



# WHAT WERE THEY THINKING

## THE SUPREME COURT IN REVUE, OCTOBER TERM 2008

*John P. Elwood*

**O**T2008 WAS A TERM where the first were last and the last were first. Expected blockbusters fizzled, while lesser-known cases appear to have risen *Appendi*-like to prominence. And although OT2008, so far at least, appears fated to be *almost* a big Term – the Term the Court *nearly* struck down Section 5 of the Voting Rights Act, *almost* recognized a constitutional right of prisoners to DNA testing, and *nearly* swore in the President on the very first try<sup>1</sup> – the final word on OT2008 will have to wait until this fall: In a rare move, the Court ordered September reargument for an important election-law case and portentously asked for briefing on whether to overrule longstanding precedents permitting restrictions on corporate funding of cam-

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<sup>1</sup> Because of a small glitch in the administration of the oath of office, the Chief Justice inadvertently swore in Barack Hussein Obama as a third-class Webelo in lower Montgomery County's Den 307.

paign speech. So while OT2008 may have been a little dull and not as good as you expected, if you wait long enough, there will probably be a twist that everyone kind of expects anyway. Kind of like an M. Night Shyamalan movie. But for all its faults, at least OT2008 did not take place in Philadelphia.



Frank Wagner hasn't even finished scouring Justice Breyer's majority opinions for first-person singular references yet<sup>2</sup> and already, a consensus has begun to form in the media commentary about the Term. In short, it is that Chief Justice Roberts, while masquerading in umpire garb as a judicial minimalist, is actually a conservative activist who, along with Justices Scalia, Thomas, and Alito, is bent on taking the Court "just as far to the right, and just as fast, as Justice Kennedy will let them."<sup>3</sup> Under this view, Roberts actively seeks to erode precedents favoring criminal defendants, abortion rights, the environment, humanity, cuddly woodland animals, and even Oprah, secure in the knowledge that likely retirements will be from the ranks of the Court's more liberal members, so replacements will not slow the steady march right.<sup>4</sup> Maybe this time it will be different, but the landfills are brimming with the Maalox bottles of Reagan-Bush officials who are still wondering

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<sup>2</sup> See *South Cent. Bell v. Alabama*, 526 U.S. 160, 167 (1999) (preliminary print; the "I" was corrected before the printing of the United States Reports).

<sup>3</sup> Jordan Weissman, *It's Still Kennedy's Court, Say Supreme Court Practitioners*, BLOG OF THE LEGAL TIMES, July 6, 2009, available at [legaltimes.typepad.com/blt/2009/07/its-still-kennedys-court-say-supreme-court-practitioners.html](http://legaltimes.typepad.com/blt/2009/07/its-still-kennedys-court-say-supreme-court-practitioners.html) (quoting lawyer extraordinaire Pamela Harris).

<sup>4</sup> See, e.g., Tony Mauro, *Roberts Court Takes Narrow Road to Right: decisions suggest chief justice may be slow-playing Court's march to right*, NAT'L L.J., July 6, 2009, available at [www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202431973734&Roberts\\_Court\\_takes\\_narrow\\_road\\_to\\_right&slreturn=1](http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202431973734&Roberts_Court_takes_narrow_road_to_right&slreturn=1); Robert Barnes, *Term Saw High Court Move to Right: Roberts-Led March Likely to Continue*, WASH. POST, July 1, 2009, available at [www.washingtonpost.com/wp-dyn/content/article/2009/06/30/AR2009063004170.html](http://www.washingtonpost.com/wp-dyn/content/article/2009/06/30/AR2009063004170.html); Adam Liptak, *Roberts Court Shifts Right, Tipped by Kennedy*, N.Y. TIMES, June 30, 2009, available at [www.nytimes.com/2009/07/01/us/01scotus.html](http://www.nytimes.com/2009/07/01/us/01scotus.html).

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what became of the last inevitable steady march right. The Court's ideological lines are not as distinct or firm as they are commonly portrayed to be, plus it turns out that the whole "just as fast[] as Justice Kennedy will let them" thing is a pretty big qualifier. While Anthony M. Kennedy, S.J. (swing Justice), mostly swung right this Term (by an 11-5 margin in 5-4 opinions),<sup>5</sup> the exceptions were significant, *see Altria Group v. Good* (preemption), *Caperton v. A.T. Massey Coal Co.* (judicial disqualification, see below), and *Corley v. United States* (*McNabb-Mallory* doctrine). More fundamentally, this emerging consensus overlooks the very realistic prospect that President Obama will take advantage of relaxed regulation of stem cell research and a Democratic supermajority in the Senate to replace a retiring Justice Stevens with *five new* Justice Stevenses – maybe ones with penumbra-scanning infrared vision. This theory, however, has not yet gained widespread acceptance among persons who are current on their medications.

With that inauspicious overview, we now turn to the top eight areas of legal development in this Term's decisions, or as many as I can get to before deadline.

### 1. UNDERPERFORMERS

Every Term has a few cases that promise to be blockbusters on the day they're granted, but which fizzle in the hands of what is, after all, a common-law Court. In a time of austerity, when "flat is the new up" and some lawyers have had to bill themselves out as canine chew toys just to keep their hours up, it is fitting that we begin our review with the Term's might-have-beens.

As a matter of legal doctrine, the *ne plus paltry* for this Term was likely *Ricci v. DeStefano*, which, if you uttered the caption even at a particularly remote Inuit village in North Greenland, would precipitate the response, "Oh, the New Haven firefighters case," except that it would be 500 letters long because they'd be speaking Avannersuarmitut. As anyone on Earth with cable access and insuf-

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<sup>5</sup> All statistics that I did not just now make up are drawn from SCOTUSBlog, of course.

ficiently fast reflexes knows, the case involved a suit filed by white and Hispanic firefighters who lost their opportunity for promotion when the City of New Haven threw out their passing exam scores because no African-American candidates qualified and the City said it feared a disparate-impact lawsuit if the test results were honored. The already high-profile case drew yet more scrutiny after President Obama nominated the Second Circuit's Sonia Sotomayor to replace retiring Justice David H. Souter: Sotomayor was on the panel that summarily affirmed the district court's dismissal of the firefighter's suit, marking the last time that any form of the word "summary" could fairly be used in connection with the case. *Ricci* thus lay at the intersection of two hot-button issues: the Court's current application of antidiscrimination law, and (through appointments) the Court's *future* application of it.

As each hand-down day passed without its announcement, it became clear by process of elimination that Justice Kennedy likely wrote the opinion and the firefighters likely would prevail, and the question became whether the opinion would criticize the disposition Sotomayor joined and thereby hurt her chances at confirmation. When the majority opinion assiduously avoided criticizing the decision below and narrowly held that potential employers needed a "strong basis in evidence" that they might be liable for disparate impact discrimination under Title VII before they could engage in disparate treatment based on race, it garnered a certain amount of attention from sheer force of habit, but everything you needed to know could be seen in the ennui of Inuit snowmobile mechanics as they switched from MSNBC back to SpongeBob Sinarssugigsoq-Pants. Besides the fact that the Justices took 89 pages to dispose of a case the Second Circuit had initially affirmed by summary order (which Republicans continued to cite in opposition to Sotomayor's confirmation), the item of most note was Justice Scalia's brief concurrence stating that the Court's opinion "merely postpones the evil day on which this Court will have to confront the question . . . [w]hether, or to what extent, are the disparate impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution's guarantee of equal protection?" But no one should underes-

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timate the Court's ability to duck that for as long as possible.

If *Northwest Austin Municipal Utility District No. 1 v. Holder* were a movie, outraged mobs would have lined up by the box office demanding refunds. Of course, if it were a movie, producers would have taken steps to avoid such discontent, such as naming it *Harry Potter and the Utility District of Doom* and sending the script back for rewrite, because no producer would green-light the plotline the Court produced. The case stemmed from Congress's 2006 reenactment for a 25-year term of the Voting Rights Act of 1964, Section 5 of which requires a covered jurisdiction to seek preclearance from a federal court or the Attorney General before it can change election procedures. Perhaps realizing that utility district elections generate slightly less interest than most middle school student council elections, the District sought exemption from the preclearance requirements under the Act's so-called "bailout" provisions. The district court denied the request because only a "State or political subdivision" is permitted to seek bailout under the Act, those statutory terms include only "counties, parishes, and voter-registering subunits," and the District doesn't register anyone; the court also rejected the District's constitutional challenge. Several members of the Court have criticized Section 5 over the years, saying that it is difficult to justify restrictions on sovereign states that go beyond the prohibitions of the Fifteenth Amendment so long after the Act's original enactment. Particularly after the electoral milestone of 2008, which witnessed the election of the first Vice President from Delaware in American history, many thought it would be difficult to make the case that such elaborate voter protection measures were still needed and the Court would strike down Section 5 as unconstitutional. The case was deemed so important that amici filed a teetering stack of green amicus briefs whose production deforested an area the size of Rhode Island and whose distribution required constant monitoring lest their massed weight affect the Earth's rotation.

What we got instead was an ending that, well, M. Night Shyamalan might have rejected as farfetched. The Chief Justice, writing for everyone save Justice Thomas, held that if you hold your head

just right and squint a bit, the District is indeed a “political subdivision” under the Civil Rights Act and thus remanded for consideration of its “bailout” request. The analysis is sufficiently reticulated to defy succinct summary, but suffice it to say that ibuprofen may help alleviate lingering soreness from all the heavy lifting. Although the case is unquestionably the most important one this Term for utility districts throughout the South, Alaska, and parts of New York, Michigan, New Hampshire, South Dakota, and California, it is mostly noteworthy for what it may portend. Thanks to the Chief’s Jedi-like powers (see OT2005’s *Rumsfeld v. FAIR*), eight members of the Court have joined in full an opinion stating that the Civil Rights Act’s “preclearance requirements and its coverage formula raise serious constitutional questions,” with no separate opinions to dilute the force of that statement or to risk discovery of message-carrying droids. Some say it shows the Chief is indeed a judicial minimalist; others say it represents cautious groundwork to strike Section 5 down in the future. All I know is that, if there is a sequel, it will be hard not to be more engrossing than the original.

## 2. PROCEDURAL NICETIES

Every couple Terms, there is a blockbuster hidden among the run of anonymous cases – think of *Appendi* or *Mead*. But sometimes, even the already high-profile cases “overdeliver.” This Term’s surprise fell in that category: *Ashcroft v. Iqbal* always generated a lot of interest, because War on Terror issues always pack ‘em in at One First Street N.E. and this case involved a Pakistani Muslim (Iqbal) claiming the former Attorney General (Ashcroft, for those of you with particularly poor deductive powers) deprived him of his First and Fifth Amendment rights when he was detained under allegedly harsh conditions after 9/11. But Justice Kennedy’s 5-4 opinion appears to be a groundbreaking procedural decision as well – think *Hamdi v. Rumsfeld* meets *Anderson v. Liberty Lobby*, yielding a perfect nerd storm that swept up both political junkies and law geeks. Expanding on OT2006’s improbably named *Bell Atlantic v. Twombly* (“How’d you like that leftover kielbasa?” “Not so well – I feel a little twombly.”), Justice Kennedy concluded that Iqbal failed

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to plead sufficient facts to state a claim for unlawful discrimination, while simultaneously tendering his winning entry for the OT2008 hyphenation sweepstakes: “[Rule 8] demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” Most significantly, while the Court noted that this approach “is especially important in suits where Government-official defendants are entitled to assert the defense of qualified immunity,” it did not restrict its holding to such cases; accordingly, *Iqbal* seems equally applicable to garden-variety civil suits. It will be interesting to see whether the Justices eventually conclude they “overshot” with this one and walk it back; *somebody* already thinks they overshot – Senator Specter has introduced legislation to reverse *Twombly* and *Iqbal*, but there’s no danger of its passage anytime soon.

Paul Clement’s first argument as Principal Deputy SG back in March 2001 was *Saucier v. Katz*, which mandated a two-step sequence for resolving officials’ qualified immunity claims: (1) a court must first decide whether the facts alleged or shown by the plaintiff make out a violation of a constitutional right, and (2) if so, it must determine whether that right was “clearly established” at the time of the alleged misconduct. The opinion prompted immediate head scratching among the Supreme Court nerderati, because, wholly apart from underlying hygiene issues, mandating that courts decide constitutional questions that might not be necessary for resolution of a case seems directly at odds with the principle of constitutional avoidance, whereby the Justices let the answering machine pick up whenever a constitutional question tries calling them at home.<sup>6</sup> The decision was all the more puzzling for its unanimity on this point, and it seemed all but certain that the day would come that the Justices would be like the cow in the Far Side cartoon who stands in a field, outraged after a sudden epiphany, saying: “Grass! We’re eating grass!” *Saucier*’s “We’re eating grass!” moment had come by December 2004, see *Brosseau v. Haugen* (Breyer, J., joined by Scalia and

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<sup>6</sup> Well, that’s not *quite* right. As stated by Justice Brandeis in *Ashwander v. TVA*, it’s more like the Court will not “anticipate a question of constitutional law in advance of the necessity of deciding it.”

Ginsburg, JJ., concurring) (urging reconsideration of *Saucier's* “rigid order of battle.”).<sup>7</sup> So Clement may have felt “this is where I came in” when in March 2008, the Court added to its order granting cert in *Pearson v. Callahan*: “Whether . . . *Saucier v. Katz* should be overruled?” (citation omitted), and he announced his resignation as Solicitor General a few (OK, seven) weeks later. Justice Alito delivered the expected *coup de grace*, concluding that *Saucier's* “mandatory, two-step rule . . . should not be retained.” The opinion was unanimous, marking the only instance of which I am aware that the Court both adopted a rule and overruled it unanimously within a decade.

### 3. CRIMINAL LAW

Every couple of years, when the level of chaos in the criminal justice system ebbs to the point that it is no longer indistinguishable from the last Army outpost on the Nung River in *Apocalypse Now*, the Court likes to lob in a monkey wrench just to see exactly how much more the already overtaxed system can handle before the baling wire, spit, and chewing gum that currently hold it together lose their purchase. Think *Bailey v. United States*,<sup>8</sup> *Hubbard v. United States*,<sup>9</sup> *United States v. Lopez*,<sup>10</sup> and of course *Apprendi v. New Jersey*,<sup>11</sup> which gave birth to a franchise whose longevity and influence is rivaled only by *Star Trek* and *CSI*. OT2003's *Crawford v. Washington*, which held that the Constitution requires confrontation before testimonial statements may be introduced at trial (overruling precedent permitting admission if evidence fell within a “firmly rooted hearsay exception”) was another such case. *Crawford* bore fruit this Term in *Melendez-Diaz v. Massachusetts*, which held that, absent waiver, an expert must testify in person before a court may admit an expert report identifying material as a controlled sub-

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<sup>7</sup> 543 U.S. 194, 201-202 (2004).

<sup>8</sup> 516 U.S. 137 (1995).

<sup>9</sup> 514 U.S. 695 (1995).

<sup>10</sup> 514 U.S. 549 (1995).

<sup>11</sup> 530 U.S. 466 (2000).



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stance. Although *Melendez-Diaz* should not change practice much in federal courts (where hearsay rules typically require experts' presence), and although the Court has already determined that *Crawford* does not apply retroactively on habeas, see OT2006's *Whorton v. Bockting*, it portends major changes for state courts in cases still open on appeal: "This is the biggest case for the defense since *Miranda* [v. *Arizona*]," said a Fairfax, Virginia defense attorney,<sup>12</sup> who later was chagrined to learn that his copy of the U.S. Reports is missing *Katz v. United States*, *Duncan v. Louisiana*, *Doyle v. Ohio*, *Batson v. Kentucky*, and *Apprendi*.

*Crawford* and *Melendez-Diaz* both benefitted critically from the support of Justices Scalia and Thomas. There was a time when telling a Supreme Court advocate that he'd likely get Justice Scalia or Thomas' vote was about as comforting as saying, "at least you have your health." And there's still an element of truth to that, since for most cases where the Court is closely divided, all eyes are on the Justice from Sacramento. (This Term, for instance, Justice Kennedy was in the majority of 88.7% of divided cases, up from 79.2% in OT2007 – meaning that, if present trends continue, Justice Kennedy will be in the majority of 126.7% of cases by OT2012.) But when it comes to criminal cases in particular, litigants should be looking towards Scalia and Thomas as potential swing votes,<sup>13</sup> particularly if they can cite caselaw contemporaneous to the Framers . . . of Magna Carta. The views of Scalia and Thomas are well within the legal mainstream for the Court of King's Bench, so if a defendant charged with moperly, champerty, nightwalking, or criminal conversation would have benefitted from application of a particular rule in 1788, so shall the defendant, mescroyant though he may be. After some decades of deciding cases in accordance with their principles, even when it does not accord with their policy

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<sup>12</sup> Tom Jackman, *Lab Analyst Decision Complicates Prosecutions*, WASH. POST, July 15, 2009, at A1.

<sup>13</sup> See, e.g., *Atlantic Sounding v. Townsend* (Justice Thomas, joined by Justices Stevens, Souter, Ginsburg, and Breyer); *Cuomo v. Commerce Clearing Ass'n, L.L.C.* (Scalia, joined in full by Stevens, Souter, Ginsburg, and Breyer), *Spears v. United States* (per curiam, joined by Justices Stevens, Scalia, Souter, Ginsburg, and Breyer).

preferences,<sup>14</sup> this curious practice drew the attention of the press.<sup>15</sup>

Examination for witch-marks was more widely accepted as a method of determining guilt in 1788 than DNA tests, so there was little risk of similar defections in *District Attorney's Office v. Osborne*, which presented the question whether a prisoner convicted of sexual assault in a rape and attempted murder has a right under the Due Process Clause to obtain post-conviction access to the state's biological evidence for DNA testing. In a 5-4 decision joined by Justices Scalia, Kennedy, Thomas and Alito, the Chief held that Due Process does not require access, rejecting the Ninth Circuit's conclusion that *Brady v. Maryland*<sup>16</sup> established the proper test for considering a claim on habeas, and noting that a state has more flexibility in deciding what procedures are needed in the context of post-conviction relief.

For decades, *New York v. Belton*,<sup>17</sup> which held that police may search a car's passenger compartment as an incident to a lawful arrest, was widely read to apply even after the scene was secured. This Term, by a 5-4 margin, the Court effectively overruled the case, holding that it applies only if it is reasonable to believe that the vehicle contains evidence of the offense or if the arrestee might access the vehicle (which certainly suggests a degree of liberty greater than *Cops* viewers and alumni might expect). The case was a veritable casting call for the role of America's Next Crossover Sensation as Justices Scalia and Thomas joined Justices Stevens, Souter, and Ginsburg in the majority, and Justice Breyer joined the Chief, Alito and Kennedy, in one of AMK's rare dissenting votes (6; the runner-up was Scalia with 13).

Although it garnered scant attention, *Kansas v. Ventris* is a noteworthy addition to Sixth Amendment doctrine. Donnie Ray Ven-

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<sup>14</sup> See, e.g., *What Were They Thinking*, OT1999, 4 GREEN BAG 2d at 32 (Scalia); *id.* at 33-34 (Thomas).

<sup>15</sup> See Adam Liptak, *Roberts Court Shifts Right, Tipped by Kennedy*, N.Y. TIMES, June 30, 2009, available at [www.nytimes.com/2009/07/01/us/01scotus.html](http://www.nytimes.com/2009/07/01/us/01scotus.html).

<sup>16</sup> 373 U.S. 83 (1963).

<sup>17</sup> 453 U.S. 454 (1981).

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tris, whose parents had doomed him to a life of crime by naming him “Donnie Ray Ventris,” allegedly told his cellmate that he had robbed and killed Ernest Hicks. Donnie Ray evidently was unfamiliar with the Iron Rule of Criminal Procedure, which is that any cellmate who hears a confession will turn out to be an informant. While the statements were excluded from the case-in-chief at trial as violative of the Sixth Amendment Right to Counsel, *see Massiah v. United States*, Ventris blamed the crime on his codefendant Rhonda Theel, whose parents had doomed her to a life of bad choices in male companions by naming her “Rhonda Theel.” Ventris was convicted of robbery after the state introduced his jailhouse statement for impeachment. The Court held 7-2 in a decision written by Justice Scalia (Justices Souter and Breyer, caught up in crossover fever, joined the conservatives) that a statement elicited in violation of the Sixth Amendment was admissible for impeachment purposes. While the media reports simply focused on the Court’s “carving away” of the exclusionary rule, the case is noteworthy because it decided *when* a Sixth Amendment violation occurs – at the time the defendant is questioned without his lawyer – which, to my lights, was inconsistent with Court dicta. Analogizing to the Fourth Amendment (which is violated at the time of a police search), rather than to the Fifth Amendment (which is violated at the time coerced statements are admitted in court, *see Chavez v. Martinez*<sup>18</sup>), the Court concluded the statements could be used for impeachment because it was no longer possible to prevent the constitutional violation and exclusion from the case-in-chief suffices to deter police misconduct. As suggested by the SG’s amicus brief in *Chavez*, statements in past Court decisions suggest that the Sixth Amendment provides a trial right that is not violated until uncounseled statements are admitted at trial.<sup>19</sup> At a time when coercive interro-

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<sup>18</sup> 538 U.S. 760 (2003).

<sup>19</sup> *See* U.S. Br. 10, *Chavez v. Martinez*, 01-1444 (filed Sept. 2002) (citing *Weatherford v. Bursey*, 429 U.S. 545, 556, 558 (1977) (no Sixth Amendment violation occurred where interference with assistance of counsel had no effect on trial); *Massiah v. United States*, 377 U.S. 201, 206 (1964) (defendant denied Sixth Amendment rights “when there was used against him at his trial evidence of his own

gations are much in the news, this holding has obvious implications for questioning after the right to counsel has attached.

#### 4. IS FOR FOURTH AMENDMENT

*Safford Unified School District v. Redding* involved a Fourth Amendment claim stemming from the partial strip search of a 13-year-old girl because of suspicion she had a prescription ibuprofen tablet equivalent to two Advils hidden in her underwear. Right off the bat, I'm suspicious of the school administrators here, because as a socially aware person who is knowledgeable about the younger generation from watching the WB, I am fairly confident that no teenaged girl today owns a piece of clothing anywhere near big enough to conceal such a large tablet. Justice Ginsburg famously commented after argument that her male colleagues did not understand the extent of the intrusion on the student's privacy, saying that they "have never been a 13-year-old girl. It's a very sensitive age for a girl." Putting aside the burning question whether 13-year-old boys, whose ability to blush is surpassed only by certain rare species of hairless monkeys in Borneo, might experience similar sensitivities, some might wonder whether the average Supreme Court Justice, who turned 13 during the Eisenhower Administration and has had people stand when he enters a room for longer than Savana Redding has been alive, even remembers embarrassment. Oral argument, however, laid to rest any concern that the Justices were out of touch. As Justice Breyer trenchantly observed:

In my experience, people did sometimes stick things in my underwear. Or, not *my* underwear . . . whatever. Whatever. I was the one who did it? I don't know. I mean I don't think it's beyond human experience.

Despite having no chromosomal basis for empathy, an all-male majority concluded that the search violated the Fourth Amendment because the ibuprofen was not a sufficient danger to justify a strip search, but granted qualified immunity because the right was not

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incriminating words"))).

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sufficiently well established. (The Court pointedly noted that a circuit split alone is insufficient basis for a grant of qualified immunity, throwing cold water on dicta from a Chief Justice Rehnquist opinion much beloved by the SG's Office, *Wilson v. Layne* ("If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy.")).<sup>20</sup> You may now need a good, *well reasoned* circuit split.). Justices Stevens and Ginsburg dissented in part to protest the grant of qualified immunity, and Justice Thomas concluded that school officials' broad authority to preserve order within schools supported the search.

### 5. DUE PROCESS

In 2002, a West Virginia jury awarded Hugh Caperton \$50 million after finding that competitor Massey Energy Co. had destroyed his coal company using fraudulent business practices by painting the coal white so not even his ole Bluetick hound Buck could find it. While appealing the judgment, Massey CEO Don Blankenship donated \$3 million that obviously could have more productively been spent on top-flight D.C.-based appellate counsel to elect Brent D. Benjamin to the state Supreme Court, representing 60% of Benjamin's campaign chest as well as a substantial part of the total statewide budget for book larnin'. Benjamin rejected motions to recuse himself and then cast the decisive vote as the West Virginia Supreme Court voted 3-2 to overturn the judgment. The Supreme Court held for the first time, in a 5-4 opinion written by Justice Kennedy and joined by the Court's liberals, that the Due Process Clause requires recusal where a person with a stake in a case "had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent." While no one would ever be so churlish as to question Justice Benjamin's *actual* impartiality, the Court found recusal necessary to avoid an "appearance of impropriety." The Chief, joined by Justices Scalia, Thomas,

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<sup>20</sup> 526 U.S. 603, 618 (1999).

and Alito, dissented, noting the traditionally narrow availability of required recusal and the potentially open-ended requirement going forward. The Chief's dissent listed 40 questions not answered by the majority opinion, ranging from "How much money is too much?" to "How many days after a date should you wait before calling?" and "What color socks are you supposed to wear with khakis and oxblood loafers, anyway?"

## 6. ADMINISTRATIVE PROCEDURE ACT

If you ever have a really embarrassing disclosure to make but don't want anyone to actually notice it, just preface it with the words "Administrative Procedure Act." That pretty much guarantees that 99% of humanity will skip the following section. And the few who read on will rapidly lose interest when they learn it concerns neither the APA nor the comparative command styles of Captain Kirk and Captain Picard.

*FCC v. Fox Television Stations* actually *does* involve the APA, although people barely notice that fact for a different reason: When it comes to certain swear words, we are all ninth graders tittering at the back of Mrs. Moriarty's English class, and this case involves, as the Court put it, "the F-Word and the S-Word." In D.C., those terms usually denote "fawning" and "sycophantic," which aren't even bad words locally, but here, they involve the usual outside-the-Beltway sexual and excretory terms. In interpreting the Communications Act of 1934's prohibition on "obscene, indecent, or profane language," the Federal Communications Commission formerly took the position that fleeting references typically were not considered "indecent." In 2004, the FCC declared that even a single use of these words could be indecent. That rule is an obvious hazard for celebrities, for whom such words are a basic building block of communication akin to nouns, verbs, and insincere air-kissing, and a broadcaster quickly found itself up S-Word creek after Bono Vox, Nicole Richie, and Cher F-Worded up. The broadcasters sued and the Second Circuit found the FCC's reasoning inadequate under the APA. By a 5-4 vote in a decision written by Justice Scalia, the Court held that the FCC's new rule satisfied the APA, but declined to ad-

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dress any First Amendment challenge because it was not decided by the court below. The big news from an Ad-Law perspective is that the Court glossed the *State Farm* test for the reasonableness of a new administrative interpretation, see *Motor Vehicle Mfrs. Assn. v. State Farm Mut. Auto. Ins. Co.*,<sup>21</sup> and held that an agency “need not demonstrate . . . that the reasons for the new policy are *better* than the reasons for the old one: it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates.” That cleared up lingering uncertainty about the meaning of *State Farm* and set a low standard for the government in making changes. Heady stuff for APA buffs – or as they’d say on Vulcan, “Semara.”

### 7. PREEMPTION

Those who have studied the Court’s preemption cases tell me that doctrine in this area does not always proceed in a straight line. Some say it looks more like the EKG of a cheapskate being tasered while simultaneously being told the cost of his daughter’s wedding, but they have been known to exaggerate. Suffice it to say that a senior Shaolin monk recently tasked with meditating on the Court’s preemption caselaw gave up after only three days and opened a Las Vegas tattoo parlor.

This Term’s biggest preemption opinion was *Wyeth v. Levine*, authored by Justice Stevens. The case involved a professional musician whose arm became gangrenous after using an antinausea drug intravenously, and Wyeth said her state tort claim was preempted because the Food and Drug Administration had approved the drug’s labeling. By a 5-4 margin, with Justice Kennedy joining the Court’s more liberal members, the Court held that the Food, Drug, and Cosmetic Act did not reflect an intention to preempt state-law failure-to-warn actions, and the FDA’s contrary conclusion was unpersuasive and therefore not entitled to deference under the procrustean *Skidmore* standard. Wyeth argued that the case was controlled

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<sup>21</sup> 463 U.S. 29 (1983).

by *Geier v. American Honda Motor Co.*,<sup>22</sup> where the Court held that tort claims premised on the failure to install airbags conflicted with a federal regulation that did not require airbags on all cars. The Court rejected that argument on the ground that that decision was not written by Justice Stevens, and therefore his dissent in the case was controlling. Well, actually, I see now that the Court devoted two full paragraphs to distinguishing *Geier*, focusing mostly on the fact that the agency there had conducted a formal rulemaking, which does, after all, give the agency's position more juice under *Mead*. But in dissent, Justice Alito portrayed it as another example of what might be called *Rasul Syndrome*, see *Rasul v. Bush*<sup>23</sup>: "The contrary conclusion requires turning yesterday's dissent into today's majority opinion."

## 8. FIRST AMENDMENT

There were some juicy First Amendment cases this term. Chief among them was *Pleasant Grove City, Utah v. Summum*, involving a religion founded in 1975 by someone who goes by the name "Corky Ra," an improbable admixture of the names for a falcon-headed Egyptian sun god and a drunk WASP in golf pants. Summum – which Mr. Ra named based on extensive research on the single word most likely to confuse restaurant reservation clerks – organizes itself around "Seven Aphorisms," which, it is said, were on the original tablets Moses destroyed after deciding the Jews were not ready to receive them, but which God revealed to Mr. Ra, or, more likely, Ra peeked at while God was laughing helplessly about his name. In any event, Summum sued Pleasant Grove, insisting that a monument to the Aphorisms be placed in the City's Pioneer Park alongside a monument to those simplistic Ten Commandments. The Tenth Circuit, perhaps because it is upwind from glaucoma-plagued California, held that "the City was required to erect Summum's monument immediately." Justice Alito won the unusually plum assignment as junior Justice by besting the Chief in an epic

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<sup>22</sup> 529 U.S. 861 (2000).

<sup>23</sup> 542 U.S. 466 (2004).



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game of “rock, paper, scissors,” using his famous scissors-that-looks-both-like-rock-and-paper trick. Writing for everyone but Justice Souter, Justice Alito concluded that the placement of a monument in a public park is a form of government speech that is not subject to scrutiny under the Free Speech Clause (petitioner had not raised an Establishment Clause challenge). Justice Stevens’ concurrence referred to the government speech doctrine as “recently minted” (as in at least 18 years old, *see Rust v. Sullivan*<sup>24</sup>), but “recent” is a relative term, and perhaps he fondly remembers the cooling of the Earth’s crust the way most people reminisce about how there used to be a horse farm where the mall now stands.

The sole remaining case for OT2008 is *Citizens United v. Federal Election Commission*, which concerns whether the McCain-Feingold Bipartisan Campaign Reform Act validly prohibits dissemination of a 90-minute documentary about then-Senator Hillary Clinton prepared for the 2008 presidential election (aptly if unoriginally titled, “Hillary: The Movie” after producers discovered that “Seussical: The Musical” was already taken, and that persons in the desired demographic would rather gnaw off their own limbs than watch a film by that name). The District Court concluded that McCain-Feingold prohibited the movie from being shown before the 2008 Democratic primaries. During argument, the government took the position that McCain-Feingold validly prohibits speech paid for using general corporate funds regardless of whether it takes the form of a 90-minute documentary, 30-second ad, or even a book, leading several of the Justices (mostly the conservative ones, but Justice Ginsburg too) to express skepticism that the law could validly sweep so broadly. Then, on the last hand-down day of June, it issued an extremely unusual order setting reargument for a special September sitting and ordering additional briefing on the question whether the Court should overrule “either or both *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and the part of *McConnell v. Federal Election Comm’n*, 540 U.S. 93 (2003), which addresses the facial validity of Section 203” of McCain-Feingold.

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<sup>24</sup> 500 U.S. 173 (1991).

The September argument is shaping up to be an epic, representing newly confirmed Justice Sotomayor's first argument from her new vantage point on Justice Breyer's left, as well as Solicitor General Elena Kagan's first argument; Ted Olson, who as SG argued in favor of the facial validity of McCain-Feingold in *McConnell*, represents the party challenging application of the law; and *McConnell* veteran Seth Waxman may also argue on behalf of the law's congressional sponsors. If the law is struck down, the editorial forecast predicts moderate to high dudgeon, with a strong chance of outrage, particularly because many will say the only relevant distinction with *McConnell* is the replacement of Justice O'Connor with Justice Alito. But the smart money is predicting that Chief Justice Roberts will narrowly hold that the petitioner's brief was in an impermissible font and remand for reconsideration. Because the Court ordinarily finishes all opinions from the old Term before commencing the new one in October, the case may be decided on a compressed timetable, which doubtless has the Justices humming "Happy Days Are Here Again."

## 9. PERSONNEL CHANGES

Having finally succeeded in getting the phrase "willy-nilly" into the United States Reports, *see Kennedy v. Plan Administrator*, the Court's leading user of folksy phrases concluded he had no new worlds to conquer and Justice Souter notified the President in May of his intended retirement.<sup>25</sup> Souter had frequently said that he had the world's best job in the world's worst city because he never took to living in Washington, despite living in a tiny soulless hi-rise apartment in a crime-riddled neighborhood. Souter complained that he underwent an "intellectual lobotomy" when the summer ended and he left Weare, N.H. to return to Washington, which, if you have been to the Florence of the Western Merrimac Valley, really goes without saying. Souter privately told friends – and by

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<sup>25</sup> See generally Ed Whalen, *Has Justice Souter Actually Retired?*, NAT'L REV. ONLINE, June 30, 2009, available at [bench.nationalreview.com/post/?q=MzY3Yzc5OWJkMzg2YzBiNjI2MWU5YjI5ZDc3NTMzNjI](http://bench.nationalreview.com/post/?q=MzY3Yzc5OWJkMzg2YzBiNjI2MWU5YjI5ZDc3NTMzNjI).

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“friends,” I mean people who betray personal confidences at the first opportunity when reporters call – that if President Obama were elected, he would be the first to retire, thus making him the first Justice opposed for confirmation by Barbara Mikulski, Ted Kennedy, John Kerry and NOW (his confirmation would “end . . . freedom for women in this country”) to bide his time waiting for the election of a Democrat. Within the month, the President had nominated as his successor Second Circuit judge Sonia Sotomayor, whose impressive personal story makes Justices born outside of Pinpoint, GA look pampered. The nomination also represented shrewd politics from a demographic standpoint: when confirmed, Sotomayor became the first Justice with an alliterative name since Felix Frankfurter.

The Relentless March of Progress has brought us many wondrous things since man first walked upright: moveable type, the steam engine, artificial light, vaccine, Dr. Scholl’s Massaging Gel Insoles, and now the confirmation hearing that doesn’t really say anything. Thanks to years of research and testing dating back to *just after* the Bork hearings, scientists have been able to isolate, and then replicate, verbal responses that sound remarkably answer-like, but which actually communicate slightly less information than throat-clearing. Their solution involves an elegant mixture of the tried and true refusal to comment on any possible past, present, future, hypothetical, or even fanciful case on the ground the issue might one day come before them and pledging to apply the law to the facts, which makes judging sound like a good profession for those who find cake mixes overwhelming. On a heavily party-line vote, Justice Sotomayor was confirmed 68-31 as the 111th Justice of the Supreme Court, heiress to the seat of the great Sherman Minton, and, remarkably, the first jurist confirmed during the Obama Administration. As Justice Souter loaded his VW with books and stacks of plain yogurt cups for the trip to his new home in Hopkinton, N.H. (the old farmhouse in Weare evidently couldn’t support his ginormous book collection; for once, I am not making this up), he fundamentally remained a paradox: How did a man who seemed the very embodiment of the taciturn Yankee write so damned much?



OT2009, like next semester's classes always do, looks pretty promising. *Salazar v. Buono* involves whether an individual has Article III standing to bring an Establishment Clause challenge to an act of Congress transferring to a private party Sunrise Rock, a cross erected as a war memorial on government land, in an effort to avoid the memorial's destruction; twenty-nine amicus briefs have been filed. While one might expect the Obama Administration to have some problem proceeding with an Establishment Clause case originally filed by the outgoing Bush Administration, the institutional interest of the United States in No One Ever Having Standing makes this an easy case for them. *United States v. Stevens* involves a First Amendment challenge to a statute prohibiting depictions of cruelty to animals, which enjoys about as much popular support as jihadist porn. *United States v. Comstock* involves a constitutional challenge to the federal law authorizing civil commitment of "sexually dangerous" persons nearing release from federal prison. *Free Enterprise Fund v. PCAOB* presents a high-profile separation of powers question: whether the Sarbanes-Oxley Act's establishment of the Public Company Accounting Oversight Board is consistent with separation-of-powers principles and the Appointments Clause of the Constitution. The D.C. Circuit rejected the constitutional challenge over the 57-page dissent of Judge Brett Kavanaugh, former clerk to a well known swing Justice. Finally, *Milavetz, Gallop & Milavetz v. United States* involves whether an attorney who provides assistance to a person is a "debt relief agency" for purposes of 11 U.S.C. § 526; as any parent who pays their kids' bills knows, the answer is clearly "yes."

Until next time, that's today's baseball!

