amendment issues can defy ideological expectations. As one commentator noted early in the term, “[w]hen it comes to search and seizure issues, the justices’ opinions don’t always fall along liberal/conservative divides.” D. Epps, What the ‘Bailey’ Case May Reveal About Supreme Court Ideology, The Atlantic (Oct. 2012).

Justice Scalia, for example, led the charge in two cases this term to defend individual Fourth Amendment interests against governmental intrusions. Justice Breyer, by contrast, voted in several cases to accommodate governmental interests over individual Fourth Amendment claims. Even Justice Thomas joined a mix of justices to vote against the government in one case. But at least one ideological expectation was confirmed: Justice Alito voted in the government’s favor in all five Fourth Amendment decisions. Cf. R. Barnes, Fourth Amendment Creates New Fault Lines, The Washington Post (March 31, 2013) (noting Justice Alito’s “image as perhaps the biggest supporter of government in Fourth Amendment cases”).

In addition to highlighting diverse judicial perspectives, the Court’s Fourth Amendment decisions this term developed some important jurisprudential threads: separation of powers, the nature of the interests protected by the Fourth Amendment, and the government’s search and seizure powers over persons in custody. These threads built on recent decisions by this Court, and may indicate how the Court will decide future Fourth Amendment cases.

Backdrop to the 2012 Term
The Fourth Amendment prohibits only “unreasonable” searches and seizures. This reasonableness standard inherently includes a separation of powers component, because the Supreme Court historically has required a “neutral and detached” judicial officer to review whether each search or seizure was reasonable. Judicial review of reasonableness presumptively occurs before a search or seizure when a judge reviews a warrant application for probable cause and particularity. Or, judicial review can happen after the search or seizure when a judge reviews whether case-specific facts justified warrantless police action.

In some circumstances, however, usually where the police have important interests beyond investigating crime, the Court has departed from this traditional Fourth Amendment model and branded broad categories of searches and seizures reasonable with limited or no judicial review of case-specific facts—for example, searches of persons after lawful arrest, searches at airports or at the national border, and searches of students at school. Much of the story of the Fourth Amendment has involved government efforts to curb individualized judicial review of reasonableness.

The Court’s 2011 term previewed this ongoing separation of powers theme. During that term, the Court decided Florence v. Board of Chosen Freeholders of the County of Burlington, 132 S. Ct. 1510 (2012), upholding a jail’s routine visual strip search of a person arrested for a minor offense when admitting him to the jail’s general population. Prioritizing a jail’s interest in security over a detainee’s reduced expectation of privacy, a divided Court decided that the Fourth Amendment categorically permits these searches without any individualized judicial review of security risks justifying a strip search.

That same term, the Court reached a different conclusion about the need for individualized judicial review in United States v. Jones, 132 S. Ct. 945 (2012). In Jones, the government argued that the police do not conduct a “search” under the Fourth Amendment when they attach a GPS device to someone’s vehicle to track the vehicle’s public movements. Under this view, the Fourth Amendment would entitle individuals to no judicial review whatsoever of government GPS surveillance in public places.

Rejecting the government’s position, the Court held that the Fourth Amendment subjects this GPS surveillance activity to judicial scrutiny. Yet, while unanimous in outcome, the Jones decision revealed divergent judicial views of the Fourth Amendment interests implicated by this GPS surveillance.

Justice Scalia’s majority opinion theorized that by attaching the GPS device to Jones’s vehicle, the government trespassed onto Jones’s property to obtain evidence. In Justice Scalia’s view, “such a physical intrusion would have been considered a ‘search’ within the meaning of the Fourth Amendment when it was adopted.” By contrast, Justice Alito’s concurrence posited that the government invaded Jones’s “reasonable expectation of privacy,” the long-prevailing test from Katz v. United States, 389 U.S. 347 (1967). Justice Alito’s perspective thus emphasized the government’s use of the GPS device to monitor Jones as the search subject to judicial review, whereas Justice Scalia’s theory focused on the government’s act of attaching the GPS device to Jones’s property.

Coming out of the 2011 term, therefore, the Court remained willing to dispense with individualized judicial review when important governmental interests categorically outweigh individual interests. Jones, moreover, introduced questions of whether individuals’ Fourth Amendment interests should be defined in some contexts by a property-rights theory or the Katz privacy test, and whether and how these tests may protect individuals in a world of emerging investigative technologies.
The 2012 Term Decisions

Against this backdrop, the Supreme Court decided five Fourth Amendment cases this term that implicated various efforts by the government to minimize individualized judicial review of searches and seizures. The government did not fare well in all of these decisions. But the government prevailed in the Court’s final, and perhaps most significant, Fourth Amendment decision of the term upholding suspicionless searches of arrestees to collect DNA. The Court began the term, however, with a decision about suspicionless seizures.

Bailey v. United States

Bailey v. United States, (Docket No. 11-770) presented the question of whether the government’s categorical authority to detain persons during the execution of a search warrant extends to persons who have left the search location. In Bailey, the police secured a warrant to search a New York apartment for a firearm. As a police search unit prepared to execute the warrant, officers observed two individuals leave the apartment and enter a vehicle in the driveway. Both individuals matched a description of the drug dealer who reportedly kept the firearm.

About a mile from the apartment, the police stopped the two individuals, one of whom was Ronald Bailey, and detained them “incident to the execution of a search warrant.” Bailey identified the apartment being searched as his home. The officers also confirmed that a key in Bailey’s possession opened the apartment. The government used this evidence in convicting Bailey of gun and drug possession.

On appeal, Bailey challenged the officers’ seizure of him once he had departed from the search location. The U.S. Court of Appeals for the Second Circuit disagreed, noting that the Supreme Court has approved of the police detaining occupants of premises being searched pursuant to a valid warrant. See Muehler v. Mena, 544 U.S. 93 (2005); Michigan v. Summers, 452 U.S. 692 (1981). The Court of Appeals held that, under authority of a warrant, the police also may detain occupants who have left the premises if the “detention is effected as soon as reasonably practicable.” The Court of Appeals thus did not review whether Bailey’s seizure was reasonable beyond the government showing that the seizure had this temporal and spatial connection to a search warrant execution.

The Supreme Court reversed in an opinion by Justice Kennedy, joined by Chief Justice Roberts and Justices Scalia, Ginsburg, Kagan, and Sotomayor. The Court confirmed that Summers and Mena authorize the police to detain persons present at the execution of a search warrant without individualized suspicion, to reduce risk of harm to the executing officers, facilitate orderly completion of the search, and prevent flight of potential suspects. These governmental interests categorically justify a limited detention without individualized judicial review of each seizure.

The Court concluded, however, that “[b]ecause this exception grants substantial authority to police officers to detain outside the traditional rules of the Fourth Amendment, it must be circumscribed.” The Court determined that “[a] spatial constraint defined by the immediate vicinity of the premises to be searched … is a proper limit because it accords with the rationale of the rule.” If the police wait to detain an occupant until after she or he has left the search location, “the lawfulness of the detention is controlled by other standards,” such as probable cause or reasonable suspicion, subject to individualized judicial review. As Justice Scalia noted in his concurring opinion, Summers and Mena “embod[y] a categorical judgment that in one narrow circumstance—the presence of occupants during the execution of a search warrant—seizures are reasonable despite the absence of probable cause.”

By contrast, Justice Breyer, dissenting with Justices Thomas and Alito, believed that the government’s interest in safely and efficiently executing a search warrant categorically outweigh an individual’s Fourth Amendment interests, even for individuals who have left the search location. For the dissenters, the narrow question for judicial review in these cases should be whether the police seized the individual “as soon as reasonably practicable” following the individual’s departure from the search location.

Bailey makes clear, however, that in the future, the police must demonstrate individualized suspicion to seize individuals who have left premises being searched. As the Court noted in Bailey, circumstances relating to the search warrant may provide that suspicion. But judges will review those circumstances in each case.

Missouri v. McNeely

Missouri v. McNeely (Docket No. 11-1425) invited the Supreme Court to consider judicial review of exigencies in drunk driving cases. The police stopped Tyler McNeely in his truck and, after investigation, arrested McNeely for drunk driving. When the police sought McNeely’s consent to a Breathalyzer test to determine his blood-alcohol level, McNeely refused. The police consequently transported McNeely to a hospital, where a lab technician took his blood at police direction. The blood test revealed that McNeely’s blood-alcohol level exceeded the legal limit.

McNeely successfully suppressed the result of this blood test in the state courts on the ground that the police should have obtained a warrant before drawing his blood. The state appealed to the U.S. Supreme Court, arguing that Schmerber v. California, 384 U.S. 757 (1966), recognizes an inherent exigency in drunk driving cases due to a drunk driving suspect’s natural metabolism of alcohol. This inevitable loss of evidence, the state asserted, categorically justifies a warrantless blood draw from a drunk driving suspect who does not consent to a blood-alcohol test. Therefore, so long as the state can show probable cause to arrest for drunk driving, the state should be relieved of further judicial review of the failure to obtain a warrant.

The Supreme Court rejected the state’s categorical position. Writing a combined majority-plurality opinion joined by Justices Ginsburg, Kagan, and Scalia, and joined in part by Justice Kennedy, Justice Sotomayor reaffirmed that “a warrantless search of the person is reasonable only if it falls within a recognized exception” to the presumptive judicial review of a warrant application. The search incident to arrest exception justifies a warrantless search of the person if the police have probable cause to arrest. See United States
cases. See M. P. Gallagher, 414 U.S. 218 (1973). Indeed, under this exception, judges will not review the circumstances justifying a search incident to arrest at all—the lawful arrest categorically justifies a search of the person. But, the Court has limited this exception to exclude intrusive searches that invade “bodily integrity,” such as a blood draw. This exception thus did not justify the warrantless blood draw from McNeely.

Nevertheless, as the Court observed, a recognized exigency also can relieve the government of the judicial review necessitated by the warrant requirement. One accepted exigency holds that the police “may conduct a search without a warrant to prevent the imminent destruction of evidence.” The Court further observed, however, that courts typically must review the totality of circumstances of each case to judge whether an exigency relieved the police from securing a warrant.

The Court acknowledged that Schmerber identified blood-alcohol dissipation as an exigency. That case, however, also included “special facts,” such as the need to transport the defendant to the hospital and investigate an accident scene. Moreover, blood-alcohol dissipation typically does not present a “now or never situation,” and warrant applications have become increasingly efficient with improved technology. In the plurality portion of the decision, the Court further stressed the significant privacy intrusion caused by a blood draw, and examined how states still can prosecute drunk driving effectively without a categorical warrant exception. The Court therefore declined to extend Schmerber to a categorical exigency rule.

Chief Justice Roberts concurred in part and dissented in part, joined by Justices Alito and Breyer. Chief Justice Roberts did not dispute that a claimed exigency should be reviewed under the totality of the circumstances. But, to the chief justice, the Court suggested too broad and uncertain of a totality of circumstances inquiry for this exigency. “[D]rank driving cases are often typical,” the chief justice noted, and “[t]he natural dissipation of alcohol in the bloodstream constitutes not only the imminent but the ongoing destruction of critical evidence.” Therefore, the limited, “straightforward” question for judicial review should be whether “an officer could reasonably conclude” the police did not have time to secure a warrant and still preserve the blood-alcohol evidence.

Justice Thomas dissented. In Justice Thomas’s view, the potential loss of evidence from the body’s metabolism of alcohol categorically justifies a warrantless blood draw without individualized judicial review of this exigency.

In the end, McNeely does not prohibit blood draws in drunk driving cases, even without a warrant. Rather, in a similar outcome to Bailey, McNeely by a narrow margin rejected the state’s attempt to prevent individualized judicial review—here, review of why the police drew McNeely’s blood without a warrant. Instead, “careful, case-by-case assessment of exigency” is required.

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Florida v. Harris
Florida v. Harris (Docket No. 11-817) presented the first of two Florida cases this term with search issues involving a drug-detection dog. In Harris, the Supreme Court unanimously sided with the state’s effort to constrain judicial review of probable cause in dog-alert cases.

A police officer stopped Clayton Harris for a routine traffic violation. The officer asked for consent to search Harris’s truck. Harris refused, so the officer inspected the truck with a drug-detection dog. The dog alerted to the driver-side door handle, and the officer searched the truck. The search revealed no drugs, but the officer seized materials for manufacturing methamphetamine. While drug paraphernalia charges were pending against Harris, the same officer stopped Harris again, and the same dog again alerted to Harris’s driver-side door handle. This second search disclosed no contraband.

Harris moved to suppress the paraphernalia seized during the first search on the ground that the dog’s alert did not establish probable cause to search. The prosecution presented evidence of the officer and dog’s training in drug detection, including the dog’s private certification. Harris did not challenge this evidence. Instead, Harris emphasized that the dog’s certification had lapsed, the officer kept incomplete field performance records for the dog, and the dog twice alerted to Harris’s truck door handle when the officer found no drugs.

The trial court found probable cause, and Harris was convicted. On appeal, the Florida Supreme Court sided with Harris, concluding that “the fact that the dog has been trained and certified is simply not enough to establish probable cause.” Rather, to establish sufficient reliability for probable cause, the prosecution needed to present “evidence of the dog’s performance history,” including “how often the dog has alerted in the field without illegal contraband having been found.”

The U.S. Supreme Court unanimously rejected this exacting standard for judicial review of probable cause. In an opinion by Justice Kagan, the Court reaffirmed that probable cause exists when, in the totality of circumstances, “the facts available to [a police officer] would ‘warrant a [person] of reasonable caution in the belief’ that contraband or evidence of a crime is present.” In the Court’s view, the Florida Supreme Court “flouted” this established standard for probable cause with an overly rigid judicial “checklist” for reviewing a drug-detection dog’s reliability, measured largely by field performance. Indeed, the Court observed, “[t]he better measure of a dog’s reliability … comes away from the field, in controlled testing environments.”

The Court thus generally scripted how courts should review a drug-detection dog’s reliability in future probable cause inquiries:

If the State has produced proof from controlled settings that a dog performs reliably in detecting drugs, and the defendant has not contested that showing, then the court should find probable cause. If, in contrast, the defendant has challenged the State’s case (by disputing the reliability of the dog overall or of a particular alert), then the court should weigh the competing evidence. … The question … is whether all the facts surrounding a dog’s alert, when
thus does not relieve the government of any individualized Harris meets this test.” "A sniff," the Court humorously concluded, “is up to snuff when it
Katz "person's 'Fourth Amendment rights,’” the Court explained, “do not
sniff against "the Fourth Amendment's property-rights baseline." A
the Court evaluated the dog
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Instead, drawing directly on
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police to exercise the same implied license to knock at a front door
his front door with the dog, as the Fourth Amendment permits the
dog's sniff at his home's front door constituted a search of his home
evidence, and the state appealed.
The police in Jardines brought a
trained drug-detection dog to the
front porch of Jardines's home.
When the dog alerted to narcotics at Jardines’s front door, the police
obtained a warrant to search the home. This search disclosed
marijuana plants, and Jardines was prosecuted. Jardines moved to
suppress the marijuana evidence, contending that the
dog's sniff at his home’s front door constituted a search of his home
under the Fourth Amendment, necessitating the judicial review of
a warrant application. The Florida courts excluded the marijuana
evidence, and the state appealed.
The state on appeal reminded the Supreme Court that it already held
that drug-detection dog sniffs do not constitute a search in cases
involving vehicles and luggage. See Illinois v. Caballes, 543 U.S. 405
(2005); United States v. Place, 462 U.S. 696 (1983). Nor, the state
continued, did the police search Jardines’s home by approaching
his front door with the dog, as the Fourth Amendment permits the
police to exercise the same implied license to knock at a front door
as anyone else. Thus, in the state's view, the dog sniff constituted
investigative activity outside the Fourth Amendment’s purview. The
dog sniff simply gave the police the probable cause they needed to
persuade a reviewing judge to issue a search warrant.
In a divided 5-4 decision, the Court rejected the state's position.
Writing also for Justices Ginsburg, Kagan, Sotomayor, and Thomas,
Justice Scalia ducked the state’s argument that Jardines could claim
no Fourth Amendment privacy interest against a police visit to his
front door with a canine companion trained to detect contraband.
Instead, drawing directly on Jones, the Court evaluated the dog
sniff against “the Fourth Amendment’s property-rights baseline.” A
“person’s ‘Fourth Amendment rights,’” the Court explained, “do not
rise or fall with the Katz [privacy] formulation.”
Consistent with this property-rights baseline, the Fourth Amend-
ment protects “[t]he home [as] first among equals.” The home,
moreover, encompasses its “curtilage”—the “area ‘immediately
surrounding and associated with the home.’” And a home’s front
porch area, the Supreme Court observed, “is the classic exemplar
of curtilage. The police and their dog thus entered an area protected
by the Fourth Amendment when they mounted Jardines’s porch to
sniff around his front door.
The only remaining question, the Court posited, “is whether
[Jardines] had given his leave (even implicitly) for them to do so.”
The Court held that Jardines did not. Distinguishing “background
social norms that invite a visitor to the front door,” the Court sur-
mised that “[i]ntroducing a trained police dog to explore the area
around the home in hopes of discovering incriminating evidence is
something else.” This police activity, the Court concluded, exceeded
a visitor’s implied license to knock and instead trespassed onto
Jardines’s Fourth Amendment–protected porch. To prove reasonable
under the Fourth Amendment, this trespass required judicial review
in the form of either a warrant authorizing that police activity or an
individualized warrant exception.
In a concurrence joined by Justices Ginsburg and Sotomayor, Justice
Kagan argued: “The Court today treats this case under a property
rubric … I could just as hap-
ily have decided it by looking at Jardines' privacy interests.”
The sentiment “my home is my own,” Justice Kagan noted, may
have originated in property law, but “now also denotes a com-
mon understanding … about an especially private sphere.”
Therefore, to these justices, the
police searched Jardines’s prop-
erty by trespass, but they also searched Jardines’s home by invading
Jardines’s reasonable expectation of privacy.
Justice Alito dissented with Chief Justice Roberts and Justices
Breyer and Kennedy. Justice Alito accused the majority of counter-
feiting a new trespass theory that did not exist at common law to
fashion a viable search theory. The Court, Justice Alito emphasized,
has repeatedly held that dog sniffs do not constitute searches,
because dog sniffs do not reveal private information protected by the
Fourth Amendment—just the presence of contraband. In the dis-
sent’s view, the police officers’ position at a home front door, which
the public implicitly was invited to approach, did not transform what
the Court has held is a non-search into a search requiring judicial
review.
Justice Scalia championed his property-rights theory in Jardines
“because it keeps easy cases easy.” Justice Kagan claimed that “a
focus on Jardines' privacy interests would make an ‘easy case easy’ twice over.” Justice
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Justice Scalia championed his property-rights theory in Jardines “because it keeps easy cases easy.” Justice Kagan claimed that “a focus on Jardines' privacy interests would make an ‘easy case easy’ twice over.” Justice Kagan's broad view of privacy in the home, however, captured only three votes; the same number as Justice Alito’s narrower vision of property and privacy rights. The future thus will tell whether the Katz privacy test will subject a broader range of police information gathering to judicial review, or whether this test simply will be supplemented by Justice Scalia’s emerging property-rights theory.
Maryland v. King
Numerous states and the federal government collect the DNA of persons arrested for crimes and test that DNA against a growing database of DNA evidence from crime scenes. This DNA collection practice has solved numerous crimes. In Maryland v. King (Docket No. 12-207), the Supreme Court decided whether this practice nevertheless requires individualized judicial review of DNA collection for reasonableness, or whether the government categorically may collect DNA following an individual’s arrest.

Alonzo Jay King was arrested on assault charges. During arrest processing, officials swabbed King’s cheek to collect his DNA under Maryland’s DNA Collection Act. This act authorized DNA testing of persons arrested for serious crimes. King’s DNA sample matched the DNA profile from an unsolved rape. King was convicted of this rape, but he successfully argued to the Maryland Court of Appeals that the state searched him unreasonably when it collected his DNA without individualized suspicion. The state appealed, and the Supreme Court granted certiorari to resolve a split in authority over the constitutionality of suspicionless DNA collection from arrestees.

In an opinion by Justice Kennedy, joined by Chief Justice Roberts and Justices Alito, Breyer, and Thomas, the Court upheld Maryland’s DNA collection program. The Court noted that reasonableness, not individualized suspicion, is the touchstone of the Fourth Amendment. In this light, although DNA collections constitute searches, these searches are standardized and not subject to police investigative discretion. As a result, “there are virtually no facts for a neutral and detached magistrate to evaluate.” These searches thus will prove categorically reasonable, the Court explicated, if the state’s interests outweigh individual interests.

In balancing these interests, the Court credited the state’s interests in accurately identifying persons taken into lawful custody. Officials must know who has been arrested and will be prosecuted. This identity information reasonably includes the arrestee’s criminal history. As Florence recognized, officials also must account for security risks from detainees, and they must ensure that persons accused of crime return for trial. Identification of past conduct demonstrating a public danger further “will inform a court’s determination whether the individual should be released on bail.” Finally, identification of an arrestee as “the perpetrator of some heinous crime may have the salutary effect of freeing a person wrongfully imprisoned for the same offense.” DNA identification, the Court explained, “plays a critical role in serving those interests.”

Against the “great weight” of the state’s interests served by DNA identification, the Court assessed the intrusion of a cheek swab to collect DNA as “minimal.” Drawing again on Florence, the Court cemented the point that “[t]he expectations of privacy of an individual taken into police custody necessarily [are] of a diminished scope.” A cheek swab “does not increase the indignity already attendant to normal incidents of arrest.” Indeed, the law long has accepted comparable routine post-arrest fingerprinting and photographing for identification purposes. The Maryland Act, moreover, protects the arrestee’s DNA profile from uses other than criminal justice identification.

Consequently, the Court held that “DNA identification of arrestees is a reasonable search that can be considered part of a routine booking procedure.” The Fourth Amendment therefore does not require individualized judicial review of DNA collection from serious-offense arrestees beyond a determination that the arrest itself was lawful.

Justice Scalia penned a fiery dissent, joined by Justices Ginsburg, Kagan, and Sotomayor. Justice Scalia began by asserting:

The Fourth Amendment forbids searching a person for evidence of a crime when there is no basis for believing the person is guilty of the crime or in possession of incriminating evidence. That prohibition is categorical and without exception; it lies at the heart of the Fourth Amendment.

In light of this categorical prohibition, Justice Scalia explained, cases approving searches without individualized suspicion have “insisted upon a justifying motive apart from the investigation of crime.” Meticulously rebuking the majority’s arrestee-identification theory for upholding DNA collection, Justice Scalia protested: “The Court’s assertion that DNA is being taken, not to solve crimes, but to identify those in the State’s custody, taxes the credulity of the credulous.”

Justice Scalia acknowledged the “noble objective” of solving unsolved crimes. Yet, Justice Scalia responded, this objective “occupies a lower place in the American pantheon of noble objectives than the protection of our people from suspicionless law enforcement searches. The Fourth Amendment must prevail.” Under Justice Scalia’s dissenting position, the Fourth Amendment would prevail through individualized judicial review of DNA collection from individuals not yet convicted of crime.

The debate following the King decision may support Justice Alito’s assessment at oral argument that King may be “the most important criminal procedure case that this Court has heard in decades.” See e.g., N. Amar & N. Katyal, Why the Court Was Right to Allow Cheek Swabs, N.Y. Times (June 2, 2013); Barry Friedman, The Supreme Court Doesn’t Understand the Fourth Amendment, Slate.com (June 5, 2013). But either way, King has green-lit routine DNA testing of persons arrested for serious offenses. Future cases will determine whether, as Justice Scalia predicted, this authority will extend to minor offenses, similar to the strip-search rule in Florence. In the meantime, officials around the country have accelerated DNA collection programs. Cf. J. Goldstein, Police Agencies Are Assembling Records of DNA, N.Y. Times (June 12, 2013).

Conclusion
Following the Supreme Court’s 2010 term, the first full term of this Court, Fourth Amendment expert Orin Kerr surmised that “the current Court is rather friendly to the government in Fourth Amendment cases.” See O. Kerr, Review of the Court’s Fourth Amendment Cases, SCOTUSBlog.com (July 8, 2011). This term may have complicated this view by showing that in Fourth Amendment cases,
the Court’s predictable coalitions in contentious cases may be less predictable. The inherent moving target of the Fourth Amendment’s “reasonableness” standard may explain some of this unpredictability. But also, this unpredictability may reflect divergent perspectives on the proper balance between individualized judicial review and categorical rules for measuring reasonableness under the Fourth Amendment.

Brooks Holland is an associate professor of law at the Gonzaga University School of Law. Sarah Booher, a law student at Gonzaga, assisted in the preparation of this article. He can be reached at bholland@lawschool.gonzaga.edu.


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Chief Justice Roberts telegraphed his Court’s approach to racial equality early in his tenure, in just his second term, when he wrote in deceptively simple language that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.” Parents Involved in Community Schools v. Seattle School Dist. No. 1, 551 U.S. 701 (2007). On one level, that statement seems unremarkable, like a mere truism. After all, if the goal is to stop discrimination, it only makes sense to stop discriminating. But on another level, that statement marks the triumph of a particular approach to equality that had been percolating at the Supreme Court for some time. That approach says that the government violates equality whenever it uses race, for any reason. Indeed, that approach requires the government to turn a blind eye to race, and to be neutral in regard to it. And that approach demands government neutrality even when that neutrality hardens preexisting social inequalities between the races. In other words, equality means neutral treatment by the government, without regard to societal discrimination, and irrespective of discriminatory outcomes. Chief Justice Roberts packed all this in that simple sentence: “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”

Chief Justice Roberts’s simple statement came in a case that cut to the core of the debate over racial equality. That case, Parents Involved, tested two school districts’ use of race as a factor in placing students in primary schools in order to better integrate the school system. One of those districts, in Seattle, never operated legally segregated schools and had never been subject to a court-ordered desegregation plan. The other, in Jefferson County, Kentucky, was subject to a segregation decree until 2000, when the court dissolved the decree after finding that the district had eliminated the vestiges of its prior legal segregation.

Still, the districts found that their schools were not successfully integrated. (Like many districts around the country, the Seattle and Jefferson County districts faced a backslide of resegregation because of housing patterns and generalized societal racial discrimination, among other reasons, even though those reasons were not the government’s policy.) So the districts sought to better integrate by using race as a criteria in placing students.

A group of parents objected, claiming that the districts’ use of race violated the Equal Protection Clause. They said that the government’s use of race for any reason, including a laudable reason such as desegregation, must be subject to the most rigorous judicial scrutiny. Moreover, they said that using school integration policies to solve problems such as housing segregation or generalized society racial discrimination—problems not directly caused by the government—did not cut it.

These arguments put a particular spin on the famous Brown v. Board of Education, 347 U.S. 483 (1954). If Brown said that equality means that the government cannot use race for evil purposes (to operate segregated schools to the disadvantage of blacks), these arguments said that equality also means that the government cannot use race for good purposes, for benign purposes, for neutral purposes—or for any purposes. These arguments said that government’s use of race alone is what makes the government action suspect, never mind the reasons why government uses race. And the government cannot use race to solve general societal problems that it did not create. Or, in other words, “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”

This understanding of equality focuses on government tagging by race for any purpose, without regard to preexisting societal discrimination, and irrespective of discriminatory effects. It compels perfectly equal treatment by race, indeed, perfectly neutral treatment by race. And it does not concern itself with general societal discrimination—how that discrimination may have contributed to inequalities by race (that might be redressed by government race-based policies), or how that discrimination might cause neutral government policies to yield very unequal results. For shorthand, let us call this the “neutral treatment” understanding of equality.

But this understanding of Brown was, and is, highly controversial. The other, maybe more conventional understanding of Brown is that the government cannot use race, even facially equal treatment by race, in a way that results in deliberate and malicious harms to a minority racial group, especially in an institution, such as education, that is so fundamental to our democracy. To see this, remember that Brown moved beyond the “separate but equal” understanding of equality in Plessy v. Ferguson, 163 U.S. 537 (1896), to an understanding that separate is inherently unequal. In other words, Brown recognized that we do not live in a perfectly equal society, and that societal inequalities can be solidified and perpetuated by government policy that purports to treat people equally. The reason that segregated schools were inferior for black students in Brown is because they were stigmatized, by societal discrimination against blacks—that is, the evil in Brown was not only the racial labeling, but the way that labeling, because of societal racism, led to unequal, race-based outcomes. Segregation in Brown was illegal because of its racially disparate effects. (In this way, segregation recalls Anatole France’s famous observation that “the majestic equality of the law[s], forbid[s] rich and poor alike to sleep under bridges, to beg in the street, and to steal their bread.” Le lys rouge.) By this understanding, equality means that the government cannot use race with a nefarious purpose or to produce racially disparate effects; and in measuring those purposes and effects equality can, and must, take account of preexisting social inequalities between the races. And if so, then government may have more room to use race to redress those inequalities. Let us call this the “equal outcome” understanding of equality.
Here is a more direct way of saying it: if Brown held that separate is inherently unequal, the neutral treatment understanding puts the emphasis on “separate,” while the equal outcome understanding puts the emphasis on “inherently unequal.”

Between these two competing understandings of equality, Chief Justice Roberts unequivocally endorsed the neutral treatment understanding in Parents Involved. The whole final section of his opinion in that case is a paean to Brown and the neutral treatment understanding that he said comes from it. And just to highlight the contrast in understandings, Justice Stevens wrote in dissent that the chief justice “rewrote the history of one of this Court’s most important decisions.” He noted that segregation was imposed on blacks by whites, that “consent was not invited or required.” (Quoting Black, The Lawfulness of the Segregation Decisions, 69 Yale L. J. 421, 424–425.) And he said that “the history books do not tell stories of white children struggling to attend black schools.” In other words, according to Justice Stevens, Brown came down as it did not just because segregating states used race (in violation of the neutral treatment understanding), but because they used it against the backdrop of preexisting racial inequalities to produce an unequal result (in violation of the equal outcome understanding).

If Chief Justice Roberts’s opinion in Parents Involved telegraphed the neutral treatment understanding of equality, three cases from this term help us to see its full implications, and to predict its future. The Court in Fisher v. University of Texas at Austin (Docket No. 11-345) and Shelby County v. Holder (Docket No. 12-96) underscored the neutral treatment principle and carried that principle to two of its logical applications (if not conclusions). Fisher, the affirmative action case, said that any governmental use of race is subject to only the most rigid judicial scrutiny, with no deference to the government in the way it uses race. Shelby County, the Voting Rights Act case, said that Congress exceeded its authority when it set a formula for coverage, requiring certain states to obtain federal-government permission before making changes to their voting laws. The effect of the ruling is to allow these states to adopt facially neutral voting laws that will almost certainly have a discriminatory impact on the right to vote. Together, these two cases said that equality means neutral treatment, without regard to any preexisting racial inequalities and irrespective of the racially disparate effects of a facially neutral government policy.

These cases also said more. For example, they said that the Roberts Court, with its demand for racially neutral treatment, is less focused on equal access to institutions of democracy, such as education and the vote. Recall that Brown included very strong language on the importance of education in a democracy, even if it stopped short of saying that education is a fundamental right. And, of course, voting is a fundamental right. Still, the Roberts Court did not grant any special concession to government actions designed to ensure equal access to these institutions of democracy. Instead, the Court scrutinized the government policies themselves, notwithstanding their effects, demanding only racially neutral treatment.

These cases also said something about the courts’ role in enforcing racially neutral treatment. They said that the Roberts Court will play an aggressive role in enforcing racially neutral treatment as against both Congress and the states. But they also said that the Court will not play a serious role in enforcing equal outcomes. Indeed, the Court is almost entirely unconcerned with racially equal outcomes, or the effects of government policy; it is almost entirely concerned with racially neutral treatment alone.

Finally, one of these cases, Shelby County, introduced a new innovation in equality, the “equal sovereignty among the states.” As described more below, the doctrine of equal sovereignty among the states previously applied only to the conditions of admission to the Union. But after Shelby County, the doctrine would seem to apply to any act of Congress. While it is too early to tell just how far this doctrine will extend—and the Court did not give us any help in predicting—the implications could be sweeping.

Just as Fisher and Shelby County underscored the neutral treatment principle and gave us other glimpses of the Roberts Court’s view of equality, a third case, Arizona v. Inter Tribal Council of Arizona, Inc., (Docket No. 12-71) reminded us that there are other, structural constitutional mechanisms to protect equality. In particular, the Court in Inter Tribal Council used federalism principles to protect equality, putting federal law over state law in protecting the right to vote. (We saw this last year, too, in Arizona v. United States, 567 U.S. ___ (2012), where the Court held that federal immigration law preempted much of Arizona’s attempts to clamp down on unlawful aliens.) While the Court’s preemption jurisprudence does not always promote equality—and while Congress does not always act to promote equality, even when it can—Inter Tribal Council gives an example of how the Roberts Court used a structural feature of the Constitution, along with a congressional act, to promote equality in the right to vote.

Let’s take a closer look at these cases, one by one.

Fisher v. University of Texas at Austin: Affirmative Action
The first case, Fisher v. University of Texas at Austin, had a simple enough holding, and a 7-1 vote (with Justice Kagan recused) that crossed conventional ideological lines. The Court held that when a state university uses a race-conscious affirmative action program as part of its admissions policy, courts must review that program with the most rigorous form of judicial scrutiny, strict scrutiny, with no deference to the university on its use of race. In this way, the case fell squarely within the Roberts Court’s understanding of equality as neutral treatment—that is, that any use of race, for whatever reason, is suspect.

Fisher came to the Court ten years after its most recent foray into university affirmative action programs in Grutter v. Bollinger, 539 U.S. 306 (2003) (involving the University of Michigan School of Law’s admissions program), and Gratz v. Bollinger, 539 U.S. 244 (2003) (involving the University of Michigan’s undergraduate admissions program). Together those cases said that a university’s race-conscious affirmative action program for admission had to satisfy the most rigorous test known to constitutional law, strict scrutiny. (To be clear: “race-conscious” means that race is a named
factor in the admission decision, and not merely that the admissions process has a disparate race-based effect.) In particular, those cases held that university affirmative action programs had to be narrowly tailored to meet a compelling government interest.

Still, the Court said in those cases that a university can satisfy this strict requirement if it satisfies both parts of the test. First, as to the narrow-tailoring prong, the Court held that a university may use race as one of several factors in an individualized, flexible, and holistic review of each candidate for admission. But a university may not use a rigid quota system, assign rigid numerical values to race, or otherwise use race in a way that would make it the defining feature of an applicant. Next, as to the compelling-government-interest prong, the Court reaffirmed that a university has a compelling government interest in the educational benefits that come from student body diversity. (Justice Powell first articulated this interest in his principal opinion in the Court's landmark ruling on affirmative action, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).)

Notably, the Court also said in Grutter that it owes some deference to the university’s academic judgment in deciding to pursue the educational benefits that flow from diversity. This caused some, including Justice Kennedy, in dissent in Grutter, to worry that the Court’s approach wrongly gave a pass to university affirmative action programs. In particular, Justice Kennedy worried that deference to a university in determining its educational mission wrongly translated into judicial deference to a university in designing its race-conscious admissions program. Justice Kennedy argued that this latter deference was at odds with the strict scrutiny test, and that the Court therefore did not truly apply the most rigorous strict scrutiny test, with all its force, in that case.

Against this backdrop, the Court considered the University of Texas’s (UT’s) race-conscious affirmative action program for admissions. Under the program, UT automatically admits all Texas students in the top 10 percent of their class. For those students who fall outside the top 10 percent, UT uses a combination of an Academic Index, or “AI,” and a Personal Achievement Index, or “PAI.” The AI reflects an applicant’s test scores and academic performance in high school; the PAI reflects an applicant’s leadership and work experience, awards, extracurricular activities, and a variety of other circumstances that give insight into an applicant’s background, including race. (Race is not assigned an explicit numerical value, however. Instead, it is one of several factors in the PAI.) UT, like other schools, uses these factors to help ensure that its class was sufficiently diverse to achieve the educational benefits that the Court approved in Grutter.

After UT assigns an AI and PAI to an applicant, it plots those scores on a grid, with the AI on the x-axis and the PAI on the y-axis. If the point falls above a specified line on the grid, the applicant is admitted; if the point falls below that line, he or she is not.

Abigail Fisher applied for admission to the 2008 entering class and was rejected. She sued UT and various UT officials, arguing that the UT admissions program violated the Fourteenth Amendment Equal Protection Clause. The United States District Court for the Western District of Texas granted summary judgment in favor of UT, and the United States Court of Appeals for the Fifth Circuit affirmed. The Fifth Circuit held that Grutter required courts to defer to a university’s judgment in defining a compelling government interest in the educational benefits of diversity and in determining whether its race-based affirmative action plan was narrowly tailored to achieve that interest. Based on this deference on both prongs of the strict scrutiny test, the Fifth Circuit upheld the UT program.

The Supreme Court vacated that ruling. In an opinion by Justice Kennedy, and joined by all on the Court except Justice Ginsburg (who dissented) and Justice Kagan (who was recused), the Court ruled that the Fifth Circuit wrongly granted deference to UT on the narrow-tailoring prong, even if it properly granted deference on the compelling-interest prong. Justice Kennedy, in a virtual reprisal of his dissent in Grutter, wrote that while the Court owes some deference to UT’s educational judgment that diversity is essential to its educational mission, it owes no deference to UT’s use of race in achieving that objective. Justice Kennedy wrote that under strict scrutiny the university has to show that its use of race is “necessary” to achieve that interest by demonstrating that “no workable race-neutral alternatives would produce the educational benefits of diversity.” The Court sent the case back to the Fifth Circuit for a proper application of this standard, punctuating the fact that for this Court any overt use of race is subject to the most searching judicial review.

Importantly, Justice Kennedy garnered seven votes for his opinion, including Justices Breyer and Sotomayor. Just as importantly, those justices did not sign on to Justice Ginsburg’s dissent. Justice Ginsburg would have upheld the UT program as a race-conscious, but flexible and individualized, program under Grutter and Bakke. But she also suggested that the usually rigid strict scrutiny framework did not so neatly apply to benign or remedial affirmative action programs.

Justice Ginsburg would have upheld the UT program as a race-conscious, but flexible and individualized, program under Grutter and Bakke. But she also suggested that the usually rigid strict scrutiny framework did not so neatly apply to benign or remedial affirmative action programs. For example, she wrote that workable race-neutral alternatives to achieve diversity, so relied upon by Justice Kennedy as a part of the strict scrutiny test, are in reality anything but race neutral: “I have said before and reiterate here that only an ostrich could regard the supposedly neutral alternatives [like the top 10 percent portion of UT’s program] as race unconscious.” Moreover, she argued that a university can consider historical discrimination in fashioning its affirmative action programs, and that affirmative action options that are honest and open in their use of race are preferable to those that conceal their use of race. All this is to say that Justice Ginsburg alone was sensitive to how supposedly race-neutral government policies can have race-based effects, and that she alone argued that universities should have more room to use race than traditional, rigid strict scrutiny allows. The fact that she was alone in these positions only underscores the fact that this Court is acutely concerned about any overt use of race—neutral treatment—without regard to preexisting racial inequalities and irrespective of discriminatory outcomes.
On the other hand, the Court did not go as far as it might have. In particular, it did not entirely strike the use of race in university admissions, and it did not strike UT’s program. While Justices Scalia and Thomas each wrote separate concurrences suggesting that they would bar the use of race in university admissions and overrule part or all of Grutter, they wrote only for themselves. Notably, neither Chief Justice Roberts nor Justice Alito joined their opinions. Justice Scalia’s and Justice Thomas’s concurrences underscore the fact that while the majority reaffirmed its commitment to using rigid strict scrutiny for any overt use of race, it also held open the possibility that a university might satisfy this test.

But this is not the end of the case. On remand, the Fifth Circuit will have to determine whether the program satisfies strict scrutiny, with no deference to the university on its use of race. One way or another, the case will then come back to the Supreme Court. That is because whatever the Fifth Circuit rules, one party will likely appeal, and the Supreme Court will either decline to hear the case (leaving the Fifth Circuit’s approach as the first and leading application of the post-Fisher strict scrutiny test to a university’s affirmative action program, providing guidance for all other federal courts) or accept the case (in which case we will get another ruling from the Court on how to apply strict scrutiny). In other words, Fisher is but the first step. The Roberts Court could issue an even stronger statement endorsing a neutral treatment principle the next time around.

Shelby County v. Holder: Voting Rights

If Fisher falls in line with a neutral treatment principle and leaves open the possibility of an even stronger endorsement of that principle, Shelby County v. Holder does the same, only more. We know this because we felt the reverberations from Shelby County within days, hours really, of the Court’s ruling. And those reverberations—in particular, states moving immediately after Shelby County to adopt certain election laws that were illegal just before Shelby County—pointed even more toward neutral treatment. In other words, Shelby County, like Fisher, promoted a neutral treatment understanding of equality; but Shelby County, unlike Fisher, resulted in an immediate, tangible, and breathtaking application of that understanding.

The Court in Shelby County overturned a key provision of the Voting Rights Act of 1965 (VRA), ruling that Congress exceeded its authority under the Fifteenth Amendment in enacting the provision. To understand the case, it may help to know a little about the VRA.

The VRA seeks to enforce voting rights through two key mechanisms. The first, § 2, authorizes individuals and the federal government to sue states for enforcing any “standard, practice, or procedure” that denies or abridges the right to vote on account of race. Section 2 applies nationwide and is designed to hold states to account for discriminating by race in the right to vote. Section 2 was not directly at issue in Shelby County, but understanding how it operates helps to clarify Shelby County’s impact.

Shelby County, like Fisher, promoted a neutral treatment understanding of equality; but Shelby County, unlike Fisher, resulted in an immediate, tangible, and breathtaking application of that understanding.

Section 5 solves these problems by requiring historically offending jurisdictions to justify changes to their voting laws in race-neutral terms before those laws went into effect. Section 5 thus operates as a complement and critical backstop to § 2 case-by-case litigation. It is one of the most important and historically successful civil rights laws on the books.

But § 5 preclearance only applies to certain, historically offending jurisdictions. Congress identified those jurisdictions in 1965—Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia—and portions of North Carolina and Arizona—and “reverse-engineered” a formula to cover them. That formula, found in § 4 of the VRA, provided for coverage for any jurisdiction that had maintained a test or device as a prerequisite to voting as of November 1, 1965, and had less than 50 percent voter registration or turnout in the 1964 presidential election. (Tests or devices included literacy tests, requirements for good moral character, requirements for vouchers from registered voters, and others. Jurisdictions used tests or devices such as these to disenfranchise black voters.) Under § 4, a covered jurisdiction could “bail out” of coverage if it had not used a test or device in the preceding five years “for the purpose or with the effect of denying or abridging the right to vote on account of race or color.”

Congress reauthorized §§ 4 and 5 in 1970, 1975, and 1982. It altered the coverage formula slightly in 1970 and 1975; it expanded the definition of “test or device” in 1975, resulting in coverage over all
of Alaska, Arizona, and Texas, and several counties in California, Florida, Michigan, New York, North Carolina, and South Dakota; and it allowed political subdivisions of covered jurisdictions to bail out in 1982. The Supreme Court upheld each of these reauthorizations and changes against constitutional challenges.

In 2006, Congress again reauthorized §§ 4 and 5. Congress did not change the coverage formula in § 4 (from the most recent version in 1982), but it amended § 5 to prohibit voting changes with “any discriminatory purpose” and changes that diminish the ability of citizens, on account of race, color, or language minority status, “to elect their preferred candidates of choice.”

Soon after Congress reauthorized the VRA in 2006, a Texas utility district sued to bail out of preclearance coverage. The district alternatively argued that preclearance was unconstitutional. The Supreme Court ruled in Northwest Austin Municipal Utility District No. One v. Holder, 557 U.S. 193 (2009), that the utility district could bail out. The Court did not rule on the constitutional challenge, but Chief Justice Roberts, writing an opinion joined in full by all members of the Court except Justice Thomas, sent strong signals that the Court was concerned about the constitutionality of §§ 4 and 5. In particular, Chief Justice Roberts wrote that the preclearance requirement “imposes substantial federalism costs” and “differential between the States, despite our historic tradition that all the States enjoy equal sovereignty.” He wrote that “[t]hings have changed in the South. Voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels.” And he questioned whether the problems that preclearance was meant to address were still “concentrated in the jurisdictions singled out for preclearance.”

The Court’s concerns about the constitutionality of the VRA came to full fruition in Shelby County. In that case, Shelby County, Alabama, argued that the preclearance requirement and the coverage formula were facially unconstitutional. In particular, it argued that Congress exceeded its authority under the Fifteenth Amendment, which authorizes Congress to enact legislation to enforce the Amendment’s ban on any “den[i]al or abridg[e]ment … by any State on account of race, color, or previous condition of servitude.” This was a surprisingly aggressive argument by a county in a state that had perhaps the worst history of discrimination by race in the vote. Because Alabama was a particularly egregious offender, and because the state would have been included in any coverage formula, it was not clear that Shelby County even had standing to lodge this kind of challenge. But the Court nevertheless proceeded to the merits.

Chief Justice Roberts wrote the opinion, joined by Justices Scalia, Kennedy, Thomas, and Alito. He wrote that the coverage formula in § 4, originally drafted in 1965 and not significantly changed since, was outdated when Congress reauthorized the VRA in 2006. He said that the formula was based on “decades-old data and eradicated practices,” such as literacy tests, and that voter registration and turnout in covered jurisdictions had increased dramatically. In short, he wrote that things had changed, and that the coverage formula failed to keep up. Congress reauthorized the coverage formula in 2006 without accounting for improvements and changes in state practices relating to vote discrimination; therefore, according to the Court, Congress exceeded its authority under the Fifteenth Amendment.

Chief Justice Roberts also wrote that preclearance departed from basic principles of federalism. In particular, he wrote that a preclearance requirement for some (but not all) jurisdictions violated the “equal sovereignty” among the states and intruded upon their “equal … power, dignity, and authority.” That is because one state (a noncovered state) could immediately enact a change to its voting laws through its ordinary legislative process, while a neighboring state (a covered state) had to wait months or years to enact that same law while awaiting preclearance.

This new “equal sovereignty” principle surprised many. The Court had previously applied an equal sovereignty principle only to the conditions upon which states were admitted to the Union. Indeed, one of the Court’s own prior cases rejecting a constitutional challenge to these same provisions in the VRA said as much. But Chief Justice Roberts fashioned a new “equal sovereignty” principle that apparently sweeps more broadly—even as far as congressional treatment of the states through more routine, day-to-day legislation. And if this new principle applies to congressional authority under the Fifteenth Amendment—which was enacted during Reconstruction, with the purpose of empowering Congress over the states to prohibit race discrimination in the vote—then it is hard to see where it does not apply. The implications could be sweeping, potentially threatening any congressional regulatory or spending program that treats states differently.

Notably, the Court did not apply a particular standard or test to determine appropriate congressional enforcement authority under the Fifteenth Amendment. In particular, the Court did not apply the standard it set in City of Boerne v. Flores, 521 U.S. 507 (1997). In that case, the Court held that a congressional act designed to enforce the substantive terms of the Fourteenth Amendment had to be “congruent[i] and proportional[]” to the constitutional violation that Congress sought to prevent or remedy. This standard was seen by many as heightening the requirement for congressional authority under the Fourteenth Amendment and thus further empowering the Court to scrutinize those congressional acts. But Chief Justice Roberts did not adopt this test in overturning the coverage formula in the VRA. (He did not disavow it, either. He simply ignored it.) Instead, he wrote that the coverage formula failed even mere rationality review.

Even though the Court only struck the coverage formula in § 4—and did not strike preclearance in § 5—preclearance is now, and almost surely into the future, a dead letter.
Justice Ginsburg wrote the dissent, joined by Justices Breyer, Sotomayor, and Kagan. She took aim at the chief justice’s claim that the coverage formula was outdated because things had changed. She argued that things had changed because of the past and continued success of §§ 4 and 5, not despite them—that is, that preclearance had done its job as a backstop to § 2 litigation, and that it was still necessary as a backstop to protect against clever state efforts to discriminate by race in the vote. She was particularly concerned about “second generation barriers” to the right to vote: those barriers that masquerade as neutral voting laws, often with the stated intent to protect the integrity of the polls, but in fact result in racial discrimination in the right to vote. Justice Ginsburg argued, and illustrated, that her points were also the concerns of Congress, expressed in the voluminous congressional record, when Congress reauthorized the VRA in 2006. She argued that Congress had plenty of support for its conclusion that preclearance was well justified for the particular jurisdictions covered by § 4. Still, her position was a minority one.

The impact of the case was swift and significant. Within a week, the Supreme Court vacated two lower-court rulings that denied preclearance to two different proposed changes to Texas voting law. In the first case, State of Texas v. Holder (Docket No. 12-1028), a three-judge panel of the United States District Court for the District of Columbia had denied preclearance to Texas’s stringent voter-ID law. The court said that the law would likely have a retrogressive effect on Hispanic and Black voters in the state. In the second case, State of Texas v. United States (Docket No. 12-496), a three-judge district court panel had denied preclearance to Texas’s redistricting plans for its congressional districts and state legislative districts. The court said that these plans would have a retrogressive effect, but even more importantly, that they were enacted with a discriminatory purpose. Within days after Shelby County came down, these laws—which were barred under the pre-Shelby County regime because of their likely discriminatory outcomes—were slated to go into effect. And this is just the beginning. These cases, and other ongoing efforts in previously covered jurisdictions to enact neutral election laws that could have a retrogressive effect on the right to vote, provide a real-time illustration of the neutral treatment principle animating Shelby County and a sober picture of the future of voting rights.

Largely on the basis of equal state sovereignty, Shelby County frees up previously covered jurisdictions from the burdensome process of preclearance and leaves them free to adopt and enact their own election laws just like any other uncovered jurisdiction—without the burden of preclearance. But as for voter equality, Shelby County means that adversely affected voters can only look to case-by-case litigation to challenge election laws—litigation that at least for now has no backstop in the form of a preclearance requirement. That litigation is expensive, time-consuming, and, as the history of voting rights litigation shows, never quite catches up to the problems. Because the case allows state laws that were previously barred because of their discriminatory effects, it is consistent with the neutral treatment understanding of equality. The Texas cases show that Shelby County is an application of a neutral treatment understanding of equality—privileged neutral treatment over any concerns about preexisting inequalities or the discriminatory impact of state election laws.

**Arizona v. Inter Tribal Council of Arizona, Inc.: Voting Rights**

If Fisher and Shelby County both advance a neutral treatment understanding of equality, and thus make it tougher for government to use race to address problems of societal discrimination, Arizona v. Inter Tribal Council of Arizona, Inc. reminds us that the Court may be open to other, structural ways to promote equality—in particular, equal access to the right to vote. Thus the Court in Inter Tribal Council struck an Arizona voter registration requirement on federal supremacy grounds, ruling that the law conflicted with federal law. This reprimed a theme that we saw last summer, when the Court in Arizona v. United States struck much of Arizona’s SB1070, the state law that clamped down on undocumented immigrants, because much of that law conflicted with federal law. Inter Tribal is a case about federalism, to be sure, but it also makes an important statement about a structural way, in some cases, that the federal government can enforce the constitution’s command for equality in the right to vote.

The Court ruled in Inter Tribal Council of Arizona, Inc. that the requirement on the federal voter registration form that a voter applicant aver, under penalty of perjury, that he or she is a citizen preempted Arizona’s requirement that voter applicants provide independent documentation of citizenship. The case involved Arizona Proposition 200, a ballot initiative designed “to combat voter fraud by requiring voters to present proof of citizenship when they register to vote and to present identification when they vote on election day.” But this identification requirement threatened to prevent some citizens from registering and voting.

The constitutional problem was that Proposition 200 required more proof of citizenship than the federal government required on the uniform federal voter registration form. That form, colloquially called the “Federal Form,” was created by the federal Election Assistance Commission (EAC), under authority of the National Voter Registration Act (NVRA), and required a voter applicant only to attest, under penalty of perjury, that he or she is a citizen. The NVRA required states to “accept and use” that form, but under Proposition 200, Arizona officials were required to reject any Federal Form that did not contain additional concrete evidence of citizenship. (Under the NVRA, the EAC could authorize additional state-specific instructions to the Federal Form. But the EAC rejected Arizona’s request for state-specific instructions to include additional evidence of citizenship.) Proposition 200 thus conflicted with the Federal Form.

The Court ruled that the Federal Form preempted Arizona’s requirement for additional proof of citizenship. Justice Scalia wrote the opinion for the Court, joined by Chief Justice Roberts and Justices Ginsburg, Breyer, Sotomayor, and Kagan. He said that Congress
enacted the NVRA under its authority in Article I, Section 4, clause 1 of the Constitution, the Elections Clause. That Clause reads:

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the places of chusing Senators.

The Clause requires states to set certain terms of federal elections, but authorizes Congress to override those terms as to the “Times, Places and Manner” of holding congressional elections. The Court reaffirmed the muscular strength of the Clause, recalling that it was initially adopted so that Congress could prevent states from manipulating congressional elections in a way that would annihilate the federal government. The Court also reaffirmed its broad sweep, which allows Congress “to provide a complete code for congressional elections,” including regulations relating to voter registration. Notably, Justice Scalia wrote that preemption analysis under the Elections Clause does not begin with a presumption against preemption (like preemption analysis under the Supremacy Clause). That is because the power that the Election Clause confers is a power to preempt state law; congressional action pursuant to it necessarily preempts. Thus the Elections Clause gives Congress vast authority—and authority at the direct expense of the states.

The Court said that when Congress acted under its Elections Clause authority in requiring states to “accept and use” the Federal Form, it meant that states had to accept the form as a complete and sufficient application for voter registration. Arizona’s Proposition 200, which required rejection of a properly completed Federal Form without additional proof of citizenship, conflicted with that meaning. Thus, the Court held that the NVRA preempted Arizona’s proof-of-citizenship requirement and struck that requirement.

Justice Kennedy concurred in part and concurred in the judgment. He wrote separately to take issue with the Court’s rejection of a presumption against preemption in the Elections Clause context. Justice Kennedy argued that there was no sound basis for distinguishing between different congressional authorities for preemption purposes, and that it was not necessary in this case (because the NVRA so clearly preempted Arizona’s requirement).

Justices Thomas and Alito dissented separately. Justice Thomas argued that the Voter Qualifications Clause in Article I, Section 2, clause 1 and the Seventeenth Amendment give the states the power to determine the qualifications of voters in federal elections. He said that they also give the states the power to determine whether those qualifications are satisfied. Justice Alito argued that the NVRA’s preemptive effect was not so obvious, and that reading it to allow Arizona to require additional proof of citizenship would better harmonize it with a separate NVRA authority that would allow Arizona to design and use—and to require proof of citizenship on—its own form.

Inter Tribal means that the federal government still has vast authority in some areas to promote equal rights, without rigid scrutiny by the Court and without check by states’ rights or equal state sovereignty. In particular, Congress can prescribe certain election practices that restrict state efforts that could infringe on an equal right to vote.

While Inter Tribal is really a case about federalism principles—and not on its face about equality at all—it continues an important statement about enforcement of the U.S. Constitution’s command for equality from last summer’s ruling in Arizona v. United States. That statement is that structural features of our Constitution—federalism, separation of powers—may still be alive and well in some cases, even if not in all, to help promote equality in fundamental rights.

Together, Fisher and Shelby County underscore the Roberts Court’s commitment to a principle of race-neutral treatment. That principle says that the Constitution’s command for equality means that any government use of race is highly suspect, whether government uses race for evil, for good, for neutral, or for benign reasons. It also says that constitutional equality is not concerned with general societal discrimination—that government cannot use race to solve problems of general societal discrimination, or to achieve equal outcomes. In this way, Fisher and Shelby County are points on a trend line that traces back to Parents Involved (and well before). Chief Justice Roberts telegraphed his understanding of equality early in his tenure—“[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race”—and these cases are two logical extensions. Shelby County is particularly notable only because its immediate aftershocks starkly illustrate the implications of this approach: laws that were illegal immediately before Shelby County were slated to go into effect immediately after Shelby County. On the other hand, we will have to wait to see the full implications of Fisher.

Still, Inter Tribal teaches that there is some room to challenge government action that may have a discriminatory impact on the right to vote. That case says that structural features of the Constitution may restrict states in certain situations from enforcing certain neutral requirements that may nevertheless infringe on equal access to the right to vote.

If there were any doubt coming into this term, these cases solidified the Roberts Court’s rule on racial equality. Now we only have to wait to see its full reach.
Beyond the headline making cases about same-sex marriage and voting rights, this year’s Supreme Court term included many lesser known, but equally important cases. From the definition of a “parent” to the patentability of a human gene, the Court’s docket allowed it to explore some areas of the law that it rarely dives into (e.g. family law) and to refine its precedents on those legal areas that are becoming increasingly commonplace as technology advances (e.g., patents and intellectual property).

**Indian Child Welfare Act**

*Adoptive Couple v. Baby Girl*, 570 U.S. __ (2013), put before the Court family law issues, a legal area that the Court wades into infrequently. *Adoptive Couple* presented a unique lens for the Court to apply to these issues: the Indian Child Welfare Act (ICWA). ICWA, a federal statute, created standards for state courts to apply when adjudicating child custody cases involving Indian children. Among other requirements, ICWA bars the termination of an Indian parent’s parental rights absent a heightened showing that the Indian child may suffer serious harm if he or she remains with the custodial parent. ICWA further requires that certain efforts be made before an Indian family can be broken up and, if a court decides to remove the child, placement preference is given to the child’s extended family, other members of the tribe, and other Indian families.

*Adoptive Couple* came to the Court after an emotional roller-coaster trip through the lower courts. Baby Girl, the child at the center of this case, was born to Birth Mother after Birth Mother had previously ended her relationship with Biological Father. Biological Father is a Cherokee Indian, but when Baby Girl was first born, this fact was unknown by the tribe or the social workers. Birth Mother decided to place Baby Girl for adoption without consulting Biological Father; Baby Girl was placed with an adoptive family in South Carolina (Adoptive Couple). Biological Father had never had custody of Baby Girl and sent a text message to Birth Mother indicating he was renouncing his parental rights (there was some dispute as to what exactly Biological Father meant by this text). After being served with the adoption papers, Biological Father asserted his rights and the tribe intervened. The South Carolina state court found that Biological Father was a “parent” under ICWA and subsequently denied the adoption, resulting in Baby Girl being removed from the Adoptive Couple’s home, where she had lived for two years, and being placed with Biological Father and his family in Oklahoma. Adoptive Couple asserted that the adoption was appropriate because ICWA did not apply; according to Adoptive Couple, Biological Father was not a “parent” under ICWA.

There was a great deal of media coverage in the lead-up to, and immediate aftermath of, the oral arguments before the Supreme Court. Media outlets split on which side was more sympathetic. For example, an episode of the television talk show *Dr. Phil* featured emotional interviews with Adoptive Couple and resulted in op-eds in Indian Country Today calling for boycotts of the “anti-native” show. But every media source, and even the lower courts, agreed that this case was laced with more emotion and heartache than your average securities litigation or tax case. When issuing its ruling upholding the lower court’s decision to send Baby Girl back to her biological family, the South Carolina Supreme Court indicated it did so “with a heavy heart.”

The Supreme Court also struggled with these facts, resulting in a split 5-4 decision in favor of Adoptive Couple. The majority opinion, written by Justice Alito and joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Breyer, focused on the fact that ICWA used the terms “continued custody” and “break up”; according to the majority, these terms indicated that the act was intended to regulate the removal of children from preexisting Indian families. Parsing through various dictionary definitions of “continued,” the majority concludes that ICWA does not apply when the Indian, as in this case, parents never had custody of the Indian child.

The majority further noted its concern for Indian children, fearing that a ruling in the alternative might discourage adoption by non-Indian families. Justice Alito noted that to uphold the South Carolina ruling might prevent non-Indian families from adopting Indian children for fear that a biological Indian father could “play his ICWA trump card at the eleventh hour to override the mother’s decision and child’s best interest.” According to the majority, “if this were possible, many prospective adoptive parents would surely pause before adopting any child who might possibly qualify as Indian under the ICWA.”

Justice Sotomayor, joined by Justices Ginsburg and Kagan and Justice Scalia in part, wrote the principal dissent. After indicating that the majority has misread ICWA and focused, to a fault, exclusively on the one phrase “continued custody,” Justice Sotomayor expressed concern about the possible wide implications of the ruling. According the dissent, “[N]otwithstanding the majority’s focus on the perceived parental shortcomings of Birth Father, its reasoning necessarily extends to all Indian parents who have never had custody of their children, no matter how fully those parents have embraced the financial and emotional responsibilities of parenting.” She wrote, “The majority thereby transforms a statute that was intended to provide uniform federal standards for child custody proceedings involving Indian children and their biological parents into an illogical piecemeal scheme.” (Emphasis in original.) In response to the majority’s “trump card” argument, the dissent attempts to balance the possibility of adoptions being disrupted with a biological father’s interest in his child.

Even after the Court issued its June 25 ruling, it appears as though this case is far from over for the families involved. Shortly after the ruling, the South Carolina Supreme Court again ruled that Baby Girl should be moved, this time from her Biological Father’s family in Oklahoma back to Adoptive Couple in South Carolina. As this
issue was going to print, Chief Justice Roberts was reviewing an application from the Biological Father asking the Court to postpone the South Carolina order until he had the opportunity to appeal the new ruling on the basis that the Court’s dissenting opinion, when combined with Justice Breyer’s concurring opinion, opened up the door for him to argue that Baby Girl should be placed with his family before considering other adoptive placements. If the case ends up before the justices again, it will once more provide them an opportunity to wade into the thorny and emotionally fraught arena of family law.

**Intellectual Property**

Textbooks, seeds, and human genes: not exactly a typical trio before the Supreme Court, but this most recent term, those three things played an important role in defining and refining the Court’s intellectual property precedent.

**Kirtsaeng v. John Wiley & Sons**

*Kirtsaeng v. John Wiley & Sons* gave the Court an opportunity to reaffirm its “first sale doctrine.” Mr. Kirtsaeng, a native of Thailand who was studying in California, had his family buy textbooks in Thailand (where they were substantially less expensive) and mail him the books; he then resold those books in the United States at a substantial profit. Wiley, a major textbook publisher, sued Kirtsaeng for copyright infringement.

Kirtsaeng invoked a common copyright defense called the “first sale doctrine.” Under this doctrine, which is found in the Copyright Act, someone who rightfully owns a copy of a copyrighted work may lawfully resell the copy. Wiley argued that the doctrine did not apply because Kirtsaeng’s books were manufactured and sold in Thailand and, according to Wiley, the Copyright Act only applied to items manufactured in the United States.

In a majority opinion joined by Chief Justice Roberts and Justices Thomas, Alito, Sotomayor, and Kagan, Justice Breyer rejected Wiley’s argument, ruling in favor of Kirtsaeng. According to the majority, the textbooks were authorized and printed under the lawful license granted by Wiley, and for all intents and purposes, were “lawfully made” under the Copyright Act. The Court found Wiley and the government’s arguments justifying a “geographical” reading of the doctrine to be confusing and causing more problems than they solved. “[W]e believe that geographical interpretations create more linguistic problems than they resolve. And considerations of simplicity and coherence tip the purely linguistic balance in Kirtsaeng’s, nongeographical, favor,” Justice Breyer wrote.

**Bowman v. Monsanto Co.**

At issue in *Bowman v. Monsanto Co.* was the degree to which Monsanto could control the actions of farmers who buy its genetically modified soybean seeds. Farmer Bowman bought the genetically modified soybean seeds and then used newly grown seeds for future plantings. Monsanto claimed that Bowman’s actions violated its patent on these specific seeds (which were highly coveted because the modifications meant the seeds were resistant to a common herbicide that, in turn, allows farmers to use the herbicide to kill weeds without fear of harming their soybean crops.) Bowman argued Monsanto’s patent on specific seeds ends with the first sale; anything that occurs after that first sale is outside the scope of Monsanto’s patent.

In a unanimous decision written by Justice Kagan, the Court ruled in favor of Monsanto and patent holders. Justice Kagan’s opinion focused on the time and money a company such as Monsanto puts into the research and development of this type of seed and the need to ensure that such efforts are appropriately rewarded. According to the Court, an opposite ruling “would result in less incentive for innovation than Congress wanted.”

**Association for Molecular Pathology v. Myriad Genetics**

*Association for Molecular Pathology v. Myriad Genetics* presented the Court with the deceivingly simple question of whether human genes are patentable. Specifically, *Myriad* asked the Court to consider whether patents held over isolated human genes and related diagnostic methods were valid subject matter in patent law. Myriad Genetics held patents to two isolated genes and related diagnostic methods that, when a genetic mutation is present, indicate a higher risk of breast and/or ovarian cancer. The Court, in a majority opinion by Justice Thomas and joined by all members of the Court (Justice Scalia joined in part and wrote a concurring in part and in judgment), clearly held that naturally occurring DNA is a product of nature and therefore not patent eligible. However, the Court made a distinction between those portions of DNA that are merely isolated (and therefore not patent eligible), and synthetically manufactured DNA (referred to as cDNA), which, although mimicking the isolated DNA, is created in a lab and is not naturally occurring. According to Justice Thomas, when it comes to isolated DNA, quite simply, “Myriad did not create anything.” However, in regard to the cDNA, “the lab technician unquestionably creates something new when cDNA is made. cDNA retains the naturally occurring exons of DNA, but it is distinct from the DNA from which it was derived. As a result, cDNA is not a ‘product of nature[,]”

So if you are keeping score on the Court’s intellectual property/patent law cases it would be: one for consumer (*Kirtsaeng*), one for patent holders (*Monsanto*), and one essential tie (*Myriad*). As technologies continue to evolve and advance, the Court’s docket will likely include patent and intellectual property cases with increasingly frequency.
After ending its 2012–2013 session with a heart-stopping series of monumental rulings, the U.S. Supreme Court is showing no signs of shifting into lower gear for the term that commences on October 7.

Included in the four dozen or so cases that the Court has accepted for review so far are an array of hot-button issues, including affirmative action, campaign finance, public prayer, and the limits of executive power.

The exciting lineup comes on the heels of a session in which the Court issued historic rulings on gay marriage, voting rights, and affirmative action. The Court ended the prior session with its bombshell ruling upholding Obamacare.

“The Supreme Court has been deciding an unusually high number of blockbuster cases [in recent sessions], and that is continuing,” said Erwin Chemerinsky, dean of the law school at the University of California, Irvine. “I can already rattle off a list of potential blockbusters on the docket, and it’s only half full.”

George Washington University law professor Jeffrey Rosen, the CEO and president of the National Constitution Center, agreed that an impressive number of landmark decisions have come out of recent Supreme Court sessions and expects the same in the upcoming session. “The justices will certainly keep us all interested,” he said.

Rosen also believes another trend will continue in the next session: Chief Justice John Roberts, growing more and more comfortable in his role as chief, will increasingly put his mark on the Court. While espousing firm constitutional views that place him squarely in the conservative bloc of the Court and has favored deciding cases on narrow grounds when doing so promotes bipartisanship and leads to greater consensus among the justices.

“For the last five years we have heard talk about how this is the Kennedy Court, and how this is the Roberts Court in name only, but starting with the health-care case and continuing in this term we are seeing the chief justice having increasing success achieving his vision and putting his stamp on the Court, and it’s a sign of his increased confidence and strategic skill in articulating a vision and achieving it,” Rosen said.

The 2013–2014 docket already presents court watchers with numerous opportunities for bellwether cases in key legal areas. Following are brief synopses of four key cases to watch in the 2013–2014 session.

**Affirmative Action**
In **Schuette v. Coalition to Defend Affirmative Action** (Docket No. 12-682), the Court is once again poised to tackle the controversial subject of affirmative action. In the final week of its 2012–2013 session, the Court issued another affirmative action decision, **Fisher v. University of Texas at Austin**, 570 U.S. __ (2013). In Fisher, the

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**Ten Other Cases to Watch**

**BANKRUPTCY**
- 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, where the statutory scheme provides the litigant no notice that its consent is required, sufficient to satisfy Article III? (**Executive Benefits Ins. Agency v. Arkison**)

**CRIMINAL LAW**
- Can the provisions of the Chemical Weapons Convention Implementation Act, 18 U.S.C. § 229, be interpreted not to reach ordinary poisoning cases? (**Bond v. United States**)
- When a postindictment, ex parte restraining order freezes assets needed by a criminal defendant to retain counsel of choice, do the Fifth and Sixth Amendments require a pretrial, adversarial hearing at which the defendant may challenge the evidentiary support and legal theory of the underlying charges? (**Kaley v. United States**)
- Does a state violate a murder 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? (**Kansas v. Cheever**)

**DISPUTE RESOLUTION**
- Does a court or arbitrator get to decide whether a precondition for arbitration exists? (**BG Group PLC v. Argentina**)

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Court voided a lower court ruling in favor of the university, concluding that the lower court had failed to apply the proper strict scrutiny standard in determining that the affirmative action admissions policy at issue was constitutionally permissible.

The Schuette case arose after Michigan voters adopted a proposal that amended the state constitution to prohibit discrimination, or the granting of preferential treatment, in public education, government contracting, and public employment based on race, sex, ethnicity, or national origin. (Emphasis added.)

In an 8-7 decision, the U.S. Circuit Court of Appeals for the Sixth Circuit struck down the amendment, concluding that it violated the Equal Protection Clause of the U.S. Constitution. Relying on two prior cases—Hunter v. Erickson, 393 U.S. 385 (1969), and Washington v. Seattle School District No. 1, 458 U.S. 457 (1982)—the Sixth Circuit held that a policy enactment deprives minority groups of protection when it

- has a racial focus, targeting a policy or program that “inures primarily to the benefit of the minority”; and
- reallocates political power or reorders the decision-making process in a way that places special burdens on a minority group’s ability to achieve its goals through that process.

In its petition for a writ of certiorari, Michigan argued that Hunter and Seattle School District are distinguishable because those cases, unlike Schuette, involved situations making it more difficult for minorities to lobby for protections from discrimination rather than diversity preferences.

“It is exceedingly odd to say that a statute which bars a state from ‘discriminat[ing] … on the basis of race’ violates the Equal Protection Clause because it discriminates on the basis of race and sex,” Michigan said.

Schuette has the potential to have a significant impact on affirmative action plans and the ability of states to eliminate them.

If Michigan should prevail, “the real world effect would mean that states would be free to pass constitutional amendments banning affirmative action, which several other states have done already, most notably California, and it would ensure, at least for now, the battle over affirmative action would be fought primarily in the political process through referenda and initiatives and not in the courts,” Rosen said.

Recess Appointments
On the political powers front, National Labor Relations Board v. Canning (Docket No. 12-1281) has the potential to have major implications on the power of the presidential power of appointment. Canning involves the breadth of the president’s constitutional power to make recess appointments. Specifically, the Court has been called upon to answer two questions: (1) Whether the president’s recess-appointment power may be exercised during a recess that occurs within a session of the Senate, or is instead limited to recesses that occur between enumerated sessions of the Senate; and (2) Whether the president’s recess-appointment power may be exercised to fill vacancies that exist during a recess, or is instead limited to vacancies that first arose during that recess.

The D.C. Court of Appeals took a restrictive view, finding the president may only make recess appointments during intersession recesses (i.e., recesses that occur between two separate Senate sessions). The lower court also concluded that the president could only fill new vacancies that occurred during a recess and could not take advantage of a recess to fill preexisting vacancies.

If the restrictive view prevails, it will be a lot harder for the president to make appointments when the Senate has not acted. With the current gridlock in Congress, recess appointments have been a valuable tool for the president in filling vacancies that otherwise would have gone unfilled for prolonged periods.

It is worth noting that there is scholarly debate as to whether the Supreme Court will actually address the merits of this case. The recent deal preserving the 60-member supermajority necessary to overcome filibusters on executive appointments may have rendered Canning moot. The deal included a compromise on appointments to the National Labor Relations Board, the makeup of which sparked the Canning case. It is too early to tell what, if any, impact the deal will have on Canning; if Canning is indeed decided on the merits, it could easily be the year’s most important presidential power case.

Ten Other Cases to Watch, continued from page 351

EMPLOYMENT LAW
- Is the antibribery provision of the Labor Management Relations Act prohibiting employers from paying something of value to unions seeking to represent its employees violated by an employer offering certain benefits including access to its property in exchange for a union’s promise not to picket, boycott, or otherwise put pressure on the employer’s business? (Unite Here Local 355 v. Muthall)
- What constitutes “changing clothes” under the Fair Labor Standards Act, and under what circumstances must an employee be compensated for the time spent putting on and taking off safety gear? (Sandifer v. United States Steel Corp.)
- Does the federal Age Discrimination in Employment Act provide the only avenue of relief for a public employee allegedly discharged on account of age, or may that employee bring an action directly under the Equal Protection Clause and 42 U.S.C. § 1983? (Madaligan v. Levin)

FAIR HOUSING
- Are disparate impact claims cognizable under the Fair Housing Act? (Mount Holly, N.J. v. Holly Garden Citizens)

FIRST AMENDMENT
- Did the First Circuit err in upholding Massachusetts’s selective exclusion law—which makes it a crime for speakers other than clinic “employees or agents … acting within the scope of their employment” to “enter or remain on a public way or sidewalk” within 35 feet of an entrance, exit, or driveway of “a reproductive health care facility”—under the First and Fourteenth Amendment? (McCullen v. Coakley)
The Court is poised to wade into the thorny interplay of church and state in *Town of Greece v. Galloway* (Docket No. 12-696), a case involving the issue of whether allowing members of the public to open a town meeting with a prayer violates the First Amendment’s Establishment Clause.

Two local residents sued Greece, New York, alleging that the town had violated the Establishment Clause of the First Amendment by endorsing Christianity. The majority of those offering prayers were Christian, although the town’s policy allowed anyone of any denomination to volunteer to recite the opening prayer. The town made no attempt to control the content of the prayer.

In a 1983 case, *Marsh v. Chambers*, 463 U.S. 783 (1983), the Supreme Court, citing the “unambiguous and unbroken history” of allowing the practice dating back to the First Congress, ruled that legislative sessions could begin with a prayer in most circumstances. But in *Town of Greece*, the U.S. Court of Appeals for the Second Circuit concluded that the town’s prayer practice violated the First Amendment’s Establishment Clause. The Second Circuit reasoned that “the town’s prayer practice had the effect, even if not the purpose, of establishing religion.”

“This may be the biggest church/state case the Roberts Court has heard so far,” said Rosen. “It is really the first opportunity for the newest members of the Court—including Chief Justice Roberts and Justices Alito, Kagan, and Sotomayor—to show us exactly what they think of church/state questions.”

Chemerinsky said the case puts at odds competing camps of thought on the Establishment Clause: On the one hand are those who believe in the complete separation of church and state; on the other are those who believe the Establishment Clause only prohibits government conduct that amounts to coercion to participate in a particular religion. The case could serve as a vehicle to demonstrate which side of the divide the current composition of the court favors, he noted.

**Campaign Finance**

In *McCutcheon v. Federal Election Commission* (Docket No. 12-536), the Supreme Court is set to hear what could be its most important campaign finance decision since its 2010 ruling in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010). In *Citizens United*, the Court struck down limits on independent campaign spending by corporations, unions, and other organizations.

In *McCutcheon*, an Alabama businessman challenges the aggregate limits—that is the overall caps—on contributions individual donors can give to candidates and political committees. (The law limits that aggregate amount to $123,000 over two years.)

Since a 1976 decision, *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court has held to a distinction between campaign spending, which has been found to put a stronger burden on political speech, and campaign contributions, which have been found to put less of a burden on political speech. In *McCutcheon*, the Court has been asked to determine whether this distinction, which allows greater regulation of campaign contributions than of campaign spending, is still good law.

Noting the still lively debate about *Citizen’s United*, Chemerinsky said this *McCutcheon* has the potential to be the one of the most significant and controversial cases on the Court’s docket so far.

It is clear that the Court’s recent trend of not shying away from some of the most highly charged issues of the day will continue in the upcoming session. The 2013–2014 term could include not only landmark rulings on affirmative action and presidential appointment power, but also the most significant campaign finance ruling since *Citizens United* and the biggest pronouncement on public prayer in three decades. All the more amazing, the Court’s dance card is currently only about half full. So stay tuned: the 2013–2014 session is shaping up to be yet another doozy.
CASE HIGHLIGHTS:
2012 U.S. SUPREME COURT TERM
by the prospect of making public policy by prescribing the meaning of ambiguous statutory commands. The effect would be to transfer any number of interpretive decisions—archetypal Chevron questions, about how best to construe an ambiguous term in light of competing policy interests—from the agencies that administer the statutes to federal courts. We have cautioned that “judges ought to refrain from substituting their own interstitial lawmaker” for that of an agency. Ford Motor Credit Co. v. Milholen, 444 U.S. 555 (1980). That is precisely what Chevron presents.

Concurring in part and concurring in judgment: Justice Breyer

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

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**Admiralty**

**Lozman v. City of Riviera Beach, Florida**

**Docket No. 11-626**

**Reversed: The Eleventh Circuit**

Argued: October 1, 2012

Decided: January 15, 2013

Analysis: See ABA PREVIEW 9 Issue 1

Overview: Under federal law, “the word ‘vessel’ includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.” See 1 U.S.C. § 3.

In this case, the Court was asked to clarify the meaning of the words “capable of being used” and decide whether an indefinitely moored structure should be considered a vessel.

**Issue:** Should an indefinitely moored structure be considered a vessel?

**No.** A structure does not fall within the scope of the statutory phrase unless a reasonable observer, looking to the home’s physical characteristics and activities, would consider it designed to a practical degree for carrying people or things over water.

**From the opinion by Justice Breyer**

(joined by Chief Justice Roberts and Justices Scalia, Thomas, Ginsburg, Alito, and Kagan):
The home has no other feature that might suggest a design to transport over water anything other than its own furnishings and related personal effects. In a word, we can find nothing about the home that could lead a reasonable observer to consider it designed to a practical degree for “transportation on water.”

Dissenting: Justice Sotomayor (joined by Justice Kennedy)
their acquisition power, without regard to negative effects on competition.

Appellate Procedure
Henderson v. United States

Docket No. 11-9307
Reversed and Remanded:
The Fifth Circuit

Argued: November 28, 2012
Decided: February 20, 2013
Analysis: See ABA PREVIEW 104 Issue 3

Overview: Federal Rule of Criminal Procedure 52(b) permits an appellate court to correct a trial court’s “plain error that affects substantial rights … even though [the error] was not brought to the [trial] court’s attention.” The Court has recognized plain error may occur when, at the time of trial, governing law on an issue is settled against a defendant but then changes to the defendant’s favor by the time of appeal. The Court was asked to decide if the same is true when the law is unsettled at the time of trial but then becomes settled to the defendant’s favor by the time of appeal.

Issue: Is an error “plain” for purposes of review under Federal Rule of Criminal Procedure 52(b) when the law is unsettled at the time the error is committed but becomes settled in the defendant’s favor by the time of appeal?

Yes. Regardless of whether a legal question was settled or unsettled at the time of trial, an error is “plain” within the meaning of Rule 52(b) so long as the error was plain at the time of appellate review.

From the opinion by Justice Breyer (joined by Chief Justice Roberts and Justices Kennedy, Ginsburg, Sotomayor, and Kagan):
But if the Rule’s words “plain error” cover both (1) trial court decisions that were plainly correct at the time when the judge made the decision and (2) trial court decisions that were plainly incorrect at the time when the judge made the decision, then why should they not also cover (3) cases in the middle—i.e., where the law at the time of the trial judge’s decision was neither clearly correct nor incorrect, but unsettled?

From the dissenting opinion by Justice Scalia (joined by Justices Thomas and Alito):
Until today, however, the objective of correcting trial-court error has been qualified by the objective of inducing counsel to bring forward claims of error when they can be remedied without overturning a verdict and setting the convicted criminal defendant free. To overlook counsel’s failure to object, spend judicial resources to conduct plain-error review, and set aside criminal conviction where retrial may be difficult if not impossible, is exactly the “extravagant protection” that this court has up until now disavowed.

Appellate Procedure
Ryan v. Schad

Docket No. 12-1084
Vacated and Remanded:
The Ninth Circuit

Argued: N/A
Decided: June 24, 2013
Analysis: N/A

Overview: Edward Schad was convicted of first-degree murder and sentenced to death. After numerous state and federal appeals, the Supreme Court denied a writ of certiorari. The Ninth Circuit then, sua sponte, ruled that Schad’s previous motion to stay a mandate was actually a motion to reconsider. Consequently, the Ninth Circuit withheld the mandate. Arizona argued that Federal Rule of Appellate Procedure 41(d)(2)(D) required the court to issue its mandate. The Ninth Circuit had a full “opportunity to consider these arguments” but declined to do so, which “support[s] our determination here that called for the court to revisit an argument sua sponte that it already explicitly rejected.

Attorney’s Fees
Lefemine v. Wideman

Docket No. 12-168
Vacated and Remanded:
The Fourth Circuit

Argued: N/A
Decided: November 5, 2012
Analysis: N/A

Overview: Steven Lefemine was involved with a group that conducted abortion protests. During a protest, the local police informed Lefemine that if the group did not disband their signs, they would be ticketed for breach of the peace. The following year, Lefemine was informed that his group could again face criminal sanctions should they protest. Lefemine filed a § 1983 suit, claiming a violation of his First Amendment rights and seeking damages, a declaratory judgment, a permanent injunction, and attorney’s fees. The district court found that Lefemine’s First Amendment rights had been violated and granted the injunction but not damages; according to the court, Lefemine was not eligible for attorney’s fees based on this ruling.

Issue: Did the Fourth Circuit err when it held that a plaintiff was not a “prevailing party” for the purposes of attorney’s fees if the plaintiff is granted a permanent injunction but not nominal damages?

Yes. A plaintiff who successfully receives an injunction ordering defendants to change their behavior in a way that directly benefits the plaintiff may be a “prevailing party” eligible for the award of attorney’s fees.

From the per curiam opinion:
A plaintiff “prevails,” we have held, “when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant’s behavior in a way that directly benefits the plaintiff.” And we have repeatedly held that an injunction or declaratory judgment, like a damages award, will usually satisfy that test. Under these established standards, Lefemine was a prevailing party.
**Bankruptcy**

**Bullock v. BankChampaign, N.A.**

**Docket No. 11-1518**

**Vacated and Remanded:** The Eleventh Circuit

**Argued:** March 18, 2013  
**Decided:** May 13, 2013  
**Analysis:** See ABA PREVIEW 267 Issue 6

**Overview:** Randy Curtis Bullock, trustee of a family trust, loaned trust funds to himself, jointly with his mother, for business purposes. These loans were all repaid. A state court entered judgment against him for breach of fiduciary duty, ordering that profits from the loaned moneys be paid to the trust. The Supreme Court was asked to decide whether Bullock’s liability for self-dealing, without conscious misbehavior, is nondischargeable as a “defalcation while acting in a fiduciary capacity.”

**Issue:** Is a trustee’s liability for breach of the duty of loyalty through self-dealing nondischargeable as “defalcation” under 11 U.S.C. § 523(a)(4) even if there is no showing of conscious misconduct and no loss to the trust?

**No.** The term “defalcation” in the Bankruptcy Code includes a culpable state of mind requirement involving knowledge of, or gross recklessness in respect to, the improper nature of the fiduciary behavior.

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

Thus, where the conduct at issue does not involve bad faith, moral turpitude, or other immoral conduct, [defalcation] requires an intentional wrong. We include as intentional not only conduct that the fiduciary knows is improper but also reckless conduct of the kind that the criminal law often treats as the equivalent. Thus, we include reckless conduct of the kind set forth in the Model Penal Code. Where actual knowledge of wrongdoing is lacking, we consider conduct as equivalent if the fiduciary “consciously disregards” (or is willfully blind to) “a substantial and unjustifiable risk” that his conduct will turn out to violate a fiduciary duty.

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**Civil Procedure**

**American Express Co. v. Italian Colors Restaurant**

**Docket No. 12-133**

**Reversed: The Second Circuit**

**Argued:** February 27, 2013  
**Decided:** June 20, 2013  
**Analysis:** See ABA PREVIEW 191 Issue 5

**Overview:** The respondent retail merchants entered into agreements with petitioner American Express (Amex) detailing how the respondents would accept Amex’s credit and charge cards. Respondents brought a Sherman Antitrust Act lawsuit against Amex, claiming that Amex used its monopoly power to force merchants to accept the agreement. Amex responded that the agreement requires arbitration, but prohibits classwide arbitration. The Court was asked to determine the effect in a federal Sherman Antitrust Act action of an arbitration clause that prohibits classwide arbitration, but where enforcement of the arbitration clause would effectively prevent the plaintiffs from vindicating their rights in the arbitral forum.

**Issue:** May a federal court invalidate an arbitration agreement that a defendant invokes to resolve a Sherman Antitrust Act claim when the arbitration agreement does not permit class arbitration, but where the litigant has shown that it would be unable to effectively vindicate its federal statutory rights to prosecute the antitrust claim in the arbitral forum?

**No.** The Federal Arbitration Act does not allow a court to invalidate a class arbitration waiver on the ground that the plaintiff’s cost to individually arbitrating a federal antitrust claim exceeds potential relief.

**From the opinion by Justice Scalia** (joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito): Respondents argue that requiring them to litigate their claims individually—as they contracted to do—would contravene the policies of the antitrust laws. But the antitrust laws do not guarantee an affordable procedural path to the vindication of every claim. Congress has taken some measures to facilitate the litigation of antitrust claims—for example, it enacted a multiplied-damages remedy. See 15 U.S.C. § 15 (treble damages). In enacting such measures, Congress has told us that it is willing to go, in certain respects, beyond the normal limits of law in advancing its goals of deterring and remedying unlawful trade practice. But to say that Congress must have intended whatever departures from those normal limits advance antitrust goals is simply irrational. “[N]o legislation pursues its purposes at all costs.” Rodriguez v. United States, 480 U. S. 522 (1987) (per curiam). The antitrust laws do not “evinc[e] an intention to preclude a waiver” of class-action procedure. Mitsubishi Motors Corp. v. Solet Chrysler-Plymouth, Inc., 473 U.S. 614 (1985). The Sherman and Clayton Acts make no mention of class actions. In fact, they were enacted decades before the advent of Federal Rule of Civil Procedure 23, which was “designed to allow an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.” Califano v. Yamasaki, 442 U.S. 682, (1979). The parties here agreed to arbitrate pursuant to that “usual rule,” and it would be remarkable for a court to erase that expectation.

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

Here is the nutshell version of this case, unfortunately obscured in the Court’s decision. The owner of a small restaurant (Italian Colors) thinks that American Express (Amex) has used its monopoly power to force merchants to accept a form contract violating the antitrust laws. The restaurateur wants to challenge the allegedly unlawful provision (imposing a tying arrangement), but the same contract’s arbitration clause prevents him from doing so. That term imposes a variety of procedural bars that would make pursuit of the antitrust claim a fool’s errand.

So if the arbitration clause is enforceable, Amex has insulated itself from antitrust liability—even if it has in fact violated the law. The monopolist gets to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse. And here is the nutshell version of today’s opinion, admirably flaunted rather than camouflaged: Too darn bad.

**Concurring:** Justice Thomas  
**Taking no part in consideration:** Justice Sotomayor
Civil Procedure
Amgen, Inc., et al. v. Connecticut Retirement Plans and Trust Funds
Docket No. 11-1085
Affirmed: The Ninth Circuit

Argued: November 5, 2012
Decided: February 27, 2013
Analysis: See ABA PREVIEW 72 Issue 2

Overview: The Connecticut Retirement Plans and Trust Funds sued Amgen, Inc., and corporate officers in a securities fraud class action for losses stemming from alleged misleading statements. The Court was asked to determine whether a class plaintiff, in order to rely on the so-called “fraud-on-the-market” presumption, must prove the materiality of the alleged misstatements as part of the class certification process.

Issue: Must a plaintiff seeking certification of a securities fraud class action who invokes a rebuttable fraud-on-the-market presumption provide evidence that alleged misstatements were material to the impact on a company's stock price?

No. Proof of materiality is not a prerequisite to certification of a securities fraud class action seeking money damages for alleged violations of § 10(b) and Rule 10b-5.

From the opinion by Justice Ginsburg (joined by Chief Justice Roberts and Justices Breyer, Alito, Sotomayor, and Kagan):
First, because “[t]he question of materiality … is an objective one, involving the significance of an omitted or misrepresented fact to a reasonable investor,” materiality can be proved through evidence common to the class. Consequently, materiality is a “common question[n]” for the purposes of Rule 23(b)(3). Second, there is no risk whatever that a failure of proof on the common question of materiality will result in individual questions predominating. Because materiality is an essential element of a Rule 10b-5 claim, Connecticut Retirement’s failure to present sufficient evidence of materiality to defeat a summary judgment motion or to prevail at trial would not cause individual reliance questions to overwhelm the questions common to the class. Instead, the failure of proof on the element of materiality would end the case for one and for all; no claim would remain in which individual reliance issues could potentially predominate.

Concurring: Justice Alito
Dissenting: Justice Scalia
Dissenting: Justice Thomas (joined by Justice Kennedy, and Justice Scalia joined except for Part I-B)

Civil Procedure
Comcast Corp. v. Behrend
Docket No. 11-864
Reversed: The Third Circuit

Argued: November 5, 2012
Decided: March 27, 2013
Analysis: See ABA PREVIEW 77 Issue 2

Overview: Philadelphia Comcast cable television subscribers sued Comcast Corp. in an antitrust class action alleging that Comcast’s anticompetitive actions artificially inflated the cost of cable subscriptions. The Court was asked to determine first whether it should hear Comcast’s appeal in light of a settlement or whether Comcast properly preserved a class certification issue for appeal. The Court was also asked to determine if a trial court, during class certification, must resolve whether a plaintiff has introduced admissible expert witness testimony to show that damages may be awarded on a classwide basis.

Issue: Did the Third Circuit err in holding that the plaintiffs’ class action was properly certified when it refused to hear argument about the plaintiffs’ damage model on the basis that such an inquiry would involve questions pertaining to the underlying merits?

Yes. Respondents’ class action was improperly certified under Rule 23(b)(3).

From the opinion by Justice Scalia (joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito): The District Court and the Court of Appeals saw no need for respondents to “tie each theory of antitrust impact” to a calculation of damages. That, they said, would involve consideration of the “merits” having “no place in the class certification inquiry.” That reasoning flatly contradicts our cases requiring a determination that Rule 23 is satisfied, even when that requires inquiry into the merits of the claim. The Court of Appeals simply concluded that respondents “provided a method to measure and quantify damages on a classwide basis,” finding it unnecessary to decide “whether the methodology [was] a just and reasonable inference or speculative.” Under that logic, at the class certification stage any method of measurement is acceptable so long as it can be applied classwide, no matter how arbitrary the measurements may be. Such a proposition would reduce Rule 23(b)(3)’s predominance requirement to a nullity.

From the dissenting opinion by Justices Ginsburg and Breyer (joined by Justices Sotomayor and Kagan): The oddity of this case, in which the need to prove damages on a classwide basis through a common methodology was never challenged by respondents, is a further reason to dismiss the writ as improvidently granted. The Court’s ruling is good for this day and case only. In the mine run of cases, it remains the “black letter rule” that a class may obtain certification under Rule 23(b)(3) when liability questions common to the class predominate over damages questions unique to class members.

Civil Procedure
Gabelli et al. v. Securities and Exchange Commission
Docket No. 11-1274
Reversed and Remanded: The Second Circuit

Argued: January 8, 2013
Decided: February 27, 2013
Analysis: See ABA PREVIEW 143 Issue 4

Overview: In April 2008 the SEC filed a complaint alleging that defendants concealed that they allowed market timing in a mutual fund contrary to the fund’s stated policy. The market timing took place from 1999 until 2002. The SEC did not discover the alleged fraud until late 2003. The Supreme Court was asked to decide whether the SEC’s fraud action for civil penalties is time-barred because it was not brought within five years “from the date when the claim first accrued.”

Issue: In an enforcement action in which the government seeks civil penalties for a claim based on fraud, does the five-year period established in 28 U.S.C. § 2462 begin when the government first learns of the fraud?
No. The five-year clock in § 2462 begins to tick when the fraud occurs, not when it is discovered.

From the unanimous opinion by Chief Justice Roberts:
Grafting the discovery rule onto § 2462 would raise similar concerns. It would leave defendants exposed to Government enforcement action not only for five years after their misdeeds, but for an additional uncertain period into the future. Repose would hinge on speculation about what the Government knew, when it knew it, and when it should have known it.

Civil Procedure
Kiobel v. Royal Dutch Petroleum Co.
Docket No. 10-1491
Affirmed: The Second Circuit

Argued: October 1, 2012
Decided: April 17, 2013
Analysis: See ABA PREVIEW 17 Issue 1

Overview: In Kiobel v. Royal Dutch Petroleum Co., the Court was asked to determine whether corporations may be held liable for violations of international human rights violations under the Alien Tort Statute (ATS) and, more generally, whether any defendant may be liable when those violations occur in the territory of a foreign sovereign.

Issues: Does the ATS allow suits against corporations for violations of international law norms?

Does the ATS allow courts to recognize a cause of action for violations of the law of nations by any defendant when those violations occur in a foreign country and, if so, under what circumstances?

No. The presumption against extraterritoriality applies to claims under the ATS, and nothing in the statute rebuts the presumption.

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

To begin, nothing in the text of the statute suggests that Congress intended causes of action recognized under it to have extraterritorial reach—such violations affecting aliens can occur either within or outside the United States. Nor does the fact that the text reaches “any civil action” suggest application to torts committed abroad; it is well established that generic terms like “any” or “every” do not rebut the presumption against extraterritoriality.

Concurring: Justice Kennedy
Concurring: Justice Alito (joined by Justice Thomas)
Concurring in judgment: Justice Breyer (joined by Justices Ginsburg, Sotomayor, and Kagan)

Civil Procedure
Kloeckner v. Solis
Docket No. 11-184
Reversed and Remanded: The Eighth Circuit

Argued: October 2, 2012
Decided: December 10, 2012
Analysis: See ABA PREVIEW 12 Issue 1

Overview: The Civil Service Reform Act (CSRA) permits federal employees to appeal adverse employment actions to the Merit Systems Protection Board (MSPB). After the MSPB dismissed petitioners’ discriminatory discharge appeal as untimely, she filed a discrimination suit in federal district court. The district court dismissed the case, holding that the Federal Circuit has exclusive jurisdiction over MSPB procedural decisions. Petitioner argued that the CSRA allows for district court jurisdiction in all discrimination cases regardless of the grounds for the MSPB decision.

Issue: If the MSPB decides a mixed case without reaching the merits of the employee’s claims, does the Court of Appeals for the Federal Circuit have jurisdiction over that case?

No. An employee’s appeal of an MSPB antidiscrimination decision should be heard by the district court, not the Federal Circuit, regardless of whether the MSPB reached its decision on the procedure or jurisdiction.

From the unanimous opinion by Justice Kagan:

Proof positive that the Government misreads § 7703(b)(2) comes from considering what the phrase “judicially reviewable action” would mean under its theory. In normal legal parlance, to say that an agency action is not “judicially reviewable” is to say simply that it is not subject to judicial review—that, for one or another reason, it cannot be taken to a court. But that ordinary understanding will not work for the Government here, because it wants to use the phrase to help determine which of two courts should review a decision, rather than whether judicial review is available at all. In the Government’s alternate universe, then, to say that an agency action is not “judicially reviewable” is to say that it is subject to judicial review in the Federal Circuit (even though not in district court).

Civil Procedure
Oxford Health Plans, LLC v. Sutter
Docket No. 12-135
Affirmed: The Third Circuit

Argued: March 25, 2013
Decided: June 10, 2013
Analysis: See ABA PREVIEW 270 Issue 6

Overview: In Oxford Health Plans, LLC, the Court for the second time this term and the sixth time in recent years was presented with the problem of class arbitration. This appeal focused on the specific issue of whether an arbitrator, under the Federal Arbitration Act (FAA), legitimately construed the broad language of the parties’ arbitration clause to conduct class arbitration, where the provision contained no specific language authorizing class arbitration. Based on its growing body of jurisprudence relating to class arbitration, Oxford’s appeal required the Court to further clarify exactly when parties agree and consent to authorize class arbitration, based on specific contractual language in their arbitration agreement. With the increased use of arbitration clauses throughout commercial transactions, the battle over class arbitration has resulted in repeated appeals to the Court for guidance and clarification concerning the precise contract language authorizing or not authorizing class arbitration.

Issue: Does an arbitrator exceed his powers under the Federal Arbitration Act when the arbitrator concludes that the parties authorized class arbitration based on an arbitration clause that contained language broadly precluding litigation of any dispute, arising under the contract, in any court?
No. The arbitrator’s decision survives the limited judicial review allowed by § 10(a) (4); under review at this stage, the question is whether the arbitrator interpreted the parties contract, not whether that interpretation was correct.

From the unanimous opinion by Justice Kagan:
All we say is that convincing a court of an arbitrator’s error—even his grave error—is not enough. So long as the arbitrator was “arguably construing” the contract—which this one was—a court may not correct his mistakes under § 10(a)(4). … The potential for those mistakes is the price of agreeing to arbitration. As we have held before, we hold again: “It is the arbitrator’s construction [of a contract] which was bargained for; and so far as the arbitrator’s decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.” … The arbitrator’s construction holds, however, good, bad, or ugly.

Concurring: Justice Alito (joined by Justice Thomas)

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Civil Procedure
Sebelius v. Auburn Regional Medical Center et al.

Docket No. 11-1231
Reversed and Remanded:
The District of Columbia Circuit

Argued: December 4, 2012
Decided: January 22, 2013
Analysis: See ABA PREVIEW 100 Issue 3

Overview: Under federal statute, health care providers who receive Medicare Part A payments have 180 days from the date of their Notices of Program Reimbursement to appeal from the final determination of their total amount of reimbursement for a fiscal year. See 42 U.S.C. § 1395oo(a)(3). In this case, the Court was asked to decide whether this limitations period is subject to equitable tolling.

Issues: Is the 180-day statutory time limit for filing an appeal with the Provider Reimbursement Review Board from a final Medicare payment determination made by a fiscal intermediary, 42 U.S.C. 1395oo(a)(3), subject to equitable tolling? And, can the 180-day statutory time limit for filing an appeal with the Provider Reimbursement Review Board from a final Medicare payment determination made by a fiscal intermediary be extended by any means?

No. A presumption of equitable tolling generally applies to suits against the United States, Irwin v. Department of Veterans Affairs, 498 U.S. 89, 95-96, but this presumption does not extend to § 1395oo(a)(3); the 180-day limitation in § 1395oo(a)(3) is not “jurisdictional.”

From the unanimous opinion by Justice Ginsburg:
Key to our decision we have repeatedly held that filing deadlines ordinarily are not jurisdictional; indeed, we have described them as “quintessential claim-processing rules.” … This case is scarcely the exceptional one in which “a century’s worth of precedent and practice in American courts” rank a time limit as jurisdictional.

Concurring: Justice Sotomayor

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Civil Procedure
Standard Fire Insurance Co. v. Knowles

Docket No. 11-1450
Vacated and Remanded:
The Eighth Circuit

Argued: January 7, 2013
Decided: March 19, 2013
Analysis: See ABA PREVIEW 147 Issue 4

Overview: The Class Action Fairness Act of 2005 (CAFA) contains a provision enabling the removal of state class actions into federal courts; in order to qualify, the class action must involve damages in excess of $5 million. The Court was asked to decide whether a state class representative may stipulate to damages less than $5 million in order to avoid removal into federal court.

Issue: May a state court class representative in his complaint stipulate that he is seeking less than $5 million in damages on behalf of himself and the class in order to avoid removal into federal court?

Issue: Does Congress have authority to provide for criminal penalties for failure to register as a sex offender under SORNA, and to apply those penalties to a person who was convicted of a sex offense and released from federal detention before SORNA was enacted?

Yes. Congress has authority under the Necessary and Proper Clause to enact SORNA’s

From the unanimous opinion by Justice Breyer:
Because his precertification stipulation does not bind anyone but himself, Knowles has not reduced the value of the putative class members’ claims. For Jurisdictional purposes, our inquiry is limited to examining the case “as of the time it was filed in state court,” Wisconsin Dept. of Corrections v. Schacht, 524 U.S. 381 (1998). At that point, Knowles lacked the authority to concede the amount-in-controversy issue for the absent class members. The Federal District Court, therefore, wrongly concluded that Knowles’ precertification stipulation could overcome its finding that the CAFA jurisdictional threshold had been met.

Congressional Authority
United States v. Kebodeaux

Docket No. 12-418
Reversed and Remanded:
The Fifth Circuit

Argued: April 17, 2013
Decided: June 24, 2013
Analysis: See ABA PREVIEW 312 Issue 7

Overview: Congress enacted the Sex Offender Registration and Notification Act, or SORNA, in 2006. SORNA requires certain sex offenders to register with a state sex offender registry, and it penalizes offenders who fail to register. Anthony Kebodeaux was convicted of a sex crime under the Uniform Code of Military Justice. He served a three-month sentence and was released in 1999. After registering in Texas in 2004 and again in 2007, he later failed to update his registration when he moved to San Antonio. Kebodeaux was arrested and convicted of failing to register under SORNA, and he was sentenced to a year and a day of imprisonment. He challenged his conviction on the ground that Congress lacked authority to apply the SORNA penalty for failure to register to him.

Issue: Does Congress have authority to provide for criminal penalties for failure to register as a sex offender under SORNA, and to apply those penalties to a person who was convicted of a sex offense and released from federal detention before SORNA was enacted?

Yes. Congress has authority under the Necessary and Proper Clause to enact SORNA's
registration requirements such that they apply to an individual like Kebodeaux, who was previously subject to another federal registration statute similar to SORNA.

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

We are not aware of any plausible counterargument to the obvious conclusion, namely that as of the time of Kebodeaux’s offense, conviction, and release from federal custody, these Wetterling Act provisions applied to Kebodeaux and imposed upon him registration requirements very similar to those that SORNA later imposed. Contrary to what the Court of Appeals may have believed, the fact that the federal law’s requirements in part involved compliance with state-law requirements made them no less requirements of federal law.

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

If I thought that SORNA’s registration requirement were “reasonably adapted,” to carrying into execution some other, valid enactment, I would sustain it. But it is not. The lynchpin of the Court’s reasoning is that Kebodeaux was “subject to a federal registration requirement”—the Wetterling Act—at the time of his offense, and so the Necessary and Proper Clause “authorized Congress to modify the requirement as in SORNA and to apply the modified requirement to Kebodeaux.” That does not establish, however, that the Wetterling Act’s registration requirement was itself a valid exercise of any federal power, or that SORNA is designed to carry the Wetterling Act into execution. The former proposition is dubious, the latter obviously untrue.

**Concurring in judgment:** Chief Justice Roberts

**Concurring in judgment:** Justice Alito

**Dissenting:** Justice Thomas (joined by Justice Scalia as to Parts I, II, and III-B)

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**Constitutional Law**

**U.S. Agency for International Development v. Alliance for Open Society International, Inc.**

**Docket No. 12-10**

**Affirmed: The Second Circuit**

**Argued:** April 22, 2013  
**Decided:** June 20, 2013  
**Analysis:** See ABA PREVIEW 286 Issue 7

**Overview:** Congress passed the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003. Among other provisions, the act compels government-funded private organizations to possess or adopt policies explicitly opposing prostitution and sex trafficking. The Alliance for Open Society and other private organizations receiving funding under the act sued, arguing the policy mandate provision was a violation of their First Amendment rights.

The district court struck down the provision as unconstitutional, and a divided panel of the Second Circuit affirmed. The judges of the Second Circuit declined to rehear the case en banc, over a vigorous dissent. The circuits are split 1-1 on the issue.

**Issue:** Does the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, 22 U.S.C. §§ 7601 et seq., which compels policies opposing prostitution and sex trafficking in any organizations receiving funding under the act, violate the First Amendment?

**Yes.** The policy requirement of the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act violates the First Amendment by compelling, as a condition of federal funding, the affirmation of a belief that by its nature cannot be confined within the scope of the Government program.

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

In the present context, the relevant distinction that has emerged from our cases is between conditions that define the limits of the government spending program—those that specify the activities Congress wants to subsidize—and conditions that seek to leverage funding to regulate speech outside the contours of the program itself. The line is hardly clear, in part because the definition of a particular program can always be manipulated to subsume the challenged condition. We have held, however, that “Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise.” Legal Services Corporation v. Velazquez, 531 U.S. 533 (2001).

**From the dissenting opinion by Justice Scalia** (joined by Justice Thomas):

Of course the most obvious manner in which the admission to a program of an ideological opponent can frustrate the purpose of the program is by freeing up the opponent’s funds for use in its ideological opposition. To use the Hamas example again: Subsidizing that organization’s provision of social services enables the money that it would otherwise use for that purpose to be used, instead, for anti-American propaganda. Perhaps that problem does not exist in this case since the respondents do not affirmatively promote prostitution. But the Court’s analysis categorically rejects that justification for ideological requirements in all cases, demanding “record indica[tion]” that “federal funding will simply supplant private funding, rather than pay for new programs.” This seems to me quite naive. Money is fungible. The economic reality is that when NGOs can conduct their AIDS work on the Government’s dime, they can expend greater resources on policies that undercut the Leadership Act. The Government need not establish by record evidence that this will happen. To make it a valid consideration in determining participation in federal programs, it suffices that this is a real and obvious risk.

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

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**Copyright**

Kirtsaeng v. John Wiley & Sons, Inc.

**Docket No. 11-697**

**Reversed and Remanded:** The Second Circuit

**Argued:** October 29, 2012  
**Decided:** March 19, 2013  
**Analysis:** See ABA PREVIEW 52 Issue 2

**Overview:** In this case, the Supreme Court was asked to determine whether the “first-sale” doctrine, as embodied in § 109 of the
Copyright Act, applies where a copyrighted work was initially manufactured and sold in a foreign market, but eventually imported by someone other than the copyright owner into the United States.

**Issue:** Does the first-sale doctrine apply to lawfully made copyrighted goods that are manufactured and distributed by the copyright owner outside of the United States, and then subsequently imported by another into the United States?

**Yes.** The “first sale” doctrine applies to copies of a copyrighted work lawfully made abroad.

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

This history reiterates the importance of the “first sale” doctrine. It explains, as we have explained, the nongeographical purposes of the words “lawfully made under this title.” And it says nothing about geography. Nor, importantly, did § 109(a)’s predecessor provision. This means that, contrary to the dissent’s suggestion, any lack of legislative history pertaining to the “first sale” doctrine only tends to bolster our position that Congress’ 1976 revision did not intend to create a drastic geographical change in its revision to that provision. We consequently believe that the legislative history, on balance, supports the nongeographical interpretation.

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

**Dissenting:** Justice Ginsburg (joined by Justices Kennedy and Justice Scalia except as to Parts III and V-B-1)

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**Criminal Procedure**

**Bailey v. United States**

**Docket No. 11-770**

**Reversed and Remanded:** The Second Circuit

Argued: November 1, 2012  
Decided: February 19, 2013  
Analysis: See ABA PREVIEW 48 Issue 2

**Overview:** The Supreme Court in *Michigan v. Summers*, 452 U.S. 692 (1981), may police officers detain an individual incident to the execution of a valid search warrant when the individual has left the immediate vicinity of the premises?

**Issue:** Pursuant to the Court’s decision in *Michigan v. Summers*, 452 U.S. 692 (1981), may police officers detain an individual incident to the execution of a valid search warrant when the individual has left the immediate vicinity of the premises?

**No.** The rule in *Summers* is limited to the immediate vicinity of the premises to be searched and does not apply here, where Bailey was detained at a point beyond any reasonable understanding of the immediate vicinity of the premises in question.

**Concurring:** Justice Scalia (joined by Justices Ginsburg and Kagan)

**Dissenting:** Justice Breyer (joined by Justices Thomas and Alito)

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**Criminal Procedure**

**Boyer v. Louisiana**

**Docket No. 11-9953**

**Dismissed:** Court of Appeals of Louisiana, Third Circuit

Argued: January 14, 2013  
Decided: April 29, 2013  
Analysis: See ABA PREVIEW 181 Issue 4

**Overview:** Jonathan Boyer was prosecuted for capital murder. Unfortunately, the state did not provide funds for Boyer’s appointed counsel to mount an effective defense. As a result, the case lay dormant and Boyer simply remained in jail. Eventually, the state reduced the charges against Boyer. A jury eventually convicted Boyer on second-degree murder charges and the trial judge imposed a sentence of life in prison without the possibility of parole. Boyer contended his speedy-trial rights were violated during the more than seven-year delay between arrest and trial.

**Issue:** Are a defendant’s speedy-trial rights violated when a lack of state funding for indigent defense leads to a serious delay in the process?

**Dismissed as improvidently granted.**

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

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**Criminal Procedure**

**Chaidez v. United States**

**Docket No. 11-820**

**Affirmed:** The Seventh Circuit

Argued: November 1, 2012  
Decided: February 20, 2013  
Analysis: See ABA PREVIEW 55 Issue 2

**Overview:** The Supreme Court was asked to decide whether *Padilla v. Kentucky* announced a new rule of constitutional law or whether the decision applies retroactively under *Teague v. Lane.* *Padilla*, which the Court decided in 2010, requires defense attorneys to inform noncitizen clients whether a guilty plea carries the risk of deportation.

**Issues:** Did *Padilla* announce a new rule of constitutional law? Assuming *Padilla* announced a new rule, should *Teague’s* framework apply to *Padilla*-type claims raised during collateral review of federal convictions?

**Yes.** *Padilla* does not apply retroactively to cases already final on direct review. The Seventh Circuit was correct in holding that *Padilla* had declared a new rule and should not apply in a challenge to a final conviction.

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

All we say here is that *Padilla*’s holding that the failure to advise about a non-criminal consequence could violate the Sixth Amendment would not have been—indeed, if true, was not—“apparent to all reasonable jurists” prior to our decision. *Lambrix v. Singletary*, 520 U.S. 518 (1997). *Padilla* thus announced a “new rule.” … Under *Teague*, defendants whose convictions became final prior to *Padilla* therefore cannot benefit from its holding.
From the dissenting opinion by Justice Sotomayor (joined by Justice Ginsburg): Padilla did nothing more than apply the existing rule of Strickland v. Washington, 466 U.S. 668 (1984), in a new setting, the same way the Court has done repeatedly in the past: by surveying the relevant professional norms and concluding that they unequivocally required attorneys to provide advice about the immigration consequences of a guilty plea.

Concurring in judgment: Justice Thomas

Criminal Procedure
Descamps v. United States
Docket No. 11-9540
Reversed: The Ninth Circuit

Argued: January 7, 2013
Decided: June 20, 2013
Analysis: See ABA PREVIEW 183 Issue 4

Overview: Matthew Robert Descamps was convicted in federal court of being a felon in possession of a firearm. This offense carries a statutory maximum 10 years’ imprisonment. However, the government sought to enhance Descamps’s sentence pursuant to the Armed Career Criminal Act (ACCA), which could potentially increase Descamps’s minimum prison sentence to 15 years. To qualify as an armed career criminal, the defendant must have been previously convicted of three violent felony or serious drug offenses. The ACCA includes a burglary conviction, punishable by more than one year, as a violent felony. The federal sentencing court determined that Descamps’s prior California burglary conviction met the federal definition of generic burglary and was a crime of violence; according to the court, the prior conviction could be used to enhance Descamps’s sentence pursuant to the ACCA. The Ninth Circuit Court of Appeals affirmed. The Supreme Court was asked to decide whether a state burglary statute that is missing an element of generic burglary requires a categorical approach analysis or whether the sentencing court may use a modified categorical approach, which looks to the underlying conduct for purposes of determining an ACCA sentence enhancement.

Issue: Was the Ninth Circuit correct when it applied United States v. AgUILA-Montes de OCA, 655 F.3d 915 (9th Cir. 2011), which held that a state conviction for burglary where the statute is missing an element of the generic crime may be subject to the modified categorical approach, to determine that generic burglary under the ACCA covered California’s burglary definition, which includes only a single indivisible set of elements?

No. Sentencing courts should not apply the modified categorical approach to state crimes that involve a single indivisible set of elements.

From the opinion by Justice Kagan
(joined by Chief Justice Roberts and Justices Scalia, Kennedy, Ginsburg, Breyer, and Sotomayor):
Our caselaw explaining the categorical approach and its “modified” counterpart all but resolves this case. In those decisions, as shown below, the modified approach serves a limited function: It helps effectuate the categorical analysis when a divisible statute, listing potential offense elements in the alternative, renders opaque which element played a part in the defendant’s conviction. So understood, the modified approach cannot convert Descamps’ conviction under § 459 into an ACCA predicate, because that state law defines burglary not alternatively, but only more broadly than the generic offense.

Concurring: Justice Kennedy
Concurring in judgment: Justice Thomas
Dissenting: Justice Alito

Criminal Procedure
Evans v. Michigan
Docket No. 11-1327
Reversed: The Supreme Court of Michigan

Argued: November 6, 2012
Decided: February 20, 2013
Analysis: See ABA PREVIEW 94 Issue 2

Overview: The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides that no person “shall … be subject for the same offense to be twice put in jeopardy of life or limb. …” In a criminal prosecution, “jeopardy” attaches when the jury is impanelled and sworn, or, in a bench trial, when the court begins to receive evidence. Thus, it is well established that a midtrial acquittal by the court may not be appealed by the prosecution. The question before the Court here was: What constitutes an “acquittal”? The trial judge improperly added an extra element to the crime, and then found the evidence on that element insufficient, leading to a midtrial directed verdict of acquittal. The Michigan Supreme Court ordered a new trial, reasoning that the ruling was not an “acquittal” for double jeopardy purposes. The petitioner argued that under the Court’s double jeopardy precedents, any inquiry into the basis for a ruling that finds the evidence legally insufficient was precluded, even when it was based on a legal error, and that the Michigan court’s “extra element” exception was irreconcilable with those precedents.

Issue: Does the Double Jeopardy Clause bar retrial after the trial judge erroneously holds a particular fact to be an element of the offense and then grants a midtrial directed verdict of acquittal because the prosecution failed to prove that fact?

Yes. The Double Jeopardy Clause bars retrial for Evans’s offense; retrial following a court-decreed acquittal is barred, even if the acquittal is based on an erroneous foundation.

From the opinion by Justice Sotomayor
(joined by Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, Ginsburg, Breyer, and Kagan):
In the end, this case follows those that have come before it. The trial court’s judgment of acquittal resolved the question of Evans’ guilt or innocence as a matter of the sufficiency of the evidence, not on unrelated procedural grounds. That judgment, “however erroneous” it was, precludes reprosecution on this charge, and so should have barred the State’s appeal as well.

From the dissenting opinion by Justice Alito:
As this Court has repeatedly emphasized in double jeopardy cases, a State has an interest in receiving “one complete opportunity to convict those who have violated its laws,” but today’s decision deprives the State of Michigan of this valuable right.
Criminal Procedure
Metrich v. Lancaster
Docket No. 12-547
Reversed: The Sixth Circuit

Overview: Burt Lancaster, a former police officer, killed his girlfriend. Despite presenting alternate insanity and diminished capacity defenses, a jury convicted Lancaster of first-degree murder and possession of a firearm in the commission of a felony. Lancaster’s conviction was overturned on an unrelated issue. While his appeal was pending, the Michigan Supreme Court abolished the diminished capacity defense. At his 2005 retrial, the trial court refused to allow Lancaster to present a diminished capacity defense. As a result, Lancaster opted for a bench trial and was once again convicted. The Supreme Court was asked to decide whether it was permissible to retroactively apply the Michigan Supreme Court’s abolition of the diminished capacity defense. Further, the Court was presented with the issue of whether the diminished capacity defense was so well established in Michigan law that its abolition was unforeseeable so as to justify habeas relief.

Issues: Was the Michigan Supreme Court’s abolition of the diminished capacity defense a substantive change in Michigan law that would deny a defendant’s due process right if applied retroactively?

Did the diminished capacity defense enjoy a solid foothold in Michigan’s criminal law so that its abolition was an “unexpected and indefensible” decision justifying habeas relief?

No. Lancaster is not entitled to federal habeas relief because the Michigan court’s rejection of the diminished capacity defense during Lancaster’s retrial was not an unreasonable application of clearly established federal law.

From the unanimous opinion by Justice Ginsburg:
This court has never found a due process violation in circumstances remotely resembling Lancaster’s case—i.e., where a state supreme court, squarely addressing a particular issue for the first time, rejected a consistent line of lower court decisions based on the supreme court’s reasonable interpretation of the language of the controlling statute. Fairminded jurists could conclude that a state supreme court decision of that order is not “unexpected and indefensible by reference to [existing] law.” Lancaster therefore is not entitled to federal habeas relief on his due process claim.

Criminal Procedure
Salinas v. Texas
Docket No. 12-246
Affirmed: Court of Criminal Appeals of Texas

Overview: Long-established Supreme Court precedent under the Fifth Amendment bars the prosecution in a criminal case from commenting on a defendant’s failure to take the stand at trial or on a defendant’s refusal to answer police questions after being arrested and given Miranda warnings, which include advice about the right to silence. In this case, the defendant asked the Supreme Court to extend those rulings to bar any comment or testimony about the defendant’s refusal to respond to police interrogation when questioned prior to arrest and the warnings.

Issue: May the prosecution use, as substantive evidence of a defendant’s guilt, his refusal to answer law enforcement questions before he was arrested or read his Miranda warnings?

Yes. A prosecutor may use a defendant’s refusal to answer law enforcement questions before being arrested or read Miranda rights without violating the defendant’s Fifth Amendment rights because such a defendant has not expressly invoked the privilege.

From the opinion by Justice Alito (joined by Chief Justice Roberts and Justice Kennedy):
Our cases establish that a defendant normally does not invoke the privilege by remaining silent. In Roberts v. United States, 445 U.S. 552 (1980), for example, we rejected the Fifth Amendment claim of a defendant who remained silent throughout a police investigation and received a harsher sentence for his failure to cooperate. In so ruling, we explained that “if [the defendant] believed that his failure to cooperate was privileged, he should have said so at a time when the sentencing court could have determined whether his claim was legitimate.”… A witness does not expressly invoke the privilege by standing mute.

From the concurring in judgment opinion by Justice Thomas (joined by Justice Scalia):
We granted certiorari to decide whether the Fifth Amendment privilege against compulsory self-incrimination prohibits a prosecutor from using a defendant’s pretrial silence as evidence of his guilt. The plurality avoids reaching that question and instead concludes that Salinas’ Fifth Amendment claim fails because he did not expressly invoke the privilege. I think there is a simpler way to resolve this case. In my view, Salinas’ claim would fail even if he had invoked the privilege because the prosecutor’s comments regarding his pretrial silence did not compel him to give self-incriminating testimony.

From the dissenting opinion by Justice Breyer (joined by Justices Ginsburg, Sotomayor, and Kagan):
These circumstances give rise to a reasonable inference that Salinas’ silence derived from an exercise of his Fifth Amendment rights. This Court has recognized repeatedly that many, indeed most, Americans are aware that they have a constitutional right not to incriminate themselves by answering questions posed by the police during an interrogation conducted in order to figure out the perpetrator of a crime. See Dickerson v. United States, 530 U.S. 428 (2000); Brogan v. United States, 522 U.S. 398 (1998); Michigan v. Tucker, 417 U.S. 433 (1974). The nature of the surroundings, the switch of topic, the particular question—all suggested that the right we have and generally know we have was at issue at the critical moment here. Salinas, not being represented by counsel, would not likely have used the precise words “Fifth Amendment” to invoke his rights because he would not likely have been aware of technical legal requirements, such as a need to identify the Fifth Amendment by name.
Criminal Procedure
Sekhar v. United States
Docket No. 12-357
Reversed: The Second Circuit

Argued: April 23, 2013
Decided: June 26, 2013
Analysis: See ABA PREVIEW 283 Issue 7

Overview: Giridhar Sekhar was convicted of extortion and the interstate transmission of extortionate threats. His conviction was affirmed by the Second Circuit. The Court was asked to consider whether a general counsel’s recommendation to a state agency is “property” for purposes of attempted extortion. The Court was also presented with the opportunity to explore the boundaries of what constitutes intangible “property” within the meaning of the Hobbs Act and the interstate communication of extortionate communications.

Issue: Is the recommendation of an attorney intangible property that can be the subject of an extortion attempt under 18 U.S.C. § 1951(a) and 18 U.S.C § 875(d)?

No. Extortion under the Hobbs Act does not include attempting to compel an attorney to make a recommendation to his employer; “property” that can be extorted under the Hobbs Act must be transferable.

From the opinion by Justice Scalia
(joined by Chief Justice Roberts and Justices Thomas, Ginsburg, Breyer, and Kagan):
But what, exactly, would the petitioner have obtained for himself? A right to give his own disinterested legal opinion to his own client free of improper interference? Or perhaps, a right to give the general counsel’s disinterested legal opinion to the general counsel’s client? Either formulation sounds absurd, because it is. Clearly, petitioner’s goal was not to acquire the general counsel’s “intangible property right to give disinterested legal advice.” It was to force the general counsel to offer advice that accorded with petitioner’s wishes. But again, that is coercion, not extortion. No fluent speaker of English would say that “petitioner obtained and exercised the general counsel’s right to make a recommendation,” any more than he would say that a person “obtained and exercised another’s right to free speech.” He would say that “petitioner forced the general counsel to make a particular recommendation,” just as he would say that a person “forced another to make a statement.”

Adopting the Government’s theory here would not only make nonsense of words; it would collapse the longstanding distinction between extortion and coercion and ignore Congress’s choice to penalize one but not the other.

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

Criminal Procedure
Smith v. United States
Docket No. 11-8976
Affirmed: The District of Columbia Circuit

Argued: November 6, 2012
Decided: January 9, 2013
Analysis: See ABA PREVIEW 90 Issue 2

Overview: Calvin Smith was convicted of conspiracy to commit federal narcotics and racketeering offenses. At trial, Smith argued that he withdrew from the conspiracy more than five years before the indictment date, which would preclude his conviction under the statute of limitations. The district court instructed the jury that Smith had to prove by a preponderance of the evidence that he withdrew outside the five-year limitation period. On appeal, Smith argued that once he produced evidence that he withdrew from the conspiracy outside the statute of limitations, the government was required to prove beyond a reasonable doubt that Smith remained a conspirator within the limitations period.

Issue: When a defendant charged with conspiracy produces evidence that he withdrew from the conspiracy outside the statute of limitations, must the defendant prove that withdrawal by a preponderance of the evidence?

Yes. The defendant bears the burden of proving the defense of withdrawal; the analysis does not change when withdrawal is the basis for a statute-of-limitations defense. The Government need only prove that the conspiracy continued past the statute-of-limitations period.

From the unanimous opinion by Justice Scalia:
Establishing individual withdrawal was a burden that rested firmly on the defendant regardless of when the purported withdrawal took place.

Criminal Procedure
United States v. Davila
Docket No. 12-167
Vacated and Remanded: The Eleventh Circuit

Argued: April 15, 2013
Decided: June 13, 2013
Analysis: See ABA PREVIEW 316 Issue 7

Overview: Anthony Davila pleaded guilty in federal court to conspiracy to defraud the United States. Davila appealed, arguing that his guilty plea violated Federal Rule of Criminal Procedure 11(c)(1) because a judge discussed the guilty plea with him at a pre-plea hearing. The court of appeals agreed and vacated Davila’s guilty plea without requiring Davila to show prejudice from the judge’s comments. Before the Supreme Court, the United States argued that a defendant must demonstrate prejudice to vacate a guilty plea due to improper judicial participation in plea discussions.

Issue: Does a violation of Federal Rule of Criminal Procedure 11(c)(1)’s prohibition on judicial participation in plea discussions invalidate a guilty plea regardless of whether the defendant demonstrates prejudice?

No. Under Rule 11(h), vacatur of the plea is not in order if the record shows no prejudice to Davila’s decision to plead guilty.

From the opinion by Justice Ginsburg
(joined by Chief Justice Roberts and Justices Kennedy, Breyer, Alito, Sotomayor, and Kagan):
Given the opportunity to raise any questions he might have about matters relating to his plea, Davila simply affirmed that he wished to plead guilty to the conspiracy count. When he later explained why he elected to plead guilty, he said nothing of the Magistrate Judge’s exhortations. Instead, he called the decision “strategic,” designed to get the prosecutor to correct misinformation about the conspiracy count. Rather than automatically vacating Davila’s guilty plea because of the Rule 11(c)(1) violation, the Court of
Appeals should have considered whether it was reasonably probable that, but for the Magistrate Judge’s exhortations, Davila would have exercised his right to go to trial. In answering that question, the Magistrate Judge’s comments should be assessed, not in isolation, but in light of the full record.  

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

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**Employment Discrimination**  
**Vance v. Ball State University**  
**Docket No. 11-556**  
**Affirmed: The Seventh Circuit**

Argued: November 26, 2012  
Decided: June 24, 2013  
Analysis: See ABA PREVIEW 108 Issue 3

**Overview:** In 1998, the U.S. Supreme Court explained that employers could be vicariously liable for the harassing conduct of supervisory employees even if the victimized employee did not suffer a tangible employment action. However, the Court did not explicitly define who is a supervisor. In the instant case, the Seventh Circuit said a supervisor was only an employee who had the ability to hire and fire employees. Other circuits apply a more expansive definition to include those employees who have the ability to manage the day-to-day activities of other employees.

**Issue:** In Title VII employment discrimination cases, in order to qualify as a supervisor, must an individual have the ability to hire and fire employees such that the definition would not include individuals who only manage an employee’s day-to-day activities?

**Yes.** An employee is a supervisor for purposes of Title VII vicarious liability only if he or she is empowered by the employer to take tangible employment actions against the harassed employee.

**From the opinion by Justice Alito** (joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas): Under the definition of “supervisor” that we adopt today, the question of supervisor status, when contested, can very often be resolved as a matter of law before trial. The elimination of this issue from the trial will focus the efforts of the parties, who will be able to present their cases in a way that conforms to the framework that the jury will apply. The plaintiff will know whether he or she must prove that the employer was negligent or whether the employer will have the burden of proving the elements of the El-erth/Faragher affirmative defense. Perhaps even more important, the work of the jury, which is inevitably complicated in employment discrimination cases, will be simplified. The jurors can be given preliminary instructions that allow them to understand, as the evidence comes in, how each item of proof fits into the framework that they will ultimately be required to apply. And even where the issue of supervisor status cannot be eliminated from the trial (because there are genuine factual disputes about an alleged harasser’s authority to take tangible employment actions), this preliminary question is relatively straightforward.

**From the dissenting opinion by Justice Ginsburg** (joined by Justices Breyer, Sotomayor, and Kagan): Exhibiting remarkable resistance to the thrust of our prior decisions, workplace realities, and the EEOC’s Guidance, the Court embraces a position that relieves scores of employers of responsibility for the behavior of the supervisors they employ. Trumpeting the virtues of simplicity and administrability, the Court restricts supervisor status to those with power to take tangible employment actions. In so restricting the definition of supervisor, the Court once again shuts from sight the “robust protection against workplace discrimination Congress intended Title VII to secure.” Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007).

Concurring: Justice Thomas

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**Employment Law**  
**University of Texas Southwestern Medical Center v. Nassar**  
**Docket No. 12-484**  
**Vacated and Remanded: The Fifth Circuit**

Argued: April 24, 2013  
Decided: June 24, 2013  
Analysis: See ABA PREVIEW 276 Issue 7

**Overview:** The retaliation prohibition contained in § 704 of Title VII prohibits discrimination “because” an individual has engaged in opposition or participation activity under Title VII. This case turned on an interpretation of the single word “because.” The Court was asked to determine whether “because” means that an employee must prove that the only reason for the employer’s action was retaliation, i.e., the single motive, or is it sufficient if the employee proves that retaliation was at least one reason for the employer’s action, i.e., a mixed motive?

**Issue:** Does the retaliation prohibition in § 704 of Title VII require a plaintiff to prove single motive for an employer’s retaliation?

**Yes.** Title VII retaliation claims must be proved according to the traditional but-for causation analysis.

**From the opinion by Justice Kennedy** (joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito): If Congress had desired to make the motivating-factor standard applicable to all Title VII claims, it could have used language similar to that which it invoked in § 109…. Or, it could have inserted the motivating-factor provision as part of a section that applies to all such claims, such as § 2000e-5, which establishes the rules and remedies for all Title VII enforcement actions. See FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000). But in writing § 2000e-2(m), Congress did neither of those things, and “[w]e must give effect to Congress’ choice.”

**From the dissenting opinion by Justice Ginsburg** (joined by Justices Breyer, Sotomayor, and Kagan): To establish discrimination, all agree, the complaining party need show only that race, color, religion, sex, or national origin was “a motivating factor” in an employer’s adverse action; an employer’s proof that “other factors also motivated the [action]” will not defeat the discrimination claim. § 2000e-2(m). But a retaliation claim, the Court insists, must meet a stricter standard: The claim will fail unless the complainant shows “but-for” causation, i.e., that the employer would not have taken the adverse employment action but for a design to retaliate. In so reining in retaliation claims, the Court misapprehends what our decisions teach: Retaliation for complaining about discrimination is tightly bonded to the core prohibition and cannot be disassociated from it. Indeed, this Court has explained again and again that “retaliation in response to a complaint about [proscribed] discrimination is discrimination” on the basis of the

Environmental Law
Decker v. Northwest Environmental Defense Center
and
Georgia-Pacific West, Inc. v. Northwest Environmental Defense Center

Docket Nos. 11-338 and 11-347
Reversed and Remanded:
The Ninth Circuit

Argued: December 3, 2012
Decided: March 20, 2013
Analysis: See ABA PREVIEW 124 Issue 3

Overview: The Northwest Environmental Defense Center (NEDC) sued various timber companies, the Oregon State Forester, and members of the Oregon Board of Forestry for failure to obtain permits for storm water runoff from forest roads used for logging. The United States intervened and argued that the courts lacked jurisdiction.

Issues: Do the federal courts have jurisdiction over the NEDC’s challenge to the timber companies’ failure to obtain permits?

Do the Clean Water Act (CWA) and Environmental Protection Agency (EPA) regulations require timber corporations to obtain a permit for storm water runoff from logging roads?

Yes. CWA § 1369(b), which governs challenges to agency actions, is not a jurisdictional bar to this suit. That provision is the exclusive vehicle for suit seeking to invalidate certain agency decisions, such as the establishment of effluent standards and the issuance of permits. It does not bar a district court from entertaining a citizen suit under § 1365 when the suit is against an alleged violator and seeks to enforce an obligation imposed by the Act or its regulations. Moreover, the EPA’s recent amendment to the Industrial Stormwater Rule does not make the cases moot.

From the opinion by Justice Kennedy (joined by Chief Justice Roberts and Justices Thomas, Ginsburg, Alito, Sotomayor, and Kagan; Justice Scalia joined as to Parts I and II): For jurisdictional purposes, it is unnecessary to determine whether the NEDC is correct in arguing that only its reading of the Silvicultural Rule is permitted under the Act. It suffices to note that NEDC urges the Court to adopt a “purposeful but permissible reading of the regulation . . . to bring it into harmony with . . . the statute.” Environmental Defense v. Duke Energy Corp., 549 U.S. 561 (2007). NEDC does not seek “an implicit declaration that the . . . regulations were invalid as written.” And, as a result, § 1369(b) is not a jurisdictional bar to this suit.

Concurring: Chief Justice Roberts (joined by Justice Alito)
Concurring in part and dissenting in part: Justice Scalia
Taking no part in consideration: Justice Breyer

Equal Protection
Fisher v. University of Texas at Austin

Docket No. 11-345
Vacated and Remanded:
The Fifth Circuit

Argued: October 10, 2012
Decided: June 24, 2013
Analysis: See ABA PREVIEW 42 Issue 1

Overview: The University of Texas at Austin considered an applicant’s race in its admissions decisions, along with a number of other factors, but only for those applicants who were not admitted based on other, race-neutral criteria. The plaintiffs here were denied admission to the Fall Semester entering class and sued, arguing that UT’s use of race violated the Equal Protection Clause.

Issue: Was the Fifth Circuit correct in upholding the UT admissions program after finding that it was required to by Grutter v. Bollinger, 539 U.S. 306 (2003), to give substantial deference to the University regarding both the definition of the state’s compelling interest in having a diverse student body and in determining whether a specific plan is narrowly tailored to achieve that stated goal?

No. The Fifth Circuit erred by not holding the University to a demanding burden of strict scrutiny as required by Grutter v. Bollinger and Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); under the proper level of review, strict scrutiny must be applied to both the University’s definition of its compelling interest and its determination of the proper narrowly tailored plan to achieve that goal.

From the opinion by Justice Kennedy (joined by Chief Justice Roberts and Justices Scalia, Thomas, Breyer, Alito, and Sotomayor): Once the University has established that its goal of diversity is consistent with strict scrutiny, however, there must still be a further judicial determination that the admissions process meets strict scrutiny in its implementation. The University must prove that the means chosen by the University to attain diversity are narrowly tailored to that goal. On this point, the University receives no deference. Grutter made clear that it is for the courts, not for university administrators, to ensure that “[t]he means chosen to accomplish the [government’s] asserted purpose must be specifically and narrowly framed to accomplish that purpose.” True, a court can take account of a university’s experience and expertise in adopting or rejecting certain admissions processes. But, as the Court said in Grutter, it remains at all times the University’s obligation to demonstrate, and the Judiciary’s obligation to determine, that admissions processes “ensure that each applicant is evaluated as an individual and not in a way that makes an applicant’s race or ethnicity the defining feature of his or her application.”

From the dissenting opinion by Justice Ginsburg:
Petitioner urges that Texas’ Top Ten Percent Law and race-blind holistic review of each application achieve significant diversity, so the University must be content with those alternatives. I have said before and reiterate here that only an ostrich could regard the supposedly neutral alternatives as race unconscious. See Gratz, 539 U.S. 244 (2003) (dissenting opinion). As Justice Souter observed, the vaunted alternatives suffer from “the disadvantage of deliberate obfuscation.”

Concurring: Justice Scalia
Concurring: Justice Thomas
Taking no part in consideration: Justice Kagan
Equal Protection

Hollingsworth v. Perry

Docket No. 12-144
Vacated and Remanded:
The Ninth Circuit

Argued: March 26, 2013
Decided: June 26, 2013
Analysis: See ABA PREVIEW 232 Issue 6

Overview: In May 2008, the California Supreme Court interpreted the California Constitution to include a right to marriage equality for gays and lesbians. In November 2008, California voters passed an initiative, Proposition 8, to amend the California Constitution to require that marriage be between a man and a woman. Both the federal district court and the United States Court of Appeals for the Ninth Circuit declared Proposition 8 to be unconstitutional, although on somewhat different grounds. The Supreme Court granted review as to whether the supporters of an initiative have standing to appeal if state officials will not do so, and, if so, whether Proposition 8 violates the Constitution.

Issue: Do petitioners have standing under Article III, § 2 of the Constitution in this case? Assuming they do, does the Equal Protection Clause of the Fourteenth Amendment prohibit the state of California from defining marriage as the union of a man and a woman?

No. Petitioners, proponents of a state ballot initiative, do not have standing to appeal a district court’s ruling that the initiative is unconstitutional.

From the opinion by Chief Justice Roberts (joined by Justices Scalia, Ginsburg, Breyer, and Kagan):
The only individuals who sought to appeal that order were petitioners, who had intervened in the District Court. But the District Court had not ordered them to do or refrain from doing anything. To have standing, a litigant must seek relief for an injury that affects him in a “personal and individual way.” Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992). He must possess a “direct stake in the outcome” of the case. Arizonans for Official English v. Arizona, 520 U.S. 43 (1996). Here, however, petitioners had no “direct stake” in the outcome of their appeal. Their only interest in having the District Court order reversed was to vindicate the constitutional validity of a generally applicable California law.

From the dissenting opinion by Justice Kennedy (joined by Justices Thomas, Alito, and Sotomayor):
The Court’s opinion disregards and disparages both the political process in California and the well-stated opinion of the California Supreme Court in this case. The California Supreme Court, not this Court, expresses concern for vigorous representation; the California Supreme Court, not this Court, recognizes the necessity to avoid conflicts of interest; the California Supreme Court, not this Court, comprehends the real interest at stake in this litigation and identifies the most proper party to defend that interest. The California Supreme Court’s opinion reflects a better understanding of the dynamics and principles of Article III than does this Court’s opinion.

Equal Protection

United States v. Windsor

Docket No. 12-307
Affirmed: The Second Circuit

Argued: March 27, 2013
Decided: June 26, 2013
Analysis: See ABA PREVIEW 238 Issue 6

Overview: Section 3 of the federal Defense of Marriage Act (DOMA) defines marriage under federal law as only between one man and one woman. As a result, the Internal Revenue Service denied Edith Windsor a marriage exemption on estate taxes that she paid on her deceased same-sex spouse’s estate. Windsor sued, arguing that § 3 violated equal protection. The U.S. Department of Justice initially defended § 3, but later reversed course and joined Windsor. Still, the executive branch continued to enforce § 3. The Bipartisan Legal Advisory Group, a group of leaders in the House of Representatives, stepped in to replace the government and defend § 3 in court.

Issues: Does the Court have jurisdiction in this case, and, in particular, does the Bipartisan Legal Advisory Group (BLAG) have standing, and does the executive branch’s agreement with the lower court deprive the Supreme Court of jurisdiction?

Does § 3 of the DOMA, which defines marriage as a union only between one man and one woman for all federal purposes, violate equal protection?

Yes. The Court has jurisdiction over this case because there is a concrete disagreement between parties; the United States retains a stake in this case in spite of the executive branch’s decision not to defend the constitutionality of DOMA § 3, and BLAG has substantial adversarial arguments.

Yes. DOMA is an unconstitutional deprivation of equal protection under the Fifth Amendment.

From the opinion by Justice Kennedy (joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan):
What has been explained to this point should more than suffice to establish that the principal purpose and the necessary effect of this law are to demean those persons who are in a lawful same-sex marriage. This requires the Court to hold, as it now does, that DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution.

From the dissenting opinion by Justice Scalia (joined by Justice Thomas and in which Chief Justice Roberts joined as to Part I):
We have no power to decide this case. And even if we did, we have no power under the Constitution to invalidate this democratically adopted legislation. The Court’s errors on both points spring forth from the same diseased root: an exalted conception of the role of this institution in America.

Dissenting: Chief Justice Roberts

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

ERISA

US Airways, Inc. v. McCutchen

Docket No. 11-1285
Vacated and Remanded:
The Third Circuit

Argued: November 27, 2012
Decided: April 16, 2013
Analysis: See ABA PREVIEW 111 Issue 3

Overview: An ERISA plan reimbursed a plan participant for $66,000 in medical expenses incurred as a result of an injury caused by an underinsured motorist. The participant subsequently hired a lawyer, who settled for...
$110,000, taking $44,000 in attorneys’ fees. This left the participant with $66,000, just enough to pay for medical expenses paid by the Plan. The Plan sued the participant for the remaining amount of the recovery, which would leave the participant with no recovery for his pain and suffering and future medical expenses. The participant claimed that equitable principles applied to reduce the Plan’s recovery.

**Issue:** Is an ERISA plan with subrogation rights subject to federal common-law principles designed to prevent unjust enrichment in subrogation claims, such as the cap on double recovery and the common fund doctrine?

**No.** In a § 502(a)(3) action based on equitable lien by agreement—like this one—the ERISA plan’s terms govern; neither general unjust enrichment principles nor specific doctrines reflecting those principles can override the applicable contract, and when there are gaps in the plan, equitable doctrines may be used to properly construe it.

**From the opinion by Justice Kagan**
(joined by Justices Kennedy, Ginsburg, Breyer, and Sotomayor):
Ordinary principles of contract interpretation point toward this conclusion. Courts construe ERISA plans, as they do other contracts, by “looking to the terms of the plan” as well as to “other manifestations of the parties’ intent.” *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989). The words of a plan may speak clearly, but they may also leave gaps. And so a court must often “look outside the plan’s written language” to decide what an agreement means.

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

**Fair Debt Collection Practices Act**
*Mars v. General Revenue Corp.*

**Docket No. 11-1175**
**Affirmed:** The Tenth Circuit

**Argued:** November 7, 2012
**Decided:** February 26, 2013
**Analysis:** See ABA PREVIEW 67 Issue 2

**Overview:** Federal Rule of Civil Procedure 54(d) incorporates the general rule that a prevailing party in litigation is entitled to costs, other than attorney’s fees, unless a federal statute, the federal rules, or a court orders otherwise. The Fair Debt Collection Practices Act (FDCPA) provides that on a finding by the court that an action was brought by a plaintiff in bad faith and for the purpose of harassment, the court may award the defendant attorney’s fees reasonable in relation to the work expended and costs. The issue before the Supreme Court was whether the FDCPA has “provided otherwise” so as to require a successful defendant in an FDCPA action to prove the action was brought in bad faith and for the purpose of harassment as a condition precedent to the award of costs.

**Issue:** Does the Fair Debt Collection Practices Act (FDCPA) preclude the award of costs under Federal Rule of Civil Procedure 54(d) when a debt collector successfully defends an FDCPA suit?

**No.** Section § 1692k(a)(3) is not contrary to, and thus does not displace, a district court’s discretion to award costs under Rule 54(d)(1).

**From the opinion by Justice Thomas**
(joined by Chief Justice Roberts and Justices Scalia, Kennedy, Ginsburg, Breyer, and Alito):
We are not persuaded, however, that the original version of Rule 54(d) should be interpreted as Marx and the United States suggest. The original language was meant to ensure that Rule 54(d) did not displace existing costs provisions that were contrary to the Rule. Under the prior language, statutes that simply permitted a court to award costs did not displace the Rule…. Rather, statutes had to set forth a standard for awarding costs that was different from Rule 54(d)(1) in order to displace the Rule.

**From the dissenting opinion by Justice Sotomayor**
(joined by Justice Kagan):
While purporting to interpret the “ordinary meaning” of Rule 54(d)(1), the majority immediately abandons the ordinary meaning. The majority concludes that a statute provides otherwise for purposes of Rule 54(d)(1) only if it is “contrary” to the default. But the majority does not cite even a single dictionary definition in support of that reading, despite the oft-cited principle that a definition widely reflected in dictionaries generally governs over other possible meanings. Lacking any dictionary support for its interpretation, the majority relies instead upon a treatise published nearly 60 years after the Rule’s adoption.

**Federal Arbitration Act**
*Nitro-Lift Technologies, LLC v. Howard*

**Docket No. 11-1377**
**Vacated and Remanded:**
The Supreme Court of Oklahoma

**Argued:** N/A
**Decided:** November 26, 2012
**Analysis:** N/A

**Overview:** Nitro-Lift Technologies required employees to sign contracts that included an anticompetition clause and required arbitration for disputes. Two employees left Nitro-Lift Technologies and were subsequently employed by a competitor. Nitro-Lift Technologies claimed the employees violated the anticompetition clause and demanded arbitration. On appeal, the Oklahoma Supreme Court indicated that it could rule on the merits of the contracts even though they had not yet been before an arbitrator and found the contracts null and void.

**Issue:** Was the state court’s declaration of employment contracts as null and void before an arbitrator reviewed them appropriate under the Federal Arbitration Act?

**No.** By declaring employment contracts null and void before an arbitrator has reviewed them, the state court ignores a basic tenet of the Federal Arbitration Act.

**From the per curiam opinion:** [W]hen parties commit to arbitrate contractual disputes, it is a mainstay of the Act’s substantive law that attacks on the validity of the contract, as distinct from attacks on the validity of the arbitration clause itself, are to be resolved “by the arbitrator in the first instance, not by a federal or state court.”
Federal Liability
Levin v. United States
Docket No. 11-1351
Reversed and Remanded:
The Ninth Circuit

Argued: January 15, 2013
Decided: March 4, 2013
Analysis: See ABA PREVIEW 156 Issue 4

Overview: Under the Gonzalez Act, the United States is substituted as the sole defendant for tort claims against military medical personnel performing medical functions, who are thereby granted immunity from individual liability. Under the Federal Tort Claims Act (FTCA), the United States is liable on the same basis as a private person under the law of the state where the act or omission occurred, with exceptions for certain claims including those arising out of an assault or battery. However, the Gonzalez Act states that, for “purposes of this section,” the assault and battery exception to the FTCA does not apply to a claim arising out of a wrongfull act in the performance of medical functions. The question before the Court was whether this provision in the Gonzalez Act thereby permits suit directly against the United States for a battery committed by military medical personnel.

Issue: Has the United States waived sovereign immunity for medical battery claims based on the acts of military medical personnel when the United States is substituted for the medical practitioner as the defendant under the Gonzalez Act, despite the Federal Tort Claims Act’s general exception for assault and battery claims?

Yes. The Gonzalez Act direction in § 1089(e) abrogates the FTCA’s intentional tort exception and therefore permits Levin’s suit against the United States alleging medical battery by a Navy doctor acting within the scope of his employment.

From the unanimous opinion by Justice Ginsburg (Justice Scalia did not join footnotes 6 and 7):
The choice between these alternative readings of § 1089(e) is not difficult to make. Section 1089(e)’s operative clause states, in no uncertain terms, that the intentional tort exception to the FTCA, § 2680(h), “shall not apply,” and § 1089(e)’s introductory clause confines the abrogation of § 2680(h) to medical personnel employed by the agencies listed in the Gonzalez Act.

Federal Liability
Millbrook v. United States
Docket No. 11-10362
Reversed and Remanded:
The Third Circuit

Argued: February 19, 2013
Decided: March 27, 2013
Analysis: See ABA PREVIEW 188 Issue 5

Overview: A federal prisoner brought suit under the Federal Tort Claims Act (FTCA) alleging that he had been sexually assaulted by prison guards. Under the FTCA, the United States is liable on the same basis as a private person under the law of the state where the act or omission occurred, with an exception for such intentional torts as assault or battery. However, as an exception to the exception, the “law enforcement proviso” holds the United States liable for certain intentional torts when committed by “investigative or law enforcement officers of the United States.” The proviso defines such officers as those “empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.” The question before the Court was whether the law enforcement proviso authorizes intentional tort claims against the United States whenever a law enforcement officer was acting within the scope of federal employment or only when that law enforcement officer was engaged in a search, seizure of evidence, or an arrest.

Issue: Does the “law enforcement proviso” in the Federal Tort Claims Act, which allows intentional tort claims (including assault and battery) involving law enforcement officers to be brought directly against the United States whenever a law enforcement officer was acting within the scope of federal employment or only when that law enforcement officer was engaged in a search, seizure of evidence, or an arrest?

No. The law enforcement proviso extends to law enforcement officers’ acts or omissions that arise within the scope of their employment, regardless of whether the officers are engaged in investigative or law enforcement activity, or are executing a search, seizing evidence, or making an arrest.

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

Federal Liability
United States v. Bormes
Docket No. 11-192
Vacated and Remanded:
The Federal Circuit

Argued: October 2, 2012
Decided: November 13, 2012
Analysis: See ABA PREVIEW 4 Issue 1

Overview: The United States asked the Court to hold the federal government immune from civil liability for violations of the Fair Credit Reporting Act, arguing that the general waiver of sovereign immunity for monetary claims found in the Tucker Act does not apply when another statute provides for judicial remedies without expressly authorizing suit against the federal government.

Issue: Does the Little Tucker Act, 28 U.S.C. § 1346(a)(2), waive the sovereign immunity of the United States with respect to actions for damages under the Fair Credit Reporting Act, 15 U.S.C. §§ 1681 et seq.?

No. The Fair Credit Reporting Act is the type of statute that has its own judicial remedies thereby displacing the Tucker Act’s consent to suit for money-damages claims.

From the unanimous opinion by Justice Scalia:

Plaintiffs cannot, therefore, mix and match FCRA’s provisions with the Little Tucker Act’s immunity waiver to create an action
against the United States. Since FCRA is a detailed remedial scheme, only its own text can determine whether the damages liability Congress crafted extends to the Federal Government. To hold otherwise—to permit plaintiffs to remedy the absence of a waiver of sovereign immunity in specific, detailed statutes by pleading general Tucker Act jurisdiction—would transform the sovereign-immunity landscape.

### Federal Procedure

**Genesis HealthCare Corp. v. Symczyk**

**Docket No. 11-1059**

**Reversed: The Third Circuit**

**Argument:** Laura Symczyk brought a lawsuit under the Fair Labor Standards Act (FLSA) against her employers Genesis HealthCare Corp. and ElderCare Resources Corp. The trial court dismissed Symczyk’s claim before deciding whether to certify the collective FLSA action. The court’s dismissal was in response to the defendants’ motion after Symczyk failed to respond to their offer of a full settlement. The Supreme Court was asked to decide whether the trial court’s action mooted the case and prevented adjudication of the claims of similarly situated employees.

**Issue:** Did Symczyk’s refusal to accept the offer constitute a ground for dismissal of her claims and moot her individual suit?

**Yes.** Because respondent has no personal interest in representing putative, unnamed claimants, nor any other continuing interest that would preserve her suit from mootness, her suit was appropriately dismissed for lack of subject-matter jurisdiction.

**From the opinion by Justice Thomas**

(joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Alito): In the absence of any claimant’s opting in, respondent’s suit became moot when her individual claim became moot, because she lacked any personal interest in representing others in this action. While the FLSA authorizes an aggrieved employee to bring an action on behalf of himself and “other employees similarly situated,” the mere presence of collective-action allegations in the complaint cannot save the suit from mootness once the individual claim is satisfied.

**From the dissenting opinion by Justice Kagan**

(joined by Justices Ginsburg, Breyer and Sotomayor): That thrice-asserted view is wrong, wrong, and wrong again. We made clear earlier this Term that “[a]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot.” *Chafin v. Chafin*, 568 U.S. __, ___ (2012). “[A] case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party.” By those measures, an unaccepted offer of judgment cannot moot a case. When a plaintiff rejects such an offer—however good the terms—her interest in the lawsuit remains what it was before. And so too does the court’s ability to grant her relief.

### Fourth Amendment

**Florida v. Harris**

**Docket No. 11-817**

**Reversed: The Supreme Court of Florida**

**Argument:** Harris was one of two cases concerning drug detection dog sniffs from Florida that the Supreme Court heard in October. In *Harris*, there was no question a search took place during the dog sniff. The issue was what the state must demonstrate to show probable cause for doing so. Specifically, the Court was asked to consider whether an alert by a narcotics detection dog the state claims is “trained” and “certified” is alone sufficient to establish probable cause without more evidence of the dog’s reliability. The case arose in the context of a warrantless vehicle search but could have implications for searches under warrants and for civil forfeiture proceedings.

**Issue:** Was the Florida Supreme Court decision holding that an alert by a well-trained narcotics detection dog certified to detect illegal contraband insufficient to establish probable cause for the search of a vehicle proper?

**No.** The dog’s training and testing records, supported by his reliability in detecting drugs, established that the police officer had probable cause to search Harris’s truck.

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

The question—similar to every inquiry into probable cause—is whether all the facts surrounding a dog’s alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime. A sniff is up to snuff when it meets the test.

### Fourth Amendment

**Florida v. Jardines**

**Docket No. 11-564**

**Affirmed: The Supreme Court of Florida**

**Argument:** On Halloween Day 2012, two cases from Florida were the latest “battlegrounds” in Fourth Amendment law: drug detection dog sniffs. The first of these cases, *Florida v. Jardines*, involved a basic Fourth Amendment question: Has there been a governmental “search” for purposes of the Fourth Amendment? The context in which this issue is raised here involves both drug detection dogs and private homes. The second case, *Florida v. Harris*, involved the reliability of drug detection dog sniffs.

**Issues:** Is a dog sniffing by a trained narcotics detection dog at the front door of a suspected grow house a Fourth Amendment search requiring probable cause? Is the officers’ conduct during the investigation of the grow house, including remaining outside the house while awaiting a search warrant, a Fourth Amendment search?

**Yes.** The investigation of Jardines’s home, including the use of a trained detection dog on a front porch, was a “search” within the meaning of the Fourth Amendment.

**From the opinion by Justice Scalia**

(joined by Justices Thomas, Ginsburg, Sotomayor, and Kagan): Thus, we need not decide whether the officers’ investigation of Jardines’ home violated his expectation of privacy under
Katz. One virtue of the Fourth Amendment’s property-rights baseline is that it keeps easy cases easy. That the officers learned what they learned only by physically intruding on Jardines’ property to gather evidence is enough to establish that a search occurred.

From the dissenting opinion by Justice Alito (joined by Chief Justice Roberts and Justices Kennedy and Breyer): The Court has been unable to find a single case—from the United States or any other common-law nation—that supports the rule on which its decision is based. Thus, trespass law provides no support for the Court’s holding today. The Court’s decision is also inconsistent with the reasonable-expectation-of-privacy test that the Court adopted in Katz v. United States, 389 U.S. 347 (1967). A reasonable person understands that odors remaining within the range that, while detectible by a dog, cannot be smelled by a human. For these reasons, I would hold that no search within the meaning of the Fourth Amendment took place in this case, and I would reverse the decision below.

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

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Fourth Amendment
Maryland v. King

Docket No. 12-207
Reversed: Court of Appeals of Maryland

Argued: February 26, 2013
Decided: June 3, 2013
Analysis: See ABA PREVIEW 214 Issue 5

Overview: Alonzo Jay King Jr. was arrested on assault charges. During booking, officers took a DNA sample with a buccal (mouth) swab and submitted it for analysis and collection in the state DNA database. The database later revealed a hit, linking King’s DNA profile to DNA obtained in an earlier unsolved rape case. Based on the hit, the arresting officer obtained an indictment against King for charges related to the rape. The officer then obtained a search warrant for a second buccal swab, which also revealed the link to the earlier rape. Before his trial for the rape, King moved to suppress the results of the second swab, arguing that it violated the Fourth Amendment.

Issue: Does the Fourth Amendment protect a person arrested for a serious crime from a buccal swab, without warrant or suspicion, to collect and analyze his DNA?

No. When officers make an arrest supported by probable cause to hold for a serious offense and bring the suspect to the station to be detained in custody, taking and analyzing a check swab of the arrestee’s DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment.

From the opinion by Justice Kennedy (joined by Chief Justice Roberts and Justices Thomas, Breyer, and Alito): The task of identification necessarily entails searching public and police records based on the identifying information provided by the arrestee to see what is already known about him. The DNA collected from arrestees is an irrefutable identification of the person from whom it was taken. Like a fingerprint, the 13 CODIS loci are not themselves evidence of any particular crime, in the way that a drug test can by itself be evidence of illegal narcotics use. A DNA profile is useful to police because it gives them a form of identification to search the records already in their valid possession. In this respect the use of DNA for identification is no different than matching an arrestee’s face to a wanted poster of a previously unidentified suspect; or matching tattoos to known gang symbols to reveal a criminal affiliation; or matching the arrestee’s fingerprints to those recovered from a crime scene.

From the dissenting opinion by Justice Scalia (joined by Justices Ginsburg, Sotomayor, and Kagan): Whenever this Court has allowed a suspicionless search, it has insisted upon a justifying motive apart from the investigation of crime. It is obvious that no such non investigative motive exists in this case. The Court’s assertion that DNA is being taken, not to solve crimes, but to identify those in the State’s custody, taxes the credulity of the credulous. And the Court’s comparison of Maryland’s DNA searches to other techniques, such as fingerprinting, can seem apt only to those who know no more than today’s opinion has chosen to tell them about how those DNA searches actually work.

Fourth Amendment
Missouri v. McNeely

Docket No. 11-1425
Affirmed: The Supreme Court of Missouri

Argued: January 9, 2013
Decided: April 17, 2013
Analysis: See ABA PREVIEW 172 Issue 4

Overview: Tyler McNeely was arrested for drunk driving and immediately transported to a local hospital for a blood draw to determine the level of alcohol in his blood. McNeely did not consent to the draw, and the officer did not obtain a warrant. After McNeely was charged with drunk driving, he moved to suppress the results of his blood test, arguing that the blood draw violated his Fourth Amendment rights.

Issue: Does the Fourth Amendment allow an officer to order a warrantless blood draw of a drunk-driving suspect immediately upon arrest and transportation to a hospital, even absent special circumstances that would have delayed the officer in obtaining the blood draw?

No. In drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant.

From the opinion by Justice Sotomayor (with respect to Parts I, II-A, II-B, and IV joined by Justices Scalia, Kennedy, Ginsburg, and Kagan) (with respect to Parts II-C and III joined by Justices Scalia, Ginsburg, and Kagan): We do not doubt that some circumstances will make obtaining a warrant impractical such that the dissipation of alcohol from the bloodstream will support an exigency justifying a properly conducted warrantless blood test. That, however, is a reason to decide each case on its facts, as we did in Schmerber v. California, 384 U.S. 757, not to accept the “considerable overgeneralization” that a per se rule would reflect….. While the desire for a bright-line rule is understandable, the Fourth Amendment will not tolerate adoption of an overly broad categorical approach that would dilute the warrant requirement in a context where significant privacy interests are at stake. Moreover, a case-by-case approach is hardly unique within our
Fourth Amendment jurisprudence. Numerous police actions are judged based on fact-intensive, totality of the circumstances analyses rather than according to categori-cal rules, including in situations that are more likely to require police officers to make difficult split-second judgments.

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

Habeas Corpus
Johnson v. Williams
Docket No. 11–465
Reversed and Remanded: The Ninth Circuit

Argued: October 3, 2012
Decided: February 20, 2013
Analysis: See ABA PREVIEW 38 Issue 1

Overview: Tara Sheneva Williams was convicted of first-degree murder after a trial during which the dismissal of one juror was alleged to have violated Williams’s Sixth Amendment rights. During the state court appeal, the state court denied relief, explaining its decision, but did not expressly acknowledge the federal-law basis for Williams’s claim. The Supreme Court was asked to determine whether such a state court decision is a full adjudication of Williams’s claims “on the merits” such that it triggers the deferential treatment standard under the AEDPA 28 U.S.C. § 2254(d).

Issue: Has a state court adjudicated habeas petitioner’s claim been adjudicated “on the merits,” triggering the deferential treatment given to such a decision by AEDPA 28 U.S.C. § 2254(d), where the state court denied relief in an explained decision but did not expressly acknowledge a federal-law basis for the claim?

Yes. For purposes of § 2254(d), when a state court rules against a defendant in an opinion that rejects some of the defendant’s claims but does not expressly address a federal claim, a federal habeas court must presume, subject to rebuttal, that the federal claim was adjudicated on the merits.

From the opinion by Justice Alito (joined by Chief Justice Roberts and Justices Kennedy, Thomas, Ginsburg, Breyer, Sotomayor, and Kagan):
In sum, because it is by no means uncommon for a state court to fail to address separately a federal claim that the court has not simply overlooked, we see no sound reason for failing to apply the Richter presumption in cases like the one now before us. When a state court rejects a federal claim without expressly addressing that claim, a federal habeas court must presume that the federal claim was adjudicated on the merits—but that presumption can in some limited circumstances be rebutted.

From the concurring opinion by Justice Scalia:
The answer to whether the federal claim has been “evaluated based on the intrinsic right and wrong of the matter” is anybody’s guess. One thing, however, is certain: The Court’s case-by-case approach will guarantee protracted litigation over whether a state-court judge was aware of a claim on the day he rejected it.

Habeas Corpus
Marshall v. Rodgers
Docket No. 12–382
Reversed and Remanded: The Ninth Circuit

Argued: N/A
Decided: April 1, 2013
Analysis: N/A

Overview: Otis Lee Rodgers, challenging his state conviction, sought a writ of habeas corpus from the United States District Court for the Central District of California. Rodgers claimed that state courts violated his Sixth Amendment right to effective assistance of counsel by declining to appoint an attorney to assist in filing a motion for a new trial, even though he had previously waived his right to counsel three times. The district court denied his petition, and he appealed to the Court of Appeals for the Ninth Circuit, which granted habeas relief. The Supreme Court was asked whether the court of appeals erred in concluding that respondent’s claim is supported by “clearly established Federal law,” under 28 U.S.C.

Issue: Was the Ninth Circuit correct to rule that federal law “clearly establish[es],” for purposes of habeas corpus review of state-court judgments under 28 U.S.C. § 2254(d), a defendant’s right to request the reappointment of counsel after a valid waiver of counsel?

No. The court of appeals erred when it held that the lower court’s decision to deny a defendant’s request for reappointment of counsel after the defendant has waived such a right was contrary to “clearly established Federal Law.

From the per curiam opinion: All this case requires—and all the Court of Appeals was empowered to do under § 2254(d)(1)—is to observe that, in light of the tension between the Sixth Amendment’s guarantee of “the right to counsel at all critical stages of the criminal process,” and its concurrent promise of “a constitutional right to proceed without counsel when [a criminal defendant] voluntarily and intelligently elects to do so,” it cannot be said that California’s approach is contrary to or an unreasonable application of the “general standard[s]” established by the Court’s assistance-of-counsel cases.

Habeas Corpus
McQuigg v. Perkins
Docket No. 12–126
Vacated and Remanded: The Sixth Circuit

Argued: February 25, 2013
Decided: May 28, 2013
Analysis: See ABA PREVIEW 205 Issue 5

Overview: Floyd Perkins was convicted of first-degree murder; during his appeal, Perkins waited until after a filing deadline, and until he was in federal court, to present new evidence of his innocence. The Court was asked to examine whether an actual-innocence exception to one-year Antiterrorism and Effective Death Penalty Act of 1996’s timely filing requirement exists and, if so, whether petitioner must also demonstrate diligence to fall within the exception.

Issues: Is there, under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), an actual-innocence exception to the requirement that a petitioner show an extraordinary circumstance that “prevented timely filing” of a habeas petition and, if so, is there an additional actual-innocence exception to the requirement that a petitioner demonstrate that “he has been pursuing his rights diligently”?
No. A federal habeas court, when reviewing an actual-innocence claim, should count unjustified delay not as an absolute barrier, but as a factor in determining whether actual innocence has been shown. In this case, the district court’s decision that the petitioner’s petition was insufficient to meet the actual-innocence standard was dispositive and should not have been disrupted by the Court of Appeals.

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

While we reject the State’s argument that habeas petitioners who assert convincing actual-innocence claims must prove diligence to cross a federal court’s threshold, we hold that the Sixth Circuit erred to the extent that it eliminated timing as a factor relevant in evaluating the reliability of a petitioner’s proof of innocence. To invoke the miscarriage of justice exception to AEDPA’s statute of limitations, we repeat, a petitioner “must show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence.”

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

Habeas Corpus
Nevada v. Jackson
Docket No. 12-694
Reversed and Remanded:
The Ninth Circuit

Argued: N/A
Decided: June 3, 2013
Analysis: N/A

Overview: In this case, the Ninth Circuit held that Calvin Jackson, convicted of rape and other serious crimes, was entitled to relief under the Antiterrorism and Effective Death Penalty Act because the Supreme Court of Nevada unreasonably applied clearly established Supreme Court precedent regarding a criminal defendant’s constitutional right to present a defense. At his trial, Jackson unsuccessfully sought to introduce evidence for the purpose of showing that the rape victim previously reported that he had assaulted her but that the police had been unable to substantiate those allegations. The state supreme court held that this evidence was properly excluded, and no prior decision of this Court clearly established that the exclusion of this evidence violated his federal constitutional rights.

Issue: Was the Ninth Circuit in error when it held that a defendant was entitled to habeas relief after a state supreme court upheld a trial court decision that the evidence of a rape victim’s previous unsubstantiated allegations against the defendant was properly excluded due to the defendant’s failure to follow proper notice requirements?

Yes. The state supreme court’s application of the Supreme Court’s clearly established precedents was in fact reasonable when no prior decision by the Supreme Court clearly established that the exclusion of the evidence violated Jackson’s constitutional right.

From the per curiam opinion: The Ninth Circuit elided the distinction between cross-examination and extrinsic evidence by characterizing the cases as recognizing a broad right to present “evidence bearing on [a witness’] credibility.” By framing our precedent at such a high level of generality, a lower federal court could transform even the most imaginative extension of existing case law onto “clearly established Federal law, as determined by the Supreme Court.” 28 U.S.C. § 2254(d)(1). In thus collapsing the distinction between “an unreasonable application of federal law” and what a lower court believes to be “an incorrect or erroneous application of federal law,” Williams v. Taylor, 529 U.S. 362 (2000), the Ninth Circuit’s approach would defeat the substantial deference that AEDPA requires.

Dissenting: Justice Alito joined as to Parts I, II, and III)

Habeas Corpus
Ryan v. Gonzales and Tibbals v. Carter
Docket Nos. 10-930 and 11-218
Reversed: The Ninth Circuit
and
Reversed and Remanded: The Sixth Circuit

Argued: October 9, 2012
Decided: January 8, 2013
Analysis: See ABA PREVIEW 23 and 26 Issue 1
Overview: Gonzales: Convicted of first degree murder, Ernest Gonzales was sentenced to death in Arizona state court. After unsuccessfully pursuing state court remedies, he sought a writ of habeas corpus in federal district court. Counsel for Gonzales then moved to stay his federal habeas proceedings based on Gonzales’s alleged incompetency. The federal district court denied the motion to stay, noting that Gonzales’s claims were purely legal and record based. Reading 18 U.S.C. § 3599(a)(2) broadly, the Ninth Circuit reversed.

Tibbals: Habeas corpus affords convicted defendants the opportunity to challenge unfair and unconstitutional state-court convictions. In this process, capital habeas defendants have the right to an appointment of counsel. However, these appointed attorneys may have great difficulty if their clients are not competent. Tibbals asked the Court to determine whether federal district courts have the inherent authority to grant a stay when such defendants are truly incompetent.

Issues: Does 18 U.S.C. § 3599(a)(2) entitle an incompetent inmate to stay indefinitely federal habeas proceedings until and unless he is rendered competent, even if his habeas claims are strictly law or record based?

Do prisoners in capital cases possess a “right to competence” in federal habeas proceedings under Rees v. Peyton, 384 U.S. 312 (1966)? Can a federal district court order an indefinite stay of a federal habeas proceeding under Rees?

No. Section 3599 does not allow state prisoner’s the right to suspend federal habeas proceedings indefinitely after a finding of incompetency.

No. Section 4241 does not provide a right to competency during federal habeas proceedings.

From the unanimous opinion by Justice Thomas:

In addition to lacking any basis in the statutory text, the assertion that the right to counsel implies a right to competence is difficult to square with our constitutional precedents. The right to counsel is located in the Sixth Amendment. (“In all criminal prosecutions, the accused shall enjoy the right … to have the Assistance of Counsel for his defence.”) If the right to counsel carried with it an implied right to competence, the right to competence at trial would flow from the Sixth Amendment. But “[w]e have repeatedly and consistently recognized
that “the criminal trial of an incompetent defendant violates due process,”” not the Sixth Amendment.

**Habeas Corpus**

**Trevino v. Thaler**

**Docket No. 11-10189**

Vacated and Remanded: The Fifth Circuit

Argued: February 25, 2013
Decided: May 28, 2013
Analysis: See ABA PREVIEW 196 Issue 5

**Overview:** Convicted of capital murder for the gang rape and murder of a 15-year-old girl, Carlos Trevino was sentenced to death by a Texas jury. After unsuccessfully pursuing state court remedies, he sought a writ of habeas corpus in federal district court. In federal court, Trevino maintained his trial counsel was ineffective in failing to present additional mitigating evidence, and state habeas counsel was ineffective in failing to raise this complaint in his first state habeas petition. Both the federal district court and the Fifth Circuit denied Trevino’s federal habeas petition. Subsequently, the Court handed down its decision in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), holding an Arizona inmate’s failure to raise a claim of ineffective assistance of counsel in his first state habeas petition may be excused because in Arizona inmates are barred from asserting ineffective assistance of counsel on direct appeal, and Arizona does not provide counsel during habeas proceedings.

**Issue:** Should the Court extend *Martinez* to states that do not require prisoners to raise all ineffective assistance of counsel claims in state habeas proceedings?

**Yes.** Where, as here, a state’s procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have meaningful opportunity to raise an ineffective-assistance-of-trial-counsel claim on direct appeal, the exception recognized in *Martinez* applies.

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

Thus, for present purposes, a distinction between (1) a State that denies permission to raise the claim on direct appeal and (2) a State that in theory grants permission but, as a matter of procedural design and systemic operation, denies a meaningful opportunity to do so is a distinction without a difference. In saying this, we do not (any more than we did in *Martinez*) seek to encourage States to tailor direct appeals so that they provide a fuller opportunity to raise ineffective-assistance-of-trial-counsel claims. That is a matter for the States to decide. And, as we have said, there are often good reasons for hearing the claim initially during collateral proceedings.

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

Today, with hardly a mention of these concerns, the majority throws over the crisp limit we made so explicit just last Term. We announced in *Martinez* that the exception applies “where the State barred the defendant from raising the claims on direct appeal.” But today, the Court takes all the starch out of its rule with an assortment of adjectives, adverbs, and modifying clauses: *Martinez*’s “narrow exception” now applies whenever the “state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity” to raise his claim on direct appeal.

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

**Immigration Law**

**Moncrieffe v. Holder**

**Docket No. 11-702**

Reversed and Remanded: The Fifth Circuit

Argued: October 10, 2012
Decided: April 23, 2013
Analysis: See ABA PREVIEW 34 Issue 1

**Overview:** Adrian Moncrieffe, who was convicted under a Georgia statute prohibiting the possession of marijuana with the intent to distribute, asserted that his conviction did not amount to an “aggravated felony” for which he may be deported under the Immigration and Nationality Act. Moncrieffe argued that the state statute under which he was convicted punishes behavior that is treated as a misdemeanor under federal law and therefore did not satisfy the requirement that his conviction be “punishable as a felony” under federal law.

**Issue:** Has an alien convicted under a state statute criminalizing the possession of marijuana with intent to distribute committed an “aggravated felony” for which he is deportable even though the state statute punishes behavior that would be treated as a misdemeanor under federal law upon the defendant’s affirmative showing of certain mitigating factors?

**No.** If a noncitizen’s conviction for a marijuana distribution offense fails to establish that the offense involved either remuneration or more than a small amount of marijuana, it is not an aggravated felony under the INA.

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

The Government cites no statutory authority for such case-specific factfinding in immigration court, and none is apparent in the INA. Indeed, the Government’s main categorical argument would seem to preclude this inquiry: If the Government were correct that “the fact of a marijuana-distribution conviction alone constitutes a CSA felony,” then all marijuana distribution convictions would categorically be convictions of the drug trafficking aggravated felony, mandatory deportation would follow under the statute, and there would be no room for the Government’s follow-on factfinding procedure. The Government cannot have it both ways.

**Dissenting:** Justice Thomas

**Dissenting:** Justice Alito

**Indian Child Welfare Act**

**Adoptive Couple v. Baby Girl**

**Docket No. 12-399**

Reversed and Remanded: The Supreme Court of South Carolina

Argued: April 16, 2013
Decided: June 25, 2013
Analysis: See ABA PREVIEW 291 Issue 7

**Overview:** The birth parents of “Baby Girl” were unmarried. Mother decided to put the child up for adoption without consulting Father. Baby Girl was placed with an adoptive family in South Carolina, where she lived for about two years. Father is a Cherokee Indian, but for reasons that are disputed,
the tribe and social workers initially were unaware of this. When Father was served with adoption papers, he obtained counsel and asserted his rights, and the tribe intervened. The state court found that he was a “parent” under the Indian Child Welfare Act (ICWA) because he acknowledged paternity and paternity was established through DNA. The state court denied the adoption and the Supreme Court of South Carolina affirmed.

**Issues:** Is Father a “parent” under the Indian Child Welfare Act (ICWA)? If so, does ICWA bar the termination of Father’s parental rights.

No. Even assuming that Father is a “parent” under ICWA, ICWA does not bar the termination of Father’s parental rights because the father did not have “continued custody of the child” nor was there an existing Indian family that would have been eligible for “remedial services” to prevent a “breakup.”

**From the opinion by Justice Alito**

(Joining by Chief Justice Roberts and Justices Kennedy, Thomas, and Breyer): The Indian Child Welfare Act was enacted to help preserve the cultural identity and heritage of Indian tribes, but under the State Supreme Court’s reading, the Act would put certain vulnerable children at a great disadvantage solely because an ancestor—even a remote one—was an Indian. As the State Supreme Court read §§ 1912(d) and (f), a biological Indian father could abandon his child in utero and refuse any support for the birth mother—perhaps contributing to the mother’s decision to put the child up for adoption—and then could play his ICWA trump card at the eleventh hour to overreach the tribe and social workers initially were unaware of this. When Father was served with adoption papers, he obtained counsel and asserted his rights, and the tribe intervened. The state court found that he was a “parent” under the Indian Child Welfare Act (ICWA) because he acknowledged paternity and paternity was established through DNA. The state court denied the adoption and the Supreme Court of South Carolina affirmed.

**Issues:** Is Father a “parent” under the Indian Child Welfare Act (ICWA)? If so, does ICWA bar the termination of Father’s parental rights.

No. Even assuming that Father is a “parent” under ICWA, ICWA does not bar the termination of Father’s parental rights because the father did not have “continued custody of the child” nor was there an existing Indian family that would have been eligible for “remedial services” to prevent a “breakup.”

**From the opinion by Justice Alito**

(Joining by Chief Justice Roberts and Justices Kennedy, Ginsburg, Kagan and Justice Scalia in part): [N]otwithstanding the majority’s focus on the perceived parental shortcomings of Birth Father, its reasoning necessarily extends to all Indian parents who have never had custody of their children, no matter how fully those parents have embraced the financial and emotional responsibilities of parenting. The majority thereby transforms a statute that was intended to provide uniform federal standards for child custody proceedings involving Indian children and their biological parents into an illogical piecemeal scheme.

**Concurring: Justice Thomas**

**Concurring: Justice Breyer**

**Dissenting: Justice Scalia**

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**Intellectual Property**

**Federal Trade Commission v. Actavis Inc., et al.**

**Docket No. 12-416**

**Reversed and Remanded: The Eleventh Circuit**

Argued: March 25, 2013

Decided: June 17, 2013

Analysis: See ABA PREVIEW 259 Issue 6

**Overview:** Solvay Pharmaceuticals and Besins Healthcare co-own a patent for AndroGel, a topical synthetic testosterone gel. Two other drug manufacturers developed generic versions of AndroGel and subsequently filed the necessary applications under the Federal Food, Drug, and Cosmetic Act. In response, Solvay filed suit alleging patent infringement. The parties eventually settled the suit through a reverse-payment settlement whereby Solvay agreed to pay the generic manufacturers a sum of money in return for the generic manufacturers agreeing to withhold the release of a generic AndroGel until a future date. The Federal Trade Commission (FTC) alleged such an arrangement was in violation of antitrust laws. The Court was asked to determine whether such reverse-payment settlement agreements are per se lawful unless the underlying patent litigation was a sham or the patent was obtained by fraud or, instead, presumptively anticompetitive and unlawful.

**Issue:** Was the Eleventh Circuit correct when it upheld the district court’s dismissal of the FTC’s complaint after finding that such settlement agreements are immune from antitrust attacks so long as the anticompetitive effects of the settlement fall within the scope of the patent’s exclusionary potential?

No. The Eleventh Circuit erred in affirming the dismissal of the FTC’s complaint; the government can bring a lawsuit alleging that reverse-payment agreements between brand-name drug manufacturers and generic drug manufacturers violate antitrust laws.

**From the opinion by Justice Breyer**

(Joining by Justices Kennedy, Ginsburg, Sotomayor, and Kagan): Given these factors, it would be incongruous to determine antitrust legality by measuring the settlement’s anticompetitive effects solely against patent law policy, rather than by measuring them against precompetitive antitrust policies as well. And indeed, contrary to the Circuit’s view that the only pertinent question is whether “the settlement agreement . . . fall[s] within” the legitimate “scope” of the patent’s “exclusionary potential,” this Court has indicated that patent and antitrust policies are both relevant in determining the “scope of the patent monopoly”—and consequently antitrust law immunity—that is conferred by a patent.

**From the dissenting opinion by Chief Justice Roberts**

(Joining by Justices Scalia and Thomas): [U]nder our precedent, this is a fairly straightforward case. Solvay paid a competitor to respect its patent—conduct which did not exceed the scope of its patent. No one alleges that there was sham litigation, or that Solvay’s patent was obtained through fraud on the PTO. As in any settlement, Solvay gave its competitors something of value (money) and, in exchange, its competitors gave it something of value (dropping their legal claims). In doing so, they put an end to litigation that had been dragging on for three years. Ordinarily, we would think this a good thing.

**Taking no part in consideration:**

Justice Alito

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**Jurisdiction**

**Already, LLC v. Nike, Inc.**

**Docket No. 11-982**

**Affirmed: The Second Circuit**

Argued: November 7, 2012

Decided: January 9, 2013

Analysis: See ABA PREVIEW 86 Issue 2

**Overview:** Article III of the Constitution authorizes federal courts to hear “Cases” or “Controversies.” This means that a dispute must be live and actual from its inception.
and throughout the litigation. It also means that a claimant in federal court has to show that he or she suffered an injury resulting from the challenged behavior and that the requested judicial relief will redress it.

**Issue:** Does a covenant not to enforce a trademark against a competitor’s existing products and any future “colorable imitations” moot the competitor’s action to have the trademark declared invalid?

Yes. A case becomes moot—and therefore no longer a “Case” or “Controversy” for Article III purposes—“when the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome.” Nike met its burden to show that it would not resume its enforcement efforts against Already because the covenant prohibited Nike from filing suit or making any claim or demand; protected both Already and Already’s distributors and customers; and covered not just current or previous designs, but also colorable imitations.

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

Already’s only legally cognizable injury—the fact that Nike took steps to enforce its trademark—is now gone, and given the breadth of the covenant, cannot reasonably be expected to recur. There being no other basis on which to fine a live controversy, the case is clearly moot.

**Concurring:** Justice Kennedy (joined by Justices Thomas, Alito, and Sotomayor)

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**Jurisdiction**

**Gunn v. Minton**

**Docket No. 11-1118**

**Reversed and Remanded:**

The Supreme Court of Texas

Argued: January 16, 2013
Decided: February 20, 2013
Analysis: See ABA PREVIEW 165 Issue 4

**Overview:** 28 U.S.C. § 1338 states: “No State shall have jurisdiction over any claim for relief arising under any Act of Congress relating to patents.” In this case, a client filed a legal-malpractice claim in Texas state courts against his former attorney on the ground that the attorney mishandled the client’s federal patent infringement claim. The lower state courts ruled for summary judgment against the client, but the Texas Supreme Court ordered the case dismissed, holding that § 1338 deprives state courts of jurisdiction over the legal-malpractice claim. The Supreme Court was asked to decide whether § 1338 deprives state courts of jurisdiction to hear state-law legal-malpractice claims based on an underlying federal patent infringement case.

**Issue:** Do federal courts have exclusive jurisdiction under 28 U.S.C. § 1338 over a state legal-malpractice claim that is based on an underlying federal patent infringement case?

No. Section § 1338(a) does not deprive the state courts of subject matter jurisdiction over state legal-malpractice claims based on underlying federal patent-infringement cases.

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

In this case, although state courts must answer a question of patent law to resolve Minton’s legal malpractice claim, their answer will have no broader effects. It will not stand as binding precedent for any future patent claim; it will not even affect the validity of Minton’s patent. Accordingly, there is no “serious federal interest in claiming the advantages thought to be inherent in a federal forum.” Section 1338(a) does not deprive the state courts of subject matter jurisdiction.

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

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**Patent Law**

**Association for Molecular Pathology v. Myriad Genetics, Inc.**

**Docket No. 12-398**

**Affirmed in Part and Reversed in Part:**

The Federal Circuit

Argued: April 15, 2013
Decided: June 13, 2013
Analysis: See ABA PREVIEW 300 Issue 7

**Overview:** In this case, the Supreme Court was asked to consider whether patents held over isolated human genes and related diagnostic methods are valid subject matter under patent law. Myriad Genetics, Inc., held patents over two isolated genes and related diagnostic methods that, when a genetic mutation is present, indicate higher risk of breast and/or ovarian cancer. Plaintiffs contended that genetic material, even when isolated from the human body, is not patent-eligible material because such genetic material claims products of nature and therefore is not patentable subject matter under patent law.

**Issue:** Does a party’s appeal of a district court order returning a child to his or her country of habitual residence under The Hague Convention become moot when the child actually returns to his or her country of habitual residence?

No. The return of a child to a foreign country pursuant to a Convention return order does not render an appeal of that order moot.

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

The Hague Convention mandates the prompt return of children to their countries of habitual residence. But such return does not render this case moot; there is a live dispute between the parties over where their child will be raised, and there is a possibility of effectual relief for the prevailing parent.

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

They [plaintiffs] nevertheless argue that cDNA is not patent eligible because “[t]he nucleotide sequence of cDNA is dictated by nature, not by the lab technician.” That may be so, but the lab technician unquestionably creates something new when cDNA is made. cDNA retains the naturally occurring exons of DNA, but it is distinct from the DNA from which it is derived. As a result, cDNA is not a “product of nature” and is patent eligible under § 101, except insofar as very short series of DNA may have no intervening introns to remove when creating cDNA. In that situation, a short strand of cDNA may be distinguishable from natural DNA.

Concurring in part and concurring in judgment: Justice Scalia

Preemption

American Trucking Associations, Inc. v. Los Angeles, California

Docket No. 11-798

Reversed in Part and Remanded: The Ninth Circuit

Argued: April 16, 2013
Decided: June 13, 2013
Analysis: See ABA PREVIEW 304 Issue 7

Overview: The Port of Los Angeles (POLA, or the Port) requires all drayage service providers (those providers who transport goods over a short distance) to agree to certain provisions in a “concession agreement.” But the American Trucking Associations, Inc., a trucking industry trade group, argued that these requirements are inconsistent with the Federal Aviation Administration Authorization Act, and that a penalty for violating them runs afoul of Supreme Court preemption jurisprudence.

Issues: Does the FAAAA, which expressly prohibits states from enacting regulations that have “the force and effect of law,” preempt the requirements for drayage trucks under the Port’s concession agreement?

Yes. The FAAAA expressly preempts the concession agreement’s placard and parking requirements. Section 145011(c)(1) preempts a state “law, regulation, or other provision having the force and effect of law related to price, route, or service of any motor carrier … with respect to the transportation of property.” 49 U.S.C. § 14501(c)(1).

From the unanimous opinion by Justice Kagan:

That counts as action “having the force and effect of law” if anything does. The port here has not acted as a private party, contracting in a way that the owner of an ordinary commercial enterprise could mimic. Rather, it has forced terminal operators—and through them, trucking companies—to alter their conduct by implementing a criminal prohibition punishable by time in prison. In some cases, the question whether governmental action has the force of law may pose difficulties; the line between regulatory and proprietary conduct has soft edges. But this case takes us nowhere near those uncertain boundaries. Contractual commitments resulting not from ordinary bargaining (as in Wolens), but instead from the threat of criminal sanctions manifest the government qua government, performing its prototypical regulatory role.

Concurring: Justice Thomas

Preemption

Arizona v. Inter Tribal Council of Arizona, Inc.

Docket No. 12-71

Affirmed: The Ninth Circuit

Argued: March 18, 2013
Decided: June 17, 2013
Analysis: See ABA PREVIEW 254 Issue 6

Overview: Arizona Proposition 200 required applicants for voter registration in the state to provide certain evidence of U.S. citizenship. But this evidence was not required on the federal voter registration form, developed by the U.S. Election Assistance Commission under authority of the National
Voter Registration Act. (The federal form contains its own procedure for ensuring that an applicant for voter registration is a U.S. citizen). The question before the Court was whether Arizona can add its requirement consistent with the National Voter Registration Act.

**Issue:** May Arizona require applicants for voter registration to provide additional evidence of U.S. citizenship without conflicting with the requirements of the National Voter Registration Act?

No. Arizona’s evidence-of-citizenship requirement, as applied to Federal Form applicants, is preempted by the NVRA’s mandate that states “accept and use” the Federal Form.

**From the opinion by Justice Scalia** (joined by Chief Justice Roberts and Justices Ginsburg, Breyer, Sotomayor, and Kagan; and in which Justice Kennedy joined in part):

When Congress legislates with respect to the “Times, Places and Manner” of holding congressional elections, it necessarily displaces some element of a pre-existing legal regime erected by the States. Because the power the Elections Clause confers is none other than the power to pre-empt, the reasonable assumption is that the statutory text accurately communicates the scope of Congress’s pre-emptive intent. Moreover, the federalism concerns underlying the presumption in the Supremacy Clause context are somewhat weaker here. Unlike the States’ “historic police powers,” … the States’ role in regulating congressional elections—while weighty and worthy of respect—has always existed subject to the express qualification that it “terminates according to federal law.” *Buckman Co. v. Plaintiff’s Legal Comm.*, 531 U.S. 341 (2001). In sum, there is no compelling reason not to read Elections Clause legislation simply to mean what it says.

We conclude that the fairest reading of the statute is that a state-imposed requirement of evidence of citizenship not required by the Federal Form is “inconsistent with” the NVRA’s mandate that States “accept and use” the Federal Form. … If this reading prevails, the Elections Clause requires that Arizona’s rule give way.

**Concurring in part and concurring in judgment:** Justice Kennedy

**Dissenting:** Justice Thomas

**Dissenting:** Justice Alito

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**Preemption**

*Dan’s City Used Cars, Inc. v. Pelkey*

**Docket No. 12-52**

**Affirmed:** The Supreme Court of New Hampshire

**Argued:** March 20, 2013

**Decided:** May 13, 2013

**Analysis:** See ABA PREVIEW 247 Issue 6

**Overview:** Dan’s City towed respondent’s car from the parking lot of respondent’s apartment complex. When the vehicle had not been claimed in 30 days, Dan’s City, pursuant to state law, determined the car’s owner and sent him notice, which was returned as undeliverable. Respondent was hospitalized at that time. Respondent’s attorney notified Dan’s City that respondent wanted the car back; respondent did not attend the auction or pay any of the charges. Dan’s City eventually traded the car away. Respondent sued Dan’s City and the apartment owners under state law. Dan’s City countered that respondent’s claims were preempted by the Federal Aviation Administration Authorization Act of 1994 (FAAAA). The trial court agreed with Dan’s City, but the New Hampshire Supreme Court reversed, holding that consumer protection and negligence claims were not preempted.

**Issue:** Are respondent’s consumer fraud and negligence claims preempted because they relate to the services of petitioner with respect to transportation?

**No.** Section 14501(c)(1) does not preempt state-law claims stemming from the storage and disposal of a towed vehicle.

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

Pelkey’s claims escape preemption, we hold, because they are not “related to” the service of a motor carrier “with respect to the transportation of property.” FAAA § 14501(c)(1). Although § 14501(c)(1) otherwise tracks the ADA’s air-carrier preemption provision, … the FAAA formulation contains one conspicuous alteration—the addition of the words “with respect to the transportation of property.” That phrase “massively limits the scope of preemption” ordered by the FAAA…. As the New Hampshire Supreme Court correctly understood, for purposes of FAAA preemption, it is not sufficient that a state law relates to the “price, route, or service” of a motor carrier in any capacity; the law must also concern a motor carrier’s “transportation of property.”

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**Preemption**

*Hillman v. Maretta*

**Docket No. 11-1221**

**Affirmed:** The Supreme Court of Virginia

**Argued:** April 22, 2013

**Decided:** June 3, 2013

**Analysis:** See ABA PREVIEW 320 Issue 7

**Overview:** Warren Hillman named Judy Maretta, his wife at the time, as the beneficiary of his Federal Employees’ Group Life Insurance, or FEGLI, policy. Warren and Maretta divorced, and Warren married Jacqueline Hillman. When Warren died, Hillman filed for benefits under Warren’s policy. Hillman’s application was rejected, however, and Maretta received the benefits because the Federal Employees’ Group Life Insurance Act, or FEGLIA, specifies that a designated beneficiary receives benefits first. Hillman then sued Maretta for the benefits in Virginia state court.

**Issue:** Does FEGLIA, which specifies that a designated beneficiary receives benefits under a FEGLIA policy first, preempt Virginia law, which provides that an ex-spouse who is a designated beneficiary is liable to a surviving spouse for the full amount of the benefits?

**Yes.** Section D of the Virginia statute is preempted by FEGLIA because it conflicts with the purpose and objective of FEGLIA.

**From the opinion by Justice Sotomayor** (joined by Chief Justice Roberts and Justices Kennedy, Ginsburg, Breyer, and Kagan and Justice Scalia as to all but footnote 4):

Section D interferes with Congress’ scheme, because it directs that the proceeds actually “belong” to someone other than the named beneficiary by creating a cause of action for their recovery by a third party. … It makes no difference whether state law requires the transfer of the proceeds, as Section A does, or creates a cause of action, like Section D, that enables another person to receive proceeds upon filing an action in state court. In either case, state law displaces the beneficiary selected by the insured in accordance...
with FEGLIA and places someone else in her stead. As in Wisner, applicable state law “substitutes the widow” for the “beneficiary Congress direct shall receive the insurance money,” and thereby “frustrates the deliberate purpose of Congress” to ensure that a federal employee’s named beneficiary receives the proceeds.

Concurring in judgment: Justice Thomas

Concurring in judgment: Justice Alito

Preemption

Mutual Pharmaceutical Co., Inc. v. Bartlett

Docket No. 12-142
Reversed: The First Circuit

Argued: March 19, 2013
Decided: June 24, 2013
Analysis: See ABA PREVIEW 263 Issue 6

Overview: Karen L. Bartlett took generic sulindac for pain in her shoulder and developed a rare and severe reaction to the drug. She sued the manufacturer under state design-defect law and won compensatory damages. The manufacturer appealed the judgment, however, arguing that it conflicted with the manufacturer’s requirement under the Federal Food, Drug, and Cosmetic Act to produce a generic drug that is equivalent to its name-brand counterpart.

Issue: Does the Federal Food, Drug, and Cosmetic Act preempt a judgment against a generic drug manufacturer under a state-law design-defect claim?

Yes. State-law design-defect claims that turn on the adequacy of a drug’s warning are preempted by federal law under PLIVA, Inc. v. Mensing, 564 U.S. ___ (2011).

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

The Court of Appeals reasoned that Mutual could escape the impossibility of complying with both its federal- and state-law duties by “choos[ing] not to make [sulindac] at all.” We reject this “stop-selling” rationale as incompatible with our pre-emption jurisprudence. Our pre-emption cases presume that an actor seeking to satisfy both his federal- and state-law obligations is not required to cease acting altogether in order to avoid liability. Indeed, if the option of ceasing to act defeated a claim of impossibility, impossibility pre-emption would be “all but meaningless.”

From the dissenting opinion by Justice Sotomayor (joined by Justice Ginsburg): [T]he Court’s solemn affirmation that it merely discharges its duty to “follo[w] the law,” and gives effect to Congress’ policy judgment, rather than its own, is hard to accept. By once again expanding the scope of impossibility pre-emption, the Court turns Congress’ intent on its head and arrives at a holding that is irreconcilable with our precedents. As a result, the Court has left a seriously injured consumer without any remedy despite Congress’ explicit efforts to preserve state common-law liability.

Dissenting: Justice Breyer (joined by Justice Kagan)

Preemption

Sebelius v. Cloer

Docket No. 12-236
Affirmed: The Federal Circuit

Argued: March 19, 2013
Decided: May 20, 2013
Analysis: See ABA PREVIEW 228 Issue 6

Overview: Alleging her multiple sclerosis was brought on by a flawed vaccination, Dr. Melissa Cloer filed a petition under the National Childhood Vaccine Injury Act of 1986 (Vaccine Act). The legislation authorizes a no-fault system to adjudicate such claims and grants attorneys’ fees even for petitions denied, so long as a petition is filed in good faith and with a reasonable basis. A series of court decisions ultimately led to the dismissal of Cloer’s claims as untimely. Cloer then requested attorneys’ fees and costs for her unmeritorious claim, which the Federal Circuit granted.

Issue: May an injured person whose petition is dismissed as untimely under the National Vaccine Injury Compensation Program recover attorneys’ fees and costs from the government?

Yes. An untimely NVIA petition may qualify for an award of attorney’s fees if it is filed in good faith and there is a reasonable basis for its claim.

From the opinion by Justice Sotomayor (Joined by Chief Justice Roberts and Justices Kennedy, Ginsburg, Breyer, Alito, and Kagan and joined by Justices Scalia and Thomas to all but Part II-B):

Our “inquiry ceases [in a statutory construction case] if the statutory language is unambiguous and the statutory scheme is coherent and consistent.” Barnhart v. Sigmon Coal Co., 534 U.S. 438 (2002). The text of the statute is clear: like any other unsuccessful petition, an untimely petition brought in good faith and with a reasonable basis that is filed with—meaning delivered to and received by—the clerk of the Court of Federal Claims is eligible for an award of attorney’s fees.

Preemption

Wos v. E.M.A.

Docket No. 12-98
Affirmed: The Fourth Circuit

Argued: January 8, 2013
Decided: March 20, 2013
Analysis: See ABA PREVIEW 152 Issue 4

Overview: E.M.A. was born with profound and permanent disabilities. North Carolina’s Medicaid program paid for her medical expenses. She then sued her doctor and others, through her guardian ad litem and with her parents, for medical expenses and for other damages. She settled with the defendants in her malpractice case, but for an amount substantially less than her total damages claim. After settlement, North Carolina asserted a lien under state law for one-third of the total settlement as reimbursement for actual medical expenses already paid. E.M.A. brought this case to prevent North Carolina from asserting that lien.

Issue: Does the federal Medicaid Act, which requires states to recoup Medicaid payments for actual medical expenses from a Medicaid beneficiary’s settlement in a medical malpractice case, preempt a state law that requires the state to recoup as much as one-third of the total settlement, without an individualized determination that the one-third portion represents actual medical expenses paid?

Yes. The federal anti-lien provision preempts North Carolina’s irrebuttable statutory presumption that one-third of a tort recovery is attributable to medical expenses.

From the opinion by Justice Kennedy (joined by Justices Ginsburg, Breyer, Alito, Sotomayor, and Kagan):
The State thus has ample means available to allocate Medicaid beneficiaries’ tort recoveries in an efficient manner that complies with federal law. Indeed, if States are concerned that case-by-case judicial allocations will prove unwieldy, they may even be able to adopt ex ante administrative criteria for allocating medical and nonmedical expenses, provided that these criteria are backed by evidence suggesting that they are likely to yield reasonable results in the mine run of cases. What they cannot do is what North Carolina did here: adopt an arbitrary, one-size-fits-all allocation for all cases.

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

Privacy
Maracich v. Spears

Docket No. 12–25
Vacated and Remanded:
The Fourth Circuit

Argued: January 9, 2013
Decided: June 17, 2013
Analysis: See ABA PREVIEW 168 Issue 4

Overview: The Driver’s Privacy Protection Act (DPPA) prohibits individuals from obtaining and using personal information from state DMV records unless the use of the information falls under one of 14 permissible use exceptions. The Court was asked to determine whether lawyers who obtained tens of thousands of records to solicit clients for upcoming litigation made permissible “use in connection with” litigation. The Court was also asked to determine whether the lawyers are nonetheless liable because the act’s bulk solicitation permissible use requires the subjects’ express consent, which the lawyers did not obtain.

Issue: Do plaintiffs’ lawyers make a permissible use under subsection (b)(4) of the DPPA (use in connection with litigation) when they obtain and use tens of thousands of drivers’ records for the purpose of soliciting their participation in a group action under state law against a number of car dealerships?

No. An attorney’s solicitation of clients is not a permissible purpose covered by the (b)(4) litigation exception.

From the opinion by Justice Kennedy (joined by Chief Justice Roberts and Justices Thomas, Breyer, and Alito): Limiting the reach of (b)(4) to foreclose solicitation of clients also respects the statutory design of the DPPA. The use of protected personal information for the purpose of bulk solicitation is addressed explicitly by the text of (b)(12). Congress was aware that personal information from motor vehicle records could be used for solicitation, and it permitted it in circumstances that it defined, with the specific safeguard of consent by the person contacted. So the absence of the term “solicitation” in (b)(4) is telling. Subsection (b)(12) allows solicitation only of those persons who have given express consent to have their names and addresses disclosed for this purpose. If (b)(4) were to be interpreted to allow solicitation without consent, then the structure of the Act, and the purpose of (b)(12), would be compromised to a serious degree.

From the dissenting opinion by Justice Ginsburg (joined by Justices Scalia, Sotomayor, and Kagan): The courts below determined that the lawyers’ requests for the information and their use of it fell squarely within the litigation exception to the Driver’s Privacy Protection Act of 1994 (DPPA), 18 U.S.C. § 2721(b)(4), and that the Act’s limitation on solicitation, § 2721(b)(12), did not override the litigation exception. I would affirm that sound judgment. As the Fourth Circuit explained, respondents “did what any good lawyer would have done.” This Court’s holding, exposing respondents not only to astronomical liquidated damages, § 2724(b)(1), but to criminal fines as well, § 2723(a), is scarcely what Congress ordered in enacting the DPPA.

Privileges and Immunities Clause and Dormant Commerce Clause
McBurney v. Young

Docket No. 12–17
Affirmed: The Fourth Circuit

Argued: February 20, 2013
Decided: April 29, 2013
Analysis: See ABA PREVIEW 211 Issue 5

Overview: Most states allow anyone to request public records. A few states—Virginia, Arkansas, and Tennessee—have “citizens-only” provisions. In these states only citizens of those states can obtain public records. Two individuals challenged Virginia’s law, contending it violated both the Privileges and Immunities Clause and the Dormant Commerce Clause.

Issue: Under the Privileges and Immunities Clause of Article IV and the Dormant Commerce Clause of the United States Constitution, may a state preclude citizens of other states from enjoying the same right of access to public records that the state affords its own citizens?

Yes. Virginia’s FOIA does not violate the Privileges and Immunities Clause, which protects only those privileges and immunities that are “fundamental,” nor does it violate the Dormant Commerce Clause since the FOIA neither prohibits access to an interstate market nor imposes burdensome regulation on the market.

From the unanimous opinion by Justice Alito: Here, by contrast, Virginia neither prohibits access to an interstate market nor imposes burdensome regulation on that market. Rather, it merely creates and provides to its own citizens copies—which would not otherwise exist—of state records. As discussed above, the express purpose of Virginia’s FOIA law is to “ensur[e] the people of the Commonwealth ready access to public records in the custody of a public body or its officers and employees, and free entry to meeting of public bodies wherein the business of the people is being conducted.”

Concurring: Justice Thomas

Sentencing
Alleyne v. United States

Docket No. 11–9335
Vacated and Remanded:
The Fourth Circuit

Argued: January 14, 2013
Decided: June 17, 2013
Analysis: See ABA PREVIEW 140 Issue 4

Overview: After a federal trial court jury convicted Allen Ryan Alleyne of a 2009 robbery, the judge imposed consecutive sentences of 46 months for the robbery and seven years for his accomplice’s brandishing of a weapon. The judge’s finding by a
preponderance of the evidence that a gun had been brandished raised the minimum possible sentence from five years to seven. In a series of cases since 2000, the Supreme Court has held that the Sixth Amendment right to a jury trial requires that a jury determine beyond a reasonable doubt any fact increasing the length of sentences imposed. In *Harris v. United States*, 536 U.S. 545 (2002), the Court held that sentencing factors that increase the minimum sentence of a mandatory term of imprisonment could constitutionally be left to a judge applying the lower preponderance of the evidence standard. The Supreme Court was asked here to determine whether it should overrule *Harris* and require such decisions to be made by a jury utilizing the beyond a reasonable doubt standard.

**Issue:** When a jury convicts a defendant of a crime in which one of the participants had a weapon, can factual determinations affecting the length of a consecutive mandatory minimum sentence imposed on the defendant regarding the weapons charge be made by the judge?

No. Because mandatory minimum sentences increase the penalty for a crime, any fact that increases the mandatory minimum is an “element” that must be submitted to the jury; accordingly, *Harris* is overruled.

**From the opinion by Justice Thomas**

(as the opinion of the Court with respect to Parts I, III-B, III-C, and IV, joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan; and an opinion with respect to Parts II and III-A joined by Justices Ginsburg, Sotomayor, and Kagan):

It is impossible to dispute that facts increasing the legally prescribed floor aggravate the punishment. . . . Elevating the low-end of a sentencing range heightens the loss of liberty associated with the crime: the defendant’s “expected punishment has increased as a result of the narrowed range” and “the prosecution is empowered, by invoking the mandatory minimum, to require the judge to impose a higher punishment than he might wish.” . . . Why else would Congress link an increased mandatory minimum to a particular aggravating fact other than to heighten the consequences for that behavior? . . . This reality demonstrates that the core crime and the fact triggering the mandatory minimum sentence together constitute a new, aggravated crime, each element of which must be submitted to the jury.

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

**Concurring in part and concurring in judgment:** Justice Breyer

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

**Dissenting:** Justice Alito

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**Standing**

*Clapper v. Amnesty International USA*

Docket No. 11-1025

Reversed and Remanded: The Second Circuit

Argued: October 29, 2012
Decided: February 26, 2013
Analysis: See ABA PREVIEW 82 Issue 2

Overview: The FISA Amendments Act (FAA) grants the government new and enhanced authority to conduct surveillance of international communications. But in order for plaintiffs to sue to stop the government from conducting surveillance under FAA, they must first establish standing. Standing requires plaintiffs to allege that they suffered an injury in fact, that the defendant’s behavior caused the injury, and that judicial relief will redress their injury.

**Issue:** Did these plaintiffs, a group of attorneys, journalists, and organizations, establish standing to sue the federal government to stop it from conducting surveillance under the FAA?

No. Because the plaintiffs do not face a threat of certainly impending interception under § 1881a, their costs are simply the product of their fear of surveillance, which is insufficient to create standing.

**From the opinion by Justice Alito**

(joined by Chief Justice Roberts and Justices Scalia, Kennedy, Thomas): Respondents’ contention that they have standing because they incurred certain costs as a reasonable reaction to a risk of harm is unavailing—because the harm respondents seek to avoid is not certainly impending. In other words, respondents cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending.

**From the dissenting opinion by Justice Breyer**

(joined by Justices Ginsburg, Sotomayor, and Kagan): The majority more plausibly says that the plaintiffs have failed to show that the
threatened harm is “certainly impending.” But, as the majority appears to concede, *certainty* is not and never has been, the touchstone for standing. The future is inherently uncertain. Yet federal courts frequently entertain actions for injunctions and for declaratory relief aimed at preventing future activities that are reasonably likely or highly likely, but not absolutely certain, to take place. And that degree of certainty is all that is needed to support standing here.

**Takings**

*Arkansas Game & Fish Commission v. United States*

**Docket No. 11-597**

Reversed and Remanded:

The Federal Circuit

Argued: October 3, 2012
Decided: December 4, 2012
Analysis: See ABA PREVIEW 30 Issue 1

**Overview:** The Arkansas Game & Fish Commission sued the federal government after the Army Corps of Engineers approved a series of deviations from its “normal regulation” release rates of water from the Clearwater Dam. The deviations caused flooding of the Commission’s property over six consecutive years and damaged and destroyed the Commission’s timber and wildlife. The Commission asked the Court to determine whether the government’s actions created a taking within the meaning of the Fifth Amendment’s Takings Clause.

**Issue:** Are the Army Corps of Engineer’s deviations from “normal regulation” release rates of water from the Clearwater Dam exempt from Fifth Amendment Takings Clause analysis, where the temporary deviations caused flooding over six consecutive years and damaged and destroyed timber and wildlife?

**No.** Regardless of their length in duration, government-induced temporary floodings are not automatically exempted from the Takings Clause.

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

Tellingly, the Government qualifies its defense of the Federal Circuit’s exclusion of flood invasions from temporary takings analysis. It sensibly acknowledges that a taking might be found where there is a “sufficiently prolonged series of nominally temporary but substantively identical deviations.” This concession is in some tension with the categorical rule adopted by the Court of Appeals. Indeed, once it is recognized that at least some repeated nonpermanent flooding can amount to a taking of property, the question presented to us has been essentially answered. Flooding cases, like other takings cases, should be assessed with reference to the “particular circumstances of each case,” and not by resorting to blanket exclusionary rules.

**Takings**

*Horne v. Department of Agriculture*

**Docket No. 12-123**

Reversed and Remanded:

The Ninth Circuit

Argued: March 20, 2013
Decided: June 10, 2013
Analysis: See ABA PREVIEW 250 Issue 6

**Overview:** Horne and others were raisin farmers or “producers” subject to the Marketing Agreement Act, a New Deal program that allowed producers of agricultural products to petition to organize to reduce production, limit allocations to “handlers” (generally one who packs, ships, or processes those products), or to set aside some of those products, all in an effort to raise product prices. Dismayed by the system, Horne and others set up their own scheme by which they claimed not to be handlers, the only class regulated, but sought to sell their product and raisins grown by other producers directly to consumers. United States Department of Agriculture (USDA) brought civil proceedings. An administrative law judge upheld a civil payment and fine order, as did the Ninth Circuit. The USDA contended in response to a Petition for Rehearing that any monetary taking claim in this case was exclusively subject to the jurisdiction of the Court of Claims; the Ninth Circuit again agreed. The Supreme Court was asked to decide whether the funds involved in the USDA order are subject to the Fifth Amendment’s Taking Clause and, if so, whether the Horne claim is “ripe.”

**Issue:** Did the Ninth Circuit err in holding, contrary to a decision of the Federal Circuit, that it lacked jurisdiction over petitioners’ takings defense, even though petitioners, as “handlers” of raisins under the Raisin Marketing Order, are statutorily required under 7 U.S.C. § 608c(15) to exhaust all claims and defenses in administrative proceedings before the United States Department of Agriculture, with exclusive jurisdiction for review in federal district court?

**Yes.** The Ninth Circuit has jurisdiction to decide petitioners’ taking claim.

**From the unanimous opinion by Justice Thomas:** In the case of an administrative enforcement proceeding, when a party raises a constitutional defense to an assessed fine, it would make little sense to require the party to pay the fine in one proceeding and then turn around and sue for recovery of that same money in another proceeding.... We see no indication that Congress intended this result for handlers subject to enforcement proceedings under the AMAA. Petitioners were therefore free to raise their takings-based defense before the USDA. And, because § 608c(14)(B) allows a handler to seek judicial review of an adverse order, the district court and Ninth Circuit were not precluded from reviewing our petitioners’ constitutional challenge.

**Takings**

*Koontz v. St. Johns River Water Management District*

**Docket No. 11-1447**

Reversed and Remanded:

The Supreme Court of Florida

Argued: January 15, 2013
Decided: June 25, 2013
Analysis: See ABA PREVIEW 176 Issue 4

**Overview:** Coy A. Koontz Sr. owned property in a state-designated wetlands area and applied to the St. Johns River Water Management District (District) for permits to develop his land. The District suggested that Koontz agree to improve certain off-site property, also within the wetlands, in order to offset or mitigate the adverse impacts of his own proposed development. Koontz refused, and the District denied his application. Koontz sued, arguing that the District’s
suggested conditions and its denial of the permit violated the Takings Clause.

**Issue: Did the state supreme court err when it held that such a governmental request was not appropriately reviewed under the traditional Takings Clause analysis?**

**Yes.** A government's demand for property from a land-use permit applicant must satisfy the Nollan/Dolan Takings Clause analysis even if the government denies the permit or if the demand is for money.

**From the dissenting opinion by Justice Alito** (joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas):
The Florida Supreme Court puzzled over how the government’s demand for property can violate the Takings Clause even though “no property of any kind was ever taken,” but the unconstitutional conditions doctrine provides a ready answer. Extorti onate demands for property in the land-use permitting context run afoot of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation. As in other unconstitutional conditions cases in which someone refuses to cede a constitutional right in the face of coercive pressure, the impermissible denial of a governmental benefit is a constitutionally cognizable injury.

**From the dissenting opinion by Justice Kagan** (joined by Justices Ginsburg, Breyer, and Sotomayor):
Our core disagreement concerns the second question the Court addresses. The majority extends Nollan and Dolan to cases in which the government conditions a permit not on the transfer of real property, but instead on the payment or expenditure of money. That runs roughshod over Eastern Enterprises v. Apfel, 524 U.S. 498 (1998), which held that the government may impose ordinary financial obligations without triggering the Takings Clause’s protections. The boundaries of the majority’s new rule are uncertain. But it threatens to subject a vast array of land-use regulations, applied daily in States and localities throughout the country, to heightened constitutional scrutiny. I would not embark on so unwise an adventure, and would affirm the Florida Supreme Court’s decision.

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**Tax Law**  
**PPL Corporation v. Commissioner of Internal Revenue**  
**Docket No. 12-43**  
**Reversed: The Third Circuit**

Argued: February 20, 2013  
Decided: Mary 20, 2013  
Analysis: See ABA PREVIEW 201 Issue 5  

**Overview:** The United States Supreme Court was asked to decide whether the United Kingdom Windfall Tax qualifies for a United States foreign income tax credit under 26 U.S.C. § 901 (§ 901). PPL Corporation (PPL) argued that the Windfall Tax is a tax on income and that PPL was therefore entitled to a foreign tax credit that would reduce its federal income tax liability by almost $40 million (including interest). The Internal Revenue Service (the IRS) argued that the Windfall Tax is a tax on value and, accordingly, that PPL was not entitled to a foreign tax credit.

**Issue:** Is the United Kingdom Windfall Tax an income tax that qualifies for a foreign income tax credit under § 901?

**Yes.** The United Kingdom Windfall Tax is creditable under § 901.

**From the unanimous opinion by Justice Thomas:**
Giving further form to these principles, Treasury Regulation § 1.901-2(a)(3)(i) explains that a foreign tax’s pre-dominant character is that of a U.S. income tax “[i]f … the foreign tax is likely to reach net gain in the normal circumstances in which it applies.” The regulation then sets forth three tests for assessing whether a foreign tax reaches net gain. A tax does so if, “judged on the basis of its predominant character, [it] satisfies each of the realization, gross receipts, and net income requirements set forth in paragraphs (b)(2), (b)(3) and (b)(4), respectively, of this section.” § 1.901-2(b)(1). The tests indicate that the net gain (also referred to as net income) consists of realized gross receipts reduced by significant costs and expenses attributable to such gross receipts. A foreign tax that reaches net income, or profits, is creditable.

**Concurring:** Justice Sotomayor

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**Voting Rights Act**  
**Shelby County v. Holder**  
**Docket No. 12-96**  
**Reversed: The District of Columbia Circuit**

Argued: February 27, 2013  
Decided: June 25, 2013  
Analysis: See ABA PREVIEW 219 Issue 5

**Overview:** Congress reauthorized §§ 5 and 4(b) of the Voting Rights Act in 2006. Section 5 requires certain covered jurisdictions, defined under § 4(b), to obtain preclearance from the United States attorney general or the United States District Court for the District of Columbia before making any changes to their electoral processes. Shelby County, Alabama, a covered jurisdiction, challenged the reauthorization, arguing that it exceeded congressional authority.

**Issue:** Did Congress’s decision in 2006 to reauthorize § 5 of the Voting Rights Act (VRA) of 1965, under the preexisting coverage formula of § 4(b) of the VRA, exceed its authority under the Fourteenth and Fifteenth Amendments and thus violate the Tenth Amendment and Article IV of the United States Constitution?

**Yes.** Section 4 of the Voting Rights Act is unconstitutional and its formula can no longer be used as a basis for subjecting jurisdictions to § 5 preclearance.

**From the opinion by Chief Justice Roberts** (joined by Justices Scalia, Kennedy, Thomas, and Alito):
In 1965, the States could be divided into two groups: those with a recent history of voter discrimination and those without. Congress based its coverage formula on that distinction. Today the Nation is no longer divided along those lines, yet the Voting Rights Act continues to treat it as if it were.

**From the dissenting opinion by Justice Ginsburg** (joined by Justices Breyer, Sotomayor, and Kagan):
Recognizing that large progress has been made, Congress determined, based on a voluminous record, that the scourge of discrimination was not yet extirpated. The question this case presents is who decides whether, as currently operative, § 5 remains
With overwhelming support in both Houses, Congress concluded that, for two prime reasons, § 5 should continue in force, unabated. First, continuance would facilitate completion of the impressive gains thus far made; and second, continuance would guard against backsliding. Those assessments were well within Congress’ province to make and should elicit this Court’s unstinting approbation.

Concurring: Justice Thomas

Water Law
Tarrant Regional Water District v. Herrmann

Docket No. 11-889
Affirmed: The Tenth Circuit

Argued: April 23, 2013
Decided: June 13, 2013
Analysis: See ABA PREVIEW 296 Issue 7

Overview: Texas has rights to Red River water pursuant to the Red River Compact, approved by all basin states and Congress. Texas wanted to divert a portion of its allocation in Oklahoma, which passed a statute banning the export of water. This case gave the Court the opportunity to decide (1) whether Texas’s compact rights included the right to divert water in Oklahoma, and (2) whether Oklahoma’s effort to prohibit that diversion violated the Dormant Commerce Clause.

Issue: Does a congressionally approved multistate compact designed to ensure a share of water to each of the contracting states preempt state laws that obstruct co-compacting states from accessing their share of the allocated water from within the boundaries of another co-compacting state?

No. The Compact does not preempt the Oklahoma water statutes; further, those statutes do not run afoul of the Commerce Clause.

From the unanimous opinion by Justice Sotomayor:
If more than 25 percent of subbasin 5’s water is located in Oklahoma, that water is not “unallocated”; rather, it is allocated to Oklahoma unless and until another State calls for an accounting and Oklahoma is asked to refrain from utilizing more than its entitled share. The Oklahoma water statutes cannot discriminate against interstate commerce with respect to unallocated waters because the Compact leaves no water unallocated. Tarrant’s Commerce Clause argument founders on this point.

Water Pollution Control
Los Angeles County Flood Control Dist. v. Natural Resources Defense Council, Inc.

Docket No. 11-460
Reversed and Remanded: The Ninth Circuit

Argued: December 4, 2012
Decided: January 8, 2013
Analysis: See ABA PREVIEW 129 Issue 3

Overview: The Court was asked to review a ruling of the Ninth Circuit that found the Los Angeles County Flood Control District in violation of its permit under the Clean Water Act for its Municipal Separate Storm Sewer Systems (MS4) discharges into the Los Angeles and San Gabriel Rivers. Segments of those rivers that constitute a part of the MS4 have been paved to improve flood control, and the pollution levels measured as the water moves through those segments and other monitoring locations exceed the amounts allowed by the District’s permit. The District claims that pollution is not a discharge of the District, but is instead the mere passage of water from one part of the river to another.

Issue: When water flows from one portion of a river that is navigable water of the United States, through a concrete channel or other engineered improvement in the river constructed for flood and stormwater control as part of a municipal separate storm sewer system, into a lower portion of the same river, can there be a “discharge” from an “outfall” under the Clean Water Act, notwithstanding this Court’s holding in South Florida Water Management District v. Miccosukee Tribe of Indians, 541 U.S. 95, 105 (2004), that transfer of water within a single body of water cannot constitute a “discharge” for purposes of the Act?

No. The water flow from an improved portion of a navigable waterway into an unimproved portion of the same waterway does not qualify as a “discharge of a pollutant” under the Clean Water Act.

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

[We] held in Miccosukee that the transfer of polluted water between “two parts of the same water body” does not constitute a discharge of pollutants under the CWA. We derived that determination from the CWA’s text, which defines the term “discharge of a pollutant” to mean “any addition of any pollutant to navigable waters from any point source.” 33 U. S. C. § 1362(12) (emphasis added). Under a common understanding of the meaning of the word “add,” no pollutants are “added” to a water body when water is merely transferred between different portions of that water body.

Concurring in judgment: Justice Alito
Contributors to This Issue:

The Court’s 2012 Class Act
Analyzed by Linda S. Mullenix, the Morris & Rita Atlas Chair in Advocacy at the University of Texas School of Law.

Marriage Equality
Recapped by Erwin Chemerinsky of the University of California, Irvine School of Law.

The Fourth Amendment Cases
Presented by Brooks Holland of Gonzaga University School of Law.

The Roberts Court and Racial Equality
Analyzed by Steven D. Schwinn, an associate professor at The John Marshall Law School.

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