

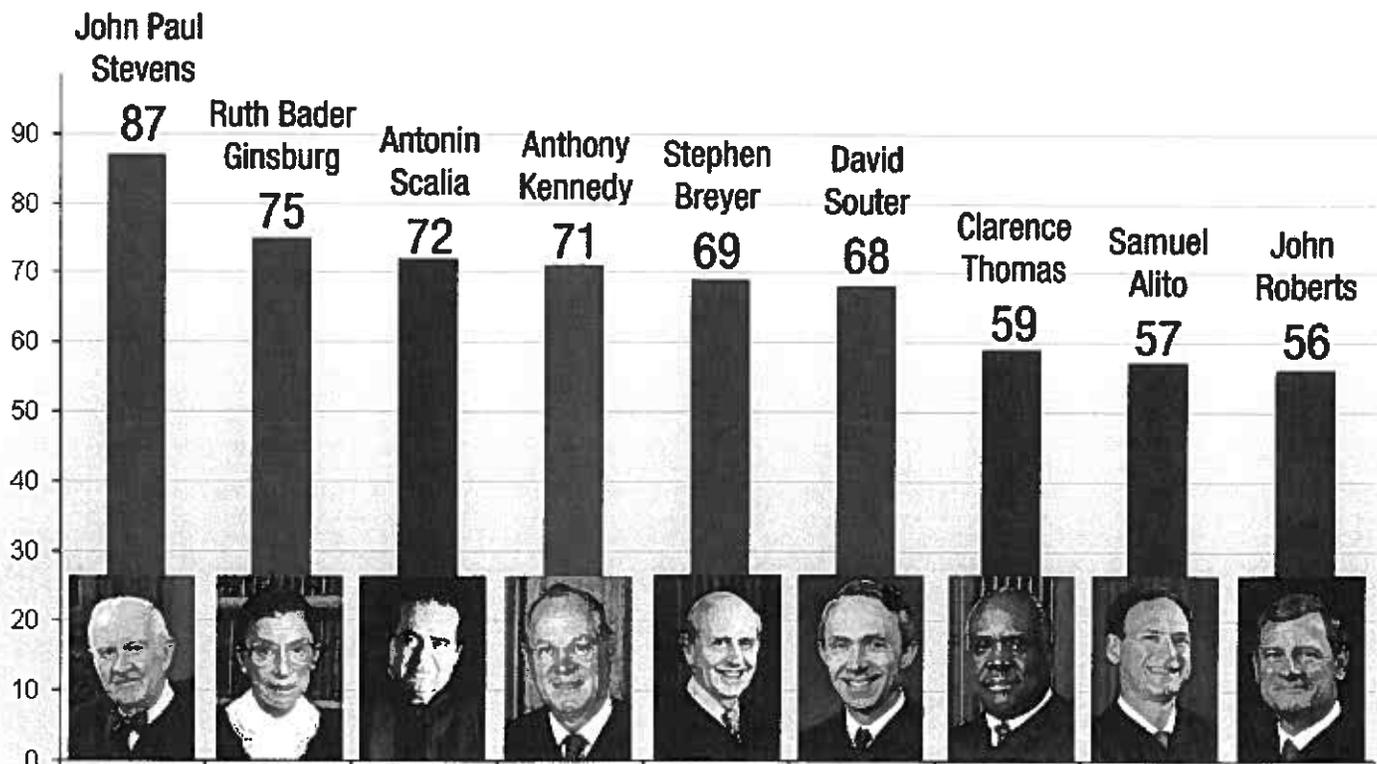
OPENINGS ON THE COURT?

MANY ANALYSTS PREDICT THAT THAT NEXT PRESIDENT COULD NOMINATE THREE OR MORE JUSTICES. THAT'S NOT surprising if you look at the ages of the current justices. And what's particularly noteworthy is that the progressive Justices are also the older ones, which is why many commentators predict that the next openings on the Court will come from the moderate wing of the Court.

We'll need to make sure that these Justices aren't replaced with jurists in the mold of Alito and Roberts. Instead we need Justices who are committed to faithfulness to the Constitution – its values, its principles, and its history.

New Justices should have:

- » a record of commitment to individual rights
- » a dedication to the Constitution's promise of equal justice for all.
- » an understanding of the importance of the Court in protecting the less powerful against corporate and government interests
- » commitment to keeping the doors of justice open to all.



5. DIVERSITY

THE COURT STRUCK DOWN VOLUNTARY SCHOOL DESEGREGATION PLANS USED IN SEATTLE AND LOUISVILLE. Now students are more likely to attend schools where everyone looks like they do.

4. CONSUMER PROTECTIONS

CHARLES RIEGEL NEEDED TO BE PUT ON LIFE SUPPORT AFTER A CATHETER BURST IN HIS BODY DURING angioplasty. Don't worry, though — the company that made the catheter didn't have to pay a dime after the Supreme Court ruled that, since the device had received FDA approval, the company could not be sued for damages under state law.

3. LGBT RIGHTS

IN 2003, THE SUPREME COURT RULED IN LAWRENCE V. TEXAS THAT STATES COULDN'T MAKE CRIMINALS OUT of people for being gay or lesbian. One more right wing Justice on the Supreme Court could reverse that progress, making same-sex couples outlaws in a dozen states.

2. PRIVACY

IMAGINE: YOU'RE A BREAST CANCER SURVIVOR. ONE DAY DURING AN EXAMINATION THE DOCTOR BRINGS A DRUG company sales rep into the room, doesn't tell you who he is, and lets him observe your exam (while you're undressed!). You sue. The judge tells you it's your fault, and throws out the case. What happens? In the Bush administration, that judge gets nominated for a promotion.

AND THE NUMBER ONE REASON FOR PROGRESSIVES
TO UNITE AND SAVE THE COURT IN 2008:

1. GEORGE W. BUSH

IN 2000, THE SUPREME COURT STOPPED THE VOTE RE-COUNT IN FLORIDA AND HANDED THE PRESIDENCY election to George W. Bush. Since then, President Bush has moved the courts further to the right with two Supreme Court justices and hundreds of lower federal court judges. This election will determine whether our courts will start to be repaired— or if they'll continue their dangerous decline.

You can learn more about the Supreme Court and how the 2008 election can affect your rights and liberties here at PFAW.org.



TOP TEN REASONS WHY THE COURT MATTERS

THIS FALL, VOTERS WILL DECIDE THE FUTURE OF THE SUPREME COURT FOR MANY YEARS TO COME. THE NEXT appointments to the court will almost certainly be made by the president this November. And his or her nominees for the bench will be confirmed by a Senate with new members elected this fall.

Here are the top 10 reasons to remember the Supreme Court when you cast a ballot on Election Day

10. RELIGIOUS FREEDOM

THE BUSH ADMINISTRATION HAS USED ITS FAITH-BASED INITIATIVE TO SUPPORT its favored preachers. Bad enough, but how would you feel if the administration spent that money to hold a series of “Christian nation” rallies? Not much you could do, now that the Supreme Court with Bush’s new right-wing Justices has limited taxpayers’ ability to challenge violations of the Establishment Clause.

9. FREE SPEECH

WITH THE HELP OF BUSH’S NEW JUSTICES, THE SUPREME COURT RULED IN favor of school officials who punished a student for holding a banner at a school-sponsored event that expressed a message administrators didn’t agree with (“Bong hits 4 Jesus”).

8. FAIR PAY

LILLY LEDBETTER WORKED JUST AS HARD AS ANY MAN IN HER FACTORY, BUT GOT PAID LESS. SHE PROVED IT IN A court of law, but the company appealed, and the Supreme Court slammed the courthouse door in her face, declaring that Lilly had lost the right to sue because she hadn’t complained about the discrimination soon enough. Never mind that the Court’s ruling would have required her to sue before she knew about the unfair pay disparity.

7. CLEAN WATER

IN 2006, THE SUPREME COURT CUT THE REACH OF CLEAN WATER ACT PROTECTIONS. BUT IT COULD BE worse: one more right-wing Justice, and the Court would have eliminated protections for more than half of the nation’s rivers and streams!

6. CHOICE

FOR THE FIRST TIME IN 35 YEARS, THE SUPREME COURT SAID THAT POLITICIANS COULD OUTLAW A SPECIFIC abortion procedure — with no exception for the health of the woman. And with the vote of one more Justice, the Court is poised to overturn *Roe v. Wade*.

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THE HUMAN TOLL

How Individual Americans Have Fared
at the Hands of Bush Judges

Introduction

As President Bush nears the end of his second term with record low approval ratings, the American public has rendered a clear verdict: the policies of the Bush administration have largely failed at home and abroad. Yet by one important measure that pollsters and pundits often ignore, Bush has been an over-achiever: during his administration, 314 judges have been confirmed to lifetime appointments to the federal bench, including the two Bush nominees who now sit on the United States Supreme Court, Chief Justice John Roberts and Associate Justice Samuel Alito. The impact that President Bush has had on the federal courts may be his most enduring legacy, at least domestically. After leaders to come have figured out what to do about \$4.00 gasoline, \$4 trillion in debt, a battered economy and a war that has damaged our standing in the world, Bush's judges will still be safely ensconced on the federal bench, and on the highest court in the land.

What has that meant for individual Americans? And what will that mean in the future?

People For the American Way Foundation has documented in a series of reports the damage that Bush-nominated judges have done to the Constitution – and to Americans' ability to seek and expect justice in the federal courts when challenging unlawful treatment by corporations, government agencies, and other powerful entities. This report looks at a selection of cases with an eye to the human cost of a federal judiciary dominated by an ideology that is all too willing to sacrifice individual rights and legal protections.

Rhetoric vs. Real Harm

Our reports and studies done by others make clear the emptiness of the jargon used by the Bush Administration, its allies in Congress and right-wing legal groups, who say they favor judges who “will interpret the law, not make it” and won’t “legislate from the bench.” In fact, in many cases judges nominated by President Bush have written or joined opinions seeking to limit congressional authority and the protection of individual rights.

Bush-nominated judges are also far too willing to close the courthouse doors to ordinary Americans, so much so that Yale Law School Professor Judith Resnik labeled the Supreme Court's 2006–2007 term “the year they closed the courts.” Bush-nominated appeals court judges have written or joined opinions that have sought to:

- prevent a female worker from attempting to prove that significant disparities between her salary and the salaries of male employees violated the Equal Pay Act. *Ambrose v. Summit Polymers, Inc.*, 6th Cir. (Judge Jeffrey Sutton)
- deny the family of a murdered 8-year-old girl the opportunity to try to prove in court that local officials had helped put her in danger. *Bright v. Westmoreland County*, 3d Cir. (Judge D. Brooks Smith)
- stop an African American man from pursuing a claim that his constitutional rights had been violated by state troopers engaged in racial profiling. *Gibson v. Superintendent*, 3d Cir. (Judge Van Franklin Van Antwerpen)

- overturn a lower court decision that a female sheriff department employee who had been sexually harassed by the sheriff (who, among other things, called her vagina a "snapper" and stroked "his mustache while telling [her] he was clearing off her seat") could pursue a claim that she had effectively been forced to resign. *Wright v. Rolette County*, 8th Cir. (Judge Michael Melloy)
- prevent an African American employee fired from a Wal-Mart store, who had been called a "lawn jockey" by his supervisor, from trying to prove he had suffered illegal racial discrimination and harassment. *Canady v. Wal-Mart Stores, Inc.*, 8th Cir. (Judge William Riley)
- stop a Wal-Mart employee at another store from even presenting to a jury her claim that she had been fired because of illegal pregnancy-based employment discrimination. *Quick v. Wal-Mart Stores, Inc.*, 8th Cir. (Judge William Riley)

Trouble at the Top

The damage is most visible and consequential at the Supreme Court, where Chief Justice Roberts and Justice Alito have joined Justices Antonin Scalia and Clarence Thomas to form a right-wing voting bloc. When joined, as they often have been, by the more moderate conservative Justice Anthony Kennedy and occasionally other justices, the result has been a series of destructive rulings.

During the last two full terms with Roberts and Alito on the bench, the Court:

- severely limited the ability of victims of pay discrimination to obtain compensation for the discrimination (*Ledbetter v. Goodyear Tire and Rubber Co.*)
- gave a green light to Indiana's voter ID law, the most restrictive in the nation, which has already kept eligible voters from being able to exercise their right to vote (*Crawford v. Marion County Election Bd.*)
- overturned two of its own precedents in order to hold that a person who filed his appeal within the time given by a federal district court judge was out of luck — with no legal recourse — when it turned out that the judge had given him the wrong date (*Bowles v. Russell*)
- chipped away at the constitutional protection for women's reproductive freedom by upholding a federal ban on a vaguely defined abortion procedure, despite the absence of an exception in the law to protect a woman's health (*Gonzales v. Carhart*)
- limited the ability of federal taxpayers to challenge government expenditures that violate the Establishment Clause, undermining the separation of church and state (*Hein v. Freedom From Religion Foundation*)

"Repealing the 20th Century"

Efforts to push the judiciary to the right did not begin with the Bush Administration. The successful campaigns to win confirmation for John Roberts and Samuel Alito were a continuation, and in some ways a culmination, of a decades-long effort by the far-right that had already begun to bear fruit. In a December 12, 2007 article in *The American Prospect*, attorney Simon Lazarus documented that "the conservative-activist threat to judicially repeal the economic protections that Congress and state legislatures have enacted since the New Deal" made significant strides under the Rehnquist Court, leaving Americans with fewer legal protections, and fewer legal remedies. Thanks to the second President Bush, Americans now have a Roberts Court — and a federal judiciary — that is furthering this destructive work.

The Future of the Judiciary: a Threat to Americans' Rights, Safety, and Welfare?

The next U.S. president will likely have the opportunity to nominate two or three Supreme Court justices. If those new justices share the judicial ideology of President Bush's nominees, Americans will see their protections by the federal courts deteriorate even further. That's especially true if, as seems likely, at least some of those nominees replace more moderate Supreme Court justices who have resisted the Court's damaging ideological shift.

The hundreds of other lower federal court judges likely to be nominated by the next president will also have an immense impact on individual Americans, as this report and other studies of the federal judiciary make clear. Because the Supreme Court agrees to hear only a tiny fraction of cases, the appeals courts are typically the courts of last resort for most Americans. Of the 13 federal circuit courts of appeals, 10 now have a majority of judges who were nominated by Republican presidents, in some cases, a super-majority. Two are evenly divided, and only one has a majority of judges nominated by Democratic presidents.

We urge all Americans to consider the extraordinary power and impact that the next president's ability to nominate hundreds of federal judges, including possibly two, three or more Supreme Court justices, could have on their rights and their lives.

Note:

All the judges whose names appear in boldface below were nominated to the federal bench by President George W. Bush and confirmed by the United States Senate.

For more information, see People For the American Way Foundation's reports, including "Confirmed Judges, Confirmed Fears" and annual End-of-Term reports, at www.PFAW.org.

Turning Back the Clock on Equality and Justice for All

Judges nominated by President Bush have consistently sought to reverse the progress of the last half-century in combating discrimination. Time and again, they have voted to dismiss cases before trial and refused to allow victims of alleged discrimination to have their day in court, placing stringent burdens of proof on these plaintiffs, or closing the courthouse doors altogether. In cases ranging from gender discrimination and sexual harassment to race- and age-based discrimination, Bush judges have interpreted the law to the detriment of plaintiffs.

Gender and sexual orientation discrimination

Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162 (2007)

Lilly Ledbetter worked as a supervisor at a Goodyear plant in Gadsden, Alabama, for almost twenty years. Late in her career, she received an anonymous tip that she had been paid much less than her male colleagues for years. Because of performance evaluations that she claimed were skewed based on sex, Ledbetter did not get the pay raises that her male colleagues received, creating a wider and wider pay disparity. A jury ruled for Ledbetter and awarded her back pay, but Goodyear appealed and the case eventually reached the Supreme Court, which ruled against her, 5-4. In a majority opinion written by Justice **Samuel Alito** and joined by Chief Justice **Roberts** and Justices **Scalia**, **Thomas**, and **Kennedy**, the Court held that Ledbetter's lawsuit was too late she had not filed her claim within 180 days of the very first discriminatory action, and that the discriminatory paychecks that Ledbetter had received over the years did not start the clock running again. Thus, the majority held that Ledbetter was not entitled to any compensation for the unequal pay. In a sharp dissent, Justice **Ginsburg** explained that the nature of pay discrimination renders it different from other forms of employment discrimination due to its "incremental" nature, which is generally only recognized by the victim over a longer period of time, as the differences in pay become more apparent. According to Justice **Ginsburg**, discriminatory pay is often hidden by employers and is not as easy to identify as a single, overt act of discrimination, such as a discriminatory firing or hiring.

Birch v. Cuyahoga County Probate Court, 392 F.3d 151 (6th Cir. 2004)

Wanda Birch worked as a court magistrate in Cuyahoga County, Ohio. In 1998, her colleagues conducted a wage study of Cuyahoga County magistrates. The troubling results showed that all female magistrates were paid less than all male magistrates and that the highest-paid woman earned less than the lowest-paid man. Earning \$39,000 a year, Birch had the lowest salary of all. She and some of the other female magistrates met with the Presiding Judge to discuss the salary discrepancies. During the meeting, the judge allegedly told them, "I don't have to hire women" and "I don't know how I would make these salaries fair. I rely on the men to do the important work of the Court." When Birch asked the judge why she was paid the least, he told her that he "did not trust her work" and "would prefer that you not work here." The Sixth Circuit majority ruled that Birch had provided enough evidence to prove that her salary "was set lower than it would have been had she been a man." However, Judge **Julia Smith Gibbons** dissented. To prove pay discrimination, Judge **Gibbons** argued, Birch needed to prove that the magistrates had all done equal work.

***Harrison-Pepper v. Miami University*, 103 Fed. Appx. 596 (6th Cir. 2004)**

Sally Harrison-Pepper, a full professor at Miami University, was hired in 1988. Of the eight full professors in the Interdisciplinary Studies department, she was paid the least. Another woman in the department was paid the second-least. As a result of a series of unequal raises, Harrison-Pepper earned some \$13,000 less a year than a male colleague who was hired the same year. When she discovered the problem and brought it to the attention of administrators, the university initially agreed to put her on a payment track that would eventually catch her up to her male colleagues. Several years later, however, Harrison-Pepper's salary and raises were not what the university had promised, and she sued. The district court granted the university's motion for summary judgment, and the Sixth Circuit upheld that ruling in an opinion authored by Judge **Deborah Cook**. Judge Cook's ruling prevented Harrison-Pepper from proceeding with her case and having a finder of fact determine whether the salary disparities to which she had been subjected stemmed from unlawful sex discrimination. Judge Ronald Lee Gilman dissented, and criticized the majority for acting as a fact-finder rather than applying the appropriate summary judgment standard.

***Lofton v. Secretary of the Department of Children and Family Services*, 377 F.3d 1275 (11th Cir. 2004).**

Steven Lofton was a pediatric nurse and a foster parent who had raised three HIV-positive children from birth. In 1994, Lofton sought to adopt one of his foster children, a 3-year-old boy who had tested positive for HIV and cocaine at birth. Lofton had been recognized for outstanding foster parenting by the Children's Home Society, and the child he wanted to adopt had since tested HIV-negative under his care. Florida did not allow Lofton to adopt his foster child because Lofton is gay. When Lofton and several others challenged the 1977 Florida law that bars gay men and lesbians from adopting children, a three-judge panel of the 11th Circuit upheld the law, claiming that "dual-gender parenting plays [a critical role] in shaping sexual and gender identity and in providing heterosexual role modeling." All of the 11th Circuit judges were later asked whether the entire court should rehear the case, including Judge **William Pryor**, whose decision not to have the court rehear the case was determinative, since the court's 6-6 decision on re-hearing left the panel ruling upholding the law intact. In 2003, as Attorney General of Alabama, Pryor had equated consensual sex between same-sex adults with prostitution, adultery, necrophilia, bestiality, possession of child pornography, and even incest and pedophilia (if the child should credibly claim to be 'willing')."

Sexual harassment

***Lutkewitte v. Gonzales*, 436 F.3d 248 (D.C. Cir. 2006)**

Janet Lutkewitte was repeatedly sexually harassed by her boss at the FBI, David Ehemann, over a period of almost two years. Lutkewitte claimed that Ehemann had repeatedly made unwanted sexual advances to her, and that she ultimately submitted to having sex with him out of a fear of losing her job. Lutkewitte claimed that after she submitted to Ehemann's sexual demands, he provided her with favorable job benefits, including overtime pay and a new car for her personal use. Lutkewitte settled her case against Ehemann, leaving only her claim against the FBI to be tried. The jury found that although Lutkewitte had proven a hostile work environment, the FBI had acted with reasonable care to prevent the harassment and to promptly correct the situation, and entered a verdict for the FBI. Lutkewitte appealed, and a three-judge panel of the D.C. Circuit unanimously affirmed the verdict against her. The panel majority upheld the verdict on the basis of the facts, ruling that there was insufficient evidence to support Lutkewitte's claim that a tangible employment action had been taken as the result of her submission to Ehemann's sexual demands. Thus, she was not entitled to a jury

instruction that the FBI was strictly liable for the harassment. Judge **Janice Rogers Brown**, in a concurring opinion, laid out her personal vision of Title VII, explaining that employers should never be held strictly liable in sexual submission cases when the victim of harassment has not suffered an *adverse* employment consequence. Judge Brown expressly acknowledged, however, that her approach was contrary to that of two Circuits, as well as “at odds with the stance adopted by the EEOC.”

***Wright v. Rolette County*, 417 F.3d 879 (8th Cir. 2005)**

Brigitte Wright worked as a deputy in the Rolette County Sheriff’s Department. Her boss, Tony Sims, the elected sheriff, sexually harassed Wright. Sims had made numerous “unwelcome comments of a sexual nature that would be offensive to any reasonable person,” including calling Wright’s vagina a “snapper” and “stroking his mustache while telling Wright he was ‘clearing off her seat.’” Wright complained about the sheriff’s behavior to a County Commissioner and the County Attorney, yet nothing was done. After Wright made a formal complaint that the sheriff’s behavior had created a hostile work environment, the County hired an attorney to investigate Wright’s claim, but placed Wright on administrative leave during the investigation. The county appointed an investigator, who concluded that the comments were “inappropriate”, but “not unwelcome.” Wright returned to work, where the harassment continued and she soon quit and filed suit, claiming that Sims had constructively discharged her. Judge **Michael Melloy**, writing for the Eighth Circuit majority, agreed that Wright had been subjected to a hostile work environment. However, the majority held that Wright had not “shown that her work conditions would be intolerable to a reasonable person,” and rejected her claim of constructive discharge. A dissenting judge would have held that Wright should have been allowed to present her claim to a jury.

***Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757 (6th Cir. 2006)**

Christopher Vickers worked as a private police officer at the Fairfield Medical Center, where, he claimed, other hospital police officers had harassed him. According to Vickers, other officers called him “fag” and other slurs, put irritants in his food, impressed “FAG” on his report forms, and touched his crotch with a tape measure. During police handcuff training, one of the other officers handcuffed Vickers and simulated sex with him. Writing for the Sixth Circuit majority, Judge **Julia Smith Gibbons** ruled that Vickers had no discrimination claim. Although Judge Gibbons acknowledged that Title VII does protect individuals from “sex stereotyping,” she wrote that Vickers had been discriminated against on the basis of perceived homosexuality, not failure to conform to a certain role. According to Judge Gibbons, ruling in Vickers’ favor would “have the effect of *de facto* amending Title VII to encompass sexual orientation as a prohibited basis for discrimination,” because “all homosexuals, by definition, fail to conform to traditional gender norms in their sexual practices.” A dissenting judge would have allowed Vickers to proceed with his sex stereotyping claims, explaining that Vickers had alleged sufficient facts and dismissal of his case was improper.

***Brown v. Snow*, 440 F.3d 1259 (11th Cir. 2006)**

Mason Brown worked for the IRS as a tax examiner. In 2000, he was given a performance review of 3.67 out of 5 and rated “Fully Successful.” An interim manager, Dolores Bagley, made sexual comments towards Brown and attempted to have physical contact with him. After he rejected her advances, she reduced his performance review score to 3.33 and promised to “get [him] back” for rejecting her. Brown complained about Bagley to several supervisors, but reported that none of them took any action. He later applied for several promotions with the IRS, but received none of them. Brown claimed that the lower performance review given to him by Bagley had prevented him from getting promotions. Writing for the Eleventh Circuit, Judge **William Pryor** ruled against Brown. According to Judge Pryor, lower scores on performance evaluations are not sufficient for

sexual harassment claims under Title VII. To proceed with his case, Brown needed to prove that the lower performance ratings were the reason he had not been promoted.

Racial discrimination

Jackson v. Flint Ink N. Am. Corp., 370 F.3d 791 (8th Cir. 2004)

Herman Jackson, an African American, had worked for Flint Ink for seventeen months in what he characterized as a racially hostile work environment. Jackson testified that his supervisor and plant manager had referred to him as “that damn nigger” and “damn black,” respectively. Jackson alleged that a co-worker had expressed his disapproval of Jackson’s musical tastes by telling him, “We don’t listen to that damn black music around here, nigger shit, radio.” The same co-worker allegedly called him a “fucking nigger.” Judge **William Riley** joined another judge in upholding a lower court ruling dismissing Jackson’s case on summary judgment, preventing Jackson from even presenting his case to a jury. According to the majority, what they characterized as “six isolated incidents” were not sufficient to raise a hostile environment claim. A dissenting judge would have held that the lower court was clearly wrong in taking Jackson’s case away from a jury because issues of fact existed and criticized the majority for having “take[n] on the jury’s job”

Hood v. Midwest Savings Bank, 95 Fed. Appx. 768 (6th Cir. 2004)

George Hood, an African American, was certified as a home builder by the Federal Housing Administration. He wanted to build a house in a primarily black neighborhood in Columbus, Ohio, and needed a loan. Hood was initially denied the loan by Midwest Savings Bank, but was later given a loan on considerably less favorable terms. Later, he defaulted on his loan and sued the bank, claimed that he had been the victim of “redlining” and race discrimination. Sixth Circuit Judge **Julia Smith Gibbons** wrote the majority opinion upholding a grant of summary judgment against Hood, an opinion that essentially required Hood to present evidence that non-minority applicants with his qualifications were awarded loans after he was denied one. A dissenting judge criticized Judge Gibbons’ opinion for articulating “an unduly burdensome standard” for establishing a prima facie case of discrimination under the federal civil rights laws in question.

Hillig v. Rumsfeld, 381 F.3d 1028 (10th Cir. 2004)

Terrie Hillig, an African American, had worked for the Defense Finance Accounting Service (DFAS) for five years. She claimed that her two supervisors had given her discriminatory approval ratings and had stalled her request for annual leave, while white men received prompt confirmations. Hillig filed two racial discrimination complaints with the Equal Employment Opportunity office with the Department of Defense. Several years after these claims were settled to Hillig’s benefit, she applied for a job as a Personnel Clerk/Assistant at the Department of Justice. Her interviewer told her she would be “a perfect fit” for the position, but he ultimately hired a caucasian woman who had never filed a discrimination complaint. Hillig believed she had not gotten the job because her supervisors at DFAS had given negative references about to her to the Department of Justice, a suspicion later confirmed by an Equal Employment Opportunity office investigation, in which one of Hillig’s supervisors told the investigator Hillig was “a shitty employee.” The DOJ interviewer denied that his choice had anything to do with any of that; instead, he claimed that he had not hired Hillig because he thought her long fingernails would make her type too slowly. Hillig claimed she never had long fingernails. The Tenth Circuit ruled in Hillig’s favor, but Judge **Terrence O’Brien** dissented. According to Judge O’Brien, the negative evaluations were not the reason Hillig was not hired, and they did not constitute an “adverse employment action.”

***Overton v. New York State Div. of Military and Naval Affairs*, 373 F.3d 83 (2d. Cir. 2004)**

William Overton was an airplane technician who worked for the New York Air National Guard, in a military capacity, as well as for the Air Force, in a civilian capacity. Overton contended that, during the course of his civilian employment, his civilian co-worker and later supervisor, who was also his military superior, had created a hostile work environment “by making racially offensive remarks and threatening Overton in a racially offensive manner.” According to Overton, the conduct included such egregious statements as “Niggers belong on the basketball court rather than working on C5 aircraft.” Overton also maintained that he had been transferred in retaliation for filing discrimination complaints. He later left the Guard and sued in civilian court. At issue was whether Overton could proceed with his case under a doctrine that prohibits suits against the military for injuries that “arise out of or are in the course of activity incident to [the plaintiff’s military] service.” Even though the alleged racially offensive comments were made when Overton was working in a civilian capacity, Judge **Richard Wesley** joined the majority in ruling that Overton could not bring his suit on the ground that, “if permitted to proceed, [it] would likely affect [Overton’s] military relationship with” his supervisor.

Age Discrimination

***Rosso v. The A.I. Root Company*, 97 Fed. Appx. 517 (6th Cir. 2004)**

When he was 61, Anthony Rosso was fired from his job at the A.I. Root Company. In court, Rosso’s former supervisor testified that the president of the company had told him to fire Rosso because “Tony’s old, and I’ve got reports that he has a severe memory loss . . . sounds like early Alzheimer’s disease to me.” The president denied making the statement. Judge **Jeffrey Sutton** joined the Sixth Circuit majority, which threw out Rosso’s case on the ground that he had not presented enough evidence of direct discrimination. A dissenting judge disagreed, stating “[i]t is difficult to imagine more explicit direct evidence of age and disability discrimination than the direct statement by a supervisor that he wished to fire an employee, based partially on age, memory loss, and supposed early-onset of Alzheimer’s disease.”

***Cichewicz v. UNOVA Industrial Automotive Sys., Inc.*, 92 Fed. Appx. 215 (6th Cir. 2004)**

Daniel Cichewicz had worked for UNOVA as a salesman for twenty years when he was laid off. He was told that his position was being eliminated not because of poor job performance but because he did not “fit in.” Cichewicz was 53, and another salesman over 50 had also been fired. In court, Cichewicz’s supervisor testified that the company had used “the ‘reorganization’ and ‘economic necessity’ explanation . . . as the tool to explain the systematic removal of employees in their 50s in order to replace them with substantially younger employees.” Over several years, UNOVA had reduced the size of its workforce by letting a string of employees go, all over 40. The majority considered this sufficient evidence to allow Cichewicz’s age discrimination case to go forward, but Judge **Deborah Cook** dissented, claiming that Cichewicz needed to prove that he had been replaced by someone younger.

Americans with Disabilities Act

***Laird v. Redwood Trust LLC*, 392 F.3d 661 (4th Cir. 2004)**

Carolee Laird suffers from spina bifida and uses a wheelchair. One night, she visited the Redwood Trust Nightclub in Baltimore. Because the nightclub had not installed an elevator, Laird could not get to two of its three floors. Laird sued under the Americans with Disabilities Act. Judge **Dennis Shedd** joined the majority, which ruled that the top floor of the nightclub was a “mezzanine” rather than a “floor,” a critical distinction

in this case. Because the ADA only requires elevators in buildings with at least three floors, the court's ruling meant that the nightclub had no obligation to install an elevator for the benefit of its disabled guests. According to a dissenting judge, this interpretation of the ADA "creates a loophole that could swallow the rule and ultimately stymie the purpose of the ADA - to integrate individuals with disabilities into mainstream life by guaranteeing them reasonable access to places of public accommodation."

Favoring Government and Corporations over Individuals

As the following examples show, judges nominated by President Bush have shown a striking deference to the government and to corporations, often issuing opinions or seeking to rule in favor of the powerful at the expense of individuals.

Pro-corporate rulings

Doe v. Exxon Mobil Corp., 473 F.3d 345 (D.C. Cir. 2007)

In 2001, Exxon Mobil employed a security detail of Indonesian soldiers to protect its natural gas facility in the district of Aceh, Indonesia. Eleven Indonesian villagers alleged that these soldiers had committed human rights violations against them, including torture, sexual assault, and murder, and sued Exxon. Exxon filed a motion to dismiss the suit as presenting "nonjusticiable political question[s]." The district court asked the State Department's opinion on whether hearing the case would interfere with any U.S. foreign policy goals. The Department replied with two letters expressing concern about damage to U.S. relations with Indonesia, a key ally in the war on terror. The district court, however, declined to dismiss the Indonesians' common law tort claims, and Exxon appealed, asking the D.C. Circuit to order that the case be dismissed. A majority of the D.C. Circuit panel ruled that the case could proceed. Judge **Brett Kavanaugh**, a former Senior Associate Counsel to President Bush, would have dismissed the case and denied the plaintiffs any opportunity for recovery.

Ileto v. GlocInc., 370 F.3d 860 (9th Cir. 2004)

A mentally unstable man named Buford Furrow burst into a Jewish Community Center (JCC) in Granada Hills, California, and shot six-year-old Joshua Stepakoff, five-year-old Benjamin Kadish, and Mindy Finkelstein, a sixteen-year-old camp counselor. He fled the scene and soon shot and killed Joseph Ileto, a postal worker who was delivering mail nearby. Although he had been convicted of a felony, had spent time in a mental institution, and could not legally buy guns, Furrow had at least six guns in his possession at the time of the shootings. Ileto's mother and the children injured in the JCC shooting sued Glock, the company that had manufactured and distributed several of the guns. The families claimed that the manufacturer had "intentionally produced more firearms than the legitimate market demands with the intent of marketing their firearms to illegal purchasers who buy guns on the secondary market." A panel of the Ninth Circuit allowed the victims' case to proceed, and the full court decline to re-hear the case. However, Judges **Consuelo Maria Callahan**, **Carlos Bea**, and **Jay Bybee** dissented from the denial of re-hearing by the full court. According to these three Bush appointees, the panel's ruling would allow "[a]ny manufacturer of an arguably dangerous product that finds its way into California [to] be hauled into court."

Merrill v. Arch Coal, Inc., 118 Fed. Appx. 37 (6th Cir. 2004)

The widow and child of a coal miner killed at work filed a wrongful death suit against the parent company of the mine, and the Sixth Circuit allowed the case to proceed. Dissenting Judge **Deborah Cook** would have dismissed the case on the ground that a parent company has no obligation to protect the safety of its subsidiary company's miners.

No Justice for the Powerless

Collins v. Pond Creek Mining Co., 468 F.3d 213 (4th Cir. 2006)

Johnny Collins was a coal miner for 36 years. He suffered from pneumoconiosis, also known as black lung disease, and was designated as "totally disabled" by the disease. Thanks to the Black Lung Benefits Act, he received approximately \$575 a month in government benefits. After Johnny died, his wife, Nora, applied for survivor's benefits under the same law. Although the Fourth Circuit ruled that Mrs. Collins was entitled to rely on the prior finding that her husband had black lung disease and pursue her claim for benefits, Judge **Dennis Shedd** disagreed. Judge Shedd would have upheld an administrative ruling that Mrs. Collins had failed to prove that her husband had suffered from black lung disease as well as failed to prove that the disease had caused his death.

Wooten v. Logan, 92 Fed. Appx. 143 (6th Cir. 2004)

A county sheriff conspired with another man to pull over a car and lure one of its passengers, a mentally handicapped girl, into a police car. He then proceeded to rape her with his uniform, badge, and gun on. Judge **John Rogers**, writing for the Sixth Circuit, ruled that the county was not liable because the sheriff had not been setting "official policy" during the rape. The dissenting judge argued that if one of the sheriff's subordinates had been the rapist and the sheriff had approved it, he would have been creating "official policy," and that the fact that the sheriff committed the act himself should make no difference.

Helms v. General Dynamics Corp., 222 Fed. Appx. 821 (11th Cir. 2007)

George Helms worked as a functional analyst for General Dynamics Corporation. Helms had a number of past health problems, including a rotator cuff injury, insomnia, and a history of lymphoma. He also suffered from chronic headaches that were so painful he could not work, so his doctor prescribed him several medications that left him sedated and unable to drive or concentrate. Aetna, his health insurance company, denied Helms' application for short-term disability because he had not provided evidence that he could not work, despite multiple letters from his doctor, who "totally supported" Helms' disability claim. One such letter read:

Mr. Helms suffers from daily chronic headaches of a debilitating nature. He is presently taking medication to control the severity of the headache episodes. These medications, neurontin and methadone, cause sedation interfering with his ability to work or drive a vehicle and numerous other daily activities. Mr. Helms is unable to work while taking the medications required for his condition. He must have the medication to control the pain.

Aetna reasoned that since Helms had found a combination of medications that reduced his pain, he had not proven that he still qualified for short-term disability benefits. Although the Eleventh Circuit ruled for Helms, Judge **William Pryor** agreed with the insurance company that Helms had not proven that he could not work.

***Vogler v. Blackmore*, 352 F.3d 150 (5th Cir. 2003)**

Becky Vogler and her three-year-old daughter, Kallie, were driving north on Highway 69 in Texas when a tractor-trailer heading south swerved from the opposite shoulder into their lane. The truck slammed into the front of their Honda Accord, spun it around and struck the passenger's side, and finally ran over the roof of the car from front to back. Both Becky and Kallie Vogler were killed. A jury found the trucker and trucking company liable and awarded \$200,000 each to the estates of Becky and Kallie Vogler for the mental anguish they suffered before death, as well as more than \$3 million total for the plaintiff, Frank Vogler, who had lost both his wife and his child in the accident. Judge **Edith Brown Clement** authored the Fifth Circuit's opinion, which upheld the awards for Mr. Vogler, but reduced the award for Mrs. Vogler's estate to \$30,000 and struck down the award for Kallie's estate on the grounds that Vogler had not provided evidence that his daughter had any "awareness of the impending collision" before "her portion of the car was crushed."

***Huss v. Gayden*, 465 F.3d 201, 208-09 (5th Cir. 2006)**

Barbara Huss, a pregnant woman, had had three previous miscarriages, prior ovarian cysts, and a child delivered by C-section, and was a diabetic. When she went into early labor, doctors at the Memphis OB/GYN practice where Huss was a patient prescribed Terbutaline to stop her contractions. The medication was successful, but Huss needed frequent medical care during the remainder of her pregnancy. Two months after her early labor, she was in such poor condition that her doctors attempted to induce labor and failed. The baby was delivered by C-section. The day after she left the hospital, Huss was back in the emergency room with troubled breathing and was diagnosed with cardiomyopathy, pulmonary edema, and congestive heart failure. When Huss brought a medical malpractice lawsuit against the doctors who had prescribed Terbutaline, a jury awarded her \$3.5 million dollars. On appeal, Judge Priscilla Owen voted to overturn the jury award on the ground that Huss had brought her lawsuit too late. According to Owen, Huss should have known sooner that Terbutaline could have caused her serious heart and lung problems even though her doctors themselves claimed that the drug did nothing to cause her injuries. In dissent, Judge Patrick Higginbotham (a Reagan appointee) accused Owen of trying to impose "tort reform by decree, not ballot."

Eroding Individual Rights and Freedoms

President Bush's judicial nominees have demonstrated a troubling lack of respect for Americans' constitutional rights and liberties. Among other things, and as the following examples show, they have curtailed or tried to curtail First Amendment protections, protections for voting rights, women's reproductive freedoms, and protections against unreasonable searches.

First Amendment Rights

***Planned Parenthood of South Carolina v. Rose*, 373 F.3d 580 (4th Cir. 2004)**

A South Carolina statute allowed drivers in the state to buy a "Choose Life" specialty license plate, but a similar plate with a pro-choice message was not available. The district court ruled that that the statute authorizing the "Choose Life" license plate violated the First Amendment, and the Fourth Circuit majority agreed. However, in a dissenting opinion, Judge **Dennis Shedd** claimed that the First Amendment did not apply. According to Judge Shedd, the state was not favoring one private opinion over another, but was "the literal speaker of the 'Choose Life' message," and the majority had "unduly restrict[ed] the ability of elected officials to express the

views of their constituents on any issue, however controversial.” The only way for citizens of South Carolina to change the license plate situation, said Shedd, was to elect a sufficiently pro-choice legislature.

***Child Evangelism Fellowship of Maryland, Inc. v. Montgomery County Public Schools*, 373 F.3d 589 (4th Cir. 2004):**

The Child Evangelism Fellowship, a group that describes itself as a “Bible-centered, worldwide organization composed of born-again believers whose purpose is to evangelize boys and girls with the Gospel of the Lord Jesus Christ and to establish (disciple) them in the local church for Christian living” ran a “Good News Club” for children after school. At the Good News Club, “children recite Bible verses, sing songs, play games, learn Bible stories, and pray.” In order to spread the word about their ministry, the Child Evangelism Fellowship wanted to include their flyers along with other take-home flyers at public schools. Concerned about First Amendment issues, the Montgomery County school department refused to allow this. Judge **Dennis Shedd** joined the majority that ruled against the Montgomery County Public Schools. According to the majority, “Requiring students to carry home, among other items, a flyer containing an invitation to participate in a religious activity – an invitation that cannot be accepted absent parental consent – does not coerce religious activity” and does not violate the First Amendment.

***Garcetti v. Ceballos*, 547 U.S. 410 (2006)**

Richard Ceballos was a deputy district attorney. After he reviewed a search warrant and traveled to the site of the search, he became concerned about false information in the warrant. The warrant had described as a “driveway” what Ceballos considered a full-fledged road, and claimed that there had been tire tracks in a road where tire tracks could not have been noticeable. Ceballos wrote a memo to his supervisors about his concerns and suggested that the case be dropped. Instead, the supervisors proceeded with the case, transferred Ceballos to another position in another courthouse, and denied him a promotion. Ceballos claimed that his First Amendment rights had been violated. In a 5-4 ruling, Chief Justice **Roberts**, and Justices **Alito**, **Scalia**, **Thomas**, and **Kennedy** held that Ceballos, as a public employee acting in his official capacity, was not entitled to First Amendment protections, even though he would have had no ability to blow the whistle on alleged police and DA misconduct had he not worked in the district attorney’s office.

***Monteiro v. City of Elizabeth*, 436 F.3d 397 (3d Cir. 2006)**

Armenio Monteiro was a City Council member in Elizabeth, New Jersey. Patricia Perkins-Auguste, the chair of the City Council, verbally attacked Monteiro “for what she perceived to be his role in the distribution of a pamphlet protesting the budget and inviting citizens to attend the meeting.” During the meeting, she confronted Monteiro verbally, and when he defended himself, she had him arrested for disorderly conduct and hauled out of the meeting. Monteiro sued, claiming his First Amendment rights had been violated, but Perkins-Auguste argued that she was immune because of her status as chairperson. The Third Circuit ruled against her, but Judge **D. Michael Fisher** dissented. Perkins-Auguste was not liable, Judge Fisher argued, because a “reasonable person” in her shoes would not have “recognized a constitutional infringement.”

Fourth Amendment Rights

***Doran v. Eckold*, 409 F.3d 958 (8th Cir. 2005) (en banc), cert. denied, 126 S. Ct. 736 (2005)**

Kansas City Police received an anonymous tip that David Doran was manufacturing methamphetamine and selling drugs from his house. A police officer searched Doran’s trash cans and found cold medicine, which

can be used to manufacture meth, plastic bags with the corners cut out, and some methamphetamine residue. Relying on this evidence, the police obtained a search warrant. The search warrant was not a “no-knock” warrant and required officers to knock and announce their presence before entering. In a “dynamic entry,” the police arrived at 10:00 PM, shouted, “Police, search warrant,” and then immediately rammed the door open. Doran had been asleep; when he woke up, he thought the noise was a break-in, and he rushed downstairs with a pistol. When he saw the laser lights, he realized it was the police and bent over to set his gun down. Before he could do so, he was shot twice by a police officer. During the search, the police found only a small amount of marijuana and no evidence of a meth lab or drug dealing. Doran claimed that the officers had violated his civil rights and sued. A jury awarded him \$2 million. On appeal, the Eighth Circuit ruled against Doran. In an 8-6 decision, five Bush judges, **Duane Benton, Steven Colloton, Raymond Gruender, Michael Melloy, and William Riley**, joined the majority.

Reproductive Rights

Gonzales v. Carhart, 127 S. Ct. 1610 (2007)

In 2000, the Supreme Court, in a 5-4 ruling in *Stenberg v. Carhart*, struck down a Nebraska law banning a specific abortion procedure that did not contain an exception to protect a woman’s health. In 2003, the Republican-controlled Congress passed a substantially identical law. When a challenge to this law came before the Supreme Court in 2007, the Court in a 5-4 ruling *upheld* the law (*Gonzales v. Carhart*). The only thing that had changed between the two decisions was the makeup of the Court: Justice Sandra Day O’Connor, who had been in the majority in the first ruling, had since been replaced by Justice **Samuel Alito**. The majority in *Gonzales* expounded on what it called the government’s duty to protect “the bond of love the mother has for her child” and the personal consequences of abortions, in what dissenting Justice Ruth Bader Ginsburg described as an “antiabortion shibboleth.”

Right to asylum

Kornetskyi v. Gonzales, 129 Fed. Appx. 254 (6th Cir. 2005)

Igor Kornetskyi, a Ukrainian radiologist, had treated victims of the Chernobyl disaster. Kornetskyi spent so much time exposed to radiation that he became a radiation “carrier” and threatened his family’s health. He then began to speak out against Soviet handling of nuclear issues and claimed that because of his open criticism of the state, the Soviet secret police and KGB searched his home, kept him under surveillance, and interrogated him and his family. Several times, they threatened to kill Kornetskyi and his wife or put them in a mental institution. Finally, Kornetskyi and his family applied for visitor visas and immigrated to the United States. When their visas expired, the INS arranged for them to be deported. Kornetskyi argued that he was entitled to asylum in the United States because he had been persecuted by the Soviets. Both the Immigration Judge and the Board of Immigration Appeals ruled against Kornetskyi. On appeal, Sixth Circuit Judge **Deborah Cook** wrote the majority opinion denying asylum and stating that “[t]he Kornetskyis’ claim that the KGB and Secret Police searched their home, interrogated them, and verbally threatened them amounts to ‘harassment,’ not ‘persecution.’”

Right to vote

Summit County Democratic Cent. & Exec. Comm. v. Blackwell, 388 F.3d 547 (6th Cir. 2004)

The Summit County Democratic Party filed suit to strike down an Ohio law that permitted political parties to send “challengers” to polling places. The challengers targeted districts that were heavily African American. Sixth Circuit Judge **John Rogers** wrote the majority opinion holding that the presence of challengers did not constitute a “severe burden” on the right to vote, and that it was in “the public interest” for them to be there in order to keep people who shouldn’t vote from voting.

Cottier v. City of Martin, 445 F.3d 1113 (8th Cir. 2006)

Martin, South Dakota, is a city in which Native Americans make up 45% of the population and 36% of the voting age population. Whites are in the majority. For years, Martin had been the site of racial tension between Native Americans and whites. The city was divided into three wards, each of which elected two aldermen. Despite the city’s sizable Native American population, only two Native-American-preferred alderman candidates had been elected since 1984, and both of the successful candidates were running unopposed. The plaintiffs, two Native Americans, claimed that the way the wards had been drawn violated their rights under the Voting Rights Act and the 14th and 15th Amendments. The Eighth Circuit agreed and ordered the voting districts to be redrawn. Judge **Steven Colloton** dissented, arguing that the plaintiffs had not provided evidence that the white majority usually voted in such a way that the Indian-preferred candidates lost.

“The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law.”

**Justice Anthony Kennedy
5-4 ruling in *Boumediene v. Bush***

**CIVIL RIGHTS AND CIVIL LIBERTIES
IN THE SUPREME COURT’S 2007-08 Term**

July 2008

Introduction

The Supreme Court’s 2007-08 term was the third with Chief Justice John Roberts at the helm. Although not marked by as many 5-4 rulings as was the prior term of the Roberts Court, this past session left no doubt that the Court remains “sharply divided ideologically on some of the most fundamental constitutional questions.”¹ Indeed, the Court’s 5-4 ruling in *Boumediene v. Bush*, holding that detainees held at Guantanamo Bay have a constitutional right to challenge their detention through habeas corpus petitions in federal court, underscored once again that the justices have markedly different visions of the Constitution and of the role of the Court in protecting individual rights.

Other rulings this term, as in the prior two terms, further evidence the sharp ideological divide on the Roberts Court, a divide cemented in 2006 when the ultraconservative Samuel Alito joined John Roberts on the bench as the successor to the more moderate Sandra Day O’Connor. As the prior two terms have shown, and as this session reaffirmed, Chief Justice Roberts and Justices Alito, Scalia, and Thomas comprise a right-wing voting bloc on the Court. With Justices Stevens, Souter, Ginsburg, and Breyer forming the Court’s moderate-to-liberal wing, Justice Kennedy has continued to provide the deciding vote in critical cases, prompting Linda Greenhouse to write of this term that “[i]t was, once again, Justice Kennedy’s court.”² Similarly, David Savage wrote in the *Los Angeles Times* that “[t]he Supreme Court ended its annual term . . . just where it began: evenly divided between conservative and liberal blocs of four justices, with the deciding votes cast by Justice Anthony M. Kennedy.”³

¹ R. Barnes, “A Win by McCain Could Push a Split Court to the Right,” *Washington Post*, A01 (June 29, 2008).

² L. Greenhouse, “On Court that Defied Labeling, Kennedy Made the Boldest Mark,” *New York Times* (June 29, 2008).

³ D. Savage, “Supreme Court Blocs Rarely Wavered,” *Los Angeles Times* (June 29, 2008).

For example, Justice Kennedy wrote the majority opinion in *Boumediene*, joined by Justices Stevens, Souter, Ginsburg, and Breyer. Chief Justice Roberts and Justices Scalia, Thomas and Alito dissented. The same 5-4 split occurred in *Kennedy v. Louisiana*, in which the Court, in another opinion by Justice Kennedy, held that capital punishment may not be imposed on someone convicted of raping a child when no death resulted nor was intended. However, in *District of Columbia v. Heller*, Justice Kennedy joined the ultraconservative justices to provide the fifth vote for a highly controversial decision striking down the District of Columbia's ban on handguns and holding for the first time in U.S. history that the Second Amendment's right to bear arms is unrelated to militia use. Justice Kennedy also joined the ultraconservative bloc, and wrote the Court's opinion, in the 5-3 ruling in *Stoneridge Investments v. Scientific-Atlanta*, holding that investors victimized by corporate fraud may not sue businesses that aided and abetted the fraud. Justices Stevens, Souter, and Ginsburg dissented (and Justice Breyer took no part in the case).

Another of the Court's most controversial rulings this term brought dissents from Justices Souter, Ginsburg, and Breyer. In a 6-3 judgment in *Crawford v. Marion County Election Board*, the Court gave a green light to Indiana's voter ID law, the most restrictive in the nation. The law prohibits registered voters from casting a regular ballot at the polls unless they can provide a current, government-issued photo ID that also contains an expiration date. Civil rights and voting rights organizations challenged the law, citing the burden on particular groups of voters, including the poor, the elderly, and minorities, whose members often lack these types of government IDs. While an opinion by Justice Stevens did not embrace the view of three members of the far-right bloc -- Alito, Thomas, and Scalia -- that "the burden at issue is minimal and justified,"⁴ it nonetheless did reject a facial challenge to the law, even though there was no evidence that in-person voter impersonation fraud has ever occurred in Indiana history.

Indeed, in addition to its impact on voting rights, the decision in *Crawford* also reflects what appears to be a growing hostility on the Roberts Court to facial challenges, and a willingness to allow a law to be implemented and create actual harm (which could include a violation of constitutional rights) before a meritorious challenge may be brought. In fact, the *Crawford* decision resulted in harmful consequences shortly after it was handed down. In primary elections held in Indiana not long after the ruling, elderly nuns who do not drive were among those eligible voters turned away from the voting booth because they could not produce the requisite government-issued photo IDs.⁵

⁴ *Crawford v. Marion County Election Board*, 128 S. Ct. 1610, 1624 (2008) (opinion of Scalia, J., concurring in the judgment).

⁵ See, e.g., D. Hastings, "Indiana Nuns Lacking ID Denied at Poll by Fellow Sister," *The Evening News & The Tribune* (May 6, 2008), available at: <http://www.news-tribune.net/archivesearch/local_story_127180817.html> (visited July 11, 2008).

In another rejection of a facial challenge this term, the Court's 7-2 decision in *Washington State Grange v. Washington State Republican Party* upheld a state primary system that allows a candidate to self-identify with a political party and advance to the general-election ballot identified with that party, even if the party does not endorse the candidate. The Court's decision, by Justice Thomas, stated expressly that "[f]acial challenges are disfavored."⁶

Overall, the Court has grown more conservative in recent years, increasingly becoming a friend of big business and issuing decisions that protect corporate America, decisions often unmarked by the clear ideological divisions seen in other categories of cases. For example, in an opinion by Justice Souter from which Justices Stevens, Ginsburg, and Breyer dissented, the Court handed Exxon a huge victory by reducing to a virtual slap on the wrist the punitive damages that had been awarded against the company after the disastrous *Exxon Valdez* oil spill. And there was only one dissent in the ruling this term in *Riegel v. Medtronic*, holding that federal law prohibits individuals who have been harmed by defective medical devices from suing the manufacturers for damages under state law if the devices received pre-market approval from the FDA.

The Court's pro-business trend has been so pronounced that it was the subject of an extensive commentary by Jeffrey Rosen earlier this year in the Sunday *New York Times Magazine*.⁷ According to Rosen, "[t]oday . . . there are no economic populists on the court, even on the liberal wing. And ever since John Roberts was appointed chief justice in 2005, the court has seemed only more receptive to business concerns."⁸ The result, as in the *Medtronic* case, is often to leave ordinary Americans with no redress for their injuries.

Continuing another recent trend, the Court this term heard relatively few cases. In fact, the Court issued rulings this term in only 72 cases, the fewest since the 1953-54 term.⁹ With the appellate courts dominated by Republican-nominated judges, the decline in the number of cases taken by the Supreme Court may well be due to the fact that the circuit courts are now more ideologically in sync with each other and with the conservative Roberts Court.¹⁰

⁶ *Washington State Grange v. Washington State Republican Party*, 128 S. Ct. 1184, 1191 (2008). Last term, in a 5-4 ruling, the Court rejected a facial challenge to a federal ban on a specific abortion procedure, although facial challenges had long been accepted by the federal courts as a means of testing the constitutionality of restrictions on women's reproductive freedom. See *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007).

⁷ J. Rosen, "Supreme Court Inc.," *New York Times* (Mar. 16, 2008).

⁸ *Id.*

⁹ L. Greenhouse, "On Court that Defied Labeling, Kennedy Made the Boldest Mark," *New York Times* (June 29, 2008).

¹⁰ At the end of last term, for example, some commentators observed that "an increasingly homogenous appellate judiciary appointed by Republican administrations is producing fewer conflicting opinions among circuits, a chief characteristic of the kinds of cases the justices like to take. Or that the federal government, usually the most

This report summarizes the Court's key decisions in 2007-08 in civil rights and civil liberties cases. It includes cases in which PFAWF filed *amicus curiae* briefs as well as cases in which PFAWF took no position and has no position on the outcome. In this term, as in any term, a number of cases presented narrow issues that will not necessarily have far-reaching consequences. And, as in any term, some cases were decided unanimously or otherwise did not fall along ideological lines. But in a number of critical cases that will in fact have a significant impact on the law and society, the Court continued to reflect that it is sharply divided along ideological lines. It is those cases that reaffirm the disturbing direction of the Roberts Court.

persuasive in convincing the court that an issue is ripe for review, is losing less often at the lower levels and not appealing as many cases." R. Barnes, "Justices Continue Trend of Hearing Fewer Cases," *Washington Post* (Jan. 7, 2007).

Voting Rights

In one of its most divided rulings of the term, the Court upheld the most restrictive state voter ID law in the nation, a ruling that, as noted in the Introduction, already has had detrimental consequences for voters.

- *Crawford v. Marion County Election Board*, 128 S. Ct. 1610 (2008)

In a 6-3 judgment, the Supreme Court rejected a facial challenge to Indiana's voter identification law, the most restrictive in the nation. The majority, however, was divided as to its reasoning, and the Court's ruling did not foreclose a future as-applied challenge to this or any other voter ID law.

Indiana's voter ID law, enacted in 2005, prohibits an eligible voter from voting in person unless he or she brings to the polls a currently valid, government-issued photo ID that bears an expiration date. Other photos IDs, including those issued by employers to employees or by universities to students, are not acceptable. Voters who come to the polls without the required photo ID are permitted to cast a provisional ballot, but that ballot will not be counted unless, within 10 days, the voter brings the required photo ID to the circuit county clerk's office.

Soon after the law was enacted, it was challenged by local Democratic party groups as well as nonprofit organizations representing voters likely to be most harmed by the voter ID requirements. The plaintiffs charged that the law "substantially burdens the right to vote in violation of the Fourteenth Amendment" in that it is unnecessary and "will place an unjustified burden on those who cannot readily obtain" the required ID. 128 S. Ct. 1610, 1614.

In particular, the plaintiffs argued that the law would substantially burden certain specific groups of voters, including the poor, the elderly, students, and the disabled, many of whose members lack and cannot readily acquire the necessary photo ID. The plaintiffs also argued that the law was motivated by partisan concerns, since the groups most affected trend Democratic, and support for the law came from Republicans in the state legislature.

Both the district court and the court of appeals rejected the challenge to the law. The Supreme Court affirmed, 6-3, but no opinion garnered the support of more than three Justices.

Justice Stevens wrote an opinion joined by Chief Justice Roberts and Justice Kennedy in which they took the position that the evidence presented by the plaintiffs was insufficient to sustain a facial challenge to the law. Citing the Court's earlier ruling this Term in *Washington State Grange v. Washington State Republican Party*, 128 S. Ct. 1184 (2008), Justice Stevens's opinion noted the "magnitude" of the burden of persuasion that plaintiffs carry in mounting a facial attack on the constitutionality of a law in all its applications. 128 S. Ct. at 1622.

The three Justices concluded that the record in the case did not demonstrate that the voter ID law poses “‘excessively burdensome requirements’ on any class of voters.” 128 S. Ct. at 1623. In so concluding, the Justices accepted as legitimate the state’s asserted interest in the law as a means of preventing in-person voter impersonation fraud, even though the opinion acknowledged that “[t]he record contains no evidence of such fraud actually occurring in Indiana at any time in its history.” 128 S. Ct. at 1619. The Justices also rejected the partisan impetus for the law as a basis for striking it down, given that, in their view, there were “valid neutral justifications” for the law. 128 S. Ct. at 1624.

Justice Scalia wrote an opinion concurring in the judgment that was joined by Justices Thomas and Alito and that took a much more accepting view of the voter ID law. These three Justices dismissed as “irrelevant” the plaintiffs’ premise that the law “may have imposed a special burden on some voters,” stating that they would decide the case on the ground that “the burden at issue is minimal and justified.” 128 S. Ct. at 1624. According to Justices Scalia, Thomas, and Alito, because Indiana’s voter ID law “is a generally applicable, nondiscriminatory voting regulation,” individual impacts are not relevant “to determining the severity of the burden it imposes,” and “[a] voter complaining about such a law’s effect on him has no valid equal protection claim” in the absence of discriminatory intent. 128 S. Ct. at 1625-26.

Justice Souter wrote a dissenting opinion joined by Justice Ginsburg in which they would have held the voter ID law unconstitutional because it substantially burdens the right to vote and the state had failed to justify the imposition of such burdens. The dissent discussed in detail the nature of the substantial burden that the law would place on certain groups of voters, and rejected the claim that the law was needed to prevent in-person voter fraud, given the state’s inability to cite a single case of such fraud in its history. According to the dissent, like the \$1.50 poll tax struck down by the Court 42 years ago, “the onus of the Indiana law is illegitimate just because it correlates with no state interest so well as it does with the object of deterring poorer residents from exercising the franchise.” 128 S. Ct. at 1643.

Justice Breyer wrote a separate dissent stating his belief that the voter ID law “is unconstitutional because it imposes a disproportionate burden upon those eligible voters who lack” the requisite photo ID. 128 S. Ct. at 1643. Justice Breyer noted his agreement with the view expressed in Justice Stevens’s opinion that there is no constitutional bar to a photo ID requirement, but disagreed with the assessment there and in Justice Scalia’s opinion of “the burdens imposed by the statute.” 128 S. Ct. at 1644.

The Court’s divided ruling left the door open to a future as-applied challenge to the Indiana law or any other voter ID law.

- *Riley v. Kennedy*, 2008 U.S. LEXIS 4517 (2008)

In a 7-2 opinion, the Court upheld an Alabama gubernatorial appointment practice against challenges to it under the Voting Rights Act of 1965 (“VRA”). Specifically, the Court held that the implementation of the holding of a state supreme court regarding voting procedures does not require federal preclearance under the VRA when it is not a “change” from voting procedures that had been “in force or effect.” 2008 U.S. LEXIS 4517, at *10-11.

The VRA was “designed by Congress to banish the blight of racial discrimination in voting.” 2008 U.S. LEXIS 4517, at *11 (internal quotation omitted). Section 5 of the VRA requires jurisdictions that have evidenced a history of such discrimination to obtain federal preclearance before making changes in their voting systems or procedures.

Alabama law required that midterm vacancies on county voting commissions be filled by appointment of the governor, but the Alabama legislature passed a law requiring midterm vacancies to be filled by special election instead. The Alabama Supreme Court held that the new law violated the state Constitution. The state legislature then passed another statute to allow special elections, which was also struck down by the state Supreme Court. The court authorized a return to gubernatorial appointments to fill vacancies, and the governor made such an appointment. In response, an Alabama state legislator filed the current case in federal court, arguing that a return to the method of gubernatorial appointment had not obtained the required federal preclearance under the VRA.

A three-judge federal district court held that a return to gubernatorial appointment did in fact require preclearance under the VRA, but withheld relief so that Alabama could seek belated preclearance. The Department of Justice denied Alabama’s preclearance request on the ground that minority members of a voting district may wish to elect minority candidates for their district’s seat, whereas the choice of the governor -- an official elected by the entire state -- may be influenced by a different racial constituency than that of the single voting district. After the Department of Justice ruling, the district court acted on its prior decision and invalidated the appointment by the governor, a decision that the governor appealed directly to the Supreme Court pursuant to the provision of the VRA governing appeals.

In an opinion by Justice Ginsburg joined by all members of the Court except Justices Stevens and Souter, the Supreme Court reversed. Although the Court acknowledged that a change from filling vacancies by appointments rather than special elections would require preclearance, it held here that no “change” had taken place as far the VRA was concerned. According to the Court, the invalidated special elections law was never “in force or effect” and thus was not a baseline practice for the purposes of the VRA. Rather, the Court held, the baseline practice was the prior practice of gubernatorial appointment. Thus, the return to the baseline practice of gubernatorial appointment was only a “reversion,” not a “change” requiring preclearance under the VRA.

Justice Stevens wrote a dissent, joined by Justice Souter, in which they expressed concern about the erosion of the VRA and deference to state courts in VRA matters. As the dissent observed, it was the intent of Congress to give the VRA the “broadest possible scope.” 2008 U.S. LEXIS 4517, at *42-43 (internal citation omitted). The dissent would have held that under this broad scope, a return to a practice of gubernatorial appointment was a change in voting practice requiring preclearance. The dissent also would have held that the implementation of a state court holding should be subject to preclearance requirements, and criticized the majority for suggesting that state courts are more entitled to deference than are state legislatures. To illustrate the necessity of oversight of state courts, Justice Stevens listed a history of past discriminatory voting practices encouraged and upheld by the Alabama Supreme Court, working “hand-in-hand with the Alabama Legislature” to disenfranchise black voters. 2008 U.S. LEXIS 4517, at *60.

Rights of Detainees, the Accused, and the Convicted

In one of its most important and sharply divided rulings of the term, the Court rejected the efforts of the Bush Administration and its congressional allies to strip federal courts of jurisdiction to hear habeas corpus petitions from Guantanamo Bay detainees challenging their detention. In another divided ruling, the Court held that rights conveyed under the Vienna Convention to citizens of other countries arrested for crimes in the United States are not enforceable unless Congress has passed implementing legislation. The Court also ruled this term in a number of other cases involving the rights of the accused and the convicted, including two death penalty cases.

- *Boumediene v. Bush; Al Odah v. United States*, 2008 U.S. LEXIS 4887 (2008)

In a 5-4 decision in two consolidated cases, the Court ruled that a group of foreign nationals held by the United States as enemy combatants at the Guantanamo Bay Naval Base in Cuba have a right to petition the federal courts for habeas corpus relief. The cases had been filed by Guantanamo detainees challenging the legality of their detentions and the constitutionality of the Military Commissions Act of 2006, which, among other things, sought to remove all federal court jurisdiction over habeas corpus petitions filed by Guantanamo detainees.

Since 2002, more than 600 persons captured abroad during hostilities between the U.S. and the Taliban regime in Afghanistan have been held in executive detention in Guantanamo Bay, many without any meaningful review at all of the legitimacy of their detentions. In the intervening years, many actions have been filed by the detainees in federal court seeking an opportunity to challenge their detentions, two of which were previously heard by the Supreme Court and resulted in rulings relevant to the case here.

In *Rasul v. Bush*, 542 U.S. 466 (2004), the Supreme Court held that the federal courts have jurisdiction to hear petitions for writs of habeas corpus filed pursuant to 28 U.S.C. § 2241 by persons detained as “enemy combatants” by the United States in

Guantanamo. Congress then enacted the Detainee Treatment Act (“DTA”), which attempted to deprive the federal courts of habeas jurisdiction. However, in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), the Supreme Court held that the DTA does not apply retroactively to preclude consideration of pending statutory petitions for habeas corpus relief filed by Guantanamo detainees.

In response to the decision in *Hamdan*, Congress passed the Military Commissions Act of 2006 (“MCA”), seeking to deprive the federal courts of jurisdiction over habeas petitions of detainees held at Guantanamo Bay, including those pending at the time of its enactment. *Boumediene* involved just such a group of petitioners, each of whom had appeared before a Combatant Status Review Tribunal (“CSRT”), was determined to be an “enemy combatant” and had a habeas petition pending in the district court.

After the Supreme Court’s decision in *Rasul*, the district courts consolidated petitions filed by Guantanamo detainees into two separate proceedings, each with a different result. In one case, the district court dismissed the petitions for lack of jurisdiction, whereas in the other, the court held that the detainees had rights under the Due Process Clause. After the *Hamdan* decision, the cases were consolidated on appeal and the D.C. Circuit held that the MCA lawfully eliminated jurisdiction of the federal courts over all pending and future habeas claims by foreign detainees, and that the MCA did not violate the Suspension Clause of the Constitution. The Court of Appeals further held that the writ of habeas corpus would not be available to the foreign detainees in any event because the U.S. Constitution does not confer rights on aliens without property or presence in the United States who are being held at an overseas military base.

The petitioners in *Boumediene* argued that despite the retroactive language of the MCA, they have a constitutional right to petition the federal courts for a writ of habeas corpus. The petitioners further argued that under the Suspension Clause, this right can only be suspended in cases of rebellion or invasion, providing a fundamental check on the legality of executive detentions.

Although the Supreme Court initially declined to hear the case, it subsequently decided to do so. In a majority opinion written by Justice Kennedy, and joined by Justices Stevens, Souter, Ginsburg, and Breyer, the Court reversed the Court of Appeals and held that the petitioners have a constitutional right of habeas corpus regardless of their designations as enemy combatants or their presence within the extraterritorial confines of Guantanamo Bay. Additionally, the Court held that the circumstances specified by the Suspension Clause for suspending the privilege of habeas corpus did not exist, and thus the MCA could not deprive the detainees of the constitutional right to seek habeas relief.

In reaching its conclusion, the Court conducted a historical review of the Great Writ, observing that the Framers “viewed freedom from unlawful restraint as a fundamental precept of liberty” and that habeas corpus is a “vital instrument” to that end, as evidenced by “the care taken [in the Constitution] to specify the limited grounds for its

suspension.” 2008 U.S. LEXIS 4887, at *30, 36. According to the Court, the concept of the separation of powers lies beneath the constitutional writ of habeas corpus, as it not only protects against “arbitrary suspensions” but also “guarantees an affirmative right to judicial inquiry into the causes of detention.” 2008 U.S. LEXIS 4887, at *37.

The Court acknowledged that “before today the Court has never held that noncitizens detained by our Government in territory over which another country maintains *de jure* sovereignty have any rights under our Constitution.” 2008 U.S. LEXIS 4887, at *83. However, the Court flatly rejected the government’s argument that this lack of precedent somehow proves that the writ does not extend to petitioners, by pointing out the differences in this case from any other. As the Court emphasized, this case “involve[s] individuals detained by executive order for the duration of a conflict that, if measured from September 11, 2001, to the present, is already among the longest wars in American history.” 2008 U.S. LEXIS 4887, at *83.

Given the applicability of the Suspension Clause, the Court went on to determine whether the DTA’s CSRT procedures, which may be reviewed only by the D.C. Circuit, are an adequate substitute for the constitutional habeas process, and concluded that they were not.

The Court emphasized that its decision did not mean that all Guantanamo detainees would be set free. Rather, the Court held only that the MCA’s habeas stripping provisions are unconstitutional, leaving the DTA and the CSRT process intact. Thus, only the petitioners in this case -- those detainees whose habeas petitions were pending at the time of the DTA’s enactment -- are immediately eligible to seek a writ of habeas corpus in federal court. As to all future habeas petitions, the Court emphasized that the government is entitled to determine a detainee’s status through a CSRT before a court should entertain a habeas corpus petition “except in cases of undue delay.” 2008 U.S. LEXIS 4887, at *124.

Justice Souter, who joined the majority opinion, also issued a concurring opinion, joined by Justices Ginsburg and Breyer, explaining their belief that the Court’s reasoning in *Rasul* also applied to confer jurisdiction to the courts over constitutionally-based habeas corpus petitions such as those in the instant case. Justice Souter’s opinion also rebutted the dissenters’ criticisms that the Court should trust the government to handle challenges within a reasonable period of time, stating that, “[a]fter six years of sustained executive detentions in Guantanamo, subject to habeas jurisdiction but without any actual habeas scrutiny, today’s decision is no judicial victory, but an act of perseverance in trying to make habeas review, and the obligation of the courts to provide it, mean something of value both to prisoners and to the Nation.” 2008 U.S. LEXIS 4887, at *133.

Chief Justice Roberts wrote a dissent, joined by Justices Scalia, Thomas and Alito, criticizing the majority for failing to dissect the CSRT process in order to determine whether it satisfied due process standards. According to the dissent, the Court did not need to address whether the petitioners are entitled to the constitutional writ.

Rather, the dissent would have held that the Court should have addressed only whether the DTA process is satisfactory under *Hamdi v. Rumsfeld*, which ruled that a U.S. citizen designated as an enemy combatant must be afforded “notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.” 2008 U.S. LEXIS 4887, at *139 (internal citations omitted).

Justice Scalia also filed a separate dissent, joined by Chief Justice Roberts and Justices Thomas and Alito, refuting the majority’s historical analysis and declaring that “[t]he writ of habeas corpus does not, and never has, run in favor of aliens abroad.” 2008 U.S. LEXIS 4887, at *177. Justice Scalia’s dissent set out what he believes will be the disastrous consequences of the majority’s decision, including his prediction that the decision “will almost certainly cause more Americans to be killed.” 2008 U.S. LEXIS 4887, at *178. The dissent ended by stating that “[t]he Nation will live to regret what the Court has done today.” 2008 U.S. LEXIS 4887, at *217.

- *Medellin v. Texas*, 128 S. Ct. 1346 (2008)

In a 6-3 ruling with ramifications for Americans abroad, the Court held that rights conveyed under the Vienna Convention on Consular Relations to citizens of other signatory nations arrested for crimes in this country are not enforceable absent implementing legislation passed by Congress making the Convention federal law and binding on the states.

Jose Ernesto Medellin, a Mexican national, was convicted of capital murder and sentenced to death in Texas state court after confessing to participating in the gang rape and murder of two teenage girls in Houston. He sought post-conviction relief, claiming that the failure of authorities to inform him of his Vienna Convention right to have the Mexican consulate notified of his arrest and to request their assistance affected the outcome of his criminal case.

Medellin had failed to raise his Vienna Convention claim in the direct appeal of his conviction, raising it for the first time in his state court petition for post-conviction relief. Accordingly, the Texas courts held that his claim was procedurally barred because made too late.

Medellin was not the only Mexican national held in U.S. jails alleging violation of Vienna Convention rights. After Medellin’s conviction, Mexico brought a claim against the United States in the International Court of Justice (“ICJ”), a tribunal established to adjudicate disputes between United Nations member states. In this proceeding, known as the *Case Concerning Avena and Other Mexican Nationals*, the ICJ ruled that 51 Mexican nationals, including Medellin, were entitled to reconsideration of their state court convictions because of violations of the Vienna Convention.

After the ICJ’s decision in *Avena*, the Supreme Court held in *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006), that the Vienna Convention did not preclude the application of state criminal procedural rules. Although the *Sanchez-Llamas* Court found

that the ICJ interpretation of the Vienna Convention was not binding on American courts, the Court did not address any specific ICJ decision in that case. Subsequently, President Bush issued a memorandum stating that the United States would discharge its international obligations under the *Avena* decision such that “state courts [would] give effect to the decision.” 128 S. Ct. at 1353 (internal citation omitted).

Relying on the *Avena* decision and the President’s memorandum, Medellin filed a second application for habeas corpus relief in the Texas state courts, which was ultimately dismissed. The Supreme Court agreed to hear the case, and affirmed the dismissal.

Chief Justice Roberts, in an opinion for the Court joined by Justices Scalia, Kennedy, Thomas and Alito, held that Article 94 of the United Nations Charter, which states that “[e]ach Member of the United Nations undertakes to comply with the decision of the [ICJ] in any case to which it is a party,” does not make ICJ decisions automatically enforceable in domestic courts, but rather is only “a commitment on the part of U.N. members to take future action through its political branches to comply with an ICJ decision.” 128 S. Ct. at 1358 (internal citations omitted). In rejecting Medellin’s argument, the majority held that while the ICJ decision created “an international law obligation on the part of the United States,” it does not of its own force constitute binding federal law that pre-empts state restrictions on the filing of successive habeas petitions.” *Id.* at 1367.

The majority also rejected the President’s claim, made in an *amicus curiae* brief, that he has the power “to establish binding rules of decision that preempt contrary state law,” holding that “[t]he President has an array of political and diplomatic means available to enforce international obligations, but unilaterally converting a non-self-executing treaty into a self-executing one is not among them.” 128 S. Ct. at 1368. Instead, the Court held, only Congress has such power.

Justice Breyer wrote a dissenting opinion joined by Justices Ginsburg and Souter. Relying on the text and history of the Supremacy Clause, as well as the Court’s treaty-related cases, the dissent would have held that the treaties at issue here operate as the equivalent of federal law, and that the decision of the ICJ was binding on the United States and its courts.

According to the dissent, “the United States has ratified approximately 70 treaties with ICJ dispute resolution provisions roughly similar” and “many of those treaties contemplate ICJ adjudication of the sort of substantive matters. . . the Court has found self-executing, or otherwise appear addressed to the judicial branch.” 128 S. Ct. at 1383-84. The dissent also predicted that the Court’s decision will have serious negative implications in protecting the rights of American citizens abroad.

Justice Stevens wrote an opinion concurring in the judgment in which he agreed with the reasoning of the dissent and stated that the Court’s treaty-related decisions “do not support a presumption against self-execution.” 128 S. Ct. at 1372. However, he

found that Article 94's language that the U.S. will "undertak[e] to comply with the decision" -- albeit ambiguous in either a self-executing treaty or a non-self-executing one -- are words that "contemplate[] future action by the political branches." 128 S. Ct. at 1373. Recognizing that Congress had not taken any further action, Justice Stevens agreed with the majority in the judgment.

- *Allen v. Siebert*, 128 S. Ct. 2 (2008)

Federal law allows for the tolling (suspension) of the deadline for an inmate to file a federal *habeas corpus* petition seeking relief from a state conviction while a "properly filed" state court application for such relief is pending. In this case, the Court held, 7-2, that a state court application that is untimely under state law for any reason is not one that has been "properly filed" and thus does not trigger the federal tolling provision.

Daniel Seibert was convicted and sentenced to death for murder in Alabama in 1990. In 1992, his petition for postconviction relief was denied by the state courts as untimely under Alabama law. In 2000, the Alabama Supreme Court declined to hear the case. In 2001, Seibert filed a petition for a writ of *habeas corpus* in federal court. The Antiterrorism and Effective Death Penalty Act of 1996 established a one-year statute of limitations for filing a federal *habeas* petition under § 2224(d)(1), but allows the limitations period to be tolled while a "properly filed application for State post-conviction or other collateral review" is pending. 128 S. Ct. at 3. However, Siebert's appeal was final before the Act became effective, so the statute of limitations began to run from the Act's effective date. Without tolling, Seibert's federal *habeas* petition would have been untimely by more than four years.

The district court dismissed Siebert's *habeas* petition as untimely, "reasoning that an application for state postconviction relief is not 'properly filed' if it was rejected by the state court on statute-of-limitations grounds." 128 S. Ct. at 3. The Court of Appeals reversed, holding that Siebert's state court application for postconviction relief had been properly filed because the state time bar was discretionary, not jurisdictional. The Court of Appeals remanded the case to the district court to rule on the merits.

In the meantime, however, the Supreme Court decided *Pace v. DiGugliemo*, 544 U.S. 408 (2005), in which it held "that a state postconviction petition rejected by the state court as untimely is not 'properly filed' within the meaning of § 2244(d)(2)." 128 S. Ct. at 3. Relying on *Pace*, the district court held that Seibert's federal *habeas* petition was untimely. Again, the Court of Appeals reversed and remanded, distinguishing *Pace* on the ground that the Alabama filing deadline was an affirmative defense, and not a statute of limitations as in *Pace*.

On review, the Supreme Court held in a *per curiam* (unsigned) opinion that "[t]he Court of Appeals' carve-out of time limits that operate as affirmative defenses is inconsistent with our holding in *Pace*." 128 S. Ct. at 3. The Court noted that time limits are conditions to filing a petition for state postconviction relief, stating that "[t]he fact

that Alabama’s [filing deadline] is an affirmative defense that can be waived (or is subject to equitable tolling) renders it no less a ‘filing’ requirement than a jurisdictional time bar would be; it only makes it a less stringent one.” 128 U.S. at 4. The Court concluded that “[w]hen a postconviction petition is untimely under state law, ‘that [is] the end of the matter’ for purposes of §2244(d)(2).” 128 U.S. at 4 (internal citations omitted). Accordingly, the Court held that Seibert’s state petition for postconviction relief had not been “properly filed” and thus there had been no tolling of the one-year statute of limitations for Seibert to file his federal *habeas* petition, which meant that the latter had been filed too late.

Justice Stevens issued a dissent, joined by Justice Ginsburg, observing that “there is an obvious distinction between time limits that go to the very initiation of a petition, and time limits that create an affirmative defense that can be waived.” 128 S. Ct. at 5. The two justices would have held that the Alabama time limit fell into the latter category, and thus would have upheld the ruling by the Court of Appeals.

- *Baze v. Rees*, 128 S. Ct. 1520 (2008)

In a 7-2 judgment that produced a plurality opinion, five concurring opinions, and a dissent, the Court ruled that Kentucky’s three-drug lethal injection protocol does not violate the Eighth Amendment’s prohibition against cruel and unusual punishment.

Writing the plurality opinion, Chief Justice Roberts, joined by Justices Kennedy and Alito, set the standard that a petitioner must meet in order to prevail in a claim that a state’s lethal injection procedure is unconstitutional. According to the plurality, the challenged protocol must be shown to create a “substantial risk of serious harm” and “[the petitioner] must show that the risk is substantial when compared to the known and available alternatives.” 128 S. Ct. at 1531, 1537. In this case, the Court rejected the petitioners’ suggestion that Kentucky should switch to a one-drug protocol, finding that they failed to show that the alternative is an “equally effective manner of imposing the death sentence.” 128 S. Ct. at 1535.

The Court emphasized that 29 of the 35 other states that use the lethal injection method of execution employ the same three-drug protocol as Kentucky, and took notice that the suggested one-drug protocol has not been adopted by any state. Chief Justice Roberts also dismissed the notion that isolated or accidental incidents of pain are sufficient to “establish the sort of ‘objectively intolerable risk of harm’ that qualifies as cruel and unusual.” 128 S. Ct. at 1531.

Justice Alito, in addition to joining the plurality opinion, also wrote a separate concurring opinion. According to Justice Alito, in order for a petitioner to prevail in arguing that a modification of a lethal injection protocol is necessary, and that a state’s refusal to adopt the modification is cruel and unusual under the Eighth Amendment, he must show that the change would “significantly reduce a substantial risk of severe pain”

and that the new method is recommended by a well-established scientific consensus. 128 S. Ct. at 1540.

Justice Stevens wrote a concurring opinion stating for the first time his opposition to the death penalty, concluding that it serves none of the three purposes that it is intended to further -- incapacitation, deterrence and retribution. Quoting Justice White's concurring opinion in *Furman v. Georgia*, 408 U.S. 238, 312 (1972), Justice Stevens agreed that "[T]he imposition of the death penalty represents 'the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the States [is] patently excess and cruel and unusual punishment violative of the Eight Amendment.'" 128 S. Ct. at 1551.

However, notwithstanding these views, Justice Stevens recognized that the Supreme Court "has held that the death penalty is constitutional, and has established a framework for evaluating the constitutionality of particular methods of execution." 128 S. Ct. at 1552. Finding that "the petitioners had failed to prove that Kentucky's lethal injection protocol violates the Eighth Amendment," Justice Stevens concurred in the judgment of the Court. 128 S. Ct. at 1552.

Justice Scalia, joined by Justice Thomas, wrote a separate concurring opinion to criticize Justice Stevens's opposition to the death penalty.

Justice Thomas wrote a separate concurring opinion of his own, which Justice Scalia joined, to state that he would find that "a method of execution violates the Eighth Amendment only if it is deliberately designed to inflict pain." 128 S. Ct. at 1556. According to Justices Thomas and Scalia, the Eighth Amendment's prohibition against cruel and unusual punishment does not mean that a method of execution is unconstitutional just because it involves a risk of pain, even if that risk is substantial.

Justice Breyer wrote a separate concurring opinion in which he agreed with Justice Ginsburg that the relevant question in determining whether a method of execution is constitutional is "whether the method creates an untoward, readily avoidable risk of inflicting severe and unnecessary suffering." 128 S. Ct. at 1563. However, finding that the petitioners failed to present sufficient evidence that Kentucky's execution method created such a risk, Justice Breyer concurred in the judgment of the Court.

Justice Ginsburg wrote a dissenting opinion, joined only by Justice Souter, in which she stated that the judgment should be vacated and the case remanded with instructions to consider whether the State's omission of certain safeguards "poses an untoward, readily avoidable risk of inflicting severe and unnecessary pain." 128 S. Ct. at 1567. Justices Ginsburg and Souter specifically agreed with the plurality that "the degree of risk, magnitude of pain, and availability of alternatives must be considered," but did not agree that "substantial risk" should be the "fixed threshold" that must be met. 128 S. Ct. at 1568.

- *Snyder v. Louisiana*, 128 S. Ct. 1203 (2008)

In a 7-2 decision, the Court held that a Louisiana trial court had erred in allowing the prosecutor to strike two African American potential jurors in the trial of Allen Snyder, an African American man accused of murder. Snyder was convicted and sentenced to death.

During *voir dire*, the prosecutor had used peremptory challenges to exclude all five potential black jurors. In his appeal to the Louisiana Supreme Court, Snyder argued that two of the peremptory challenges were based on race and thus unconstitutional. The Louisiana Supreme Court did not find the challenges to be improper, and affirmed Snyder's conviction. The U.S. Supreme Court agreed to hear the case.

In an opinion written by Justice Alito and joined by Chief Justice Roberts and Justices Stevens, Kennedy, Souter, Ginsburg and Breyer, the Supreme Court reversed. The Court explained that under *Batson v. Kentucky*, 476 U.S. 79 (1986), a trial court must follow a three-step process in adjudicating a claim that a peremptory challenge has been based on race. First the defendant must make a prima facie showing that a peremptory challenge was based on race. Then, the prosecution must offer a race-neutral basis for excluding the juror in question. Finally, the court, based on the parties' submissions, must determine whether the prosecution has purposefully discriminated on the basis of race. In making this determination, the Court noted that *Miller-El v. Dretke*, 545 U.S. 231 (2005), announced an additional requirement that in "considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted" by the trial judge. 128 S. Ct. at 1208 (internal citations omitted). The instant case raised in part the question of whether *Miller-El* requires a factual finding by the trial judge in weighing *Batson* challenges.

Here, the Court focused its analysis on the exclusion of Jeffrey Brooks, an African American college student. The prosecutor argued that Brooks had been excluded from the jury because he was nervous, and because of his busy schedule as a student. However, the Supreme Court found that the trial judge had not made a specific finding regarding Brooks's demeanor. Therefore, the Court concluded, there was no evidence that the trial judge had accepted the peremptory challenge based on Brooks's alleged nervousness. The Court also did not accept the argument that Brooks's schedule would have prevented him from serving as a juror, since the record reflected that Brooks had sought and received his dean's approval to rearrange his schedule to accommodate his jury duty.

More troubling to the Court was the fact that the prosecution had not challenged white jurors who had schedules more demanding than that of Brooks. The Court held that the prosecution's explanation for the peremptory challenges was pretextual, and, as a result, an inference of discriminatory intent was raised.

Justice Thomas, joined by Justice Scalia, dissented, contending that the Court should have deferred to the trial court in the absence of exceptional circumstances.

According to the dissent, none of the evidence in the record pointed to clear error on the part of the trial judge. Since the record as Justices Thomas and Scalia viewed it was ambiguous as to the ground on which the trial judge had allowed the peremptory challenge, they would have held that the Court should have deferred to the trial judge.

- *Kennedy v. Louisiana*, 2008 U.S. LEXIS 5262 (2008)

In a 5-4 decision, the Supreme Court held that it is unconstitutional to execute someone for a crime against an individual, including the rape of a young child, when the victim's life is not taken.

Patrick Kennedy was convicted of raping his eight-year-old stepdaughter; a jury sentenced him to death under a Louisiana statute that allowed capital punishment for the rape of a child under 12. The Louisiana Supreme Court upheld the death penalty, and the United States Supreme Court agreed to hear the case.

In an opinion written by Justice Kennedy and joined by Justices Stevens, Souter, Ginsburg, and Breyer, the Court held that sentencing Patrick Kennedy to death was a violation of the Eighth Amendment's prohibition on cruel and unusual punishment. The Court framed its decision with a general concern that the law should limit the use of the death penalty to "those offenders who commit a narrow category of serious crimes and whose extreme culpability makes them the most deserving of execution." 2008 U.S. LEXIS 5262, at *24 (internal citation omitted). The Court observed that "[w]hen the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint." 2008 U.S. LEXIS 5262, at *24.

The majority affirmed the Court's previous declaration that the prohibition on cruel and unusual punishment proscribes "all excessive punishments." 2008 U.S. LEXIS 5262, at *22 (internal citations omitted). In determining whether the death penalty was excessive in cases of child rape, the Court considered two factors: national opinion and the Court's independent judgment.

The majority concluded that there was a national consensus against execution for child rape. Only six states allow those who rape children to be executed; no one has been executed for rape in America since 1964 (or for any other non-homicide offense since 1963); and the only two people now on death-row for non-homicide offenses (including Kennedy) were both sentenced under Louisiana's child rape statute.

The majority also explained that the Court's independent judgment and analysis of the Eighth Amendment supported its decision. According to the majority, there is a fundamental moral distinction between all homicide and non-homicide crimes, and that even a horrific crime, like the rape of a minor, "cannot be compared to murder in [its] severity and irrevocability." 2008 U.S. LEXIS 5262, at *53 (internal citations omitted). The majority also voiced a concern that the death penalty might encourage those who rape children to murder their victims.

Justice Alito issued a dissent, joined by Chief Justice Roberts and Justices Scalia and Thomas, in which they would have upheld the constitutionality of the death penalty for the crime of rape of a child. According to the dissent, the majority was wrong to claim a national consensus against executing those who rape children, arguing that there was a trend toward more states adopting the death penalty as a punishment for such crimes. The dissent also contended that the Court's decision that a form of punishment is unconstitutional stifles the development of a national consensus on the issue, and acts as a one way ratchet to limit the death penalty.

The dissent also attacked the majority's "independent judgment." 2008 LEXIS 5262, at *36. Among other things, the dissent argued that the Court's decision was fundamentally wrong because those who rape children commit worse crimes and exhibit greater moral depravity than many other criminals who are permitted to be executed, such as criminals who, with no intent to kill, are found guilty of murder because of the actions of their accomplices.

- *Indiana v. Edwards*, 2008 U.S. Lexis 5031 (2008)

In a 7-2 decision, the Court held that the Sixth Amendment did not prohibit a trial judge from insisting that a criminal defendant who is mentally incompetent cannot represent himself or herself at trial. A defendant may be competent to stand trial, but not competent to represent himself or herself.

Ahmad Edwards was charged with attempted murder and other crimes after firing at a store security guard and wounding a bystander during his attempt to steal a pair of shoes. Edwards's schizophrenia became an issue for the court, and after several hearings a trial judge decided that Edwards was competent to stand trial, but not competent to represent himself. Edwards desired to make a self-defense argument to the jury, but his court-appointed counsel preferred a defense focusing on lack of intent, and presented that argument. Edwards demanded to represent himself, but was not allowed to do so, and was convicted without having presented to the jury the grounds he believed established his innocence. On appeal, Edwards argued that his Sixth Amendment right to self-representation had been violated. The Supreme Court of Indiana agreed, and ordered a re-trial. The United States Supreme Court vacated that decision.

Justice Breyer wrote the Court's opinion, joined by Chief Justice Roberts and Justices Stevens, Kennedy, Souter, Ginsburg, and Alito. In holding that Edwards's Sixth Amendment right of self-representation had not been violated, the Court distinguished this case from *Faretta v. California*, 422 U.S. 806 (1975), in which the Court held that a criminal defendant has the constitutional right to proceed to trial without counsel when he or she voluntarily and intelligently elects to do so. Specifically, the Court distinguished *Faretta* on the ground that it did not consider the problem of mental competency. According to the Court, insofar as allowing the mentally incompetent to represent themselves "threatens an improper conviction or sentence, self-representation in that

exceptional context undercuts the most basic of the Constitution's criminal law objectives, providing a fair trial." 2008 U.S. Lexis 5031, at *22. The Court concluded that the government's interest in ensuring a fair trial and the appearance of a fair trial can outweigh the defendant's interest in self-representation.

Justice Scalia wrote a dissent, joined by Justice Thomas, which took the position that the Constitution guarantees to *all* criminal defendants the right to self-representation at trial. According to the dissent, forcing on a defendant a lawyer who the defendant does not want is contrary to the basic right to defend oneself in court. The dissent contended that "[w]hat the Constitution requires is that a defendant be given the right to challenge the State's case against him using the arguments *he* sees fit." 2008 U.S. Lexis 5031, at *34 (emphasis in original). Justices Scalia and Thomas would have held that the right to self-representation should only be taken away when a defendant "insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom." 2008 U.S. Lexis 5031, at *36 (internal quotation omitted).

- *Munaf v. Geren; Geren v. Omar*, 2008 U.S. LEXIS 4888 (2008)

In a unanimous decision, the Supreme Court held that the federal courts have jurisdiction to hear habeas corpus petitions filed under 28 U.S.C. § 2441 by American citizens held overseas by American forces operating subject to an American chain of command, even when those forces are acting as part of a multinational coalition. However, the Court held that in these specific cases, the federal courts do not have the authority to prohibit the release of the petitioners to Iraqi custody for criminal prosecution.

These consolidated cases involve habeas petitions filed by two American citizens, Mohammad Munaf and Shawqi Omar, who voluntarily traveled to Iraq (separately) and were each arrested by a multinational force known as the MNF-I for alleged criminal conduct there. Munaf and Omar were each tried by MNF-I tribunals and detained by the U.S. military in Iraq operating as part of the MNF-I after it was determined that they posed threats to Iraq's security.

After Omar's tribunal, a habeas petition was filed on his behalf in federal court to prevent his transfer to the Central Criminal Court of Iraq ("CCCI") for criminal proceedings. The district court granted Omar's request for a preliminary injunction precluding his release to Iraqi custody, and the D.C. Circuit affirmed. Munaf was tried by the CCCI and found guilty of kidnapping, but an Iraqi appellate court vacated the verdict and directed that Munaf remain in custody until further criminal proceedings were concluded. A habeas petition was also filed on his behalf in federal court. The district court dismissed the claim for lack of jurisdiction and the D.C. Circuit affirmed. In so doing, the court distinguished its decision from that in *Omar* because, unlike Omar, Munaf had not been tried and convicted in a criminal court. The Supreme Court agreed to hear both cases.

In a unanimous decision authored by Chief Justice Roberts, the Supreme Court rejected the government's argument that the federal courts lacked jurisdiction to hear statutory habeas petitions filed on behalf of American citizens being held overseas by American forces that are acting as part of a multinational force. In so holding, the Court relied on the government's concessions that Omar and Munaf were being held in the "physical custody of American soldiers who answer only to an American chain of command." 2008 U.S. LEXIS 4888, at *21 (internal citations omitted).

The Court distinguished the case from *Hirota v. MacArthur*, 338 U.S. 197 (1948), which held that the federal courts lacked jurisdiction to hear the habeas petitions filed by two non-citizen detainees held in Japan by the United States military. In the instant case, the Court pointed out that the *Hirota* detainees were not American citizens and the *Hirota* Court did not believe they were being held pursuant to a solely American chain of command, since General MacArthur at that time served under the direction of the Far Eastern Commission and not the U.S. military.

After holding that the federal courts do have jurisdiction to hear the petitioners' habeas claims, the Court nonetheless held that the federal courts do not have the authority to enjoin the transfer of "individuals detained within another sovereign's territory to that sovereign's government for criminal prosecution." 2008 U.S. LEXIS 4888, at *27. Recognizing that the extraordinary relief of a preliminary injunction is only appropriate when the petitioners can show, among other things, a likelihood of success on the merits, the Court reviewed the merits of each petitioner's habeas claims, which were based on their assertion that they have a legally enforceable right not to be transferred to Iraqi authority for criminal proceedings.

As to the merits of that assertion, the Court held that "the[] requests would interfere with Iraq's sovereign right to 'punish offenses against its laws committed within its borders.'" 2008 U.S. LEXIS 4888, at *33 (internal citations omitted). The Court therefore held that the "the detainees' claims do not state grounds upon which habeas relief may be granted," and concluded that "no injunction should have been entered." 2008 U.S. LEXIS 4888, at *33. According to the Court, "[h]abeas corpus does not require the United States to shelter [] fugitives from the criminal justice system of the sovereign with authority to prosecute them." 2008 U.S. LEXIS 4888, at *55.

Justices Souter, Ginsburg and Breyer, who joined the Court's opinion, also issued a concurring opinion, written by Justice Souter, to emphasize that the Court's decision should not be read to foreclose relief to an American citizen who resists transfer from the American military to a foreign government for prosecution in a case in which the citizen is likely to be tortured.

Civil Rights and Discrimination

In large measure, the employment discrimination cases heard by the Court this term were not sharply divisive, and the Court issued a number of rulings in favor of workers. In one 5-4 decision, however, the Court upheld a state disability-retirement benefits plan even though the plan had a disparate impact on older workers.

- *Federal Express v. Holowecki*, 128 S. Ct. 1147 (2008)

In this 7-2 decision, the Court held that the filing of an “Intake Questionnaire” with the Equal Employment Opportunity Commission (“EEOC”) alleging age discrimination qualified as the filing of a “charge” under the Age Discrimination in Employment Act (“ADEA”). The ADEA provides that before a plaintiff can bring suit under the statute, he or she must first file a “charge” of discrimination with the EEOC.

The issue of the adequacy of the filing with the EEOC arose in a lawsuit brought by current and former employees of FedEx, who alleged that the company had engaged in unlawful age discrimination through certain practices intended to encourage older workers to leave the company before they were ready to retire. One of the plaintiffs submitted an Intake Questionnaire to the EEOC along with a detailed, sworn affidavit alleging that FedEx had discriminated against employees based on age.

The EEOC did nothing with the Intake Questionnaire, and did not consider it to be a charge. The employees brought suit, but the district court granted FedEx’s motion to dismiss the case on the ground that no charge had been filed with the EEOC as required by the ADEA. The employees appealed, and the Second Circuit reversed. In an opinion that rejected form (literally) over substance, the Second Circuit held that the EEOC “questionnaire” submitted in this case constituted a charge because the content “satisfied the statutory and regulatory requirements for what content must be included in a charge” and because it “communicated [the employee’s] intent to activate the EEOC’s administrative process.” *Holowecki v. Federal Express*, 440 F.3d 558, 568 (2d. Cir. 2006).

In an opinion by Justice Kennedy and joined by all of the Justices except Thomas and Scalia, the Court affirmed, holding that an Intake Questionnaire constitutes a charge if it expresses the filer’s intent to activate the EEOC’s enforcement process. The Court noted that this was the position taken by the EEOC in the government’s *amicus* brief, and found it appropriate to accord judicial deference to the EEOC position. The Court rejected the employees’ broader interpretation under which any filing containing the names of the parties along with an allegation of discrimination would be considered a charge. The Court also rejected FedEx’s argument that a filing cannot be considered a charge if the EEOC fails to notify the employer that a charge has been filed, recognizing that an employee has no control over what the EEOC does.

Justice Thomas, joined by Justice Scalia, dissented, and would have held that the lawsuit was barred due to the plaintiffs’ failure to file a charge with the EEOC. They

placed great emphasis on the fact that the stated purpose of the form submitted here was “pre-charge” counseling, while the EEOC provides a separate document called a “Charge of Discrimination” that expressly triggers the agency’s enforcement processes. The dissent also observed the EEOC typically does not view Intake Questionnaires as charges.

- *Sprint/United Management Co. v. Mendelsohn*, 128 S. Ct. 1140 (2008)

In a unanimous decision, the Supreme Court rejected an employer’s contention that certain types of evidence of unlawful discrimination must be subjected to a *per se* rule of exclusion, and sent the case back to the lower courts for clarification of why evidence had been excluded.

At the age of 51, Ellen Mendelsohn, who had worked for Sprint for 13 years and was the oldest manager in her unit, was fired as part of a company-wide reduction in force. She filed suit under the federal Age Discrimination in Employment Act (“ADEA”), claiming that she had been selected unlawfully for termination based on her age. At trial, she sought to present testimony from other older Sprint workers about age discrimination within the company. However, at Sprint’s request, the trial judge barred Mendelsohn from calling as witnesses any former co-workers who did not have the same supervisor that she had. The trial proceeded without the witnesses, and the jury found for Sprint.

On appeal, a 2-1 panel of the Tenth Circuit reversed, holding that the district court had erred in prohibiting Mendelsohn from calling the other employees as witnesses and presenting “other supervisor” evidence. The majority explained that the evidence was relevant to “Sprint’s discriminatory animus toward older workers” and that the “exclusion of such evidence unfairly inhibited Mendelsohn from presenting her case to the jury.” *Mendelsohn v. Sprint/United Management Co.*, 466 F.3d 1223, 1226 (10th Cir. 2006). Judge Tymkovich dissented.

Sprint appealed to the Supreme Court. In a unanimous opinion written by Justice Thomas, the Court rejected Sprint’s argument that “other supervisor” evidence was not relevant and should never be admitted. However, the Court held that Tenth Circuit had erred in finding that the district court had applied such a *per se* rule of exclusion, and also found that the district court’s reasoning for its evidentiary ruling was not clear. The Supreme Court did note, however, that if the district court had, in fact, excluded the “other supervisor” evidence based on a *per se* rule, it would have been proper for the Tenth Circuit to find that the district court had abused its discretion, since the decision whether to admit evidence of discrimination by other supervisors is fact-based and dependent on many factors. The Supreme Court sent the case back to the district court so that the court could clarify its ruling.

- *CBOCS West, Inc. v. Humphries*, 2008 U.S. LEXIS 4516 (2008)

In a 7-2 decision, the Court held that a critical Reconstruction Era civil rights statute, 42 U.S.C. § 1981, contains an implied private right of action allowing workers who have been retaliated against for complaining of race discrimination to sue their employers.

Hedrick Humphries was fired from his position as an assistant manager at Cracker Barrel, owned by CBOCS West, after complaining about race discrimination by another assistant manager in dismissing a black employee. Humphries filed suit under Title VII and Section 1981 alleging both race discrimination and retaliation claims. The district court dismissed Humphries's Title VII claims on procedural grounds, and granted summary judgment against him on his § 1981 retaliation claim, holding that he had not made out a prima facie case of unlawful retaliation. The Seventh Circuit reversed, and the Supreme Court agreed to hear the case.

The Court rejected CBOCS's claim that § 1981, which prohibits race discrimination in the making of contracts and has thus been construed to prohibit race discrimination in the workplace, does not also allow an employee to sue if he has suffered retaliation for complaining about race discrimination. Justice Breyer wrote the Court's opinion, joined by all members of the Court except Justices Thomas and Scalia.

The Court's opinion relied heavily on precedent, particularly *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969) and *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005). In those cases, the Court had read into major civil rights statutes an implied private right of action for retaliation claims -- in *Sullivan*, § 1982 (the companion statute to § 1981 dealing with property rights), and in *Jackson*, Title IX (which prohibits sex discrimination by schools that receive federal funds). Since the Court's "precedents have long construed §§ 1981 and 1982 similarly," *Humphries*, 2008 U.S. LEXIS 4516, at *9, the majority in this case found *Sullivan* to be persuasive. Justice Breyer wrote that the federal courts had come to "a broad consensus that § 1981, as amended, encompasses retaliation claims," a conclusion Justice Breyer found "well embedded in the law." 2008 U.S. LEXIS 4516, at *15, *16.

Justice Thomas issued a dissenting opinion, joined by Justice Scalia, in which they railed against implied private rights of action for retaliation generally and in particular contended that the Court here did a disservice to the text of the statute. According to the dissent, retaliation involves a person's complaint about race discrimination but is not about the person's racial status, and therefore should not be interpreted as race discrimination itself. Justices Thomas and Scalia, both of whom had dissented in *Jackson*, argued that the Court in that case had wrongly reinterpreted the *Sullivan* holding to find an implied right of action for retaliation claims under § 1982, and that the Court here had relied improperly on that misinterpretation of *Sullivan*.

- ***Gómez-Pérez v. Potter*, 2008 U.S. LEXIS 4518 (2008)**

In a 6-3 decision, the Court held that the Age Discrimination in Employment Act (“ADEA”) contains an implied private right of action for retaliation claims against federal-sector employers.

Myrna Gómez-Pérez worked for the U.S. Postal Service in Puerto Rico. She applied for and was granted a transfer to be closer to her ailing mother. When she applied to transfer back to her previous position, she was told it had been turned into a part-time position and had been filled. Gómez-Pérez filed an unsuccessful union grievance and then filed an equal employment opportunity age discrimination complaint with the Postal Service. She then alleged that she was subjected to a variety of forms of retaliation after filing the complaint. Gómez-Pérez filed suit under the ADEA, and the district court dismissed her retaliation claims on sovereign immunity grounds. The First Circuit upheld the dismissal on different grounds, holding that the ADEA does not reach retaliation claims against federal-sector employers. Gómez-Pérez appealed to the Supreme Court, which ruled in her favor.

Justice Alito wrote the Court’s opinion, joined by Justices Stevens, Kennedy, Souter, Breyer and Ginsburg. As it did in *CBOCS West, Inc. v. Humphries* (above), decided on the same day, the Court here relied heavily on its rulings in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969) (concerning § 1982) and *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005) (concerning Title IX). The majority concluded that “[f]ollowing the reasoning of *Sullivan* and *Jackson* we interpret the ADEA federal-sector provision’s prohibition of ‘discrimination based on age’ as likewise proscribing retaliation.” 2008 U.S. LEXIS 4518, at *14.

Chief Justice Roberts issued a dissenting opinion, joined in part by Justices Scalia and Thomas. In the portion of the dissent not joined by Scalia and Thomas, Roberts attempted to distinguish *Jackson* and *CBOCS West, Inc. v. Humphries* from *Gómez-Pérez* by stating that “not every express ban on discrimination must be read as a ban on retaliation as well.” 2008 U.S. LEXIS 4518, at *37. Chief Justice Roberts reiterated that he agreed with the *stare decisis* reasoning and the holding in *CBOCS West*.

In the portion of the dissent joined by Justices Scalia and Thomas, Chief Justice Roberts observed that “Congress has always protected federal employees from retaliation through the established civil service process,” 2008 U.S. LEXIS 4518, at *33, and contended that the statutory language and structure of the ADEA do not support the finding of an implied cause of action for retaliation. In particular, the dissent argued that the difference in language between the federal-sector and private-sector sections of the ADEA indicate that Congress did not intend to cover retaliation claims against federal-sector employers.

Justice Thomas issued a separate dissent, joined by Justice Scalia, to reiterate their view that the Court’s retaliation precedents “incorrectly conflated the concepts of retaliation and discrimination.” 2008 U.S. LEXIS 4518, at *56.

- ***Meacham v. Knolls Atomic Power Laboratory***, 2008 U.S. LEXIS 5029 (2008)

The Age Discrimination in Employment Act (“ADEA”) exempts employer actions that would otherwise be prohibited by the statute if they were in fact based on “reasonable factors other than age.” In a 7-1 decision with Justice Breyer not participating in the case, the Court held that employers bear the burden of persuading fact-finders that employer decisions challenged as violating the ADEA were based on reasonable factors other than age.

Clifford Meacham and 30 other employees were laid off by Knolls Atomic Power Laboratory. Thirty of the 31 employees were at least 40 years old; 28 of them, including Meacham, sued Knolls for violating the ADEA. The employees alleged that Knolls had designed its workforce reduction process with a discriminatory intent to eliminate older employees, and that, even if there were no discriminatory intent, the process had a discriminatory impact on older employees, leading to the statistically improbable outcome that 30 of the 31 laid off employees were at least 40 years old.

A jury found in favor of the employees on the discriminatory impact claim, but not the discriminatory intent claim. Knolls argued that its decisions were exempt from liability because they were based on reasonable factors other than age, and that it was entitled to judgment as a matter of law. The trial court rejected Knolls’ argument, but the Second Circuit reversed, holding that, while Knolls had the burden of producing evidence to show that its decisions were based on reasonable factors other than age, once it had produced evidence of such factors, the employees had the burden of proving that those factors were not relied on or were unreasonable. The Court of Appeals further held that the employees had failed to meet that burden. The Supreme Court vacated the Second Circuit’s decision, holding that under the ADEA, an employer must prove that its challenged decisions were actually based on reasonable factors other than age.

The majority opinion, written by Justice Souter and joined by Chief Justice Roberts and Justices Stevens, Kennedy, Ginsburg, and Alito, reasoned that Congress had placed the burden of proof on employers because the ADEA was structured so as to make the “reasonable factors other than age” provision an affirmative defense. In particular, the majority explained that other provisions of the ADEA had been interpreted as affirmative defenses, and saw no reason to interpret the “reasonable factors other than age” provision differently.

Justice Scalia concurred, taking the position that, because Congress gave the Equal Employment Opportunity Commission (“EEOC”) the authority to administer the ADEA, the Court should have deferred to the Commission’s interpretation of the ADEA. While the EEOC interpreted the “reasonable factors other than age” provision as the majority did, *i.e.*, that it is an affirmative defense, the majority did not view the Commission’s most relevant regulations as applicable here.

Justice Thomas wrote an opinion concurring in part and dissenting in part. Justice Thomas agreed with the majority that an employer bears the burden of proof when arguing that its employment decisions were based on reasonable factors other than age in disparate treatment cases, but would have held that the employees here should not prevail because, in his opinion disparate *impact* claims cannot be brought under the ADEA. That position was rejected by the Court in *Smith v. City of Jackson*, 544 U.S. 228 (2005).

- *Engquist v. Oregon Department of Agriculture*, 2008 U.S. LEXIS 4705 (2008)

In a 6-3 decision, the Court declined to recognize a “class-of-one” theory of equal protection in the area of public employment.

Anup Engquist, a native of India, began working for the Oregon Department of Agriculture in 1992. She was dismissed from her job in 2002, and brought suit under federal anti-discrimination laws and the Equal Protection Clause, claiming that she had been discriminated based on race, sex, and national origin. Engquist “also brought what is known as a ‘class-of-one’ equal protection claim, alleging that she was fired not because she was a member of an identified class (unlike her race, sex, and national origin claims), but simply for ‘arbitrary, vindictive, and malicious reasons.’” 2008 U.S. LEXIS 4705, at *7-8. A jury found for Engquist on her class-of-one claim, and awarded her compensatory and punitive damages. Although nine other circuits have allowed similar claims to go forward, the Ninth Circuit held that an equal protection class-of-one theory is not cognizable in the context of public employment, and reversed.

The Supreme Court agreed to hear the case in order to resolve this split among the circuits. In an opinion written by Chief Justice Roberts and joined by Justices Scalia, Kennedy, Thomas, Breyer, and Alito, the Court agreed with the Ninth Circuit and declined to recognize a class-of-one equal protection theory in the area of public employment. In so ruling, the Court distinguished its earlier holding in *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000), in which it first recognized a class-of-one theory of equal protection. In *Olech*, a village resident sought connection to her local municipal water supply, and was told she would be given a connection only if she gave the village a 33-foot easement, even though the village had required other property owners to grant only a 15-foot easement. In that case, the Court concluded that the resident had “been intentionally treated differently from others similarly situated and that there [was] no rational basis for the difference in treatment.” 2008 U.S. LEXIS 4705, at *18 (quoting 528 U.S. at 564).

Here, the Court noted that in *Olech* there had been a clear standard against which to evaluate the disparity in treatment. Engquist’s case, on the other hand, involved questions of what the Court called subjective, “discretionary decisionmaking.” 2008 U.S. LEXIS 4705, at *21. The Court also noted the difference between the government’s “exercising ‘the power to regulate or license, as lawmaker,’ and the government acting ‘as proprietor, to manage [its] internal operations,’” 2008 U.S. LEXIS 4705, at *12, and

held that the government has more leeway when it deals with citizens as employees than when it uses its sovereign powers to deal with citizens at large.

In rejecting the class-of-one theory, the Court observed that “treating seemingly similarly situated individuals differently in the employment context is par for the course,” that the class-of-one theory does not fit in the public employment context, and that it is contrary to the concept of at-will employment. 2008 U.S. LEXIS 4705, at *23. In addition, the Court feared that allowing a class-of-one claim to go forward in the public employment context would open the courts up to a multitude of such claims.

Justice Stevens issued a dissent that was joined by Justices Souter and Ginsberg, and would have held that Engquist’s constitutional rights had been violated. The dissenters viewed the decision in *Olech* as having been dictated by the absence of a rational basis for the disparity in treatment. In Engquist’s case, the dissenters observed, the state had offered no explanation or defense for its actions -- there was no workplace or performance-based rationale for Engquist to have been fired. The dissenters rejected the majority’s argument that employment decisions are inherently discretionary, taking the position that there is a difference “between an exercise of discretion and an arbitrary decision.” 2008 U.S. LEXIS 4705, at *36. The dissent concluded by criticizing the majority:

Instead of using a scalpel to confine so-called “class-of-one” claims to cases involving a complete absence of any conceivable rational basis for the adverse action and the differential treatment of the plaintiff, the Court adopts an unnecessarily broad rule that tolerates arbitrary and irrational decisions in the employment context.

2008 U.S. LEXIS 4705, at *39.

- ***Kentucky Retirement Systems v. EEOC*, 2008 U.S. LEXIS 5032 (2008)**

In a 5-4 ruling, the Court upheld a Kentucky disability-retirement benefits plan against a challenge that it violated the Age Discrimination in Employment Act (“ADEA”), concluding that any difference in treatment experienced by older workers was not motivated by their age but rather by pension eligibility.

Hazardous position workers for the state of Kentucky (such as police officers and firefighters) become eligible for a normal retirement pension in two ways. The first is via a service-based track that does not consider an employee’s age, and requires that an employee have worked for the state for 20 years. The second is through a partially age-based track requiring the employee to work for the state for five years and reach the age of 55.

If a hazardous position worker becomes seriously disabled but is not yet eligible for a pension, the state will add the number of years necessary to qualify the worker for a

pension under either track. As a result, younger workers may receive more imputed years of service than older workers. Under the plan, disability-retirement benefits are calculated based on years of service, including imputed years. This means that a younger disabled employee who worked fewer actual years than an older disabled employee had worked could receive greater disability benefits because of additional imputed years of service.

Charles Lickteig became disabled while working in a Kentucky sheriff's department. He had already become eligible for normal retirement under the five-year, age-based track, so did not earn any imputed years of service under the disability-retirement benefits plan. Lickteig complained to the Equal Employment Opportunity Commission ("EEOC"), which brought suit arguing that the state had failed to award Lickteig imputed years of service because of his age, which the EEOC contended was a violation of the ADEA. The district court granted summary judgment against the EEOC and a panel of the Sixth Circuit affirmed. The Sixth Circuit reheard the case *en banc*, and reversed. Due to the potential impact of that ruling on many state pension plans, the Supreme Court agreed to hear the case.

In an opinion by Justice Breyer joined by Chief Justice Roberts and Justices Stevens, Souter, and Thomas, the Supreme Court upheld the Kentucky plan. According to the Court, to prevail under the ADEA when a pension plan includes age as a factor and employees are then treated differently, a plaintiff must prove that the employer's "differential treatment was 'actually motivated' by *age*, not pension status." 2008 U.S. LEXIS 5032, at *23 (emphasis in original). Although pension status may not be used as a proxy for age -- employees of a certain pension status may not be targeted for different treatment because it is assumed they will be older -- the Court held that in the current case, the differences in treatment in the employer's disability-retirement benefits plan were the result of pension status and not motivated by age. The majority concluded that age was a factor here in the calculation of disability benefits only because it was a factor in the normal pension plan, and that it was the state's intention to enable disabled employees to be covered under the pension plan.

Justice Kennedy wrote a dissent, joined by Justices Scalia, Ginsburg, and Alito, taking the position that the Court's opinion undermined the disparate treatment prong of the ADEA. The dissent argued that regardless of employer intent, Kentucky's disability system has a disparate impact on older workers in some circumstances, and would thus have held it unlawful under the ADEA. The dissent accused the majority of requiring that an employer have discriminatory intent in order to violate the ADEA, which the dissent stated "finds no support in the text of the statute." 2008 U.S. LEXIS 5032, at *33. The dissent argued that by undercutting a plaintiff's ability to base a claim on disparate treatment, the majority "puts the Act and its enforcement on a wrong course." 2008 U.S. LEXIS 5032, at *27.

Free Speech and Associational Rights

In a 5-4 decision striking a blow to campaign finance reform, the Court ruled that the so-called “Millionaire’s Amendment” of the Bipartisan Campaign Reform Act violated the First Amendment. Free speech claims in other contexts did not fair as well, however. In two decisions, the Court rejected challenges to state election systems, one regarding primaries and the other the selection of judicial candidates. In each case, the Court reversed appellate rulings that had accepted free speech challenges to the election systems. In another free speech case, the Court upheld the “pandering” provision of a federal criminal law targeting those who promote child pornography.

- *Washington State Grange v. Washington State Republican Party*, 128 S. Ct. 1184 (2008).

In a 7-2 ruling, the Court rejected a facial challenge brought by political parties to a state’s primary election system. The ruling produced some strange bedfellows as well as some sniping among the conservative justices.

At issue was the constitutionality of Washington State’s primary system, under which the top two candidates advance to the general election. The state allows a candidate to self-identify with a particular political party, even if the party does *not* endorse that candidate. Parties challenged the primary system as an unconstitutional burden on their First Amendment associational rights, a claim upheld by the Ninth Circuit, which noted that the freedom to associate must also include “some freedom to exclude others from the association.” 460 F.3d 1108, 1116 (9th Cir. 2006).

The Supreme Court reversed. In an opinion by Justice Thomas, from which only Justices Scalia and Kennedy dissented, the Court stated that “[f]acial challenges are disfavored,” 128 S. Ct. at 1191, and rejected this one on the ground that there was no basis in this facial challenge for assuming that voters would be confused by the candidates’ stated party-preferences (*e.g.*, the state could put disclaimers on the actual ballots).

Justice Scalia wrote a dissent, joined by Justice Kennedy, in which they would have held that the Washington State primary system “positively impairs the legitimate role of political parties,” and that the Constitution does not permit “this sabotage.” 128 S. Ct. at 1203.

Chief Justice Roberts issued a concurring opinion, joined by Justice Alito. Although they both joined Justice Thomas’s majority opinion, their separate concurrence was issued to note some agreement with the concerns expressed in Justice Scalia’s dissent, but also to explain why they thought Scalia was wrong. Justice Scalia in turn specifically addressed Chief Justice Roberts’s concurrence, turning his acerbic writing on the Chief. In particular, Scalia mocked Roberts’s suggestion that the state could design a ballot so that a voter would no more think that a particular party had endorsed a specific candidate solely because the candidate identified herself with that party than the voter

would think someone was associated with Campbell's because she said "I like Campbell's soup." 128 S. Ct. at 1197.

- *N.Y. State Bd. of Elections v. Lopez Torres*, 128 S. Ct. 791 (2008)

In this case, the Supreme Court voted unanimously to overturn a Second Circuit decision holding that New York State's system for selecting candidates for judicial elections violated the First Amendment.

The case was brought by a group of voters, unsuccessful judicial candidates, and Common Cause, who claimed that a state law enacted in 1921 that required political parties to select their candidates for judges on the New York Supreme Court (the state's trial court) by a convention of delegates elected by party members was unconstitutional. Delegates for the party conventions are elected from a "delegate primary" held in September in each of the state's 150 assembly districts; individuals may run for a delegate position by submitting a petition to the Board of Elections signed by 500 enrolled party members within a specified time period.

The plaintiffs argued that the nominating process "burdened the rights of challengers seeking to run against candidates favored by the party leadership, and deprived voters and candidates of their rights to gain access to the ballot and to associate in choosing their party's candidates." 128 S. Ct. at 797. In particular, the plaintiffs challenged the nominating provision that required potential delegates to submit a 500-signature petition provision collected during a 37-day window prior to the primary.

Justice Scalia, in an opinion joined by Chief Justice Roberts and Justices Stevens, Souter, Thomas, Ginsburg, Breyer and Alito, distinguished the First Amendment rights of political parties to structure their own internal processes in selecting the candidates of their choosing from the plaintiffs' "own claimed associational right not only to join, but to have a certain degree of influence in, the party." 128 S. Ct. at 798 (emphasis in original).

Although the Court recognized "an individual's associational right to vote in a party primary without undue state-imposed impediment," it held the 500-signature provision to be reasonable, as states may "demand a minimum degree of support for candidate access to a primary ballot." 128 S. Ct. at 798.

Underlying the plaintiffs' challenge was their objection to the claimed unfair advantage the nominating process afforded to candidates supported by party leadership. However, Justice Scalia observed that ballot-access cases have generally centered on "the requirements themselves, and not on the manner in which political actors function under those requirements." 128 S. Ct. at 799. The Court also rejected the plaintiffs' arguments that their First Amendment rights were infringed because the state's nominating process rendered the general election ballot uncompetitive. According to the Court, "[c]andidates who fail to obtain a major party's nomination via convention can still get on the general-

election ballot for the judicial district by providing the requisite number of signatures of voters resident in the district.” 128 S. Ct. at 800.

Justice Stevens, in addition to joining the Court’s opinion, wrote a separate opinion concurring in the judgment, which was joined by Justice Souter, to make clear that the Court’s holding that New York State’s nominating process does not run afoul of the First Amendment does not mean that the Court endorsed or agreed with the policies chosen.

Justice Kennedy wrote an opinion concurring in the judgment in which he pointed out that had the state not provided a means for candidates to get on the general election ballot apart from a party’s nominating convention, then the process would be “subject to scrutiny from the standpoint of a ‘reasonably diligent independent candidate.’” 128 S. Ct. at 802 (internal citation omitted).

In a separate section of his concurrence, Justice Kennedy, joined here by Justice Breyer, also questioned whether the election process -- with the attendant campaigning and fundraising components and its susceptibility to criticism and abuse -- is suitable for the selection of judges of statewide jurisdiction, and whether it is “consistent with the perception and the reality of judicial independence and judicial excellence.” 128 S. Ct. at 803.

- *United States v. Williams*, 128 S. Ct. 1830 (2008)

In a 7-2 ruling, the Court upheld the so-called pandering provision, § 2252A, of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act (“PROTECT Act”) against a challenge that it is overbroad and unduly vague. The law makes it a crime for a person to knowingly solicit, offer, or promote “any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material” is actual child pornography, even if it is not. 18 USC § 2252A(a)(3)(B).

Michael Williams was arrested after he uploaded a link to several pornographic pictures of real children in an online chat room to persuade users that he had real child pornography to trade. He pleaded guilty on all counts, including possession of actual child pornography, but reserved the right to challenge the constitutionality of the pandering conviction. The district court rejected his challenge, but the Eleventh Circuit reversed, holding that the statute was overly broad and impermissibly vague. The government appealed.

In an opinion by Justice Scalia joined by Chief Justice Roberts and Justices Stevens, Alito, Breyer, Kennedy, and Thomas, the Court agreed with the government, reversed the Eleventh Circuit, and upheld the statute. In rejecting Williams’s overbreadth challenge, the Court explained that the applicable standard for a facial challenge is whether the statute “prohibits a substantial amount of protected speech.” 128 S. Ct. at 1838.

In addressing whether the statute criminalizes a substantial amount of protected expressed activity, the Court noted that attempts to engage in illegal transactions are not protected by the First Amendment. The Court held that the Eleventh Circuit's rationale was incorrect, since the Eleventh Circuit took the position that noncommercial transactions should have been protected. Instead, the Court held that "offers to provide or requests to obtain child pornography are categorically excluded from the First Amendment." 128 S. Ct. at 1842.

The Court held that the law was not unduly broad or vague, and summarily rejected a series of hypothetical situations aimed at demonstrating the law's potentially broad reach. According to the Court, the situations would either not occur or not be protected by the courts. The Court explained that there was no risk of the law being overbroad since "the defendant must believe that the picture contains certain material, and that material in fact (and not merely in his estimation) must meet the statutory definition." 128 S. Ct. at 1843.

The Court also rejected Williams's argument that the pandering statute is unduly vague and thus violates the Due Process Clause. According to the Court, the Eleventh Circuit mistakenly believed that "the mere fact that close cases can be envisioned renders a statute vague." 128 S. Ct. at 1846. The Court held that the statute is clear as to what behavior was being criminalized.

Justice Stevens authored a concurring opinion, in which he was joined by Justice Breyer, agreeing that the statute was not overbroad since it required an element of lasciviousness.

Justice Souter wrote a dissent, joined by Justice Ginsburg, in which they asserted that the majority had erased the carefully drawn line between constitutionally protected speech and real child pornography, since the Court's decision allows individuals to be punished even if the images they possessed were not images of real children. Justices Souter and Ginsburg would have found the statute overbroad and held it unconstitutional under the Court's prior First Amendment jurisprudence.

- ***Davis v. Federal Election Commission***, 2008 U.S. LEXIS 5267 (2008)

In a 5-4 decision, the Supreme Court held that the so-called "Millionaire's Amendment" of the Bipartisan Campaign Reform Act ("BCRA"), which increases the amount of money that candidates running for Congress can raise from individual donors when they face self-financing candidates, violates the First Amendment.

The Millionaire's Amendment requires that candidates disclose their personal spending to the Federal Election Commission ("FEC"), and changes the fundraising rules when the "opposition personal funds amount" (the difference between each candidate's expenditure of personal funds and 50% of the funds raised for the election at certain times in the year preceding the election) exceeds \$350,000 in House elections and

varying amounts in Senate elections. When the specified amount is exceeded, a non-self-financing candidate is subject to less restrictive fundraising limits. House candidates can receive up to \$6,900 from individual donors instead of the usual \$2,300, even if those donors have reached their normal aggregate contributions cap, and can accept coordinated party funds without any limit.

In 2004 and 2006, Jack Davis ran unsuccessfully as a Democratic candidate for the House of Representatives. He spent \$1.2 million on the 2004 campaign and \$2.3 million on the 2006 campaign, principally from his own funds. In 2006, Davis filed declarations about his spending with the FEC. The FEC then informed Davis that it believed he had violated the law by not disclosing personal expenditures during the 2004 campaign. Davis sued the FEC, seeking a declaration that the Millionaire's Amendment is unconstitutional and asking that the FEC be enjoined from enforcing it and raising the caps for his opponent during the 2006 campaign. The FEC agreed to take no enforcement action against Davis for his alleged violation while the lawsuit was pending.

A three-judge district court rejected Davis's argument that the Millionaire's Amendment violated the First Amendment. Pursuant to BCRA's procedure for appellate review, Davis appealed directly to the Supreme Court.

In an opinion written by Justice Alito and joined by Chief Justice Roberts and Justices Scalia, Thomas and Kennedy, the Court agreed with Davis that the Millionaire's Amendment violates the First Amendment. The majority characterized the increased contribution limits for a non-self-financing candidate as a burden on a self-financing candidate's First Amendment right to spend personal funds to finance campaign speech.

The majority explained that this burden "cannot stand unless it is justified by a compelling state interest," 2008 U.S. LEXIS 5267, at *29 (internal citations omitted), and held that no such interest had been identified here. According to the majority, the only government interest recognized in campaign finance law is an interest in preventing "actual and apparent corruption of the political process." 2008 U.S. LEXIS 5267, at *26 (internal citations omitted). The Court held that this interest was not furthered by a burden on self-financing, since self-financing reduces the threat of corruption by decreasing a candidate's reliance on other sources of funding. The Court rejected the FEC's argument that there was a legitimate government interest in "reduc[ing] *the natural advantage* that wealthy individuals possess in campaigns for federal office," 2008 U.S. LEXIS 5267, at *31 (emphasis in original, internal citations omitted), or in countering the advantage given to wealthy individuals by limitations on individual contributions.

The Court also struck down the disclosure requirements, stating that compelled disclosure in itself "infringe[s] on privacy of association and belief guaranteed by the First Amendment," 2008 U.S. LEXIS 5267, at *36 (internal citations omitted), and that this infringement was unjustified and unconstitutional when the law it is designed to implement is itself unconstitutional.

Justice Stevens, dissenting as to the merits,¹¹ would have upheld the Millionaire’s Amendment. According to Justice Stevens, the Court’s precedent in *Buckley v. Valeo*, 424 U.S. 1 (1976), characterizing limits on the quantity of speech or the ability of candidates to spend money on speech as offensive to the First Amendment, should be overturned because what matters is the ability of citizens to communicate their message. Justice Stevens expressed the view that limits on campaign expenditures are more like the time, place and manner regulations that First Amendment jurisprudence allows than content regulation, which is prohibited. He contended that limits on the quantity of speech and how much money candidates can spend will not, if reasonable, decrease the quality of debate, and are likely to improve it. Justice Stevens would therefore have held that limits on campaign expenditures, like the Millionaire’s Amendment, are not offensive to the Constitution.

Then, in a portion of his opinion joined by Justices Souter, Ginsburg and Breyer, Justice Stevens took the position that even if the Millionaire’s Amendment burdened a First Amendment right, the law was justified by the government’s interest in “reducing both the influence of wealth on the outcomes of elections, and the appearance that wealth alone dictates those results.” 2008 U.S. LEXIS 5267, at *53.

Justice Ginsburg issued a brief, separate opinion dissenting on the merits, joined by Justice Breyer, in which they explained that they would not address Justice Stevens’s arguments about *Buckley* because the FEC had not asked the Court to overturn it and thus the issue had not been briefed, and further noted their belief that the Millionaire’s Amendment is constitutional even under *Buckley*.

Federalism and States’ Rights

In several decisions this term, the Court held that federal laws pre-empted or superseded state law claims, proceedings, or regulations. One of those rulings in particular was a victory for big business, as the Court held that manufacturers of defective medical devices could not be sued under state law if the devices had received pre-market approval from the FDA.

- *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999 (2008)

In this 8-1 decision, the Court held that the pre-emption clause of the Medical Device Amendments of 1976 bars state common law claims challenging the safety or effectiveness of a medical device that received pre-market approval from the FDA.

During heart surgery in 1996, a Medtronic catheter ruptured in Charles Riegel’s coronary artery, causing Riegel to suffer extensive injuries. Riegel died in 2004. Before his death, Riegel and his wife brought suit against Medtronic, claiming that the catheter was “designed, labeled, and manufactured in a manner that violated New York common

¹¹ Whether Davis had standing was also at issue in the case. The Court unanimously held that he did.

law, and that these defects caused Riegel to suffer severe and permanent injuries.” 128 S. Ct. at 1005. The catheter had received pre-market approval from the FDA.

Until the enactment of the Medical Device Amendments of 1976 (“MDA”), the regulation of new medical devices had been left to the states, although drug regulation was conducted at the federal level under the Federal Food, Drug, and Cosmetic Act. The MDA, however, scaled back state obligations and created a system of detailed federal oversight of medical devices based on the level of risk associated with the device. The MDA contains an express pre-emption clause declaring:

Except as provided in subsection (b) of this section, no State or political subdivision of a State may establish or continue in effect with respect to a device intended for human use any requirement (1) which is different from, or in addition to, any requirement applicable under this Act to the device, and (2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this Act.

21 U.S.C. § 360k(a).

In this case, the district court held that the pre-emption provision barred the common law claims brought by the Riegels. The Second Circuit affirmed, observing that the Riegels’ claims would, if successful, impose state requirements on device manufacturers that were additional to or different from federal requirements.

The Supreme Court upheld the Second Circuit’s ruling. In an opinion for the Court by Justice Scalia joined fully by Chief Justice Roberts and Justices Kennedy, Alito, Thomas, Breyer and Souter, and in part by Justice Stevens, the Court held that common law claims arising from additional or different requirements than those under the MDA are barred by the pre-emption clause of the statute. The majority added that the section at issue “does not prevent a State from providing a damages remedy for claims premised on a violation of FDA regulations; the state duties in such a case ‘parallel,’ rather than add to, federal requirements.” 128 S. Ct. at 1011.

In an opinion concurring in part and concurring in the judgment, Justice Stevens explained his belief that the primary purpose of the 1976 amendments was to address conflicting state regulation of medical devices, and not to pre-empt common law tort actions. Justice Stevens observed, however, that the language of the MDA goes beyond pre-empting state regulations and reaches other types of “requirements,” such as duties imposed under common law. Justice Stevens therefore concurred in the judgment, and joined most of the Court’s opinion.

However, Justice Stevens disagreed with the majority on whether a finding by a state court jury imposes a “requirement” within the meaning of the pre-emption provision. Justice Stevens distinguished a finding by a jury from a rule of law, and took the position that only the latter creates a “requirement.” Justice Stevens also criticized

the majority for suggesting that Congress had decided that the concern for injuries from FDA-approved devices was outweighed by the concern for those who would suffer without new medical devices.

Justice Ginsburg dissented, stating her belief that Congress had not intended to curtail state common law suits seeking compensation for injuries caused by defectively designed or labeled medical devices. Justice Ginsburg stressed that Congress's purpose was to pre-empt the pre-existing system of state regulation of medical devices, not to bar common law tort actions. Looking at the context of 1976 amendments, Justice Ginsburg concluded that the term "requirement" was not meant to include claims under state tort law. She further noted that the absence of a federal compensatory remedy from the text of the statute indicated that Congress did not intend to pre-empt suits grounded in state common law. In her opinion, the Court's decision had granted immunity to an industry that, in the judgment of Congress, should be subject to more stringent regulation.

- ***Rowe v. New Hampshire Motor Transport Association*, 128 S. Ct. 989 (2008)**

In a unanimous decision, the Court held that federal law pre-empted a state's efforts to prevent minors from buying cigarettes and other tobacco products from remote sellers.

At issue in the case were two provisions of a Maine law restricting the delivery and sale of tobacco products to underage buyers. The first provided that tobacco retailers who shipped their products were required to use a delivery service that would confirm, among other things, that the package was being delivered not only to the person to whom it was addressed but also that the recipient was legally old enough to buy tobacco.

The second challenged provision prohibited any person from "knowingly" transporting a tobacco product to someone in Maine unless either the sender or receiver had a Maine license. This provision further stated that a person was "deemed to know" that a package contained tobacco if it so stated, or if the person receiving the package received it from someone whose name appeared on a list of unlicensed tobacco retailers distributed by the state Attorney General to package-delivery companies. The law provided civil monetary penalties for its violation.

The Federal Aviation Administration Authorization Act of 1994 ("FAAAA") contains a pre-emption clause providing that a state "may not enact or enforce a law . . . related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." 49 U.S.C. § 14501(c)(1). Transport carrier associations brought suit in federal court against the Attorney General of Maine, claiming that the foregoing provisions of the Maine tobacco delivery law were pre-empted by the FAAAA. The lower courts agreed, and Maine appealed to the Supreme Court.

In an opinion by Justice Breyer that was joined in relevant part by Justice Scalia and in full by the other seven Justices, the Court affirmed the lower court rulings, holding

that the pre-emption clause of the FAAA did in fact pre-empt the challenged portions of the Maine law. In so holding, the Court first observed that the congressional purpose behind the pre-emption clause was to help “assure transportation rates, routes, and services that reflect ‘maximum reliance on competitive market forces,’ thereby stimulating ‘efficiency, innovation, and low prices,’ as well as ‘variety’ and ‘quality.’” 128 S. Ct. at 995 (internal citations omitted).

The Court explained that requiring a tobacco retailer to use a delivery service that followed certain procedures would require *carriers* to offer certain services “that the market does not now provide (and which the carriers would prefer not to offer).” This, according to the Court, would allow Maine to substitute “its own governmental commands for ‘competitive market forces’” in determining what services motor carriers provided. 128 S. Ct. at 995.

With respect to the “deemed to know” provision, the Court held that this aspect of the law would require every carrier to examine every package and examine it against the Attorney General’s list, “thereby directly regulating a significant aspect of the motor carrier’s package pick-up and delivery service. In this way it creates the kind of state-mandated regulation that the federal Act pre-empts.” 128 S. Ct. at 996.

Finally, the Court also rejected Maine’s argument that it find an implicit exception for public health laws in the FAAAA’s pre-emption clause. While the Court noted that the federal law did not pre-empt broad public health laws not aimed at motor carriers or having a tenuous effect on their rates, routes, or services, the Court held that this was a case in which the state law was aimed directly at the carriage of goods and that its impact on trucking was significant.

Justice Ginsburg, although joining the Court’s opinion, wrote a separate concurring opinion in order to “emphasize the large regulatory gap left by an application of the FAAAA perhaps overlooked by Congress, and the urgent need for the National Legislature to fill that gap.” 128 S. Ct. at 998. Justice Ginsburg noted the great threat to public health posed by tobacco, and the growing ease by which state regulations intended to prevent tobacco sales to minors could be thwarted by Internet sales. She closed her opinion by stating, “[n]ow alerted to the problem, Congress has the capacity to act with care and dispatch to provide an effective solution.” 128 S. Ct. at 999.

Justice Scalia wrote a brief concurring opinion to state that he joined the Court’s opinion, except those portions relying on “the reports of committees of one House of Congress to show the intent of that full House and of the other -- with regard to propositions that are apparent from the text of the law, unnecessary to the disposition of the case, or both.” 128 S. Ct. at 999.

- *Preston v. Ferrer*, 128 S.Ct. 978 (2008)

In an 8-1 ruling, the Court held that the Federal Arbitration Act (“FAA”) supersedes state laws governing contract disputes when the parties have agreed to arbitrate all disputes arising under the contract, whether the state laws place jurisdiction over a dispute in a judicial forum or in an administrative agency.

This case involved a dispute between Alex Ferrer, who appears as “Judge Alex” on a Fox television show, and Arnold Preston, a California entertainment industry attorney who represented Ferrer. The parties had agreed to arbitration in their contract. Seeking fees allegedly due him, Preston invoked the arbitration clause of the contract. In response, Ferrer petitioned the California Labor Commission, and argued that Preston had acted as an unlicensed talent agent in violation of the California Talent Agencies Act. As a result, he asserted, the contract should be rendered void, and asked the Labor Commission to stay the arbitration process. The Commission, however, held that it did not have the authority to order such relief.

Seeking to have the arbitration process stopped, Ferrer then filed suit in California trial court. The trial court enjoined the arbitration process, and held that arbitration could not proceed unless the Labor Commissioner determined that the Labor Commission does not have jurisdiction over the dispute. The California Court of Appeal affirmed the decision, and held that California law vests exclusive original jurisdiction over the dispute in the Labor Commissioner. The California Supreme Court denied Preston’s petition for review, and the U.S. Supreme Court agreed to hear the case to determine “whether the Federal Arbitration Act overrides a state law vesting initial adjudicatory authority in an administrative agency.” 128 S.Ct. at 982-983.

In an opinion by Justice Ginsburg joined by all members of the Court except Justice Thomas, the Court reversed the California Court of Appeal’s ruling. The Court held that when the parties to a contract have agreed to arbitration, the FAA supersedes state laws that place original jurisdiction in another forum. The Court noted that the FAA did not pre-empt the Talent Agencies Act, but only determined the forum in which the dispute was to be resolved. According to the Court, the FAA reflects a national policy favoring arbitration of claims that the parties have agreed to resolve in that manner. This policy, the Court held, applies in both state and federal courts and forecloses state legislative attempts at undercutting arbitration agreements. Here, the Court explained, postponing arbitration until after the state Labor Commission had made a decision would be against Congress’s intent to expedite resolution of disputes through an arbitration process.

In a very short dissent, Justice Thomas repeated his previously expressed view that the FAA does not apply to proceedings in state courts, and therefore would have held that “in state-court proceedings, the FAA cannot displace a state law that delays arbitration until administrative proceedings are completed.” 128 S.Ct. at 989. Justice Thomas would thus have affirmed the judgment of the California Court of Appeal.

- *Chamber of Commerce of the United States v. Brown*, 2008 U.S. LEXIS 5033 (2008)

In a 7-2 decision, the Court held that the National Labor Relations Act (“NLRA”) pre-empted, and thus invalidated, a California law prohibiting employers who receive state funds from using those funds in their efforts to stop union-organizing campaigns.

Business organizations in California sued to enjoin the enforcement of two sections of the California Government Code. These provisions prohibit employers “that receive state funds from using the funds to ‘assist, promote, or deter union organizing.’” 2008 U.S. LEXIS 5033, at *4 (2008). The organizations argued that these provisions of state law were pre-empted by the NLRA. The district court agreed, holding the state laws invalid. The Ninth Circuit twice upheld that ruling, then granted rehearing *en banc* and reversed. The Supreme Court held that the state provisions were pre-empted by the NLRA, and reversed the Court of Appeals.

Justice Stevens wrote the Court’s opinion, joined by Chief Justice Roberts and Justices Alito, Souter, Thomas, Kennedy and Scalia. Although the Court recognized that the NLRA does not contain any express pre-emption clause, it nonetheless noted “that Congress implicitly mandated two types of pre-emption as necessary to implement federal labor policy.” 2008 U.S. LEXIS 5033, at *8. The first, named for the case in which it was first recognized, is the “*Garmon* pre-emption,” which prohibits state regulation of activity that “the NLRA protects, prohibits, or arguably protects or prohibits.” 2008 U.S. LEXIS 5033, at *8 (internal citation omitted). The second, also named for the case in which it was first recognized, is the “*Machinists* pre-emption,” which prohibits both National Labor Relations Board and state regulation of activity that Congress intended to leave unregulated.

In the instant case, the majority held that the challenged California provisions were pre-empted under *Machinists* because Congress had amended the NLRA to essentially codify the First Amendment as applied to union organizing, showing its intent that there should be free and open debate. (Having so ruled, the Court did not address the question of whether *Garmon* pre-emption might also apply.)

Justice Breyer wrote a dissent, joined by Justice Ginsburg, and would have upheld the California statutes on the basis that they do not constitute the kind of regulation that the NLRA pre-empts. While Justices Breyer and Ginsburg recognized that congressional policy favors free debate in unionization campaigns, they viewed the state provisions as simply limiting the sources of money that could be used in that free debate, rather than limiting the debate itself or the amount of money spent on it. The dissenters left open the possibility that the NLRA would pre-empt the California laws if in practice they worked to discourage the use of non-state funds in unionization debates, which would limit the free debate intended by Congress.

The Rights of Consumers and Investors

In several different legal contexts, the Court decided a number of cases this term favorably for big business, including the pre-emption cases and the *Exxon* case discussed in other sections of this report. In one case specifically concerning corporate fraud, a divided Court limited the ability of the victims to obtain relief from those who had aided and abetted the fraud.

- *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761 (2008)

In a 5-3 decision, with Justice Breyer taking no part in the case, the Court held that victims of securities fraud cannot sue those who aided and abetted the fraud, and upheld the dismissal of a fraud claim brought by investors against two suppliers of a publicly traded company that had helped the company falsely inflate its revenues.

Anticipating that it would not meet its projected revenue goals for the year, Charter Communications, Inc., a publicly-traded company, arranged to secretly overpay two suppliers of Charter's digital cable equipment. The suppliers would return the overpayment by purchasing advertising from Charter. The equipment agreements were backdated in order to make them appear unconnected to the advertising agreement. The transactions were later reviewed by Charter's auditors, who approved the company's year-end financial statements showing that it had met projected revenue and operating cash goals.

A group of purchasers of Charter stock sued the company for securities fraud, and also sued the two suppliers. The Eighth Circuit ruled that the two suppliers had not made mis-representations that were relied upon by the investors -- a necessary element of fraud -- and dismissed the claim against them. The Supreme Court agreed to hear an appeal by the investors, and upheld the dismissal.

In an opinion by Justice Kennedy, joined by Chief Justice Roberts and Justices Scalia, Thomas and Alito, the Court held that § 10(b) of the Securities Exchange Act of 1934 ("the Act") cannot be read to provide an implied private right of action against those who aid and abet securities fraud.

As Justice Kennedy recognized, although the Act does not expressly create a private right of action against anyone, the Supreme Court has previously found an implied right of action in the words of the statute against those who perpetrate investment fraud. However, the majority rejected the investors' claim that the statute provides an implied private right of action against those who aid and abet the fraud, citing the Court's decision in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), which, in the words of Justice Kennedy, held that "§ 10(b) liability did not extend to aiders and abettors." 128 S. Ct. at 768.

Analyzing the facts under the requisite elements of a typical securities fraud violation, the Court observed that “[t]he conduct of a secondary actor must satisfy each of the elements or preconditions for liability.” 128 S. Ct. at 769. Here, the Court held that the investors could not “show reliance upon any of [the suppliers’] actions except in an indirect chain that we find too remote for liability.” 128 S. Ct. at 769. Hence, the Court concluded that the suppliers had no liability to the investors under the implied private right of action the Court had recognized under § 10(b).

In so holding, the Court rejected the investors’ argument that “investors rely not only upon the public statements relating to a security but also upon the transactions those statements reflect,” and explained that “[w]ere this concept of reliance to be adopted, the implied cause of action would reach the whole marketplace in which the issuing company does business; and there is no authority for this rule.” 128 S. Ct. at 770.

And, in a statement with ramifications beyond securities fraud, the Court stated that “[c]oncerns with the judicial creation of a private right of action caution against its expansion. The decision to extend the cause of action is for Congress, not for us.” 128 S. Ct. at 773.

Justice Stevens wrote a dissenting opinion, joined by Justices Souter and Ginsburg, in which they criticized the majority’s “unduly stringent and unmoored” view of reliance. 128 S. Ct. at 777. The dissent would have held that “[i]nvestors relied on Charter’s revenue statements in deciding whether to invest in Charter and in doing so relied on [the suppliers’] fraud, which was itself a ‘deceptive device’ prohibited by 10(b) of the Securities Exchange Act.” 128 S. Ct. at 774.

The dissenters found the Court’s narrow approach to implied private causes of action to be a significant departure from prior federal jurisprudence. 128 S. Ct. at 777. Moreover, according to the dissent, “Congress enacted § 10(b) with the understanding that federal courts respected the principle that every wrong would have a remedy. Today’s decision simply cuts back further on Congress’ intended remedy.” 128 S. Ct. at 782.

The Environment

In another ruling this term that favored big business, the Court, in a case involving the 1989 *Exxon Valdez* oil spill, adopted a new rule significantly limiting punitive damages in federal maritime cases.

- *Exxon Shipping Co. v. Baker*, 2008 U.S. LEXIS 5263 (2008)

In a 5-3 ruling (with Justice Alito taking no part in the case), the Court adopted limits for punitive damages in maritime cases and sharply reduced the amount of punitive damages awarded against Exxon arising out of the *Exxon Valdez* oil spill.

The *Exxon Valdez* ran aground on Bligh Reef in Prince William Sound, Alaska, in March 1989, spilling more than 11 million gallons of crude oil and causing significant environmental damage and substantial disruption to the livelihoods of commercial fishermen and others. Lawsuits were brought against Exxon by fishermen, Native Americans, and landowners, and consolidated into this action.

A jury awarded the plaintiffs compensatory damages of \$507.5 million and punitive damages of \$5 billion from Exxon. The District Court twice upheld the award, but reduced the punitive damages to \$4.5 billion, and the Ninth Circuit eventually reduced the punitive damages award to \$2.5 billion. The Supreme Court agreed to hear the case to resolve three questions: “whether a shipowner may be liable for punitive damages without acquiescence in the actions causing harm, whether punitive damages have been barred implicitly by federal statutory law [the Clean Air Act] making no provision for them, and whether the award of \$2.5 billion in this case is greater than maritime law should allow in the circumstances.” 2008 U.S. LEXIS 5263, at *8-9.

Justice Souter wrote the Court’s opinion, which was joined as to the first two questions by all of the justices participating in the case. First, without identifying the position of any individual justice, Justice Souter stated that the eight justices were evenly divided on the question of whether corporations can be held liable under maritime law for punitive damages based on the acts of managerial agents. Because the Court was evenly divided, the Ninth Circuit ruling on this issue stands, but has no precedential value going forward.

Second, the Court also ruled unanimously that the Clean Water Act does not preempt punitive damages in maritime law. In rejecting Exxon’s argument that it does, the Court noted that no statutory pre-emption clause exists, and explained that allowing punitive damages would not interfere with the federal policy of the statute.

The remainder of Justice Souter’s opinion for the Court dealt with whether the amount of the punitive damages awarded against Exxon was excessive, and was joined only by Chief Justice Roberts and Justices Kennedy, Scalia, and Thomas. The opinion noted the modern consensus that the purposes of punitive damages are retribution and deterrence. In evaluating whether the award here was excessive, the opinion surveyed state legislative policies on punitive damages and state civil verdicts in which judges or juries have awarded punitive damages. The majority’s analysis found that the amount of punitive damages varies considerably from case to case and jurisdiction to jurisdiction, leading the majority to express their concern that wrongdoers cannot predict the amount of punitive damages for which they might be held liable. As the majority put it, “[t]he real problem, it seems, is the stark unpredictability of punitive awards.” 2008 U.S. LEXIS 5263, at *50.

The majority held that, under its authority over maritime common law, the Court should adopt a numerical ratio tying punitive damages to the amount of compensatory damages in maritime cases, although it recognized that “some will murmur that this smacks too much of policy and too little of principle.” 2008 U.S. LEXIS 5263, at *64.

The majority ruled that the appropriate ratio of punitive damages to compensatory damages should be a simple 1:1. This ruling drastically reduced the punitive damage award against Exxon from \$2.5 billion to \$507.5 million (the amount of the compensatory damages), a sum that apparently would only take Exxon less than a week to earn.¹² The majority described this case as one with “no earmarks of exceptional blameworthiness within the punishable spectrum,” one “without intentional or malicious conduct, and without behavior driven primarily by desire for gain.” 2008 U.S. LEXIS 5263, at *75.

Justice Scalia wrote a short concurrence, joined by Justice Thomas, to reiterate their view that the Constitution imposes no limit on punitive damages.

Justices Ginsburg, Stevens, and Breyer would have upheld the \$2.5 billion punitive damages award against Exxon, and each issued a dissenting opinion on this point. Justice Stevens took the position that

[o]n an abuse-of-discretion standard, I am persuaded that a reviewing court should not invalidate this award. In light of Exxon’s decision to permit a lapsed alcoholic to command a supertanker carrying tens of millions of gallons of crude oil through the treacherous waters of Prince William Sound, thereby endangering all of the individuals who depended upon the sound for their livelihoods, the jury could reasonably have given expression to its “moral condemnation” of Exxon’s conduct in the form of this award.

2008 U.S. LEXIS 5263, at *92 (footnote omitted).

Justices Stevens and Ginsburg both placed special emphasis on their view that the Court should have left the establishment of a limiting principle on punitive damages to Congress, rather than have adopted a 1:1 ratio. In support of that view, Justice Stevens wrote “[t]he congressional choice not to limit the availability of punitive damages under maritime law should not be viewed as an invitation to make policy judgments on the basis of evidence in the public domain that Congress is better able to evaluate than is this Court.” 2008 U.S. LEXIS 5263, at *86. Justice Breyer’s dissent focused on his view that while punitive damages should be “awarded according to meaningful standards,” 2008 U.S. LEXIS 5263, at *97, this case warranted an exception to the 1:1 rule adopted by the majority.

¹² According to a report earlier this year, Exxon earned profits in 2007 at a rate of nearly \$1,300 per second. See David Ellis, “Exxon shatters profit records” *CNN Money* (February 1, 2008) available at <http://money.cnn.com/2008/02/01/news/companies/exxon_earnings/> (visited June 25, 2008).

Access to Justice

In a 5-4 ruling, the Court gave an expansive reading to a federal tort claims law, exempting all law enforcement officers from such claims and precluding those injured by their negligence from suing them. In another case, the Court held that lower courts must consider whether certain claims against the government are untimely even when the government has waived the issue of timeliness.

- *Ali v. Federal Bureau of Prisons*, 128 S.Ct. 831 (2008)

In a 5-4 ruling, the Court held that the Federal Tort Claims Act does not allow prison inmates to bring tort claims against federal corrections officers.

Abdus-Shahid M.S. Ali, serving a 20-year sentence for murder, claimed that several of his possessions, including two copies of the Qur'an and a prayer rug, were missing after his possessions had been inventoried and shipped from one federal prison to another. Ali filed an administrative tort claim with the Federal Bureau of Prisons but was denied relief; in the agency's view, Ali's signature on the receipt certified the accuracy of the contents of his duffels. Ali then brought suit under the Federal Tort Claims Act against the Federal Bureau of Prisons and several employees. The district court dismissed the claim for lack of subject matter jurisdiction, holding that the Act did not authorize property claims against law enforcement officers. The 11th Circuit affirmed, and the Supreme Court agreed to hear the case in order to resolve a circuit split.

As a general matter, the Federal Tort Claims Act waives the sovereign immunity of the United States for torts committed by federal employees. However, the waiver of sovereign immunity does not apply to claims that arise "from the detention of property by 'any officer of customs or excise or any other law enforcement officer.'" 128 S. Ct. at 834 (2008). At issue in this case was whether federal prison guards are included within the meaning of that exception. In an opinion by Justice Thomas joined by Chief Justice Roberts and Justices Alito, Ginsburg, and Scalia, the Court held that they are and thus that Ali could not bring suit for the loss of his property.

In so holding, the Court concluded that "any other law enforcement officer" means *all* law enforcement officers, applying an expansive meaning to "any": "Congress' use of 'any' to modify 'other law enforcement officer' is most naturally read to mean law enforcement officers of whatever kind." 128 S. Ct. at 836. The Court declined to hold that "any other law enforcement officer" means only those officers acting in a customs or excise capacity, stating that, "Had Congress intended to limit [the statute's] reach as petitioner contends, it easily could have written 'any other law enforcement officer *acting in a customs or excise capacity.*'" 128 S. Ct. at 840 (emphasis in original).

Justice Kennedy issued a dissenting opinion joined by Justices Stevens, Souter, and Breyer that criticized the majority for "foreclos[ing] consideration of the text within the whole context of the statute as a guide to determining legislative intent." 128 S. Ct. at 841. According to the dissent, the Court should have applied the canons of statutory

interpretation, as they “instruct that words in a series should be in interpreted in relation to one another.” *Id.* The dissent would have held that the plain words of the statute refer only to customs and tax officers, and not to all officers. In the view of the dissenters,

[i]f Congress had intended to give sweeping immunity to all federal law enforcement officials from liability for the detention of property, it would not have dropped this phrase onto the end of the statutory clause so as to appear there as something of an afterthought. The seizure of property by an officer raises serious concerns for the liberty of our people and the Act should not be read to permit appropriation of property without a remedy in tort by language so obscure and indirect.

128 S. Ct. at 849.

Justice Breyer wrote a separate dissent, joined by Justice Stevens, in which they argued that while canons of statutory construction offer help in evaluating the significance of words, “other contextual features can show that Congress intended a phrase to apply more broadly than the immediately surrounding words by themselves suggest.” 128 S. Ct. at 850. Justices Breyer and Stevens would have held that Congress had intended only a narrow tort liability exception related to customs and excise. According to their dissent, “[i]t is thus not the Latin canons . . . that shed light on the application of the statutory phrase but Justice Scalia’s more pertinent and easily remembered English-language observation that Congress ‘does not . . . hide elephants in mouseholes.’” 128 S. Ct. at 852 (internal citation omitted).

- *John R. Sand & Gravel Co. v. United States*, 128 S. Ct. 750 (2008)

In a 7-2 decision, the Court held that the question of whether a case has been timely brought in the Court of Federal Claims is one that a court must consider even if the defendant government has waived the issue of timeliness by failing to raise it.

John R. Sand and Gravel Company had a 50-year mining lease. The company claimed that certain activity by the Environmental Protection Agency (EPA) amounted to a taking of its leasehold rights, and sued the government in the Court of Federal Claims. The government argued that several of the company’s claims were barred by the applicable six-year statute of limitations, but later “conceded that certain claims were timely,” and ultimately won the case on the merits. 128 S. Ct. at 753. The company appealed to the Court of Appeals for the Federal Circuit. In defending the appeal, the government did not raise the statute of limitations. The Court of Appeals considered the issue *sua sponte* (on its own), and held that the company’s action was untimely.

The Supreme Court agreed to review the case, and in an opinion by Justice Breyer joined by all of the Justices except Stevens and Ginsburg, the Court affirmed. According to the Court, applicable precedent, including *Kendall v. United States*, 107 U.S. 123 (1833), *Finn v. United States*, 123 U.S. 227 (1887), and *Soriano v. United States*, 352

U.S. 270 (1957), when read together, held that the Court of Claims must consider the timeliness of a claim even if the issue is not raised by the government, and that the general proposition that limitations is a defense that must affirmatively be raised by a defendant does not apply to actions against the government in the Court of Federal Claims. The Supreme Court therefore held in this case that the limitations period is jurisdictional and thus not waivable.

The company had argued that the precedents holding that the statute of limitations is jurisdictional had been overturned by *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), an argument with which the dissent agreed. The majority, however, distinguished *Irwin* on the basis that the statute of limitations at issue there was different.

Responding to the company's argument that *Irwin* and the earlier cases created confusion, the Court declined to overturn *Kendall*, *Finn*, and *Soriano* on the principles of *stare decisis*. The Court concluded: "To overturn a decision settling one such matter simply because we might believe that decision is no longer 'right' would inevitably reflect a willingness to reconsider others." 128 S. Ct. at 757.

Justice Stevens issued a dissenting opinion joined by Justice Ginsburg. In their view, *Irwin* rejected the notion that the statute of limitations was jurisdictional and had thus overturned *Soriano*. The dissent criticized the majority's argument for *stare decisis* as having a "hollow ring." 128 S. Ct. at 758. Justice Stevens concluded, "[it] seems to me quite plain that *Soriano* is no longer good law, and if there is in fact ambiguity in our cases, it ought to be resolved in favor of clarifying the law, rather than preserving an anachronism whose doctrinal underpinnings were discarded years ago." 128 S. Ct. at 759.

Justice Ginsburg also issued her own dissenting opinion, arguing that the majority's decision to "adher[e] to *Kendall*, *Finn*, and *Soriano* is irreconcilable with the reasoning and result in *Irwin*." *Id.* According to Justice Ginsburg, *stare decisis*, while an important principle of law, is not inflexible, especially when the Court's thinking on a particular matter has changed, as it has with respect to time limits. "It damages the coherence of the law if we cling to outworn precedent at odds with later, more enlightened decisions." 128 S. Ct. at 760.

Justice Ginsburg was sharply critical of the majority for issuing an opinion that she believed would not assist lower courts in determining whether a particular statute of limitations is jurisdictional. She concluded, "[a]fter today's decision, one will need a crystal ball to predict when this Court will reject, and when it will cling to, its prior decisions interpreting legislative texts." 128 S. Ct. at 761.

The Right to Bear Arms

In another of its most divided decisions this term, the Court held for the first time that the Second Amendment gives Americans an individual right to keep and bear arms unrelated to militia service.

- *District of Columbia v. Heller*, 2008 U.S. LEXIS 5268 (2008).

In a 5-4 ruling, the Court divided along ideological lines over the meaning of the Second Amendment, with the majority holding that the Amendment protects an individual right to possess a firearm independent of militia service, and to use it for lawful purposes such as self-defense.

At issue in the case was Washington, D.C.'s total handgun ban and requirement that other firearms be equipped with a trigger lock while in the District, with no exception for the use of weapons for self-defense. Dick Heller, a D.C. special police officer, was not authorized under the law to keep a handgun at his home, and sued to enjoin the City from enforcing the gun control law. The district court dismissed Heller's complaint, but the D.C. Circuit reversed and directed the district court to enter summary judgment in Heller's favor. The Supreme Court agreed to hear the case.

In an opinion by Justice Scalia joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito, the Court held that "the inherent right of self-defense has been central to the Second Amendment right," and struck down the D.C. gun control laws as unconstitutional. 2008 U.S. LEXIS 5268, at *97.

The majority focused heavily on what it considered to be an originalist interpretation of the Bill of Rights. The Second Amendment states that "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed." The majority first analyzed what it called the operative clause of the Amendment -- the "keep and bear arms" portion -- separately from the militia language. In its view, the right to bear arms, as understood at the time of the Amendment's ratification, was "simply the carrying of arms" and had no special militia connotations. 2008 U.S. LEXIS 5268, at *31. Rather, according to the majority, "it has always been widely understood that the Second Amendment . . . codified a *pre-existing* right." 2008 U.S. LEXIS 5268, at *37 (emphasis in original). This right included the use of arms by individuals to defend themselves if the government did not establish or allow militias. The majority concluded that Amendment's language about militias, which it called the prefatory clause, was in no way meant to limit the right to bear arms, but rather only to clarify that an individual's right to bear arms included for militia purposes, responding to apprehensions about the federal government's limiting militia rights.

The majority recognized that, "[l]ike most rights, the right secured by the Second Amendment is not unlimited." 2008 U.S. LEXIS 5268, at *94. First, the majority did not decide if the Second Amendment applies to the states, leaving state laws that ban gun

ownership subject to future litigation. 2008 U.S. LEXIS 5268, at *84, n.23. Further, the majority left open the possibility that less restrictive gun control laws would be constitutional. This includes prohibitions on the carrying of firearms by felons or the mentally ill, prohibitions on carrying in schools or government buildings, state licensing laws, and a ban on dangerous or unusual weapons.

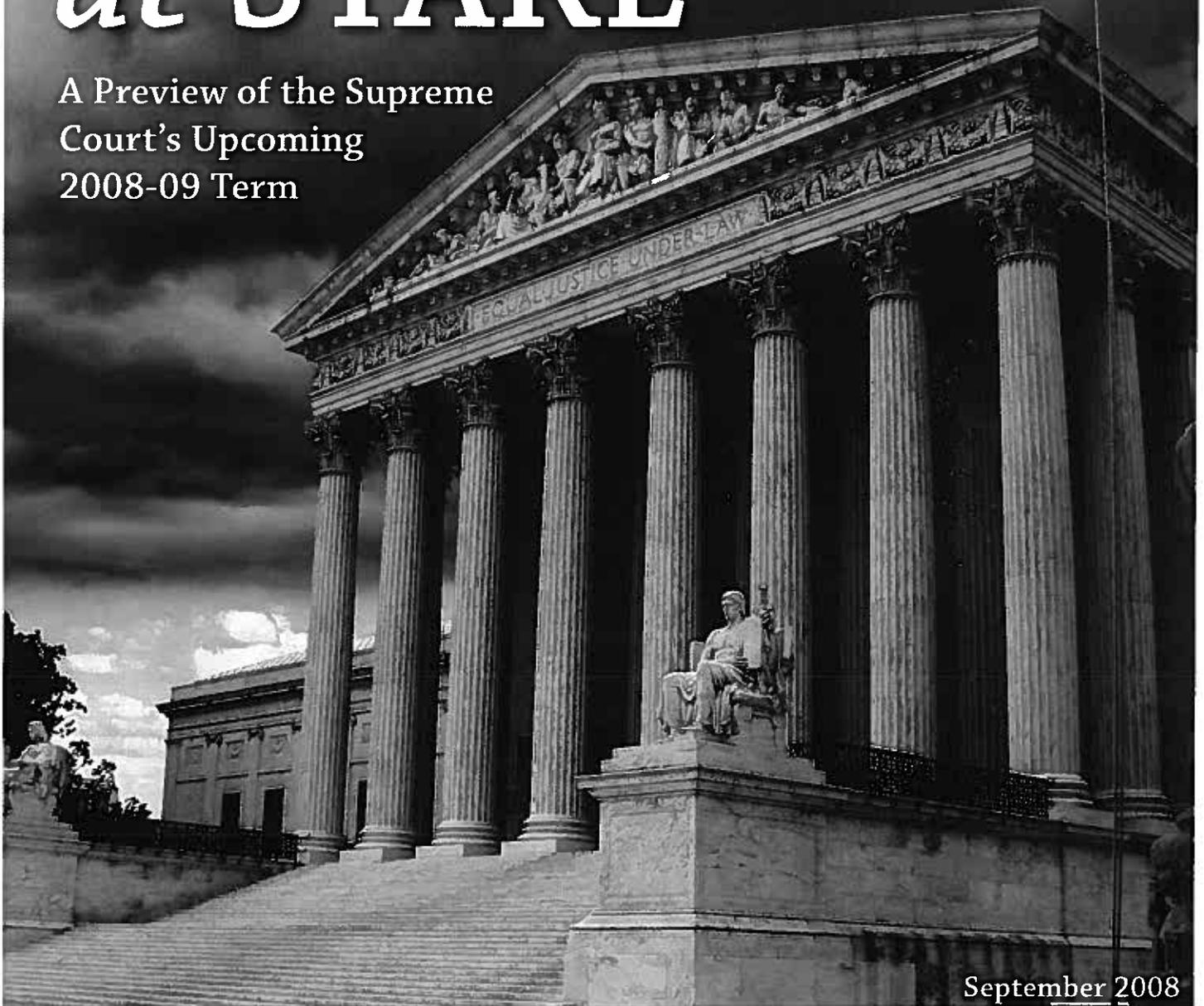
Although the majority recognized the policy arguments against handgun ownership and that the right of ownership is subject to some limitations, it stated that “the enshrinement of constitutional rights necessarily takes certain policy choices [including a handgun ban] off the table . . . it is not the role of this Court to pronounce the Second Amendment extinct.” 2008 U.S. LEXIS 5268, at *111.

Justice Stevens wrote a dissent, joined by Justices Souter, Ginsburg and Breyer, taking the position that the Second Amendment protects the right of the people to own guns only in connection to militia service, and that even if the Second Amendment right is an individual right, it is still a right confined to militia service. According to Justice Stevens’s dissent, the militia limitation was a response to concerns about the federal government’s disarming militias and creating a federal standing army, and the militia language of the Amendment informs and limits the Amendment’s “bear arms” language. The dissent criticized the majority for inventing a constitutional right of self-defense, stating that a right to use guns for self-defense, outside of the militia context, is only “the product of [the majority’s] law-changing decision.” 2008 U.S. LEXIS 5268, at *188. This new right, according to the dissent, will leave many issues unsettled and lead to more judicial activism because “it will surely give rise to a far more active judicial role in making vitally important national policy decisions.” 2008 U.S. LEXIS 5268, at *190.

Justice Breyer also wrote a dissent, joined by Justices Stevens, Souter and Ginsberg, arguing that, even if the right to bear arms includes an individual right to use them for self defense, the Second Amendment protection of this right is not absolute. Justice Breyer’s dissent criticized the majority for failing to define the level of scrutiny the Court will use to analyze Second Amendment violations and suggested an interest-balancing inquiry, “with the interests protected by the Second Amendment on one side and the governmental public-safety concerns on the other, the only question being whether the regulation at issue impermissibly burdens the former in the course of advancing the latter.” 2008 U.S. LEXIS 5268, at *205-06. According to this dissent, D.C.’s interest in curbing the high level of urban crime outweighs any Second Amendment protection.

MORE RIGHTS *at* STAKE

A Preview of the Supreme
Court's Upcoming
2008-09 Term



September 2008

**JUSTICE FOR ALL.
NO EXCEPTIONS.**
That's the American Way

 **PEOPLE
FOR THE
AMERICAN
WAY
FOUNDATION**



MORE RIGHTS AT STAKE:

A Preview of the Supreme Court's Upcoming 2008-09 Term

The Supreme Court's new term beginning on October 6, 2008 — the proverbial “first Monday in October” — will be the third full term with the Court's two newest justices, Chief Justice John Roberts and Justice Samuel Alito, on the bench. As their first two terms together have shown, President George W. Bush's nominees have joined Justices Scalia and Thomas in case after case to form an ultraconservative voting bloc. When these four justices were joined, as they often were, by Justice Anthony Kennedy in critical cases, the result was a series of 5-4 rulings that undermined Americans' rights and interests in a number of areas, including employment discrimination, reproductive freedom, and access to justice, often by overturning or effectively ignoring precedent.¹

This coming term, the Court is already set to consider a number of important cases involving voting rights, employment discrimination, free speech, and access to justice. It will also hear a case involving federal preemption of injured consumers' state law claims against the manufacturers of inadequately labeled prescription drugs. Last term, the Court held that injured consumers' state law claims for damages against the makers of negligently manufactured medical devices were preempted by federal law if the devices had received premarket approval from the FDA. This term's case presents the Court with another opportunity to rule in favor of big business and further erode the rights of Americans to obtain redress for their injuries.

Among the cases the Court will consider this term are:

- an employment discrimination case in which the Court will decide whether an employee who cooperates in her employer's internal investigation of sexual harassment by a male supervisor can nonetheless be fired or otherwise retaliated against for having done so
- another employment discrimination case in which the issue is whether an employer can calculate current retirement benefits based on its discriminatory treatment of temporary disability leave taken by pregnant employees prior to the time when federal law expressly prohibited such discriminatory treatment
- a case challenging the constitutionality of Section 5 of the Voting Rights Act, one of our country's most important civil rights laws
- a First Amendment case involving a city's refusal to display in a city park a monument containing the religious principles of the Summun, a minority faith group, although the park contains a Ten

1 See, e.g., People For the American Way Foundation, “Civil Rights and Civil Liberties in the Supreme Court's 2007-08 Term” (July 2008), available at: <<http://media.pfaw.org/legalfiles/sc-eot-07-08.pdf>>, and People For the American Way Foundation, “Civil Rights And Civil Liberties in the Supreme Court's 2006-07 Term” (July 2007), available at: <<http://media.pfaw.org/PDF/CourtWrapUp0607.pdf>>.

Commandments monument; the case pits religious right organizations against each other, with Pat Robertson's American Center for Law and Justice — usually a proponent of government-endorsed religion — representing the city in its efforts to block the Summum monument, and the Rutherford Institute filing an *amicus curiae* brief in support of Summum

- a free speech case involving the FCC's decision to regulate "fleeting expletives" (*i.e.*, a one-time or isolated vulgar utterance that is not obscene) on broadcast television as "indecent," an abrupt reversal of longstanding policy pursuant to which the FCC required repeated use of "indecent" language before proceeding against a broadcast
- a free speech case involving a state's efforts to stifle political activities by unions through the prohibition of voluntary payroll deductions from employees of local government units
- a case involving federal preemption of injured consumers' claims for damages under state law against the manufacturers of inadequately labeled drugs when the labels have been approved by the FDA; in this particular case, a musician treated for nausea caused by a migraine wound up losing her hand and forearm as the result of gangrene caused by the intravenous injection of an anti-nausea drug

This memorandum summarizes these and other non-criminal cases that the Court is already poised to consider during its 2008-09 term that raise civil rights, civil liberties, and other critical issues.² In addition to the significance of these cases, the Court will be hearing a number of them, and possibly deciding them, earlier in the term than usual. During the Court's October and November argument sessions, and for the first time in years, the Court has scheduled three cases a day for oral argument rather than two, creating what Supreme Court reporter Tony Mauro has called a front-loaded, "fatter, faster calendar."³ As reported by Mauro, the intention, according to Chief Justice Roberts, is to give the Court "more decisions to write and issue through the winter, alleviating the Court's usual headlong race to finish the term's work in May and June."⁴

The Court will no doubt add additional cases to its docket after its long conference on September 29, 2008, and as the term progresses. Given the sharp ideological divisions that have emerged on the Roberts Court, it is likely that a number of the Court's cases will be decided by narrow margins, once again demonstrating the importance of who is chosen to fill vacant seats on the Court, and who is elected to the White House to nominate them and the Senate to confirm them.

² People For the American Way Foundation does not necessarily have a position on each of these cases.

³ Tony Mauro, "Next Term: A Fatter, Faster Calendar," *Legal Times* (June 30, 2008), at 11.

⁴ *Id.*

Selected Case Summaries

- **Employment discrimination: retaliation against employees for cooperating with employer's internal investigation of sexual harassment**

- *Crawford v. Metropolitan Government of Nashville*, No. 06-1595, reviewing 211 Fed. Appx. 373 (6th Cir. 2006)

In this case, the Supreme Court will decide whether Title VII prohibits an employer from firing or otherwise retaliating against an employee who has cooperated with the employer's investigation into sexual harassment or other discrimination prohibited by Title VII.

Vicky Crawford, who worked for the Metropolitan Government of Nashville, was fired after she cooperated with an internal investigation conducted by her employer into allegations that a male supervisor had sexually harassed female employees. The investigator conducting the internal investigation asked to interview Crawford. She complied and in the course of the interview informed the investigator that the supervisor had sexually harassed her as well as other employees. The investigator concluded that the supervisor had acted inappropriately, but apparently no disciplinary action was taken against him. Several months later, Crawford was fired.

Crawford filed suit under Title VII, claiming that her firing was in retaliation for having cooperated with the investigation. Title VII prohibits an employer from retaliating against an employee who has "opposed any practice" that is unlawful under that statute (including sexual harassment) or who has "made a charge, testified, assisted or participated in any manner in any investigation, proceeding, or hearing" under the statute.

The district court granted summary judgment against Crawford, and the Sixth Circuit upheld that decision, holding that Crawford's cooperation with the internal investigation did not trigger either of the provisions of Title VII protecting an employee from retaliation. According to the court of appeals, Crawford's participation in an internal investigation did not constitute "opposition" to sexual harassment within the meaning of Title VII. In the court's view, "opposition" consists of such "overt" conduct as complaining to management and does not encompass merely "relating unfavorable information." 211 Fed. Appx. at 376. In addition, the court held that participating in an internal investigation is "not a protected activity under the participation clause." *Id.* Rather, the court held that a charge of discrimination must first be filed with the EEOC before that clause is triggered, and none had been filed here.⁵

- **Sex discrimination in education: foreclosure of equal protection claim**

- *Fitzgerald v. Barnstable School Committee*, No. 07-1125, reviewing 504 F.3d 165 (1st Cir. 2007)

At issue in this case is whether an individual who brings a claim of unlawful sex discrimination in education under Title IX is precluded from bringing an equal protection claim under 42 U.S.C. § 1983, which provides remedies to those whose constitutional or federal statutory "rights, privileges or immunities" have been violated by state actors. The courts of appeals are divided on the answer, and this case therefore calls on the Supreme Court to resolve a circuit split.

⁵ People For the American Way Foundation has joined an *amicus curiae* brief in this case urging the Supreme Court to reverse the Sixth Circuit's ruling.

The case was brought by the parents of Jacqueline Fitzgerald, a kindergarten student who allegedly had been subjected to sexual harassment by an older student on the school bus. According to Jacqueline, the older student had repeatedly forced her to lift her skirt, pull down her underwear, and spread her legs. Jacqueline's parents sued the school, claiming a violation of Jacqueline's rights under Title IX as well as under the Equal Protection Clause. The latter claim was brought under Section 1983. The district court granted summary judgment to the school on the Title IX claim. In addition, the district court dismissed the Fitzgeralds' equal protection claim, holding that it was foreclosed by Title IX.

The Fitzgeralds appealed to the First Circuit, which agreed that the school had not violated Title IX. In addition, the court of appeals upheld the dismissal of the equal protection claim brought under Section 1983, holding that this claim was precluded by Title IX's remedial scheme. The Fitzgeralds have asked the Supreme Court to consider only the Section 1983 preclusion issue.⁶

- **Sex discrimination: pregnancy leave and retirement benefits**

- *AT&T Corp. v. Hulteen*, No. 07-543, reviewing 498 F.3d 1001 (9th Cir. 2007) (*en banc*)

This is another case in which the Court has been asked to resolve a split among the circuit courts. At issue is whether an employer's calculation of retirement benefits *after* the passage of the federal Pregnancy Discrimination Act can include a denial of credit for time spent by female employees on pregnancy disability leave *prior* to passage of the Act if time spent on leave for other temporary disabilities is included in computing an employee's length of service.

In 1978, Congress enacted the Pregnancy Discrimination Act ("PDA"), which among other things "requires employers to accord women who take pregnancy leave the same benefits as employees who take other types of temporary disability leave." 498 F.3d at 1003. Prior to passage of the PDA, AT&T had discriminated against its pregnant employees by treating temporary disability leave due to pregnancy less favorably than it did leave taken because of other disabilities for purposes of calculating future retirement benefits. In particular, AT&T calculates pension and retirement benefits based on credits for length of service, and prior to 1978 had restricted the number of days of service credit for pregnancy-related disability leave but had no restrictions on the amount of service credit an employee received when on leave because of any other temporary disability. Accordingly, female employees retiring after 1978 who had taken pregnancy disability leave during their tenure at AT&T were not fully credited for time spent on that leave.

Noreen Hulteen and three other past and present employees of AT&T who had taken pregnancy leave before 1978 brought suit against AT&T under Title VII, charging that AT&T had engaged in unlawful sex discrimination after 1978 by failing to fully credit their pregnancy disability leave for purposes of their retirement benefits.

The district court granted Hulteen's motion for summary judgment based on Ninth Circuit precedent, *Pallas v. Pacific Bell*,⁷ which held that an employer violated Title VII in calculating retirement benefits after the effective date of the PDA "when it gave service credit in those calculations for all pre-PDA temporary disability leave taken by employees except leave by reason of pregnancy." *Hulteen*, 498 F.3d at 1003. AT&T appealed, and a three-judge panel of the Ninth Circuit reversed, holding that *Pallas* "gave 'the PDA impermissible retroactive effect under controlling law today.'" *Hulteen*, 498 F.3d at 1005.

6 People For the American Way Foundation has joined an *amicus curiae* brief in this case urging the Supreme Court to hold that Title IX does not foreclose the bringing of claims under Section 1983.

7 *Pallas v. Pacific Bell*, 940 F.2d 1324 (9th Cir. 1991), *cert. denied*, 502 U.S. 1050 (1992).

The full Ninth Circuit then re-heard the case, and agreed with the district court, ruling in favor of the employees “that AT&T violated Title VII by failing to credit pre-PDA pregnancy leave when it calculated benefits owed Hulteen.” 498 F.3d at 1005. The Ninth Circuit did not view the case as a matter of retroactive application of the PDA, but rather as one of current discrimination by AT&T, which could have credited the employees for their time on pregnancy leave but instead “simply chose to continue its systematic discrimination against women, based on pregnancy, even after Congress made it illegal.” 498 F.3d at 1011. According to the court, “[t]hat AT&T’s practice of applying the discriminatory pre-PDA policies constitutes a separate and actionable act of discrimination is ‘too obvious to warrant extended discussion.’” 498 F.3d at 1012.

Four judges, all nominated by Republican presidents, dissented from the court’s *en banc* ruling. In a dissenting opinion by Judge Diarmuid O’Scainnlain (a Reagan nominee) and joined by Judges Pamela Ann Rymer (Bush I), Jay Bybee (Bush II), and Consuelo Callahan (Bush II), the four charged that the majority had “breath[ed] new life into an expired sex discrimination claim.” 498 F.3d at 1019. The dissenters viewed the Supreme Court’s recent decision in *Ledbetter v. Goodyear Tire*⁸ as precluding a Title VII claim in the absence of “current discriminatory intent,” and found none in AT&T’s current calculation of retirement benefits based on what they characterized as “then-lawful pre-PDA pregnancy leave rules.” 498 F.3d at 1022, 1025.

- **Voting rights: the power of Congress to combat race discrimination**

- *Northwest Austin Municipal Utility District Number One v. Mukasey*, No. 08-322, reviewing 557 F. Supp. 2d 9 (D.D.C. May 30, 2008) (second amended opinion issued Sept. 12, 2008)

This case may well be one of the most significant to come before the Court this term, as it involves a constitutional challenge to a portion of one of our country’s most important civil rights laws, the Voting Rights Act of 1965, enacted to combat the historic denial of voting rights to African Americans. Section 5 of the Act, a non-permanent provision, prohibits “covered jurisdictions” — those states and political subdivisions with histories of racial discrimination in voting — from making any change in their voting procedures” without preclearance from a three-judge panel of the United States District Court for the District of Columbia or from the Attorney General. 557 F. Supp. 2d at 11. In order to obtain such preclearance, the covered jurisdiction must demonstrate that the proposed change does not have the purpose, and will not have the effect, “of denying or abridging the right to vote on account of race or color.” 42 U.S.C. § 1973c.

In 2006, Congress voted to extend Section 5 for another 25 years. Shortly thereafter, Northwest Austin Municipal Utility District Number One (“NAMUDNO”), a municipal utility district within Travis County, Texas, brought suit seeking what is known as “bailout” — a declaration that it was exempt from the preclearance requirement of Section 5 because in the past five years it had not used a test or device “for the purpose or with the effect of denying or abridging the right to vote on account of race or color.” 42 U.S.C. § 1973b(a). Alternatively, NAMUDNO claimed that Section 5 is unconstitutional because, in deciding to extend it, Congress “lacked sufficient evidence of racial discrimination in voting to justify the provision’s intrusion upon state sovereignty.” 557 F. Supp. 2d at 11. As required by the Voting Rights Act, the case was heard by a three-judge panel of the D.C. District Court.⁹

8 *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007).

9 People For the American Way, an affiliate of People For the American Way Foundation, is one of the parties that intervened in this case as a defendant in the district court to support the constitutionality

In a unanimous opinion written by D.C. Circuit Judge David Tatel, the court rejected all of NAMUDNO's claims. First, the court held that NAMUDNO was not eligible for "bailout" because the Voting Rights Act limits bailout to states and political subdivisions, and NAMUDNO is neither. Second, and most important, the court upheld the constitutionality of Section 5 of the Act. In so holding, the court rejected NAMUDNO's argument that the appropriate standard of review was whether the extension of Section 5 was a "congruent and proportional" response to current evidence of racial discrimination in voting. Instead, the court held that the appropriate standard of review was the more deferential standard of whether Congress had acted rationally in deciding to extend Section 5 in order to "protect minorities from continued racial discrimination in voting." 557 F. Supp. 2d at 80.

Applying the latter standard of review, the court held that "given the extensive legislative record documenting contemporary racial discrimination in voting in covered jurisdictions, Congress's decision to extend Section 5 for another twenty-five years was rational and therefore constitutional." 557 F. Supp. 2d at 5. In addition, although the court had concluded that the "congruent and proportional" standard was not applicable, the court proceeded in the alternative to apply that standard and held that even under that more stringent standard, "[g]iven Section 5's tailored remedial scheme, the extension qualifies as a congruent and proportional response to the continuing problem of racial discrimination in voting." 557 F. Supp. 2d at 11.

In accordance with the Voting Rights Act, NAMUDNO was entitled to appeal directly to the Supreme Court, and it did so on September 8, 2008 by filing a brief called a "jurisdictional statement" and asking the Court to "note probable jurisdiction."¹⁰

- **Voting rights: dilution of votes of racial minority group**

- *Bartlett v. Strickland*, No. 07-689, reviewing *Pender County v. Bartlett*, 649 S.E.2d 364 (N.C. 2007)

At issue in this case is whether a racial minority group that constitutes less than a numerical majority (50%) of a proposed legislative district's population can state a claim of vote dilution under the Voting Rights Act.

Unless federal law requires otherwise, the North Carolina Constitution prohibits a county from being divided in order to form a congressional district. In this case, the state legislature concluded that in drawing House District 18 it was required to straddle two counties in order to prevent the dilution of minority votes prohibited by Section 2 of the Voting Rights Act. Section 2 prohibits states from imposing "any voting qualification or prerequisite that impairs or dilutes, on account of race or color, a citizen's opportunity to . . . elect representatives of his or her choice." 649 S.E. 2d at 366 (citation omitted). Pender County, one of the counties across whose lines House District 18 was drawn, filed suit in state court, claiming that the drawing of House District 18 violated the state constitutional requirement of whole county districts and was not required by the Voting Rights Act.

As interpreted by the U.S. Supreme Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986), the Voting Rights Act requires the creation of legislative districts designed to prevent the dilution of minority votes only if, among other things, there is "a minority population [that] is sufficiently large and geographically compact

of the Voting Rights Act.

10 Once briefing is completed, the Court has the option, among other things, of dismissing the case for want of jurisdiction, summarily affirming the ruling below, or deciding to give the case full consideration on the merits.

to constitute a majority in a single-member district.” 649 S.E.2d. at 367 (citation omitted). North Carolina House District 18 does not contain an African American majority population. However, it does contain an African American voting age population of 39.36%, and past election results in North Carolina have indicated that a voting district with an African American voting age population of at least 38.37% creates an effective opportunity for African Americans to elect the candidate of their choice.

The North Carolina Supreme Court thus viewed the issue in the case as whether the Court in *Gingles* “meant a quantitative majority of the minority population (i.e., greater than 50 percent), or whether it meant instead a minority group sufficiently large in population to have significant impact on the election of candidates but not of a size to control the outcome without help from other racial groups.” 649 S.E.2d at 370. In a divided decision, a majority of the court adopted a “bright line rule” and held that under *Gingles*, a minority group must “constitute a numerical majority of citizens of voting age,” stating that such a rule “can be applied fairly, equally, and consistently throughout the redistricting process.” 649 S.E.2d at 371, 373. The majority therefore concluded that the Voting Rights Act did not require House District 18 to be drawn across county lines and that the division of a county in this manner violated the whole county provision of the state Constitution.

Two judges dissented, stating their belief that the U.S. Supreme Court has not “endorsed a bright line requirement that a minority group seeking Section 2 VRA relief constitute a numerical majority. In fact, despite having had the opportunity to do so, the Court has repeatedly declined to close the door on the issue.” 649 S.E.2d at 378. The dissenters explained that an African American candidate “can be elected in House District 18, notwithstanding that the number of minority voters in the district is less than fifty percent,” and that “[a]ltering the district to further reduce the minority population would result in dilution of a distinctive minority vote.” 649 S.E.2d at 380. The dissenters would have adopted a “flexible standard based on political realities of the district [that] supports creation of a district in which the minority group has the ability to elect a representative of choice with crossover support from voters of other racial or ethnic groups.” 649 S.E.2d at 381. Accordingly, the dissenters would have held that in drawing House District 18, the state legislature had acted properly in seeking “to maintain an effective majority district to comply with Section 2 of the VRA . . .” 649 S.E.2d. at 381.

- **Consumer protection: federal preemption of state laws — prescription drug labeling**

- *Wyeth v. Levine*, No. 06-1249, reviewing 944 A.2d 179 (VT 2006)

Last term, in a significant, pro-corporate preemption decision with broad consequences for consumers, the Supreme Court held that persons injured by a negligently manufactured medical device cannot bring state law claims against the manufacturer for damages if the device received pre-market approval from the federal Food and Drug Administration (“FDA”).¹¹ This term, the Court has accepted a case raising preemption issues concerning the inadequate labeling of prescription drugs.

Vermont resident and musician Diana Levine suffered from nausea caused by a severe migraine headache. At a health center, medical personnel treated Levine’s nausea by the intravenous injection into her arm of a drug called Phenergan using a procedure known as “IV push.” The procedure “resulted in an inadvertent injection of Phenergan into an artery. As a result, the artery was severely damaged, causing gangrene. After several weeks of deterioration, [Levine’s] hand and forearm were amputated.” 944 A.2d at 182.

Levine filed suit in state court against the drug’s manufacturer, Wyeth, asserting claims under state tort law that Wyeth’s labeling of Phenergan provided inadequate warning of the known dangers of the “IV

¹¹ *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999 (2008).

push” injection of the drug, and that this inadequate warning resulted in her injuries. The drug’s label had been approved by the FDA, and Wyeth argued that this approval preempted Levine’s state law failure-to-warn claim. The court rejected this argument, the case went to trial, and a jury ruled in Levine’s favor, awarding her \$7.4 million in damages (which the parties agreed to reduce to \$6,774,000).

Wyeth appealed, pressing its claim that federal law preempted Levine’s state law tort claim. In a divided ruling, the Vermont Supreme Court also rejected Wyeth’s preemption defense. According to the majority, “federal labeling requirements create a floor, not a ceiling, for state regulation.” 944 A.2d at 184. In addition, citing an FDA regulation, the majority held that despite prior FDA approval of a drug’s label, a manufacturer does not need FDA approval “to change labels that are insufficient to protect consumers.” 944 A.2d at 186. The majority concluded that there was “no conflict between federal objectives and Vermont common law,” 944 A.2d at 190, and thus no preemption of Levine’s state law claims.

One judge dissented, believing it impossible for Wyeth to have complied “with the requirements of both state and federal law.” 944 A.2d at 197.

- **Consumer protection: federal preemption of state laws — cigarette advertising**

- *Altria Group v. Good*, No. 07-562, reviewing 501 F.3d 29 (1st Cir. 2007)

This case presents the Court with another preemption question, this one involving the allegedly deceptive advertising of cigarettes in violation of state law.

Smokers sued Phillip Morris and its parent company, Altria Group, Inc., under the Maine Unfair Trade Practices Act, contending that the companies used unfair and deceptive practices in manufacturing and advertising Marlboro Lights and Cambridge Lights. The smokers claimed that Phillip Morris designed and promoted these cigarettes knowing that while they provide less tar and nicotine to machines that “smoke” them for testing, they do not result in delivering less tar and nicotine to human smokers, because human smokers tend to compensate for the lower nicotine intake by taking longer puffs, covering air holes with their fingers or lips, or by smoking more cigarettes. The smokers therefore argued that it was deceptive for Phillip Morris to advertise these cigarettes as “light” or having “lower tar and nicotine.”

Philip Morris argued that the smokers’ state law claims were expressly preempted by the Federal Cigarette Labeling and Advertising Act (“FCLAA”) and implicitly by the longstanding efforts of Congress and the Federal Trade Commission “to implement a national, uniform policy of informing the public about the health risks of smoking.” 501 F.3d at 31. The preemption clause of the FCLAA provides in relevant part that “[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes . . .” 501 F.3d at 34.

A federal district court accepted Philip Morris’ arguments and issued summary judgment against the smokers. On appeal, the First Circuit reversed, holding that the state claims were not preempted. Analyzing the substance of the smokers’ claims in accordance with Supreme Court precedent concerning the preemption clause of the FCLAA, the First Circuit held that the claims in this case were accusations of fraudulent misrepresentation, not claims concerning a failure to warn based on smoking and health, and thus were not expressly preempted by the FCLAA. The court also rejected Philip Morris’ implicit preemption argument, holding, among other things, that the smokers’ claims did not interfere with federal goals concerning cigarette advertising.

- **The First Amendment: religious monuments in public parks**

- *Pleasant Grove City, Utah v. Summum*, No. 07-665, reviewing 483 F.3d 1044 (10th Cir. 2007), *reh'g en banc denied*, 499 F.3d 1170 (10th Cir. Utah 2007)

At issue in this case is the constitutionality of a city's refusal to display a religious monument donated by a minority religious group in a city park already containing a Ten Commandments monument, among other displays.

Summum, a minority religious organization, sought to have the city of Pleasant Grove, Utah, erect a monument in a city park containing the Seven Aphorisms of Summum — a statement of the principles on which the Summum religion is based. The park already contained other permanent monuments, including a Ten Commandments monument that had been donated years earlier by the Fraternal Order of Eagles. The city refused to display the Seven Aphorisms, claiming that permanent displays in the park must either be related to Pleasant Grove's history or donated by groups with ties to Pleasant Grove.

Summum filed suit, arguing that in refusing to display the Seven Aphorisms the city had violated Summum's First Amendment right to freedom of speech. The district court denied Summum's motion for a preliminary injunction that would have required Pleasant Grove to erect the Summum monument while the case was pending. Summum appealed, and the Tenth Circuit reversed, holding that the monuments are private speech, not government speech, that the park is a public forum, and that Summum was likely to prevail on its claim that the city had engaged in an impermissible, content-based exclusion of the Seven Aphorisms.

The case has been complicated by an obsolete but not formally overruled Tenth Circuit decision holding that the Ten Commandments are principally secular, so that a government display of the Ten Commandments can never give rise to an Establishment Clause claim. For this reason, the case has been litigated to date, and decided, under the rubric of the Free Speech Clause. Thus, the courts have not considered whether the city's display of the Ten Commandments violates the Establishment Clause or whether displaying the Seven Aphorisms would do so, or whether the city was motivated by impermissible religious animus in refusing to display the Seven Aphorisms.¹²

In addition, the case has produced an unusual alignment of religious right organizations. Pat Robertson's American Center for Law and Justice — normally a proponent of government-endorsed religion and religious displays — represents Pleasant Grove and is arguing that the monuments are government speech and that, as such, the city had the right to reject the display of the Summum religious monument. Meanwhile, the Rutherford Institute has filed an *amicus curiae* brief in support of Summum, rejecting the ACLJ's "government speech" argument and contending that more fact-finding is necessary.

12 People For the American Way Foundation and Americans United for Separation of Church and State, the American Jewish Committee, the Anti-Defamation League, and the Baptist Joint Committee for Religious Liberty have filed an *amicus curie* brief in the case in support of neither party, explaining that while the permanent monuments in the park are government speech, it is the Establishment Clause, not the Free Speech Clause, that provides the proper analytic framework for deciding the case.

- **Free speech: “fleeting expletives” on broadcast television**

- *FCC v. Fox Television Stations, Inc.*, No. 07-582, reviewing 489 F.3d 444 (2nd Cir. 2007)

At issue in this case is whether the Federal Communications Commission (“FCC”) has the power to punish the utterance of a “fleeting expletive” (*i.e.*, a one-time or isolated vulgar utterance that is “indecent” but not “obscene”) on broadcast television.

Federal law prohibits the utterance of “obscene, indecent, or profane language” on broadcast radio and television. “The FCC first exercised its statutory authority to sanction indecent (but non-obscene) speech in 1975, when it found Pacifica Foundation’s radio broadcast of comedian George Carlin’s ‘Filthy Words’ monologue indecent . . .” 489 F.3d at 447. In a challenge brought by Pacifica to the FCC’s order, the Supreme Court, in a 5-4 ruling, held that the Constitution permitted the FCC to regulate indecent material on the broadcast media. *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). The Court stressed that its holding was limited to the facts of the Carlin monologue and that its holding did not “speak to cases involving the isolated use of a potentially offensive word in the course of a radio broadcast, as distinguished from the verbal shock treatment administered by the respondent here.” 438 U.S. at 760.

In the several decades following the *Pacifica* decision, the FCC followed a “restrained enforcement policy,” proceeding only against repeated use of “indecent” language in a particular broadcast and reaffirming “the prevailing view that a fleeting expletive would not be actionable.” 489 F.3d at 450.

However, in 2004, the FCC abruptly changed course. During a live broadcast by NBC of the Golden Globe Awards in January 2003, musician Bono stated during an acceptance speech that “this is really, really, fucking brilliant. Really, really, great.” 489 F.3d at 451. Complaints were filed with the FCC, which “found the fleeting and isolated use of the word [‘fucking’] irrelevant and overruled all prior decisions in which fleeting use of an expletive was held not indecent.” 489 F.3d at 452.

And in early 2006, the FCC issued an order finding that several other broadcasts (including the Billboard Music Awards) were “indecent” because of the isolated utterance of such words as “fuck ‘em,” “fucking,” and “bullshit.” The FCC “dismissed the fact that the expletives were fleeting and isolated and held that repeated use is not necessary for a finding of indecency.” 489 F.3d at 453.

The networks sought review of the FCC’s order by the Second Circuit. In a 2-1 decision, the court ruled that the FCC’s abrupt change in policy to regulate “fleeting expletives” was “a dramatic change in agency policy without adequate explanation.” 489 F.3d at 454. As such, the court held that the FCC’s action should be set aside pursuant to the federal Administrative Procedure Act (“APA”), which prohibits agency decisions that are “arbitrary and capricious.” The court remanded the case to the FCC, giving the agency an opportunity to offer a “reasoned analysis” to justify its new policy. 489 F.3d at 467. However, the court expressed its doubt that any such reasoning could satisfy the First Amendment challenges raised by the networks to the FCC’s policy. Judge Leval dissented, and would have held that the FCC had given “a reasoned explanation for its change of standard” and thus was not in violation of the APA. 489 F.3d at 467.

Rather than attempt to justify its policy on remand, the FCC instead asked the Supreme Court to hear the case, and the Court agreed to do so.

- **Free speech: union political activities**

- *Yursa v. Pocatello Education Association*, No. 07-869, reviewing 504 F.3d 1053 (9th Cir. 2007)

At issue in this case is whether a state may prohibit voluntary payroll deductions from local government employees for “political activities.”

Idaho law enacted in 2003 prohibits payroll deductions from (among others) employees of local government units for the purpose of “political activities.” No other payroll deductions are prohibited. Pursuant to the statute, local government employers are prohibited “from granting an employee’s request to make voluntary contributions to political activities through a payroll deduction program.” 504 F.3d at 1068. The law does not prohibit payroll deductions for any other purpose.

Unions brought suit in federal court challenging the constitutionality of the law, asserting that the law violated their right to free speech. In particular, the unions argued that the statute’s restriction on voluntary political contributions burdened political speech. The district court agreed, finding that “unions face substantial difficulties in collecting funds for political speech without using payroll deductions,” and that the payroll deduction ban would “diminish [their] ability to engage in political speech.” 504 F.3d at 1058.

On appeal, the Ninth Circuit affirmed, recognizing that while “the law does not prohibit Plaintiffs from participating in political activities . . . it hampers their ability to do so by making the collection of funds for that purpose more difficult.” 504 F.3d at 1058. The court of appeals held that the ban was a content-based restriction lacking a compelling justification and thus failed the applicable strict scrutiny.

- **Access to the courts: waiver of right to sue**

- *14 Penn Plaza LCC v. Pyett*, No. 07-581, reviewing 498 F.3d 88 (2d Cir. 2007)

At issue in this case is whether union members who have not individually waived their right to bring a lawsuit against their employer for violating federal anti-discrimination laws are nonetheless prohibited from doing so by virtue of a mandatory arbitration clause in their union’s collective bargaining agreement with their employer. There is a split among the circuits on this issue.

The plaintiff employees are union members employed by a building service and cleaning contractor. They worked as night watchmen, but were reassigned to less desirable jobs as night porters and light duty cleaners when the company engaged an affiliated contractor, who had younger workers replace the plaintiff employees. The plaintiffs filed suit in federal court, charging that they had been discriminated against in violation of the federal Age Discrimination in Employment Act. Their union’s collective bargaining agreement with the employer required that discrimination claims be arbitrated, and the employer therefore asked the district court to compel arbitration. The district court refused, relying on Second Circuit precedent holding that “union-negotiated waivers of statutory rights in CBAs [collective bargaining agreements] were unenforceable.” 498 F.3d at 92.

On appeal, the Second Circuit affirmed, noting that the court had previously ruled that “a union-negotiated mandatory arbitration agreement purporting to waive a covered worker’s right to a federal forum with respect to statutory rights is unenforceable.” 498 F.3d at 92.

- **Environmental protection: injury to marine mammals from Navy sonar**

- *Winter v. Natural Resources Defense Counsel, Inc.*, No. 07-1239, reviewing 518 F.3d 658 (9th Cir. 2008)

At issue in this case is whether the lower courts correctly placed limitations on the Navy's use of active sonar during training exercises off the California coast, in order to protect whales and other endangered marine mammals from harm.

The Natural Resources Defense Counsel and other pro-environmental groups and individuals brought suit in federal court against the Navy, seeking to prevent the Navy from using active sonar during planned training exercises in an area off the California coast where a number of endangered species of marine mammals, including certain types of whales, are found. The plaintiffs claimed that active sonar can seriously injure marine mammals as well as have significant, negative effects on their behavior. The Navy itself admitted that active sonar "may affect both the physiology and behavior of marine mammals," potentially causing physical harm and "overtly disrupt[ing]" their "normal behavior." 518 F.3d at 665.

The district court granted the plaintiffs' motion for a preliminary injunction, and imposed certain conditions on the Navy in conducting the training exercises in order to mitigate the impact of active sonar. The Navy appealed, and a unanimous panel of the Ninth Circuit upheld the district court's ruling.