WIGGIN AND DANA

Counsellors at Law

Supreme Court Update

OCTOBER 2006 TERM IN REVIEW

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Appellate Practice Group

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THE TERM IN REVIEW

Greetings, Court fans, and welcome to the third annual Term in Review!

Wiggin and Dana's Appellate Practice Group began the Supreme Court Update during the October 2002 Term as a way to keep clients, friends of the firm, and ourselves up to speed on the Court's activities. Sent by e-mail, the Update provides readers with (relatively) quick summaries of the Court's latest rulings. This Review provides all the summaries from the past Term in a single document—a ready reference to the second Term of the Roberts Court.

This Term the Court issued opinions in seventy-five cases, which we have split into two sections. Part One includes all the civil cases, while Part Two contains criminal cases and their cousins (such as Fourth Amendment and habeas cases). Within each Part, we've organized the cases by section to reflect the dominant issue of each case, with cross-references where appropriate. We've also included an index to help locate specific decisions.

Before we get to the summaries, here are some of our thoughts on what was quite a Term—particularly for one crucially important Justice.

IT'S REALLY THE KENNEDY COURT NOW

Officially, of course, it's still the Roberts Court, but the big story of the Term was Justice Kennedy's dramatic assertion of his role as the Court's pivotal Justice. That Kennedy would become the indispensable Justice was no surprise; with the departure of Justice O'Connor and the arrival of Justice Alito, he became the Court's obvious new center by January of last Term. This Term, however, Kennedy truly came into his own.

Kennedy's importance is apparent from a cursory look at the numbers. Kennedy participated in seventy-four of the Court's decisions this Term, and he managed to find himself on the "losing" side of a case only *twice*—writing but a single dissent from the Court's decision to invalidate California's sentencing guidelines (***Cunningham v. California***) and joining Alito's dissent in a "dormant" Commerce Clause case involving garbage haulers (***United Haulers Ass'n v. Oneida-Herkimer Solid Waste Management Authority***). In every other decision, Kennedy at least concurred in the judgment—a ninety-six percent "success" rate. And in the close cases, Kennedy clearly was the dominant Justice: The Court decided twenty-five cases with only five votes in the majority, and Kennedy was the crucial fifth vote in *every* one of them.

Kennedy's role in the 5-4 and 5-3 decisions demonstrates that, as predicted, the Court on balance has become more conservative. In thirteen of these cases, Kennedy joined with the Court's more conservative wing (the Chief and Justices Scalia, Thomas, and Alito) to form a majority or otherwise cobble together a judgment, whereas he joined his more liberal colleagues (Justices Stevens, Souter, Ginsburg, and Breyer) only six times. Beyond the numbers, the nature of these decisions is illuminating. Kennedy's votes with the conservatives tended to be more "legal" in nature, and thus more likely to establish governing precedents (or at least generate considerable confusion as to what those precedents are—guaranteeing future litigation).

Those Meddling Kids

This Term was frustrating for Justice Stevens, who dissented from over one-third of the Court's rulings. At times he seemed quite annoyed with what struck him as younger Justices' lack of historical perspective or respect for precedent. Here's a sampling:

Scott v. Harris: Responding to Justice Scalia's description of "a Hollywood-style car chase of the most frightening sort," he said: "I can only conclude that my colleagues were unduly frightened by two or three images on the tape that looked like bursts of lightning or explosions, but were in fact merely the headlights of vehicles zooming by in the opposite lane. Had they learned to drive when most highspeed driving took place on two-lane roads rather than on superhighways—when split-second judgments about the risk of passing a slowpoke in the face of oncoming traffic were routine—they might well have reacted to the videotape more dispassionately."

Morse v. Frederick: When the Court upheld a student's punishment for holding a "BONG HiTS 4 JESUS" banner at school, Stevens wrote: "[T]he current dominant opinion supporting the war on drugs . . . is reminiscent of the opinion that supported the nationwide ban on alcohol consumption when I was a student. While alcoholic beverages are now regarded as ordinary articles of commerce, their use was then condemned with the same moral fervor that now supports the war on drugs. . . . Surely our national experience with alcohol should make us wary of dampening speech suggesting—however inarticulately—that it would be better to tax and regulate marijuana than to persevere in a futile effort to ban its use entirely."

PICS: Lamenting what he saw as a betrayal of numerous precedents, including *Brown v. Board of Education*, Stevens wrote: "The Court has changed significantly [in the last 40 years]. It was then more faithful to *Brown* and more respectful of our precedent than it is today. It is my firm conviction that *no Member of the Court that I joined in 1975* would have agreed with today's decision."

In ***Gonzalez v. Carhart***, for example, Kennedy joined with the conservatives to uphold the federal ban on partial-birth abortion. The majority assumed (but did not expressly reaffirm) that its analysis should follow the "substantial burden" framework from *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), under which the law may not impose substantial obstacles on a woman's right to a previability abortion. Kennedy's opinion, however, appeared to work a change in the Court's application of the framework, requiring that the undue burden bear on a significant number of women rather than just the subset of women affected by the statute. In addition, Kennedy suggested that courts should not allow facial attacks on antiabortion statutes when passed, but instead should require individuals to challenge the application of laws to their specific circumstances—making future challenges more concrete but also potentially more difficult for supporters of abortion rights. Kennedy also joined another conservative majority in ***Ledbetter v. Goodyear Tire & Rubber Co.***, similarly making it more difficult for plaintiffs to challenge discriminatory pay decisions by requiring them to file their complaints within 180 days of the initial pay decision rather than within 180 days of any resulting inequitable paycheck.

In another controversial decision, ***Parents Involved in Community Schools* [*PICS*] *v. Seattle School District No. 1***, Kennedy joined most of the majority opinion finding Seattle's and Louisville's race-conscious school-assignment plans unconstitutional. The crux of the opinion was that neither of the recognized rationales for the use of race—remedying *de jure* segregation or promoting overall diversity in the special case of higher education—applied to the districts, and in any event their plans were not narrowly tailored to achieving a compelling interest. Kennedy took exception to language in the Chief Justice's opinion appearing to condemn the use of race in all circumstances, and he wrote a separate concurrence in the judgment suggesting other ways that the districts might have satisfied strict scrutiny. At the end of the day, however, it is not clear whether the differences between Kennedy and the Chief are more than rhetorical—and it is even less clear what school districts

seeking to promote integration can do without fear of legal challenge (notwithstanding Kennedy's suggestions).

In a less controversial, but quite significant antitrust ruling, ***Leegin Creative Leather Products, Inc. v. PSKS, Inc.***, Kennedy wrote for the conservative majority in holding that "vertical" pricing agreements between manufacturers and distributors to establish minimum prices for the manufacturers' products are no longer *per se* illegal but instead should be reviewed under the rule of reason. ***Leegin*** overruled *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), which had been good law for nearly a century, much to the consternation of the dissenters—who objected not so much to the substance of the ruling as to the majority's willingness to depart from *stare decisis*.

On the First Amendment front, Kennedy again joined with his conservative brethren in a series of rulings during the Term's final week—though it must be said that conservatives were hardly a united front across the three cases. In ***Hein v. Freedom from Religion Foundation, Inc.***, Kennedy agreed that a group of federal taxpayers lacked standing, based solely on that status, to challenge the Bush Administration's use of funds to sponsor speeches supporting its faith-based initiatives. (Kennedy and the Chief joined Alito's plurality opinion refusing to apply a recognized Establishment Clause exception to the no-taxpayer-standing rule, but purporting to leave the exception intact; Scalia and Thomas would have junked the Establishment Clause exception altogether). The Court then held in ***Federal Election Commission [FEC] v. Wisconsin Right to Life, Inc.*** that the McCain-Feingold Act's restrictions on campaign advertising could not constitutionally apply to "issue ads" concerning Senators' positions on filibustering judicial nominees, even when run close to an election. Again, the Court's reasoning was splintered; Kennedy, Scalia and Thomas would have revisited the Court's previous holding that the relevant provision was facially constitutional, while the Chief and Alito sought to salvage that ruling and come up with a rule carving out "issue ads" from "campaign ads" or their "functional equivalents." And in ***Morse v. Frederick***, Kennedy agreed with the conservatives that a high school student had no First Amendment right to utter speech (in this case, a "BONG HiTS 4 JESUS" banner) that reasonably could be viewed as promoting illegal drug use—though Kennedy joined with Alito in writing that students still had the right to utter speech commenting on political or social issues (such as drug legalization).

Kennedy also joined with the conservatives in a number of the Court's key criminal rulings. In ***Uttecht v. Brown***, Kennedy wrote for the majority in holding that a trial judge has broad discretion in excluding potential death-penalty jurors for cause, particularly when their *voir dire* testimony regarding their ability to impose a death sentence is conflicted. In ***Ayers v. Belmontes***, Kennedy again wrote for the majority in rejecting a challenge to California's catch-all jury instructions for considering mitigating evidence in death-penalty cases. And in ***Schriro v. Landrigan***, Kennedy joined a majority holding that a defense counsel's failure to investigate his client's mental illness and horrific background, and thus to offer evidence on these subjects in his client's death-penalty defense, was harmless because of the client's instructions not to offer mitigating evidence (even though he was unaware he was mentally ill). Finally, in ***Bowles v. Russell*** Kennedy joined a procedural ruling regarding the writ of habeas corpus that could have serious ramifications, finding that the provisions of 28 U.S.C. § 2107(c) and FRAP 4(a)(6) allowing trial courts to extend the time for an appeal by fourteen days was jurisdictional—

meaning that even where a court mistakenly gives a petitioner more time, he cannot rely on that ruling but must file within fourteen days or his appeal will be dismissed.

By contrast, Kennedy's votes with the liberals tended to occur in the less riveting or more fact-driven cases (and thus their long-term impact is likely to be limited). For example, in ***Marrama v. Citizens Bank of Massachusetts***, Kennedy joined with the liberals to hold that a debtor's right to convert his bankruptcy proceedings from Chapter 7 to the more favorable Chapter 13 is subject to an implicit bad-faith exception—potentially significant, but hardly groundbreaking.

In addition, Kennedy joined the more liberal Justices in four death-penalty cases all dealing with alleged improprieties in Texas state courts—and three of which concerned issues addressed by the Court in previous rulings. Thus, in ***Abdul-Kabir v. Quarterman***, ***Brewer v. Quarterman***, and ***Smith v. Texas***, Kennedy and the liberals upheld a series of challenges to Texas's "special issues" jury instructions, which allow death-penalty juries to consider whether a defendant deliberately caused the death of another and whether he posed a risk of future dangerousness. Essentially holding that these instructions did not ensure that juries gave full effect to all mitigating evidence, the Court sent the cases back (in Smith's case, for the second time). And in ***Panetti v. Quarterman***, the Court sent back for further review a case in which the petitioner argued he could not be executed because he was presently insane, and where the state court apparently had deprived him of the chance to press this claim adequately. To be sure, these holdings will have some legal effect—in particular, ***Panetti*** holds that "present insanity" challenges to a death sentence are not subject to the bar on new claims in "second or successive" habeas petitions—but all turned on facts unique to the cases at hand (and perhaps to Texas). In

Justice Scalia's Greatest Hits

Justice Scalia had some barbs for his fellow Justices this Term—and not just for those you might have expected. Here are some of his best zingers.

On Justice Stevens' willingness to discern Congress's intent divorced from a statute's text (*Zuni Public School District No. 89 v. Department of Education*): "The sheer applesauce of this statutory interpretation should be obvious. . . . Why should we suppose that in matters more likely to arouse the judicial libido—voting rights, antidiscrimination laws, or environmental protection, to name only a few—a judge in the School of Textual Subversion would not find it convenient (yea, *righteous!*) to assume that Congress *must* have meant, not what it said, but what he knows to be best?"

On Chief Justice Roberts' much-touted minimalist approach to deciding cases (*Hein v. Freedom from Religion Foundation, Inc.*): "Minimalism is an admirable judicial trait, but not when it comes at the cost of meaningless and disingenuous distinctions that hold the sure promise of engendering further meaningless and disingenuous distinctions in the future. The rule of law is ill served by forcing lawyers and judges to make arguments that deaden the soul of the law . . . [H]onoring *stare decisis* requires more than beating [precedent] to a pulp and then sending it out to the lower courts weakened, denigrated, more incomprehensible than ever, and yet somehow technically alive."

More on the Chief's judicial restraint (*FEC v. Wisconsin Right to Life, Inc.*): "[T]he principal opinion's attempt at distinguishing *McConnell* [*v. FEC]* is unpersuasive enough, and the change in the law it works is substantial enough, that seven Justices of this Court, having widely divergent views concerning the constitutionality of the restrictions at issue, agree that the opinion effectively overrules *McConnell* without saying so. This faux judicial restraint is judicial obfuscation."

On the Court's shifting death-penalty rulings (*Abdul-Kabir v. Quarterman*): "If . . . a majority of the Justices are going to govern us by their moral perceptions, in this area at least they ought to get their moral perceptions right the first time. Whether one regards improvised death-is-different jurisprudence with disdain or with approval, no one can be at ease with the stark reality that this Court's vacillating pronouncements have produced grossly inequitable treatment of those on death row. . . . This is not justice. It is caprice."

short, it appears that while the liberals may be able to sway Kennedy based on the facts of a given case, when the issue is one of law he seems to tilt more toward the conservative bloc.

Kennedy did give the liberal bloc one significant victory—***Massachusetts v. EPA***, where the Court held that EPA must regulate motor vehicle emissions if it finds that these emissions contribute to global warming. (EPA had declined to do so on unrelated policy grounds.) Kennedy agreed that states and others had standing to challenge EPA's rulings because of the "serious and well recognized" harms caused by global warming that regulation would help reduce. And he further agreed that if EPA found that motor vehicle emissions endangered public welfare, then the Clean Air Act requires it to regulate even if the President has other priorities. (At the end of the day, the Court still sent the case back to EPA for a substantive finding on whether emissions endanger public welfare—so the liberals' victory is not set in stone.)

A TOUGH TERM FOR PRECEDENTS

It was a tough Term for the more liberal Justices, but it might have been even tougher for old precedents. As noted above, in ***Leegin Creative Leather Products, Inc. v. PSKS, Inc.***, the Court directly overruled a decision that had stood for almost a hundred years, basically because it no longer made any economic sense. The majority brushed aside *stare decisis* as less important in antitrust cases, on the ground that our antitrust laws function as common-law statutes that courts may tweak over time. And in ***Bowles v. Russell***, the Court overruled *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962) (per curiam), and *Thompson v. INS*, 375 U.S. 384 (1964) (per curiam), at least to the extent that those cases recognized a "unique circumstances" exception to jurisdictional time limits in the Federal Rules.

Leegin and ***Bowles*** were anomalies, however, as the Court generally bent over backwards to avoid overruling past decisions—to the point of leaving numerous precedents badly maimed but, technically, still standing. Indeed, the Court (or at least a plurality of Justices) dramatically limited or reinterpreted numerous precedents to distinguish them from cases heard this Term. Some of these efforts were more successful—or at least more convincing in the eyes of dissenting Justices—than others:

- In ***Ledbetter v. Goodyear Tire & Rubber Co.***, a 5-4 majority held that a woman claiming that her employer had made discriminatory pay decisions based on gender did not have a Title VII claim that accrued with each paycheck she received; instead, she should have filed her claim within 180 days of the original decisions (which the paychecks only implemented). The Court had to distinguish *Bazemore v. Friday*, 478 U.S. 385 (1986), where it held that an employer's race-based pay system did give rise to discrimination claims that accrued paycheck by paycheck. Justice Kennedy's opinion focused on the structural aspect of the *Bazemore* scheme—white and black employees were separated into two branches with different salary levels—and read that case to hold that where an entire structure is discriminatory, every paycheck implementing that structure gives rise to a claim. Ledbetter, by contrast, challenged only her own performance evaluations in a facially nondiscriminatory system, so her claims did not accrue with each paycheck.

- In ***PICS v. Seattle School District No. 1***, the Court held that Seattle's and Louisville's race-conscious "voluntary integration" school assignment policies were unconstitutional, despite language in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), that blessed voluntary desegregation efforts as within the discretionary powers of school authorities. The Chief's opinion distinguished this language as dicta dealing with districts found to have engaged in *de jure* segregation, which was not the case for Seattle and was no longer the case for Louisville. In dissent, Justice Breyer protested that *Swann*'s language, while dicta, had become "a basic principle of constitutional law" providing "authoritative legal guidance" to school districts. To the extent Breyer was correct (the Chief and others hotly disputed his reading of the case law), the *Swann* dicta will have a hard time surviving ***PICS***.

- The Court had to address troublesome precedents in two First Amendment rulings announced late in the Term. In ***Hein v. Freedom from Religion Foundation, Inc.***, the Court held that a group of taxpayers lacked standing to bring an Establishment Clause challenge to the Bush Administration's use of general executive funds to support faith-based initiatives. In *Flast v. Cohen*, 392 U.S. 83 (1968), however, the Court had recognized an exception to the general rule against taxpayer standing for Establishment Clause challenges. The solution in Justice Alito's plurality opinion in the case was to limit *Flast* to expenditures authorized by specific congressional appropriations (that is, not a discretionary expenditure out of general executive funds approved by Congress). Justice Scalia concurred in the judgment, but his kindest word for this distinction was "disingenuous" (for more, see **Justice Scalia's Greatest Hits** above). The dissenters were equally "bewildered." And in ***Morse v. Frederick***, the "BONG HiTs 4 JESUS" banner-in-school case, the Court found no First Amendment violation in a student's punishment despite its holding in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), that school speech was subject to a "substantial disruption" test. Without identifying a new test, the Court noted that *Tinker*'s test was not absolute and held that a principal may punish speech that she reasonably believes advocates illegal drug use. Justice Thomas concurred, but like Scalia in *Hein* he thought that watering down *Tinker* without overruling it created an incoherent system: "[S]tudents have a right to speak in schools except when they don't."

- Finally, in ***Wilkie v. Robbins***, the Court declined to recognize a new *Bivens*-style cause of action where a landowner claimed that Bureau of Land Management officials repeatedly harassed him because he refused to grant them an easement across his property. Justice Souter's opinion for the Court recognized that Robbins had no adequate remedy for his "death by a thousand cuts" injuries, but it found that his need for a remedy was outweighed by the Court's inability to find a workable cause of action. The Court distinguished between the typical *Bivens* retaliation claim (a "what for" case where the motive was illegitimate) from Robbins's (a "too much" case where the motive was legitimate but the government went too far). Concerned that courts could not draw the line separating "legitimate zeal" from "going too far," the Court said "no" to a *Bivens* action—the first time, according to Justice Ginsburg's dissent, that the Court had declined to recognize a *Bivens* action where it found no other adequate remedy.

Facts and Figures

Overall, the numbers are down: The Court's opinions this Term covered 75 cases taken on writ of certiorari (counting consolidated cases, and ignoring two cases the Court DIG'd or dismissed as moot). The Court reversed or vacated 54 of them, for a reversal rate of 72 percent. Percentage-wise, the reversal rate was on par with previous years, but the Court decided a lot fewer cases this Term: By comparison, the Court decided 93 cases in the October 2005 Term and 86 in the October 2004 Term.

The Ninth Circuit is still the whipping boy: The Court continues to beat up on the Ninth Circuit. It considered 21 cases from the Ninth Circuit this Term, and reversed or vacated 19 of them, or 90 percent. Among the Circuits, only the Third Circuit had a worse reversal rate (100 percent, but the comparison is hardly fair; the Court heard only one case from the Third Circuit). Curiously, state courts—which had fared relatively well before the Court in recent years—also had a 100 percent reversal rate in their seven cases before the Court. Only the Eleventh and D.C. Circuits did better than average this Term, receiving affirmances, respectively, 60 percent (three of five cases) and 75 percent (three of four cases) of the time.

It's Justice Kennedy's world, we just live in it . . . : Justice Kennedy had one of the more successful Terms of any Justice in recent memory. He wrote but a single dissent all Term, and joined only one other—putting him on the winning side in 96 percent of the Term's decisions. No other Justice even came close, though Justice Alito also did well, joining the winning side 87 percent of the time; the Chief was also "right" in 85 percent of the decisions in which he participated. Kennedy's importance was even more clear in the close cases, as he was the fifth vote in all of the Court's 5-4 or 5-3 rulings—and he authored six of his eight majority opinions in such cases.

. . . and that has to be frustrating for the more liberal Justices: Justice Stevens once again was the Term's biggest dissenter, departing from the majority a whopping 36 percent of the time. Perhaps not coincidentally, he was followed by Justices Ginsburg (28 percent), Souter and Breyer (each at 25 percent).

Who wrote the most: It was a pretty even split in terms of majority/plurality opinions, as each Justice wrote seven or eight over the course of the Term. In keeping with his role as the Term's great dissenter, Justice Stevens wrote the most opinions overall (31), followed by Justices Scalia and Thomas (24 each).

So much for unanimity: Last Term was a bit of a honeymoon, as the Court issued 48 unanimous opinions. This Term, by contrast, only 29 could be called unanimous (and that includes concurrences in the judgment but not the majority's or plurality's reasoning; there were only 22 strictly unanimous rulings).

With that, we'll move on to the summaries. Thanks, as always, for following the Court with us.

Ken & Kim

PART ONE: CIVIL CASES

ABORTION/REPRODUCTIVE RIGHTS

***Gonzalez v. Carhart* (05-380)** has been described as a "stunning victory" for pro-life forces and an "astounding loss" for pro-choice advocates. Justice Kennedy issued the majority opinion in *Carhart* for a deeply divided Court, upholding Congress's ban on one method of second trimester abortion—an "intact D&E [dilation and evacuation]." (The procedure involves an attempt to deliver a fetus mainly intact before completing the abortion. A regular D&E, by contrast, involves removal of the fetus in parts.) Reversing the Eighth and Eleventh Circuits (and indirectly the Second Circuit), the Court found that the partial-birth abortion ban was not unconstitutionally vague, did not on its face unduly burden a woman's right to have a previability abortion, and did not require an exception for the health of the mother in light of conflicting medical evidence regarding the risks of the ban.

The Court first explained that the law was narrow, most reasonably read to preclude only one type of second-trimester abortion—an intact D&E of a living fetus. It did not preclude any first-trimester abortions, it did not apply to an intact D&E of a dead fetus (accomplished by injection before the abortion) or to abortion by induction, and it did not preclude a standard D&E. The statute applied only where there was an intent to deliver the fetus intact to a particular anatomical landmark of the woman before completing an overt act that kills the fetus. These definitions and the intent requirement saved the law from any vagueness challenge because the reference to specific anatomical landmarks (rather than merely to delivery of a "substantial portion" of the fetus, as in the Nebraska law struck down in *Stenberg v. Carhart*, 530 U.S. 914 (2000)) provided sufficient guidance for doctors to conform their actions to the statute. Moreover, doctors' fears that they could accidentally violate the law by delivering a fetus substantially intact while attempting to perform a standard D&E were unfounded because an "accidental" procedure would lack the intent required for prosecution.

Turning to substantial burden, the Court began by assuming that *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), governed the case. (That the Court did not expressly reaffirm *Casey* may have enormous implications.) First, a woman may not be prohibited from having a previability abortion, and a law may not impose an undue burden (defined as a substantial obstacle) on this right. Second, the law may prohibit abortions after viability so long as an exception exists for pregnancies that endanger the life and health of the mother. Third, the state has a legitimate interest in protecting the life of the fetus and the health of the mother. The Court focused, sort of, on the third interest, finding that the Government had a legitimate "moral" interest in regulating the intact D&E—"in which a fetus is killed just inches before completion of the birth process"—as well as an interest in protecting the integrity and reputation of the medical profession from a procedure that appears similar to infanticide. While the law would not necessarily stop any abortions (because it banned only one method), Congress legitimately could find that an intact D&E raised particular moral and ethical considerations not involved with a standard D&E (not disputing that the standard D&E "is in some respects as brutal, if not more, than the intact D&E"). Since the law did not foreclose other options for abortions before viability, it did not constitute an undue burden, notwithstanding the district courts' conclusions that the intact D&E provides medical benefits for some women. The majority found that there

was a medical dispute over whether the ban on intact D&E would "ever impose significant health risks on women" and that this "medical uncertainty . . . provides a sufficient basis to conclude in this facial attack that the Act does not impose an undue burden." Further, the Court appeared to require that the statute unduly burden a significant number of women—not that it substantially burden a subset of women (those for whom an intact D&E would provide significant medical benefit). This change could have significant ramifications for future cases.

Finally, the Court held that the lower courts should not have permitted "facial" challenges to the law, opening the door to future as-applied challenges "if it can be shown that in discrete and well-defined instances a particular condition has or is likely to occur in which the procedure prohibited by the Act must be used." This holding could be the most significant of the entire case, as it appears that the Court will now require piecemeal litigation of abortion statutes rather than allow them to be challenged as a whole when enacted. This could make challenges to future statutes far more difficult, given that litigation likely will outlast any pregnancy.

Justices Thomas and Scalia concurred to state their view that the Court's abortion jurisprudence, including *Casey* and *Roe v. Wade*, 410 U.S. 113 (1973), has "no basis in the Constitution."

Justice Ginsburg (joined by Justices Stevens, Souter and Breyer) dissented, stating: "Today's decision is alarming." In their view, the ruling declined to reaffirm *Casey* (a landmark, watershed case), blurred the line between previability and postviability abortions, blessed for the first time an abortion prohibition with no health exception, and required piecemeal as-applied challenges to abortion laws. It devalued concerns for a woman's autonomy and the right to control her own body recognized by the Court's prior jurisprudence. Further, while the majority purported to rely on the state's interest in protecting fetal life, the law "saves not a single fetus from destruction." It regulated only a form of abortion that substantial medical evidence indicated was the safest, most appropriate method for some women. Particularly troubling to the dissent was the majority's finding that the law posed no undue burden because there was no showing that "the ban on intact D&E would be unconstitutional 'in a large fraction of relevant cases.'" For the dissent, the relevant class should not be "all pregnant women," but women who "require an intact D&E because other procedures would place their health at risk." The only redeeming aspect of the decision was that it maintained the possibility for as-applied challenges.

ANTITRUST

The Court issued several significant antitrust rulings this Term. In ***Leegin Creative Leather Products, Inc. v. PSKS, Inc.* (06-480)**, a 5-4 majority led by Justice Kennedy held that vertical price-fixing agreements between manufacturers and retailers are no longer *per se* illegal under antitrust laws, but must be judged by the rule of reason. The holding overruled a nearly-century old precedent, *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), which held that a vertical agreement (often called a "resale price maintenance agreement" or RPM) was *per se* illegal. *Dr. Miles* barred RPMs notwithstanding claims by some economists that they could have procompetitive effects in certain circumstances. In overruling *Dr. Miles*, the Court first explained that the accepted standard for reviewing a practice under section 1 of the Sherman Act is the rule of reason. *Per se* illegality is reserved for practices that always or almost always tend to restrict competition. The Court's recent jurisprudence on vertical restraints of trade had

"rejected the rationales on which *Dr. Miles* was based"—the old common-law restraint on alienation, which was formalistic, not based on "demonstrable economic effect," and outdated. Further, *Dr. Miles* had equated RPMs with horizontal price fixing (i.e., an agreement between retailers to set prices), but RPMs often are driven by manufacturers that want to guarantee a minimum price for products to support brand image or stimulate additional services to be provided by retailers (such as fancy displays or a help desk). More recent case law had recognized that vertical restraints may have procompetitive justifications, including stimulating *inter*brand competition and reducing *intra*brand competition, eliminating free riders (i.e., the discounter that benefits from high-end retailers' product-related services), facilitating new market entrants, and encouraging retailer services that might not otherwise be provided. At the same time, the Court recognized that RPMs have potential anticompetitive consequences that "must not be ignored or underestimated." Because an RPM may have both procompetitive and anticompetitive effects, it is just the type of practice for which the rule of reason is appropriate. The majority rejected administrative convenience (the obvious benefit of *Dr. Miles*'s bright-line rule) as a ground for *per se* condemnation and suggested that courts would develop rules to guide litigation and separate legitimate and illegitimate conduct. In determining whether a practice is invalid under the rule of reason, a court should consider, for example: (1) the number of manufacturers that use the practice in a given industry, (2) the source of the restraint (i.e., if *retailers* were the impetus for the RPM, it smells), and (3) market power.

The majority then trotted through its rationale for overruling a century-old case that the Court repeatedly had upheld. As Kennedy explained, *stare decisis* is not as significant in antitrust cases because the Sherman Act is treated as a common-law statute. Therefore, when respected authorities hold that a change in the law is needed, the Court should act accordingly. It was also significant that the FTC and DOJ recommend that RPMs be judged under the rule of reason, and that the underpinnings of *Dr. Miles* had slowly been eroded by other cases removing vertical restraints from the *per se* unlawful framework. *Dr. Miles*'s rule was "inconsistent with a principled framework, for it makes little economic sense when analyzed with our other cases on vertical restraints" and would only serve to force manufacturers to engage in "second-best alternatives." Further, though reliance is a serious consideration when overturning long-established precedents, that concern was less valid here because, for much of the century, the Miller-Tydings Fair Trade Act had allowed states to enact laws permitting RPMs. The Act's repeal in 1975 did not indicate that Congress agreed that RPMs should be *per se* illegal, it simply meant that Congress no longer believed they should be *per se* legal.

In his dissent (joined by Justices Stevens, Souter and Ginsburg), Justice Breyer was noticeably piqued about the Court's overruling *Dr. Miles* without any legitimate basis (such as a change in circumstances) for departing from such a significant and entrenched statutory precedent—one on which businesses, consumers and Congress (in repealing Miller-Tydings) had relied. Breyer recognized that, were the Court deciding the case on a clean slate, it might be a close call. As the majority pointed out, there were *some* circumstances where the procompetitive effects of an RPM might outweigh the negative effects—but how often was this the case? Studies indicated that RPMs generally raise the price of products and are not infrequently anticompetitive. Further, it will be *very* difficult for courts and juries, as Breyer colorfully put it, "to separate the beneficial sheep from the antitrust goats." Given the likelihood that RPMs will have anticompetitive effects, the administrative benefits of a bright-line rule, and the importance of *stare decisis*, the dissenters would have left *Dr. Miles* in place.

Another decision, ***Bell Atlantic Corp. v. Twombly*** **(05-1126)**, could have significant implications for federal pleading requirements generally. The opinion holds that a complaint under section 1 of the Sherman Act must contain facts plausibly suggesting conspiracy among the defendants as opposed to merely "parallel" anticompetitive conduct. The majority opinion and the dissent are lengthy, with lots of interplay in the footnotes, so if you are an antitrust or federal rules junkie you should read the entire decision.

The case concerned phone companies' obligations to open their networks to competitors. The breakup of AT&T's local phone business in the 1980s created the "Baby Bell" regional monopolies, but Congress took these monopolies away in the Telecommunications Act of 1996, requiring the Baby Bells (awkwardly referred to as "incumbent local exchange carriers" or ILECs) to share their networks with new carriers ("competitive local exchange carriers" or CLECs). Twombly led a potentially enormous class action against a host of ILECs, alleging that they inhibited the growth of CLECs (and thus kept phone charges high) by engaging in "parallel conduct" in their respective service areas to sabotage CLECs and by refraining from competing with each other (i.e., staying out of other ILECs' service areas). Based on the absence of "meaningful" competition between ILECs and their parallel conduct against CLECs, Twombly alleged "on information and belief" that the ILECs had agreed to restrain trade. The district court dismissed the complaint as failing to state a claim because Twombly's allegations did not exclude independent self-interested conduct, but the Second Circuit reversed, holding that a plaintiff need only plead facts that make conspiracy one of the "plausible possibilities."

Construing the Second Circuit's ruling to require only that a complaint make conspiracy "conceivable," the Court reversed in an opinion by Justice Souter. The general federal pleading standard requires only "fair notice" of the claim and its grounds, with enough factual allegations to make a right to relief more than speculative. Noting that Twombly had relied on an old chestnut coined by Justice Black in *Conley v. Gibson*, 355 U.S. 41 (1957), to the effect that a complaint is well-pleaded unless the plaintiff can prove "no set of facts" that entitle him to relief, the Court noted that this phrase had "earned its retirement" as "an incomplete, negative gloss" on notice pleading requirements (i.e., don't cite it anymore). In the context of a Sherman Act claim, the Court held, the general rule requires enough factual content to "plausibly suggest" conspiracy—that is, "enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." Because otherwise lawful parallel conduct does not bespeak unlawful agreement, an allegation of parallel conduct and an "assertion" of conspiracy are not enough: The conduct must not merely be consistent with agreement, but suggestive of it (to cite one example noted by the Court, ILECs' making simultaneous, unprecedented pricing decisions would suggest collusion). The Court seemed particularly concerned with the expense of antitrust discovery; here, the cost could have been enormous (Twombly's class might have encompassed 90 percent of American local phone subscribers), so the Court took pains to note the need for district courts to require some specificity in pleading before allowing a case to proceed. Turning to the substance of Twombly's complaint, the majority held that it did not plausibly suggest conspiracy, as none of the allegations suggested that any ILEC's conduct was more than a "natural, unilateral reaction" to maintain its regional dominance and to sit tight in its market.

Justice Stevens dissented, joined in large part by Justice Ginsburg. For Stevens, the case was easy. Parallel conduct, while not itself illegal, is circumstantial evidence of conspiracy, and

Twombly had alleged that the ILECs' parallel conduct had resulted from an agreement. The conduct alleged was consistent with illegal conspiracy, and the Court wrongly had made a judicial determination of plausibility rather than require the ILECs even to answer the complaint, much less submit to discovery. Instead, their lawyers needed only to file a motion to dismiss stating that everything was hunky-dory, leading Stevens to lament "that the unfortunate result of the majority's new pleading rule will be to invite lawyers' debates over economic theory to conclusively resolve antitrust suits in the absence of any evidence." Stevens gave a lengthy defense of the *Conley* "no set of facts" rule, which the Court previously had cited numerous times with approval and which was fully consistent with the federal courts' (and many states') abandonment of fact pleading for notice pleading. He also noted that in antitrust cases, where proof often lies in the hands of alleged conspirators, it is bad policy to allow dismissals before discovery. Stevens also wrote that, even under the majority's wrongheaded "plausibility" standard, Twombly's complaint should have survived because it alleged parallel conduct and that ILECs had numerous opportunities to conspire. Finally, Stevens wrote that concern over the cost of discovery warrants careful case management, not summary dismissal of a well-pleaded complaint. In a section of his dissent not joined by Ginsburg, he noted that the Court was rejecting the intent of the drafters of the Sherman Act, the Telecommunications Act, and the Federal Rules, all to save "some of the wealthiest corporations in our economy" from discovery, a break from precedent that betrayed a lack of trust in district courts to manage their cases.

In ***Weyerhauser Co. v. Ross-Simmons Hardwood Lumber Co.*** **(05-381)**, a unanimous Court held that a plaintiff claiming that a rival has engaged in predatory bidding—bidding up prices beyond where rivals can compete—has to show two things: (1) prices causing the bidder to run at a loss, and (2) a "dangerous probability" that the rival can recoup its losses later. Justice Thomas's opinion for the Court is heavy on economic theory (in particular, "monopsonies"), but the result is that the Court simply applied its predatory *pricing* rule from *Brooke Group Ltd. v. Brown & Williamson*, 509 U.S. 209 (1993), to predatory bidding. Ross-Simmons, a sawmill, claimed that Weyerhauser had driven it out of business by bidding up the prices of sawlogs to an unprofitable level. It won at trial, but the trial court did not require it to pass the *Brooke Group* test. The Ninth Circuit agreed with the trial court, holding that predatory pricing and predatory bidding were conceptually distinct problems, but the Court thoroughly rejected its reasoning and reversed. Ross-Simmons conceded that it could not make a *Brooke Group* showing; therefore, its predatory bidding theory could not sustain its jury verdict.

Finally, in ***Credit Suisse Securities (USA) LLC v. Billing*** **(05-1157)**, the Court held that federal securities laws preempt the application of antitrust laws to certain investment bank practices regarding initial public offerings (IPOs). The case is summarized in the SECURITIES section.

BANKING

In ***Watters v. Wachovia Bank, N.A.*** **(05-1342)**, the Court held that federal law preempts state regulation of national bank subsidiaries engaged in real estate lending. After becoming a "wholly owned operating subsidiary" of Wachovia Bank, Wachovia Mortgage argued that it was no longer subject to Michigan regulations because it came under the authority of the National Bank Act and the Office of the Comptroller of the Currency (OCC). The Court agreed 5-3 (Justice Thomas did not participate). For the majority, led by Justice Ginsburg, the analysis was

simple. Generally, "federal control shields national banking from unduly burdensome and duplicative state regulation." A national bank's exercise of its real estate lending power therefore could not be subjected to burdensome state regulation. The majority agreed with the OCC that, under the National Bank Act, banks may conduct business through operating subsidiaries. Unlike "financial" subsidiaries (which may engage in additional investment activity), operating subsidiaries (such as Wachovia Mortgage) merely do what national banks can do themselves. Taking a substance-over-form approach, the majority concluded that an operating subsidiary must be treated as a national bank because "we have focused on the exercise of a national bank's powers, not on its corporate structure."

Justice Stevens dissented, joined by the Chief and Justice Scalia. They would limit the reach of the National Bank Act to actual national banks. The dissent was not persuaded by the statutory authority regarding operating subsidiaries and expressed concern about exempting subsidiaries from state regulation since an operating subsidiary, as a separate corporation, "shields the national bank from the operating subsidiaries' liabilities." The dissent viewed the separate corporate forms as distinctions with a difference, and argued that a national bank desiring to exempt its mortgage business from state regulation could make the mortgage business a department of the parent bank rather than a separate subsidiary.

BANKRUPTCY

In ***Marrama v. Citizens Bank of Massachusetts*** **(05-996)**, a 5-4 Court read a "bad faith" exception into a debtor's statutory right to convert a bankruptcy proceeding from Chapter 7 to Chapter 13 of the Bankruptcy Code. Under Chapter 7, a trustee oversees the liquidation of a debtor's assets and their distribution to creditors. Under Chapter 13, an individual with income can complete a payment plan and discharge his debts while keeping control of his property. The Code provides that either proceeding can be converted to the other, so long as the debtor would qualify as "a debtor under such chapter." Marrama tried to convert his Chapter 7 proceeding to Chapter 13, but creditors claimed that he had falsified information about his assets such that he had forfeited the right to convert. The Court agreed, in an opinion by Justice Stevens. The crux of the opinion was that Marrama would not qualify as a "debtor" under Chapter 13 because of another section in the Code providing for dismissal of a Chapter 13 proceeding (or conversion to Chapter 7) "for cause," which courts routinely read to include bad faith by the debtor. Similarly, the Code also provides that bankruptcy courts can take action to prevent abuse of process. For these reasons, the statutory right to convert is subject to an implicit bad-faith exception.

Justice Alito led the dissenters, joined by the Chief and Justices Scalia and Thomas. For the dissenters, the majority violated the text of the Code, which provides for the right to convert with no exceptions; the requirements of being a "debtor" say nothing about good or bad faith. The majority's implied exception came from separate provisions dealing with remedies for bad faith in an *existing* Chapter 13 proceeding—but simply because a court can send a Chapter 13 proceeding to Chapter 7 does not mean a debtor can forfeit the right to convert to Chapter 13.

Next, in ***Travelers Casualty & Surety Co. of America v. Pacific Gas & Electric Co.*** **(05-1429)**, the Court (Alito, J.) unanimously overruled the Ninth Circuit's decision (based on its holding in *In re Fobian*, 951 F.2d 1149 (9th Cir. 1991)) that contractually based attorney's fees are not

recoverable in bankruptcy where they were incurred litigating issues "peculiar to federal bankruptcy law." The Court gave the *Fobian* rule a sound thumping, noting that it found "no support in the Bankruptcy Code" and was "solely a rule of [the Ninth Circuit's] own creation."

The basic facts of the case are as follows: In connection with Travelers' issuance of $100 million in surety bonds to guarantee PG&E's payment of state workers' compensation benefits, PG&E executed indemnity agreements assuming responsibility for any loss incurred by Travelers in connection with the bonds, including attorneys' fees. PG&E filed for bankruptcy, and Travelers asserted a claim that was resolved by agreement in PG&E's reorganization plan. Litigation ensued when Travelers claimed that PG&E unilaterally had altered the language of the agreement, diminishing the protection Travelers would receive. The parties resolved that dispute and agreed that Travelers could submit a claim for attorneys' fees in the bankruptcy proceedings. Yet, when Travelers did so, PG&E objected, relying on *Fobian*. The bankruptcy court agreed with PG&E, as did the district court and the Ninth Circuit. But the Court rejected the rule out of hand, explaining that claims must be allowed unless they fall within one of the enumerated exceptions specified in the Code (none of which were applicable here) or were unenforceable within the meaning of Code § 502(b)(1), which permits a debtor to raise any defense to the claim that existed outside the bankruptcy process. PG&E made no effort to defend the *Fobian* rule, instead claiming for the first time that another Code section, § 506(b), categorically disallowed unsecured claims for contractual attorneys' fees. The Court refused to consider this argument.

BIVENS ACTIONS

In ***Wilkie v. Robbins*** **(06-219)**, the Court found that Robbins had neither a *Bivens* action nor a RICO action against Bureau of Land Management (BLM) officials that allegedly harassed him in an attempt to extract an easement across his property. Unbeknownst to Robbins when he purchased his Wyoming guest ranch, the previous owner had conveyed an easement to the BLM (allowing the public to cross his property to reach remote federal land) in exchange for a reciprocal easement across certain federal land. The BLM never recorded its easement, and when Robbins registered his deed he took the land free and clear of the easement under Wyoming law. Upset about having lost the easement, the BLM asked Robbins to give it back. He declined to do so without compensation, and a "seven year campaign" to obtain the easement ensued. Robbins claimed (with the support of a former BLM employee, who retired as a result of the BLM's actions toward Robbins) that: the BLM trespassed on his property; broke into his home; brought unfounded criminal charges against him (he was acquitted in 30 minutes; the jury apparently was "appalled" at the Government's conduct); suspended his special recreational use permit; brought administrative actions against him for trespass and permit violations (Robbins claimed some were false and others were the product of selective enforcement); and interfered with his business by, for example, trying to get another agency to impound his cattle and following his ranch guests on cattle drives and videotaping them while relieving themselves. For most of these actions, Robbins either could have pursued an administrative appeal or filed a lawsuit in state court; he challenged some administratively, with little success, and did nothing with respect to others. While any one of these indignities did not amount to much, Robbins argued (and the Court basically agreed) that the whole was more than the sum of the parts—as Robbins put it, it was "death by a thousand cuts." Challenging each action simply was not an effective remedy. As a result, Robbins brought a federal lawsuit, in which he claimed that BLM

officials violated his Fifth Amendment rights by retaliating against him for attempting to exclude the Government from his property. Based on this theory, Robbins asserted a claim for money damages of the sort recognized in *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). Robbins also asserted a RICO claim against BLM officials in their individual capacities, claiming that their actions amounted to extortion or bribery under Wyoming law.

Every member of the Court agreed that Robbins's RICO claim was faulty. Extortion by public officials is the taking of property *for private gain* under color of official right; there is no RICO claim when the intended beneficiary of the conduct is the Government. The Court parted ways, however, regarding Robbins's *Bivens* claim. Led by Justice Souter, the majority (all but Justices Ginsburg and Stevens), declined to recognize a *Bivens* action based on retaliation for the exercise of property rights. Where a federal official violates a constitutional protection, the decision to recognize a *Bivens* action for damage involves two steps. First, courts must consider whether there exists an alternative process to protect the interest involved such that the judicial branch should avoid creating a new action for damages. Second, even absent an adequate alternative remedy, courts must make a judgment about whether to recognize a new action, "paying heed to any special factors counseling hesitation." The Court found that Robbins had administrative and judicial remedies with respect to the vast majority of the BLM actions (noting that, "although he had mixed success, he had the means to be heard"), but it recognized that piecemeal litigation might not be entirely adequate. Turning to step two, the Court weighed the reasons for and against recognizing a new cause of action: on one side, the inadequacy of discrete, incident-by-incident remedies and, on the other, the difficulty of defining the limits of legitimate zeal by Government officials on the public's behalf where "hard bargaining is to be expected." For the majority, the scale tipped against recognizing a new cause of action; they simply did not believe a workable cause of action could be crafted. Generally, *Bivens* actions have been permitted for retaliation claims when the case can be decided based on the reason for the actions taken—the "what for" standard (e.g., in a retaliatory discharge suit, the case turns on the reason for the firing—was it in retaliation for protected conduct or for poor performance?—a question with a definite answer). Here, a "what for" standard would not work because there was no dispute that the BLM was trying to get Robbins to give the BLM an easement. But the Government had a right to bargain hard for the easement by, for example, vigilantly enforcing its land rights (e.g., reporting Robbins for trespassing) or refusing to renew a discretionary permit. For the majority, both the Government's goal (obtaining the easement) and *most* (though certainly not *all*) of its tactics were legitimate. Thus, the standard necessarily would turn on whether the Government went too far—a "too much" standard that would be administratively infeasible and that would discourage Government employees from acting zealously in the Government's interests.

Justice Thomas, joined by Justice Scalia, concurred to say that *Bivens* was an outdated case from the "heady days in which this Court assumed common-law powers to create causes of action." He would confine *Bivens* and its progeny to their facts and not recognize any new *Bivens* actions.

Ginsburg and Stevens dissented. They marched through an even lengthier version of the saga, stressing many aspects of the BLM campaign that clearly were illegitimate—such as telling Robbins's neighbor that he might trespass on her land, sparking an altercation wherein the neighbor rammed her car into Robbins's cattle and horse (which he was riding). The majority recognized that Robbins had no adequate remedy for the sum of the BLM's conduct, and the Court had never before rejected a *Bivens* claim where an adequate alternative remedy did not

exist. The majority's "special factor" counseling against creating a new action was a nonstarter, as the case really involved a classical "what for" scenario. Even if "BLM officials may have had the authority to cancel Robbins's permits or penalize his trespasses, . . . they were not at liberty to do so selectively, in retaliation for his exercise of a constitutional right."

COMMERCE CLAUSE

One might have expected that ***United Haulers Ass'n v. Oneida-Herkimer Solid Waste Management Authority* (05-1345)**, a case about waste hauling and the "dormant" Commerce Clause, would spark little emotion amongst the Justices, but that turned out not to be the case. The Chief and Justices Scalia, Thomas and Alito (who frequently vote together, but who all authored separate opinions here) engaged in lively debate over the issue. The principal question was whether certain New York counties could require garbage haulers to dispose of solid waste at the Authority, a state-created processing facility. The haulers could dispose of refuse more cheaply by hauling it to out-of-state facilities that charged lower "tipping fees" (aptly named since haulers literally *tip* the trash into the facilities), and they contended that the ordinances violated the dormant Commerce Clause by discriminating against interstate commerce in favor of the Authority. (They relied heavily on *C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383 (1994), which invalidated a similar ordinance that benefited a private waste processing facility.) The district court agreed with the haulers, but the Second Circuit reversed, holding that an ordinance does not discriminate against interstate commerce when it favors local government at the expense of all (not just out-of-state) private industry.

The Chief authored the main opinion rejecting the haulers' claims, which Justices Souter, Ginsburg and Breyer joined in full and in which Justice Scalia concurred as to all but one part (see below). The Court agreed with the Second Circuit's public/private distinction. The ordinances treated all private entities (in-state and out-of-state haulers) equally and benefited only the state-created Authority. Laws favoring in-state businesses often are premised on economic protectionism, but laws favoring local government may support many legitimate goals (here, improved recycling in the counties). Such laws fall under the balancing test set out in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), which applies to laws directed toward legitimate concerns but with incidental effects on interstate commerce. Under *Pike*, a nondiscriminatory statute is valid unless the burden it imposes on interstate commerce is "clearly excessive in relation to the putative local benefits." The ordinances survived under *Pike* because they had no disparate impact on out-of-state businesses and the Authority provided significant health and safety benefits. Scalia did not join this part of the opinion, writing that the Court's dormant Commerce Clause jurisprudence was "an unjustified judicial invention" that he was willing to follow in limited circumstances out of respect for *stare decisis*, but not in the case of a law benefiting a public entity. Justice Thomas concurred in the judgment only. He too believed the Court's dormant Commerce Clause jurisprudence was made up, but, unlike Scalia, put little stake in *stare decisis*. Thomas would engage in no dormant Commerce Clause analysis at all.

Justice Alito, joined by Justices Stevens and Kennedy, dissented. For them, *Carbone* already answered this question. First, the waste processing facility in *Carbone* was effectively a state-owned facility (the contractor who built it, free of charge, was allowed to run it for five years and charge above-market fees, after which the town would buy it back for $1). Therefore, *Carbone*

implicitly rejected the majority's public/private distinction. Second, there was no logical reason to exempt laws preferring state monopolies from dormant Commerce Clause analysis. Laws protecting state-owned businesses can be protectionist, and laws favoring private business can further legitimate public purposes. In addition, the dissenters argued that the Court "long ago" had recognized, in *Vance v. W.A. Vandercook Co.*, 170 U.S. 438 (1898), that a law favoring a state-owned monopoly violated the dormant Commerce Clause. (The Chief dismissed this contention, writing that *Vance* "certainly qualifies as 'long ago,' but does not support the proposition.") Therefore, the ordinances here, which facially discriminate against interstate commerce, should undergo strict scrutiny, which they could not survive because the local government's goals could have been accomplished by nondiscriminatory means such as uniform safety and recycling regulations.

CREDIT REPORTING

In ***Safeco Insurance Co. of America v. Burr* (06-84)** and ***GEICO General Insurance Co. v. Edo* (06-100)**, the Court considered two different class actions under the Fair Credit Reporting Act, which requires businesses to notify consumers before taking any adverse action "based on" their credit reports. If a company negligently fails to give notice, a consumer can recover actual damages, but "willful" failures entitle a consumer to statutory and punitive damages. Customers claimed that the companies, without notice, charged them higher auto insurance premiums based on their credit reports. Safeco relied on credit reports in setting premiums but sent no notice to customers that they might have gotten better rates had their credit scores been higher. GEICO developed a supposedly "neutral" system that generated a customer's premium independent of his credit score, and provided notice only if taking the credit report into account would yield a higher premium; GEICO got sued by customers who thought they might have gotten better rates with better credit scores (or whose credit scores might entitle them to a better than "neutral" premium). The district courts held for the companies—for GEICO because there was no causation (the customers paid the same premium as if GEICO had ignored their credit reports) and for Safeco because the case involved *initial* customer premiums (i.e., the court agreed with Safeco that "adverse action" applied only to *subsequent* increases in an existing customer's premium). The Ninth Circuit reversed both judgments, in the process holding that the "willfulness" requirement for statutory and punitive damages included conduct that was in "reckless disregard" of the notice rule, and remanded for review under that intent standard.

In a mostly unanimous opinion by Justice Souter, the Court reversed and reinstated the judgments in favor of GEICO and Safeco. It agreed that recklessness would be enough to satisfy the willfulness requirement, based on what it called the "standard civil usage" at common law that willfulness encompassed both knowing and reckless conduct (in contrast to criminal law, which is more exacting). The Court rejected the companies' various arguments to the contrary, in a somewhat lengthy passage that fans of statutory construction may find interesting (with Justice Scalia declining to join a few footnotes that relied on congressional report language—legislative history and all that). But the Court held that neither company had recklessly violated the Act. As to Safeco, the Court held that an initial premium charge could be an "adverse action"—but Safeco's interpretation that only premium *increases* were subject to the notice requirement, while wrong, was not recklessly so because there was no court or FTC guidance on the matter and Safeco's reading did not create an "unjustifiably high risk of harm" that was so

obvious they should have known better. (Justice Thomas, joined by Justice Alito, dissented from the ruling that an initial premium could be an adverse action. Given that the Court had ruled that Safeco was not reckless in any event, they thought it was unnecessary to reach this question.) As to GEICO, the Court agreed that the Act required but-for causation—and since the customers' rates were no higher than they would have been without their credit reports, their rates were not in fact "based on" the reports. (Justice Stevens, joined by Justice Ginsburg, dissented from this ruling because it left a loophole: customers with better-than-"neutral" credit scores who deserved better premiums than GEICO's system gave them. Because GEICO was unconstrained in coming up with its "neutral" credit score, they would require notice to these customers too.)

EDUCATION

The biggest education rulings of the Term were ***Parents Involved in Community Schools v. Seattle School District No. 1*** **(05-908)** and ***Meredith v. Jefferson County Board of Education*** **(05-915)**, which held that Seattle's and Louisville's race-conscious student assignment plans were unconstitutional. The opinions are summarized in the RACE section.

In ***Winkelman v. Parma City School District*** **(05-083)**, a seven-member majority led by Justice Kennedy held that parents have an independent, enforceable right under the Individuals with Disabilities Education Act (IDEA) to a free appropriate public education (FAPE). Common law generally precludes parents from proceeding *pro se* to enforce rights of their children, but individuals always can proceed without counsel to enforce their *own* rights. The upshot of the Court's ruling is that parents can now sue *pro se* under IDEA if they believe their child has been denied a FAPE. Parents are instrumental in developing their child's Individualized Education Plan (IEP), which is the core right of IDEA, and they can challenge the adequacy of an IEP in administrative proceedings without counsel. IDEA provides that "[a]ny party aggrieved by the [hearing officer's] findings and decision" may file a civil action. Parents, who are parties, therefore should be able to do so. Additionally, IDEA permits parents to obtain reimbursement for private school tuition when a district fails to provide a FAPE and attorneys fees where a parent is the prevailing party. Finally, it would be inequitable to permit only parents who could afford private schools (and therefore have a right to reimbursement) to challenge the adequacy of their child's education. The most vulnerable parents then might lose access to the courts.

Justice Scalia dissented, joined by Justice Thomas. For them, while IDEA explicitly gives certain rights to parents, the substantive right to a FAPE belongs to the child alone. "The Court's spraying statutory sections about like buckshot cannot create a substantive parental right to education where none exists." Since parents have no independent right to a FAPE, they cannot be considered aggrieved parties (unlike in an action for reimbursement). Therefore, they cannot sue *pro se* to enforce their child's right—they must hire counsel.

The final education case of the Term was ***Zuni Public School District v. Department of Education*** **(05-1508)**. The Federal Impact Aid Program (FIAP) provides funds to local school districts whose finances are adversely affected by a federal presence, such as a military base, that increases school expenditures without increasing local tax revenues. FIAP prohibits a state from decreasing its own funding to a district that receives the federal funds, but provides an exception where a state "equalizes expenditures" among local school districts, meaning that highest per-

pupil spending districts do not exceed the lowest by more than twenty-five percent. FIAP requires the Secretary of Education to calculate this disparity, but to "disregard" outlier school districts with "per-pupil expenditures . . . above the 95th percentile or below the 5th percentile." The Secretary promulgated regulations to carry out this task, but instead of excluding the five percent of districts with the highest and lowest expenditures, the regulations weight districts by population, identifying those districts whose *students* account for the five percent of the state's total student population at the high and low ends of the spending distribution. Under this methodology, the Secretary found that New Mexico equalized expenditures and therefore could cut state funding to Zuni and other districts that received FIAP aid. Zuni challenged the Secretary's determination, an Administrative Law Judge and the Secretary rejected the challenge, and an evenly divided *en banc* panel of the Tenth Circuit affirmed.

The Court agreed 5-4, in an opinion by Justice Breyer. The majority found that FIAP's disregard provision was ambiguous and that the Secretary's interpretation was reasonable and worthy of deference under *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The majority's conclusion was clearly driven by the legislative history. The Secretary had been using this formula for over thirty years, even before the disregard provision was added in 1994—and the provision itself originated in legislation the Secretary drafted! The Secretary's interpretation furthers the purpose of disregard provision—to eliminate outlier districts—in a way that sensibly could apply across states and differing factual circumstances (in contrast, counting districts rather than students could exclude districts with twenty percent of the students in one state but only two percent in another, depending on the size and number of districts).

The really interesting part of *Zuni* was not its interpretation of FIAP but its use of legislative history. The majority "flipped" the normal order of analysis—beginning not with the statute's language but with its history. Justice Stevens stoked the fire in his concurrence, stating that the Court's duty was to determine the legislature's intent even if it meant overlooking statutory language that, if read literally, would require a different result: "[I]n rare cases the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." To ensure they were not lumped into the Stevens camp, Justices Kennedy and Alito wrote separately to emphasize that FIAP was ambiguous and that it would be "preferable, and more faithful to *Chevron*, to arrange the opinion differently," starting with the text.

Justice Scalia, joined by the Chief and Justices Thomas and Souter (in part), dissented to state that FIAP's language does not permit consideration of student population. The dissent (minus Souter) went on a bit of a rampage about plain language, strict construction, and the paltry value of legislative history: "Contrary to the Court and to Justice Stevens, I do not believe that what we are sure the Legislature *meant* to say can trump what it *did* say." Souter dissented separately to say that Congress probably intended for the Secretary to continue to use his formula, but that he found "the statutory language unambiguous and inapt to authorize that methodology."

ELECTIONS

The Court's first decision of the Term was a unanimous *per curiam* ruling allowing new Arizona voter-fraud regulations to take effect for the November 2006 election. The cases, ***Purcell v. Gonzalez* (06A375)** and ***Arizona v. Gonzalez* (06A379)**, began in Arizona district court when

citizens challenged the state's procedures under Proposition 200, a voter-approved measure requiring proof of citizenship when voting. The procedures would not turn away voters without ID, but instead would allow them to cast provisional ballots that would count if they returned with ID within five days. (Those without an ID, but with foresight and time on their hands, could also vote in an "early voting period," which would allow officials to compare signatures on ballots with those on registration rolls.) The plaintiffs claimed the rules would deny some their right to vote, and they asked the district court to issue a temporary injunction so the rules would not apply in November. The court denied the injunction in an order that made no factual or legal findings. The plaintiffs appealed, and the Ninth Circuit issued its own temporary injunction pending the result of the appeal (from the district court's denial of a temporary injunction). To further complicate matters, one week later the district court (apparently unaware of the appeal or the Ninth Circuit's ruling) finally issued its findings that the plaintiffs did not have a strong likelihood of success on the merits and were not entitled to an injunction. Nevertheless, the Ninth Circuit's injunction pending the appeal was still in place.

Arizona officials then applied to the Court. The Court treated the applications as petitions for cert, granted them, and vacated the injunction. The short, unsigned opinion starts off with nods both to integrity in the voting process and to the right to vote, but the opinion really hinges on neither of those things. The Ninth Circuit had to give deference to the district court's ruling, but there was no indication that it had done so and the Ninth Circuit made no factual or legal findings of its own. As a result, the Supreme Court was left to review the Ninth Circuit order in light of the district court's ultimate (and later) finding that the plaintiffs did not merit temporary injunctive relief. Since there was nothing in the Ninth Circuit's ruling to show that the district court was wrong, the Court vacated the Ninth Circuit's order, leaving the rules in place to govern the voting in November. The Court took no position on the underlying merits, noting that the issues were "hotly contested." Justice Stevens wrote a short concurrence to say that leaving the rules in place for now would provide evidence on two critical issues: (1) how large the fraud problem really was, and (2) how much the rules would disenfranchise legitimate voters.

The Court issued another *per curiam* decision in ***Lance v. Coffman* (06-641)**, dismissing for lack of standing a challenge by several Colorado citizens to a court-ordered redistricting plan. A state court crafted the plan after Colorado's legislature was unable to redraw congressional districts after the 2000 census. The legislature subsequently came up with a plan, but Colorado's Attorney General filed an action claiming that the Colorado Constitution limited redistricting to once per census, and a court blocked the new plan. Citizens sued, claiming that the court plan violated the Elections Clause of the U.S. Constitution (which says that the "[m]anner of holding Elections . . . shall be prescribed . . . by the Legislature"). Because the citizens had no more than a generalized injury—possessed by every citizen—they lacked the "concrete and particularized" injury necessary for Article III standing, and the Court dismissed the case.

EMPLOYMENT

The Term's biggest employment case was ***Ledbetter v. Goodyear Tire & Rubber Co.* (05-1074)**, which divided the Court 5-4 on when the clock runs on a Title VII employment discrimination claim based on disparate pay. Title VII requires an employee to file a charge with the EEOC before suing in court, generally within 180 days of the alleged discriminatory act. Ledbetter

claimed that, over her nearly two decades at Goodyear, several supervisors gave her poor evaluations because of her sex and that, as a result, she was paid less then her male colleagues—a disparity that continued throughout her career and that Goodyear's percentage-based raise system exacerbated. Ledbetter filed her EEOC charge more than 180 days after the evaluations and initial pay decisions, but she claimed that her EEOC charge was timely because: (1) each paycheck was a separate act of discrimination; and (2) Goodyear's 1998 decision denying her a raise (which was in the 180-day charging period) "carried forward intentional discriminatory disparities from prior years." The district court allowed Ledbetter's case to go to trial, where she won, but the Eleventh Circuit reversed, finding that her EEOC charge was untimely.

The Court affirmed in an opinion by Justice Alito, joined by the Chief and Justices Scalia, Kennedy and Thomas. For them, the analysis was simple: Intent is a required element of any disparate treatment claim. Thus, the clock starts running on a disparate treatment claim when the employer takes an adverse employment action with discriminatory intent—here, Goodyear's earlier pay decisions based on discriminatory evaluations, all of which fell outside the charging period. An employee cannot shift forward the intent from an earlier act to a later act performed with no discriminatory motive. Any other holding would permit an employee subjected to a discriminatory pay decision twenty years ago to challenge that decision at any time, subverting Congress's determination to require employees to file charges within 180 days, which "reflects Congress's strong preference for the prompt resolution of employment discrimination allegations through voluntary conciliation and cooperation." *Bazemore v. Friday*, 478 U.S. 385 (1986), which held that certain race-based pay disparity claims could accrue paycheck-by-paycheck, was distinguishable, because there the plaintiffs challenged a discriminatory pay structure—the employer in that case separated its white and black employees into different pay branches. Where the structure itself is discriminatory, every paycheck provided under that structure constitutes a new discriminatory act. Here, however, Goodyear's pay structure was facially neutral and applied neutrally to Ledbetter, at least within the charging period.

The dissenters, led by Justice Ginsburg, would treat pay decisions differently from other, more discrete, adverse employment actions such as termination or failure to promote. Pay decisions are difficult for employees to see (since colleagues' salaries generally are not public) and, taken one by one, may be too small to challenge or too ambiguous to prove. "The Court would thus force plaintiffs, in many cases, to sue too soon to prevail, while cutting them off as time barred once the pay differential is large enough to enable them to mount a winnable case."

Next, in ***Long Island Care at Home Ltd. v. Coke*** **(06-593)**, the Court upheld a Labor Department regulation exempting home care "companionship" workers from minimum-wage and maximum-hour rules under the Fair Labor Standards Act (FLSA), even if they are employed by a third-party agency rather than by the household itself. FLSA exempted "domestic service employees" who provide "companionship services" for the infirm, and delegated authority to the Secretary of Labor to work out the details. Labor controversially interpreted the statute to exempt not only home care workers employed by a household directly but also those employed by agencies. Coke, a Long Island Care at Home employee, sued in hopes of being paid the minimum wage and overtime, and she managed to convince the Second Circuit that Labor's interpretation was unenforceable. The Court reversed, led by Justice Breyer. The Court viewed the case as a straightforward question of agency deference. FLSA does not define who meets the companionship worker exception, and expressly leaves it to Labor to fill in the gaps—and

Labor's interpretation was reasonable. First, "domestic service employment" is not, by its very terms, limited to those employed only by households rather than companies, and there was no clear evidence of Congress's intent as to the scope of the exemption. There indeed was a gap in the law, and Labor's attempt to fill it was reasonable. Second, while Labor's interpretation arguably conflicted with another, more general regulation limiting "domestic service employees" to those employed by families, Labor specifically designed the third-party regulation to control this kind of case (and specific trumps general). Third, Labor followed standard notice and comment procedures when promulgating the regulation, so it was not legally defective.

In ***Norfolk Southern Railway Co. v. Sorrell*** **(05-746)**, the Court unanimously held that, under the Federal Employers' Liability Act (FELA), the same causation standard should apply to an employer's negligence and any contributory negligence by a plaintiff employee, though the Court pointedly declined to say exactly what that standard should be. Sorrell was injured in a truck accident while working for Norfolk; he claimed Norfolk had created an unsafe working environment, while Norfolk claimed that the accident was his own fault. The Missouri trial court instructed the jury that Sorrell only had to prove that Norfolk's negligence caused his injuries "in whole or in part," while Norfolk had to prove that Sorrell's own negligence "*directly* contributed" to his injuries. After the Missouri courts upheld Sorrell's $1.5 million verdict, Norfolk sought cert on whether it was an error to use different standards. In briefing and at argument, Norfolk attempted to argue that the more exacting "directly contributed" standard should govern both claims, but the Court would have none of it. Norfolk's question presented at cert was whether the standards must be *the same*, not what the standard *actually should be*, and the Court would not allow Norfolk to "smuggle" a new issue in after cert had been granted. (This is becoming a theme for the Roberts Court—see the summary of ***Fry v. Pliler*** **(06-5247)** in the HABEAS CORPUS section.) The Court agreed with Norfolk that the standards should be the same; they were the same at common law and nothing indicated that Congress intended differently. Missouri's use of different standards was "unique": "It is of course possible that everyone is out of step except Missouri, but we find no basis for concluding that Congress in FELA meant to allow different causation standards." There are many ways to give a jury the same causation instruction on both kinds of negligence, so the Court will leave it to Missouri and other states to formulate those instructions—at least until someone asks the right question.

There were two other opinions, apparently written in response to each other. Justice Ginsburg concurred only in the judgment, writing that the Court previously had held that FELA enacted a relaxed causation standard along the lines of "in whole or in part"—"even the slightest part." She would dispense with giving any jury instructions that used the term "proximate cause," which she thought would only confuse jurors (a sentiment most trial lawyers likely would second). Justice Souter concurred, joined by Justices Scalia and Alito, to say that FELA should *not* be read to water down proximate-cause requirements.

Finally, ***Osborn v. Haley*** **(05-593)** concerned the Federal Employees Liability Reform and Tort Compensation Act, more commonly known as the Westfall Act (no one liked "FELRTCA"). The Act gives federal employees absolute immunity from tort suits arising out of their official actions. Once the Attorney General certifies that a defendant employee was acting within the scope of his duties, the employee is dismissed and the United States is substituted in his place. Moreover, if the action was brought in state court, it is removed to federal court, with the AG's certification being "conclusive" for removal purposes. Osborn alleged in Kentucky state court

that Forest Service employee Haley tortiously interfered with her employment with a private contractor. The AG certified, contrary to Osborn's allegations, that Haley was acting in his official capacity; the case was removed to federal court, where the Government denied that Haley did anything at all. The district court, accepting all of Osborn's allegations as true, rejected the AG's Westfall Act certification—removing the Government from the case and sending it back to state court—and held that the AG cannot certify that an employee was acting in his official capacity if the employee denies that he acted at all.

The Court (by Justice Ginsburg, joined in whole by the Chief and Justices Stevens, Kennedy and Alito, and in part by others as noted below) held that the trial court made a mistake. It may be of interest to appellate jurisdiction enthusiasts that the Court first concluded that the ruling was reviewable. Under 28 U.S.C. § 1447, remand orders on jurisdictional grounds generally cannot be appealed, but the Westfall Act's language that an AG certification is "conclusive" for removal purposes meant that the district court simply could not remand—there was no jurisdictional inquiry for the district court to undertake in this "extraordinary" case where Congress "has ordered the intercourt shuttle to travel just one way." On substance, the Court held that Westfall Act certification is proper even when a defendant denies that he did anything. Because the Act was supposed to shield employees from suit, not just liability, a court cannot reject a certification based solely on bare allegations in a complaint. Moreover, it would be odd to deny Westfall Act protection to employees who did nothing but give it to employees who admit conduct but claim official capacity: "It is illogical to assume that Congress intended to protect guilty employees but desert innocent ones." Instead, where conduct is contested, the Court must investigate the facts before ruling on the immunity issue as quickly as possible. Recognizing that this might deprive a plaintiff of a jury trial, the Court noted that upon certification the suit is against the Government, and there is no Seventh Amendment jury-trial right when suing the sovereign.

There were three other opinions. Justice Breyer agreed that the case was reviewable but would allow Westfall Act certification only if the AG accepts, at least conditionally, that something happened. (Call it the O.J. Simpson Pleading: "Nothing happened, but if it did, it was in Haley's official capacity.") Justice Souter went a step further, dissenting from the bulk of the ruling on jurisdictional grounds: Under 28 U.S.C. § 1447, remand orders are never reviewable, no matter how obvious the error. To save "half a loaf," however, he would allow appellate courts to review resubstitution orders—meaning here that the Sixth Circuit could not fix the remand, but could stop Haley from being added back into the case. Souter hoped that this would allow appellate courts to highlight errors that the district courts could self-correct before any mistaken remands took effect (which seems dubious, at best). Finally, Justice Scalia (with Justice Thomas) dissented entirely, writing that the Court's ruling "eviscerated" 28 U.S.C. § 1447. He rejected Souter's half-a-loaf approach, pointing out that remand orders and resubstitution orders are inseparable—this case could not be remanded to Kentucky as "*Osborn v. United States*" because federal courts have exclusive jurisdiction over Federal Tort Claims Act cases.

ENVIRONMENT

We begin with a global warming case, ***Massachusetts v. EPA* (05-1120)**, in which a group of states, local governments, and NGOs sued EPA after it declined to regulate motor vehicle carbon dioxide emissions. The case presented three major issues: (1) do the federal courts even have

jurisdiction to resolve the case? (2) does EPA have authority under the Act to regulate carbon dioxide emissions from new cars and trucks? and (3) even if EPA finds that these emissions are harmful, can it decline to regulate them on policy grounds? The Court split 5-4 in favor of the Petitioners, sending the case back to EPA for a specific finding as to whether or not carbon dioxide emissions endanger public welfare.

Justice Stevens wrote for the majority (which also included Justices Kennedy, Souter, Ginsburg and Breyer). As to jurisdiction, the issue was whether or not the Petitioners had standing. Ordinarily, the Court requires litigants to show that they have suffered a real and particularized injury, fairly traceable to the defendant and likely redressable by a favorable decision. The majority gave a couple of reasons why this test might be relaxed here. First, suits to enforce procedural rights may be heard even if the remedy is only the use of proper procedure rather than a different substantive outcome. Second, the Court should give states "special solicitude" because they lack full sovereign power to secure their rights and must rely on the federal government to protect their "quasi-sovereign" interests. With these thoughts in mind, the majority turned to the standard standing analysis and held that the Petitioners had standing because: (a) the harms caused by global warming, though widely shared, are "serious and well recognized," even by EPA, (b) motor vehicle emissions contribute meaningfully to the problem, and (c) regulating emissions would help reduce the risks of global warming.

The Chief wrote the principal dissent on this issue, joined by Justices Scalia, Thomas and Alito. In his view, "[t]he very concept of global warming seems inconsistent with [the particularized injury requirement]." Further, it was necessary to take a hard line on standing to stop the inquiry from becoming "utterly manipulable" and a "lawyer's game, rather than a fundamental limitation ensuring that courts function as courts and not intrude on the politically accountable branches." He did not think that the elements were satisfied because, among other problems, global warming does not cause distinctive, personalized harms and regulating vehicle emissions would not be enough, on its own, to avert such harms.

The statutory questions concerned section 202(a)(1) of the Clean Air Act, which requires the EPA Administrator to promulgate "air pollutant" emissions standards for new motor vehicles if, "in his judgment," these emissions contribute to air pollution that endangers public health or welfare. "Welfare" includes effects on weather and climate, and "air pollutant" is defined broadly (and confusingly) as "any air pollution agent or combination of such agents including [virtually 'any' substance] which is emitted into or otherwise enters the ambient air." Given these definitions, the majority concluded that the statute "embraces all airborne compounds of whatever stripe." (Justice Scalia wrote for the dissenters on this issue, arguing that greenhouse gases in the upper atmosphere do not pollute ambient surface air; the majority responded that these gases enter the ambient air and warm the atmosphere, so carbon dioxide is, indeed, an airborne compound that endangers public health and welfare.) The majority distinguished *FDA v. Brown & Williamson Corp.*, 529 U.S. 120 (2000), which blessed FDA's refusal to treat tobacco as a drug even though it met the statutory definition, by limiting that decision to cases where regulation would lead to extreme results (there, a total ban) that Congress did not intend.

Finally, on the issue of whether EPA could decline to regulate emissions on grounds unrelated to whether they endanger public health or welfare, the Court said, simply, no. Once EPA makes an endangerment finding, the statute requires it to regulate notwithstanding any contrary priorities

of the President, whether they be voluntary programs to reduce emissions or the preservation of his ability to negotiate with developing nations. So the majority sent the case back to EPA to decide whether emissions from new motor vehicles endanger public health or welfare: "If the scientific uncertainty is so profound that it precludes the EPA from making a reasoned judgment as to whether greenhouse gases contribute to global warming, the EPA must say so."

All was not bleak for EPA, however, as the Court upheld its regulations in ***Environmental Defense v. Duke Energy Corp.* (05-848)**. The case concerned two Clean Air Act schemes that govern stationary pollution sources (like power plants) built or "modified" after the Act's passage: the New Source Performance Standards (NSPS) and the Prevention of Significant Deterioration program (PSD). The NSPS provisions define "modification" as any change that "increases the amount of any air pollutant emitted" or that causes the emission of new pollutants; EPA regulations interpret this definition to mean a change that increases the hourly emission rate of any pollutant. The PSD provisions incorporate the NSPS definition, but EPA nevertheless interprets "modification" differently for that program, requiring permits only for "major modifications" that increase a plant's emissions above the prior two-year average. Duke had modified its plants in a way that managed to fall within the PSD formulation but not the NSPS formulation, and the Government argued that it needed a PSD permit. Justice Souter wrote for a (more or less) unanimous Court that upheld EPA's use of two different formulations. The Court first noted, in a section Justice Thomas did not join, that the same word may be given different meanings within the same statute. Congress clearly intended "modification" to be related in the PSD and NSPS provisions, but nothing indicated that Congress intended identity in the "details of regulatory implementation." So the only issue was whether EPA's interpretations were reasonable, which they were. Notably, all may not be lost for Duke. Ordinarily, a party must challenge regulations as exceeding statutory authority before the D.C. Circuit within sixty days of the regulations promulgation; Duke did not do this, so it limited its argument to seeking a unified interpretation of the PSD and NSPS provisions. The Court, however, sent the case back to the Fourth Circuit, noting that it had not yet considered whether the sixty-day limitation applied to Duke's case.

***United States v. Atlantic Research Corp.* (06-562)**, involved some tricky statutory parsing, but it will be of particular interest to environmental-law practitioners. It is a follow-up to the Court's decision in *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004), which we summarized in our October 2004 Term in Review. Two provisions of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)—sections 107(a) and 113(f)—deal with "potentially responsible parties," or "PRPs," who may be on the hook for expenses associated with environmental cleanups. Under section 107(a), PRPs may be responsible for remediation costs incurred by the United States or "any other person." Section 113(f) provides for a contribution action by one PRP against another that can be brought "during or following" a suit against the first PRP—usually an action by the U.S. Government (that is, the Government sues you for costs associated in cleaning up your Superfund site, and you then go after previous owners for their fair share of the costs). Courts began "directing traffic" between the provisions by forcing PRPs to litigate exclusively under section 113(f) and barring suits under the more general section 107(a). At the same time, they began ignoring section 113(f)'s "during or following" requirement, allowing PRP contribution actions even before the PRP itself had been sued. In *Cooper Industries*, the Court put an end to that practice, holding that section 113(f) allowed for contribution actions only by PRPs who themselves had already been sued for

clean-up costs. But the Court left open whether a PRP still could sue under section 107(a) free from the requirement of a previous lawsuit, and the circuits had split on this issue. Here, the Eighth Circuit found that a PRP that had not yet been sued *could* bring an action under section 107(a) to recover the actual costs incurred due to remediation (a win for the proactive).

The Court, led by Justice Thomas, unanimously agreed. First, PRPs clearly fell within the meaning of "any other person" in section 107(a); since the definition of PRP was broad, excluding them might exclude almost any private party, a "textually dubious construction" that would render the provision a nullity. The Government had argued that allowing actions under both provisions would create "tension" within CERCLA because section 113 has a much shorter limitations period as well as a settlement bar. The Court disagreed, noting that the two provisions are distinct remedies that do not swallow each other. Section 113(f) provides for *contribution*, a right to recovery contingent on an inequitable distribution of common liability to a third party, such as the United States. Section 107(a), by contrast, allows for *cost recovery* and exists independent of liability to any third party. So the provisions complement each other by providing remedies to PRPs in different procedural circumstances. A PRP found liable in a 107(a) action could seek contribution from others under 113(f), but a PRP forced to reimburse under 113(f) has not incurred its own costs of recovery and could not turn around and sue under 107(a). Finally, the Court was not concerned that allowing 107(a) actions would impede the bar on 113(f) actions against PRPs that have settled with the Government. If sued under 107(a), the party that had settled previously could file a 113(f) counterclaim for contribution, where its settlement would be taken into account. (In the footnotes, the Court noted that there was potentially some overlap for PRPs that sustain expenses under consent decrees. It also did not address the Eighth Circuit's ruling that 107(a) has an implied right of contribution for those who cannot use 113(f). It left these issues for yet another day.)

Finally, in ***National Ass'n of Home Builders v. Defenders of Wildlife*** **(06-340)** and ***EPA v. Defenders of Wildlife*** **(06-549)**, the Court addressed two apparently conflicting provisions of the Clean Water Act (CWA) and the Endangered Species Act (ESA). CWA section 402(b) requires EPA to transfer certain permitting powers to state authorities if the state can satisfy nine specific criteria, all of which have to do with whether the relevant state agency has legal authority to administer the permits; if the criteria are satisfied, then EPA *must* transfer authority to the state. ESA section 7(a)(2), however, provides that all federal agencies must consult with various Commerce and Interior Department agencies to ensure that their actions do not jeopardize any endangered species (the "no jeopardy" provision). When Arizona asked to administer the CWA permits, EPA first consulted with the Fish & Wildlife Service, but ultimately concluded that the CWA did not allow it to consider the ESA "no jeopardy" condition and therefore, no consultation was required (it also found no jeopardy in any event). Environmentalists challenged the decision, and ultimately the Ninth Circuit found that (1) EPA's decision was "arbitrary and capricious" because it took conflicting positions on the ESA provision (first going to Fish & Wildlife and then determining there was no need to go), and (2) the ESA effectively amended the CWA to add the "no jeopardy" condition as a tenth requirement for CWA permitting transfers.

A 5-4 Court reversed, with Justice Alito writing for the majority. The Court first noted that if EPA's decision truly had been arbitrary and capricious, then the Ninth Circuit should have remanded for EPA to clarify its reasons rather than reach the merits. In any event, EPA's decision was not arbitrary or capricious—EPA higher-ups overruled lower-ranking officials who

initially tried to follow the ESA provision, which is fine so long as the agency follows proper procedure (which it did). Next, it held that the ESA provision did not effectively amend the CWA transfer statute. Noting that an amendment is functionally the same as a partial repeal, the Court fell back on its general rule against repeals by implication, which it recognizes only when two statutes are irreconcilable or when Congress clearly intends a later law to substitute for an earlier one. Those conditions did not apply here. Moreover, the Ninth Circuit's reading of the ESA would implicitly override *every* federal statute mandating agency action, a result the Court could not stomach. Instead, it deferred to Commerce's and Interior's joint interpretation of the ESA "no jeopardy" provision as applying only to discretionary federal actions, which it felt was reasonable in light of the otherwise ambiguous scope of the statute. Because CWA transfer is mandatory—not discretionary—where a state satisfies the nine criteria, the transfer was proper.

Justice Stevens led the dissenters (Justices Souter, Ginsburg and Breyer). Stevens first accused the majority of ignoring the Court's holding in *TVA v. Hill*, 437 U.S. 153 (1978), the celebrated "snail darter" case, in which the Court enjoined completion of the Tellico Dam because it would destroy the habitat of a tiny species of fish. *Hill*, written by Chief Justice Burger, held that the ESA "admits of no exception" and reflected Congress's judgment that endangered species have priority over federal agency decisions. There was thus no room for exempting nondiscretionary federal actions. (The majority distinguished *Hill* by describing the Tellico Dam project as a discretionary federal action, not a mandatory one). Further, he thought the Court misread the Commerce/Interior regulations, which he viewed as consistent with a broad scope for the "no jeopardy" rule rather than restricting it to discretionary federal action. Finally, he noted that there really was no need to engage in judicial gymnastics to harmonize the statutes because the consultation process envisioned by the ESA did that by itself—the whole point of consultation here, for example, would be for EPA and Interior to figure out a way to transfer permitting authority to Arizona and protect endangered species at the same time, if any in fact were threatened. (In an interesting tidbit, Stevens noted that where no alternative can be found through consultation, the ESA allows for exemptions from the "no jeopardy" rule if approved by an "Endangered Species Committee"—a/k/a the "God Committee" because it effectively can approve the extinction of a species. How would you like that assignment?)

ERISA

In ***Beck v. PACE International Credit Union*** **(05-1448)**, the Court managed to turn an Employee Retirement Income Security Act (ERISA) case on pension plan termination into another decision about agency deference. Crown Paper Company managed a number of single-employer defined benefit pension plans, and when it went into bankruptcy it sought to terminate the plans with sufficient assets to cover its pension obligations. ERISA provides that a company may purchase annuities to cover the pensions, and Crown ultimately chose this option. PACE, which represented a group of Crown employees, had wanted Crown instead to merge the plans with PACE's own multi-employer plan, and it sued in bankruptcy court arguing that Crown had breached a fiduciary obligation to study the merger proposal seriously. (PACE was not exactly being altruistic. Crown had overfunded the pensions to the tune of $5 million. Purchasing annuities would allow Crown—in reality, its creditors—to keep the surplus, while a merger would give it to the new plan sponsor—i.e., PACE.) The case got to the Ninth Circuit, which held that while the decision to terminate a pension plan was a plan sponsor or "settlor" function

not subject to ERISA's fiduciary obligations, *implementing* a termination was a plan administrator function that *was* a fiduciary act. It then found that Crown had failed to fulfill its fiduciary obligations.

Justice Scalia wrote for the unanimous Court, which reversed. The Court noted that the settlor-versus-administrator question was tricky, and PACE's position was somewhat plausible. But it resolved the case on a different issue: whether merger was even *permissible* under ERISA. The relevant statute, 29 U.S.C. § 1341(b)(3)(A), lists two termination options—annuity purchases or lump-sum present-value payments—and says nothing about mergers. The Pension Benefit Guaranty Corporation (PBGC), the agency charged with implementing these provisions, had interpreted them not to permit merger, which it viewed as an *alternative* to plan termination rather than a means to that end. The Court noted that it traditionally defers to PGBC when interpreting ERISA, for fear of "embark[ing] on a voyage without a compass," and it found the agency's reading to be reasonable: Termination effectively ends the ERISA regime, whereas merger continues it, and the structure of ERISA demonstrates that merger and termination are different animals with different procedures and levels of PGBC oversight. Since merger was never an option, Crown did not have to consider it. The Court concluded with some harsh words for PACE, which did not dispute that Crown's annuities were sufficient to cover its obligations to its employees: "[B]y diligently funding its pension plans, Crown became the bait for a union bent on obtaining a surplus that was rightfully Crown's."

FALSE CLAIMS ACT

Rockwell International Corp. v. United States **(05-1272)** involved the "original source" exception to the bar on *qui tam* claims based on allegations that are already public. The complicated facts are as follows: Rockwell developed a method to turn toxic pond sludge into "pondcrete blocks" by adding concrete to the sludge to make it safe for disposal. Some of the pondcrete blocks unfortunately became "insolid" and contaminated the environment. James Stone, an engineer at Rockwell when the idea for pondcrete was conceived, opined in a 1982 report that the blocks were likely to fail based on a faulty design in the pumping system. After Stone was laid off in 1986, he gave his report and thousands of pages of other documents to the FBI. In 1988, the media reported the existence of thousands of insolid pondcrete blocks. In 1989, the FBI raided Rockwell based in part on Stone's information; the warrant included the allegation that the blocks were insolid "due to an inadequate waste-concrete mixture."

In 1989, Stone filed a *qui tam* suit alleging numerous false claims for payment made by Rockwell to the United States. The *qui tam* statute authorizes suits by the Attorney General or by a private individual in the Government's name, but provides that there is no *jurisdiction* over such a case "based upon the public disclosure of the allegations or transactions . . . from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information." An original source must have "direct and independent knowledge of the information on which the allegations are based and ha[ve] voluntarily provided the information to the Government before filing an action." Stone claimed that he met the original-source exception. After the AG joined the case and the complaint was amended, the case ultimately was tried on the theory that the pondcrete blocks disintegrated because a foreman overseeing the process altered the ratio of concrete to sludge to increase production capacity. On

appeal, the Tenth Circuit found that Stone was an "original source" of the allegations and, thus, entitled to sue even though the pondcrete problem was publicly disclosed in numerous media reports before he filed suit.

The Court disagreed, in a 6-2 decision (Justice Breyer did not participate). For the majority, Justice Scalia explained that the public disclosure bar is jurisdictional, not just mandatory. Therefore, if the case is not brought by a true "original source" or by the AG, a court has no jurisdiction to decide the case. Jurisdiction is not based merely upon the allegations at the time of filing the case—to the extent those allegations change in such a way that the private person filing the case is no longer an original source of the allegations in the complaint, the court lacks jurisdiction to consider the case. The majority found that Stone could not be an original source because, although he predicted the failure of the pondcrete, he had left Rockwell before the blocks began disintegrating and *could not* have known that the blocks had failed or that Rockwell had made false statements to the Government about pondcrete storage. (In fact, even Stone's prediction was flawed in that it was the shop foreman, not the pumping system, that caused the blocks to fail.) The Court took pains to point out that an original source would not normally need to know *why* a concealed defect occurred as long as he knew the defect actually existed—here, Stone did not. Finally, the Court explained that because Stone was not an original source, the trial court had no jurisdiction to consider the case when filed. However, it would be nonsensical to make the Government go back and repeat the same processes again. Thus, once Stone was removed from the case, it became an action "brought by the Attorney General" and, therefore, permissible under the public disclosure bar.

Justices Stevens and Ginsburg dissented, arguing that an individual should not be required to have "knowledge of the actual facts underlying the allegations on which he may ultimately prevail" to constitute an original source. Stone's information about the pondcrete blocks clearly was based on his work on the engineering report and it was his report, at least in part, that led to the FBI raid. If an original source learns additional information in discovery that alters the factual basis for his claims, that should not alter the court's jurisdiction to hear the case. Echoing the Government's take on the case, they thought such an approach likely would create fissures between a *qui tam* relator and the Government over how to pursue the case.

FIRST AMENDMENT

It was a big Term for First Amendment lawyers. The last week alone brought a flurry of opinions in several important—and contentious—rulings. In ***Hein v. Freedom from Religion Foundation, Inc.* (06-157)**, the Court held that status as a federal taxpayer, by itself, is not enough to confer standing to mount an Establishment Clause challenge to Bush Administration conferences supporting the Faith-Based and Community Initiatives program. The case was a referendum on the Court's decision in *Flast v. Cohen*, 392 U.S. 83 (1968). Taxpayer status generally does not confer standing to challenge federal expenditures (no single taxpayer suffers any measurable harm), but *Flast* created an exception for Establishment Clause challenges to laws authorizing the use of federal funds. The Seventh Circuit held that *Flast* conferred standing on a group of taxpayers who challenged the conferences because the President and Secretary of Education gave speeches using religious imagery and praising faith-based programs.

The Court reversed, with Justice Alito writing for a plurality that included the Chief and Justice Kennedy. For the plurality, the key was that *Flast* concerned the exercise of *Congress*'s powers to tax and spend, and thus applied to specific congressional appropriations that allegedly violated the Establishment Clause. The conferences, however, were paid for out of general executive branch funds used for day-to-day activities. The plurality refused to extend *Flast* to discretionary executive expenditures, even though they ultimately are funded by Congress, because to do so would render every federal action amenable to suit and turn courts into "continuing monitors" of executive actions. Justice Kennedy wrote a concurring opinion focusing on these separation-of-powers concerns but also noting that, even where parties have no standing to sue, members of the political branches still must obey the Constitution.

Justice Scalia concurred in the judgment (along with Justice Thomas), but it was clear that he thought the plurality opinion was absurd, creating "utterly meaningless distinctions" that "in any sane world" could not explain how the case was different from *Flast*. (That's not all—noting that Alito purported to take a "minimalist" approach by not overruling *Flast*, he wrote that minimalism should not come "at the cost of meaningless and disingenuous distinctions that hold the sure promise of engendering further meaningless and disingenuous distinctions in the future. The rule of law is ill served by forcing lawyers and judges to make arguments that deaden the soul of the law, which is logic and reason.") If the Court "is to decide cases by the rule of law rather than show of hands," it had to either accept *Flast*'s logic and apply it to all federal expenditures or overrule the decision. He would opt for the latter, as there was no logical ground for holding that the Establishment Clause, alone among our laws, gives rise to some sort of redressable psychic injury to confer taxpayer standing. (In response, Alito wrote only that Scalia's position was not "insane," just "wrong"—the Court needed only to decide a case about discretionary executive expenditures, and there was no reason to go further and overrule *Flast*.)

Justice Souter dissented along with Justices Stevens, Ginsburg and Breyer. They shared Scalia's hope for consistency but simply went the other way on *Flast*: They would confer taxpayer standing on Establishment Clause challenges regardless of whether the expenditure came from specific congressional appropriations or out of discretionary executive branch funds.

Next, in ***Federal Election Commission* [*FEC*] *v. Wisconsin Right to Life, Inc.* [*WRTL*] (06-969)**, an equally fragmented Court concluded that section 203 of the Bipartisan Campaign Reform Act (BCRA, a/k/a McCain-Feingold) barring corporate "electioneering" ads could not constitutionally apply to certain ads WRTL sought to run in Wisconsin. Section 203 prohibits unions and corporations from running ads referring to candidates in the period before a primary or election; in *McConnell v. FEC*, 540 U.S. 93 (2003), the Court held that the law was not facially overbroad, at least in the case of express campaign speech or its "functional equivalent," and assumed that the law might not apply to genuine "issue ads" divorced from electioneering. In the run-up to the 2004 elections, WRTL filed suit against the FEC seeking an order allowing it to run a series of ads encouraging voters to contact Wisconsin's senators (Feingold and Kohl) and tell them not to support a filibuster of the Bush Administration's judicial nominees. The district court denied the injunction on the ground that *McConnell* did not allow for an as-applied challenge, but the Court reversed that ruling on appeal; on remand, and after the election had already occurred without WRTL running the ads, the lower court held for WRTL.

The Court affirmed, in a judgment announced by the Chief. The only majority opinion concerned whether the Court had jurisdiction over the case. The FEC had argued that the case was moot because the election was over and the filibuster issue was resolved. The Court concluded that the case easily fit into the exception to mootness where a dispute was "capable of repetition, yet evading review." WRTL planned to run similar ads on other issues in the future, and there was no reason to think the FEC would refrain from prosecuting BCRA violations. Requiring a complete equivalence on every fact of the case was not necessary: "History repeats itself, but not at the level of specificity demanded by the FEC."

With that, the majority dissolved, as only Justice Alito joined the rest of the Chief's opinion. Because section 203 burdens political speech, they would subject it to strict scrutiny, requiring it to be narrowly tailored to achieving some compelling interest. *McConnell* held that section 203 survived strict scrutiny for express campaign advocacy or its equivalent, but the WRTL ads did not fit in that box. The issue was not whether WRTL *intended* to affect the election—that would send every case to trial on the nebulous issue of intent and impermissibly chill speech—but whether the ads could *only* be reasonably interpreted as an appeal to vote for or against a candidate. But the WRTL ads did not even mention the election; rather, they were true issue ads concerning the filibuster. While the filibuster might be pertinent to the election, "[w]here the First Amendment is implicated, the tie goes to the speaker, not the censor." So the ads fell outside *McConnell*, and Roberts found no compelling interest to justify regulating issue ads—in particular, he thought that the corruption concerns animating contribution limits did not apply to issue ads. In a curious concurrence, Alito wrote that if Roberts's "no other reasonable interpretation" standard proved unworkable, presumably someone would ask the Court to reconsider *McConnell*'s holding that section 203 was facially constitutional.

Justice Scalia again provided the fireworks by concurring in the judgment, along with Justices Kennedy and Thomas. They rejected Roberts's functional-equivalence test and would simply overrule *McConnell* and hold that section 203 is unconstitutional on its face. Scalia's opinion is a worthy read, as it marches through the Court's precedents since *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), but the upshot is that, in his view, no test to distinguish between permissible "issue-speech" and impermissible "election-speech" or its "functional equivalent" could be clear enough to avoid chilling political speech at the core of the First Amendment. Speakers cannot be compelled to risk felony prosecution simply because someone else might view their speech as supporting or opposing a candidate for office: "The fact that the line between electoral advocacy and issue advocacy dissolves in practice is an indictment of the statute, not a justification of it." Since *McConnell* had proved unworkable, it was not worthy of *stare decisis* respect—if there must be a line at all, it should be purely a *Buckley*-style "magic words" express advocacy line.

Justice Souter led the same group of dissenters as in ***Hein***. The dissent began with a lengthy history of campaign reform, but the crux is that the context of WRTL's overall ad campaign demonstrated that these ads were attempts at electoral advocacy, as its entire 2004 program was geared at voting out Feingold. (Roberts pointedly rejected "contextual" evidence like this, noting that a group does not forfeit the right to run issue ads simply because it also has views on the election.) Souter then argued that the principal opinion effectively overruled *McConnell* without saying so, by enacting a new test that turned *McConnell* on its head, despite the fact that *McConnell* enacted a bright-line rule that, in his view, had proved workable.

On the same day, the Court issued ***Morse v. Frederick* (06-278)**, in which it held that an Alaska principal did not violate the First Amendment when she punished Joseph Frederick for unfurling a "BONG HiTS 4 JESUS" banner across from his high school during an Olympic torch relay. The Ninth Circuit had held that while Frederick had acted during a school-sponsored activity (during the school day, students were allowed to leave class to watch the torch relay from either side of the street), the school had punished him without showing that his speech would cause "substantial disruption," a standard the Court adopted in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), which concerned students protesting the Vietnam War. The Court granted cert on two questions: whether Frederick had a First Amendment right to wield the banner and, if so, whether that right was so clearly established that the principal could be liable for damages.

The Court reached only the first question, finding that Frederick had no First Amendment right to utter, at a school function, speech reasonably viewed as promoting illegal drug use. In the Chief's opinion, the Court noted the difference between this case and *Tinker*, which concerned the wearing of armbands in a silent act of political speech "at the core of what the First Amendment is designed to protect." Here, by contrast, Frederick's banner was "cryptic" at best, but reasonably interpreted as encouraging illegal drug use and not attempting political discourse. The majority also noted that more recent school speech cases had made clear that students' First Amendment rights were not the same as adults', at least not in the public school setting, and also that *Tinker*'s "substantial disruption" test was not absolute. Given the importance of deterring drug use by schoolchildren and the special setting of the school environment, the First Amendment did not require the principal to tolerate Frederick's banner.

There were two concurrences. In what is probably the most important of all the opinions for purposes of future cases, Justice Alito (joined by Justice Kennedy) wrote that he joined the majority opinion because it held *only* that a public school may restrict speech reasonably viewed as advocating illegal drug use. But he viewed that regulation as "standing at the far edge of what the First Amendment permits," and he noted that the Court's ruling did not support "any restriction on speech that can plausibly be interpreted as commenting on any political or social issue"—such as the wisdom of the war on drugs or of legalizing marijuana. He reaffirmed *Tinker*'s recognition that students do not lose their First Amendment rights at school, which is, after all, an organ of the state. In a separate concurrence, Justice Thomas went in the opposite direction. He joined the majority because he agreed that public schools could ban speech advocating drug use; however, echoing Scalia's themes from ***Hein***, he feared that watering down *Tinker* without overruling it created an incoherent system—students have First Amendment rights, except when they don't. His solution would be to overrule *Tinker* and say students have no First Amendment rights at all, based on the history of public education in the 1800s when the Amendment was applied to the states. (The opinion is classic Thomas—heavily historical, willing to dispense with precedent, and bold. And you get the distinct impression that he thinks our schools have deteriorated because *Tinker* allowed the inmates to run the asylum.)

Justice Breyer partially concurred in the judgment. Breyer would not have reached the First Amendment question, but instead would have held that Frederick's right to wield his banner was not clearly established and so the principal should have qualified immunity from damages. He thought the First Amendment question was too "portentous"—how was Frederick's banner different from one that said "Legalize BONG HiTS," which the majority apparently would say

was protected?—and should be avoided. (In response, the Chief noted that qualified immunity dealt only with damages claims, while Frederick also sought injunctive and declaratory relief. Breyer replied that he thought Frederick's suspension could have been upheld on non-speech grounds—disobeying a principal, etc.—and would remand for lower courts to look at that issue.)

Justice Stevens wrote for the full dissenters, which included Justices Souter and Ginsburg. For them, the First Amendment protected student speech that neither violated a permissible rule nor advocated illegal or harmful conduct, and Frederick's "nonsense" banner did neither. (They viewed the banner as aimed solely at getting Frederick on TV—Frederick said as much—not as speech aimed at persuading anyone to do anything.) And in any event, deferring to the "reasonable judgments" of principals was an abdication of judicial responsibility—the beliefs of third parties have never defined what is and is not protected speech. Invoking the Chief's language from the ***FEC*** case, Stevens noted that in First Amendment cases "the tie goes to the speaker," and he would give the nod to Frederick. (Notably, the dissent still would have given the principal qualified immunity—which, as Breyer pointed out, meant the Court could have decided the case 9-0 on that question had the majority been so inclined. Oh well.)

Hein, ***FEC***, and ***Morse*** were all announced on the final Monday, but they were not the only First Amendment cases this Term. In ***Tennessee Secondary School Athletic Ass'n v. Brentwood Academy*** **(06-427)**, the Court held that a rule against "undue influence" in high-school recruiting did not violate a private school's First Amendment rights. The judgment was unanimous, but the reasoning was splintered. The TSSAA, a voluntary association of mostly public (and some private) high schools, had sanctioned private Brentwood Academy for contacting middle schoolers ahead of spring football practice, and the school argued that the recruiting rules impinged on its First Amendment rights and that it had been sanctioned without due process of law. In a previous ruling, the Court had held that TSSAA was a state actor, and the lower courts had ruled that the recruiting rules were content-based speech regulations that were not narrowly tailored. Here, the Court reversed, with Justice Stevens announcing the principal opinion. For him (and Justices Souter, Ginsburg and Breyer), the key was that the First Amendment protected Brentwood's ability to publish truthful information to the public at large about its athletic programs. The recruiting rules did not prohibit that speech—they merely prohibited direct, personalized communications in a coercive setting. Relying on *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), which upheld a bar association rule prohibiting in-person solicitation of personal injury clients, these Justices analogized high-school coaches to a "lawyer chas[ing] an ambulance" in a setting with highly impressionable targets. Such conduct could be prohibited, and because the school remained free to send brochures and advertise about their sports teams, the rules did not run afoul of the First Amendment.

Justice Kennedy wrote separately, joined by the Chief and Justices Scalia and Alito, to disagree with Stevens's reliance on *Ohralik*, which the Court had never before extended beyond the narrow confines of the attorney-client relationship. For them, the key was that Brentwood voluntarily had joined the TSSAA with its code of conduct on solicitation; relying on *Ohralik* without regard to this fact unnecessarily opened the door to freestanding state regulation of speech by any school, even a TSSAA nonmember. Justice Thomas also wrote separately. He too thought relying on *Ohralik* was wrong; instead, he simply would have overruled the Court's previous holding that TSSAA was a state actor, a decision he viewed as departing dramatically from the court's state-action precedents. (On the due process issue, all the Justices apparently

agreed with the portion of Stevens's opinion finding that any due-process flaws in the TSSAA hearing, which involved some *ex parte* evidence, were harmless beyond a reasonable doubt.)

Finally, in ***Davenport v. Washington Education Ass'n*** **(05-1589)** and ***Washington v. Washington Education Ass'n*** **(05-1567)**, the Court held that the First Amendment does not prevent states from requiring public-sector unions to get affirmative authorization from nonmembers before spending their agency fees for election-related purposes. Washington, like many states, authorizes "agency-shop" arrangements between unions and government employers, whereby a union can charge a fee to nonmember employees who are nevertheless represented by the union in collective bargaining. This prevents free-riding by nonmembers, but at the same time it forces nonmembers to give to unions as a condition of employment—which can be particularly tricky when the union gets politically active. Washington law provides that a public-sector union cannot use an individual's agency fees for election-related purposes without his affirmative consent to the specific expenditure, but the Washington Supreme Court held that this statute violated the union's First Amendment rights, based on language in past Court cases on the collection of agency fees to the effect that nonmembers' "dissent cannot be presumed."

The Court vacated and remanded, in an opinion by Justice Scalia. The Court began by noting that an agency-fee arrangement was "extraordinary" in that it allowed a private entity to tax government employees. Washington did not have to authorize an agency-fee relationship with public sector unions at all, so its "modest" restriction on the use of agency fees did not violate the First Amendment. The Washington court had misconstrued the Court's past cases, which concerned the minimum rules governing a union's collection and spending of fees, not the ceiling on government restrictions on their access to fees at all. Because a union has no constitutional right to agency fees, the First Amendment was not implicated by a default rule of affirmative consent. The Court also rejected the union's argument that the statute was a restriction on how it spent "its" money, on the ground that the union had agency fees (as opposed to members' dues) solely because the government forced nonmembers to pay. Where the government effectively subsidizes speech, it may enact some viewpoint-neutral, if ultimately content-based, restrictions on how the funds are used. Justice Breyer, along with the Chief and Justice Alito, agreed with the main holding but did not join this last part of the opinion, on the ground that the union raised this argument for the first time before the Court.

FOREIGN SOVEREIGN IMMUNITIES ACT

In ***Permanent Mission of India to the United Nations v. City of New York*** **(06-134)**, the Court held 7-2 that the Foreign Sovereign Immunities Act (FSIA) does not immunize a foreign government from suits concerning tax liens on property it holds to house employees. India and Mongolia both housed some of their employees on certain floors of their Missions to the United Nations, and had been refusing to pay New York City property taxes on those portions even though they were not used exclusively for diplomatic offices or ambassadorial residences. New York eventually took them to court, where the district court and Second Circuit agreed with the City that the suits fell within the "immovable property" exception to the FSIA, which denies immunity to foreign governments where "rights to immovable property are in issue." India and Mongolia argued that this exception was limited to questions of ownership or possession, but the Court disagreed, in an opinion by Justice Thomas. First, the statute is not expressly limited to

questions of ownership or possession, but covers "rights," including the right to convey; a tax lien would inhibit this right, so it is implicated by the exception. Second, although the United States once adhered to a near-absolute view of sovereign immunity, in the 1950s it joined most other countries in adopting the so-called "restrictive view," whereby immunity was recognized for sovereign acts but not private acts—and property ownership is not an inherently sovereign function. Third, international practice at the time of the FSIA's codification supported the City.

Justice Stevens dissented, with Justice Breyer joining in, on the view that if Congress wanted to exempt suits over tax liens it would have said so; the "breadth and vintage" of the background rule favoring immunity was such that the FSIA's drafters could not have intended to carve out an exception for statutes aimed at delinquent taxpayers. They pointed out that just about any dispute—from slip-and-falls to landlord-tenant disputes—could be covered to property liens, and that as a result this new exception could swallow the immunity rule. They also noted the Government's strong support of the Missions, which they found persuasive.

***Powerex Corp. v. Reliant Energy Services, Inc.* (05-85)** also addressed the FSIA in the context of appellate review of a district court's order remanding to state court a case that a party has removed to federal court. It is discussed in the JURISDICTION AND CIVIL PROCEDURE section.

GOVERNMENT CONTRACTS

In ***BP America Production Co. v. Burton* (05-669)**, the Court answered the scintillating question of whether administrative payment orders issued by the Department of the Interior's Mineral Management Services (MMS) for royalty underpayments on gas and oil leases are subject to 28 U.S.C. § 2415's six-year statute of limitations for government contract actions. The unanimous answer (minus the Chief and Justice Breyer, who did not participate) was "no." The Court's decision has broader implications, as it effectively holds that the six-year limitations period applies only to court suits by the Government.

The Mineral Leasing Act of 1920 allowed the Government to lease public lands to private parties for oil and gas production, with lessees paying a 12.5 percent royalty on gas and oil extracted. Concerned that not all royalties were being paid, Congress later required the Secretary of the Interior (who delegated the task to MMS) to audit present and past royalty payments and to collect any underpayments. If MMS found an underpayment, it would issue an order requiring repayment with stiff penalties (up to $10,000 per day) for failure to comply. The orders could be appealed through an administrative process. MMS determined that BP had underpaid royalties from 1989 to 1996 and issued a repayment order in 1996. BP appealed, challenging the calculation of royalties and also claiming that some were barred by § 2415's six-year limitations period, which applies to Government "actions" for money damages on a "contract." The D.C. Circuit found that MMS administrative orders were not "actions" subject to the limitations period, and the Court affirmed in an opinion by Justice Alito. The Court found that the ordinary meaning of the term "action" was a lawsuit, not an administrative action. Further, § 2415 refers to the filing of a complaint, and the order bears little or no resemblance to one.

INTELLECTUAL PROPERTY

There were three intellectual property rulings this Term. First, in ***MedImmune, Inc. v. Genentech, Inc.* (05-608)**, an 8-1 majority held that a patent licensee who wants to challenge the validity of the patent (and void his obligation to pay royalties) does not have to breach the license agreement to create a justifiable "case or controversy." Instead, he can file a declaratory judgment action seeking a ruling on the patent's validity. MedImmune, a drug manufacturer, agreed to pay royalties for its use of certain Genentech processes covered by patents or ultimately successful patent applications (concerning "chimeric antibodies" and "coexpression of immunoglobin chains"). After one of Genentech's pending applications was granted, it demanded additional royalties. MedImmune believed the patent was invalid, but it paid the royalties under protest for fear that Genentech would sue for infringement, exposing MedImmune to treble damages or a crippling injunction on its drug sales. MedImmune then sought a declaratory judgment that Genentech's new patent was invalid, but the district court found no dispute to resolve because MedImmune was paying the royalties.

Justice Scalia led the majority, which reversed and reinstated the case. Under the Declaratory Judgment Act, the issue is whether a dispute is "definite," "concrete" and "substantial" enough to amount to a real case or controversy. MedImmune, by paying the royalties, faced no imminent threat of harm, but this was no obstacle to suit. Indeed, the whole point of the Declaratory Judgment Act was to provide an alternative to pursuing a potentially wrongful activity. For example, a citizen can challenge coercive government action—such as a ban on distributing handbills—without actually violating the law and risking prosecution. The Court found the same reasoning persuasive in the case of a strictly private contract—in fact, in *Altvater v. Freeman*, 319 U.S. 359 (1943), the Court already had held that a licensee's payment of royalties did not render a patent dispute too "hypothetical" for a declaratory judgment action. Here, MedImmune effectively was forced to pay royalties due to the threat of treble damages and the loss of most of its business, so the coercion rationale applied and the dispute was hardly hypothetical.

Justice Thomas was the lone dissenter. He would not extend the government-coercion declaratory judgment case law to private contracts because he saw no limiting principle to allow for dismissing "hypothetical" disputes, and he thought that the majority misread *Altvater*. In turn, Scalia wrote that Thomas was quoting *Altvater* "wildly out of context" and ignoring the coercive nature of Genentech's threat to MedImmune, which was a limiting principle.

Next, in ***KSR International Co. v. Teleflex, Inc.* (04-1350)**, the Court invalidated Teleflex's "Engelgau patent" as "obvious," reversing the Federal Circuit. The Engelgau patent was for an "adjustable pedal assembly with electronic throttle control"—basically, a pedal that could be adjusted to a person's leg length and that included an electronic sensor that transmitted a signal to the car's computer to control speed. In 2000, GM chose KSR to supply a pedal system for certain truck models. KSR used an adjustable pedal it had previously patented and added a sensor. Teleflex sued for infringement, and KSR responded that the Engelgau patent was invalid because the invention was an "obvious" combination of prior art. The district court invalidated the patent, but the Federal Circuit reversed.

Justice Kennedy authored the Court's opinion, which could have substantial ramifications for patents based on combinations of prior art. Under section 103 of the Patent Act, no patent may

be issued where "the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art." In identifying the relevant prior art, the Court canvassed numerous pedal- and sensor-related patents (which we will spare you). In the end, the Court found that the Engelgau patent was little more than a combination of prior patented pedals and electronic sensors, which, given the commercial needs in the field, would have been obvious to a person with ordinary skill in the art of pedal design. The Federal Circuit erred because, instead of applying a broad and flexible approach to obviousness based on the factors set forth in section 103 and fleshed out in *Graham v. John Deere Co.*, 383 U.S. 1 (1966), it applied a rigid version of its "teaching, suggestion or motivation test" (TSM test), under which a patent is obvious only if "some motivation or suggestion to combine the prior art teachings [could] be found in the prior art, the nature of the problem, or the knowledge of a person having ordinary skill in the art." Given that the inventors of other patented pedals and sensors were addressing different issues than Engelgau, the Federal Circuit found that it would not have been obvious to Engelgau to look to those inventions. The Court rejected this subjective motivation test and over-reliance on the claim specifications in a patent. It further rejected the idea (which the Federal Circuit had adopted) that a combination of prior art can be "obvious to try" without being obvious under section 103. As Kennedy explained, "[t]he combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results." (The Court did not reject the TSM test outright, but found the Federal Circuit's application of that test, at least in this case, improper.) The Court noted that combinations of prior art might be patentable under other circumstances, such as where prior art counseled away from attempting the combination, but it urged "caution" in evaluating such patent applications because "[g]ranting patent protection to advances that would occur in the ordinary course without real innovation retards progress and may . . . deprive prior inventions of their value or utility." In the wake of ***KSR***, it is likely that both the Patent Office and the courts will take a harder look at patents combining prior arts.

Another patent case, ***Microsoft Corp. v. AT&T Corp.*** **(05-1056)**, also appears significant. AT&T sued Microsoft for infringing its patent on an apparatus that encodes and compresses speech. Microsoft ultimately admitted that its software, when installed on a computer, allowed the computer to process speech in the manner claimed by AT&T's patent. Microsoft therefore conceded liability for direct infringement for installing the software on computers it sold and for inducing infringement by licensing copies of the software to U.S. computer manufacturers. Microsoft, however, disputed liability for sending master disks or electronic transmissions of its speech-processing software abroad where the software was copied and installed on computers sold to foreign markets. Normally, U.S. patent laws reach no further than those products manufactured or sold within our borders. However, after the Court found no infringement in *Deepsouth Packing Co. v. Laitram Corp.*, 406 U.S. 518 (1972), where Deepsouth sold a shrimp deveining machine abroad in pieces to avoid Laitram's patent on a similar machine, Congress passed section 271(f) of the Patent Act. Section 271(f) prohibits supplying from the United States, for "combination" abroad, the "components" of a patented invention. AT&T contended that Microsoft was doing just that in shipping its software master disks abroad, knowing and intending that they would be copied and installed on machines that "would infringe the patent if such combination occurred within the United States." The district court agreed with AT&T, as did a divided panel of the Federal Circuit, but the Court reversed.

Justice Ginsburg authored the majority opinion, explaining that the master disks provided by Microsoft to foreign manufacturers could not be considered "components" because they were not, in themselves, capable of being installed on a computer and therefore could not be combined to form an infringing product. Instead, the master disk had to be copied onto a computer-readable medium, such as a CD-ROM, before the software could be installed on a computer. Windows (in the abstract) was "an idea without physical embodiment" and, as such, could not constitute a "'component' amenable to 'combination'" under section 271. Since the copies of the master disk indisputably were manufactured abroad, Microsoft therefore escaped liability under U.S. patent laws. While the majority recognized that this created a loophole (a pretty big one for digital property rights), it felt compelled to reach this result by the text of the statute and by the presumption against the extraterritorial reach of U.S. patent laws. If AT&T (or others like it) wanted redress, the proper place to go was to Congress or to the patent offices of foreign nations. In a footnote (that Justices Alito, Thomas and Breyer did not join), Ginsburg noted that the Court was not reaching Microsoft's alternative argument that even CD-ROMs manufactured in the U.S. and sold abroad would not constitute "components" under section 271 because they were never "combined" with foreign-made computers but were removed after the software was installed. Alito, Thomas and Breyer would have reached this issue. Alito explained that the most natural reading of "component" was a "physical part of the device," and no physical manifestation of Microsoft's software, CD-ROM or master disk ever became a component of the computer.

Justice Stevens registered a solo dissent. He would have found Microsoft's software, in the abstract, to be a component because "unlike a blueprint that merely instructs a user how to do something, software actually causes infringing conduct to occur." Perhaps this case will, as *Deepsouth* did decades earlier, prompt legislation from Congress to close this loophole.

JURISDICTION AND CIVIL PROCEDURE

The Court issued a hodgepodge of procedural rulings this Term. ***Sinochem International Co. v. Malaysia International Shipping Corp.*** **(06-102)** unanimously held that a federal court faced with a motion to dismiss for *forum non conveniens* need not first determine that it has jurisdiction over the case before dismissing it in favor of a more convenient foreign forum. *Sinochem* involved a dispute between a Chinese company and a Malaysian shipper that led to the seizure of the Malaysian ship in foreign waters, which the shipper then tried to reverse in a Pennsylvania federal court. That court ruled that it had subject matter jurisdiction over the admiralty case, but that discovery would be necessary to determine if it had personal jurisdiction over Sinochem. Despite that open jurisdictional issue, the district court dismissed the case because, in any event, the Chinese courts were obviously a more convenient forum. The Third Circuit reversed, holding that the district court had to go through the personal jurisdiction inquiry before it could dismiss for *forum non conveniens*. Justice Ginsburg wrote for the Court, which wasted no time in reversing right back and dismissing the case. A *forum non conveniens* dismissal is not a dismissal on the merits; rather, it is a threshold inquiry. As a result, while a court should dispense with jurisdictional questions where possible, a court may bypass jurisdiction when, as here, jurisdiction is not clear but the case obviously warrants *forum non conveniens* dismissal. Note, however, that the Court left open one issue not presented here: whether a court must make sure that it has jurisdiction before it can condition dismissal on the defendant's waiver of limitations or jurisdictional defenses in the foreign forum.

The Court dismissed for lack of jurisdiction in ***Dayton v. Hanson* (06-618)**. Hanson, a former employee of former Senator Mark Dayton, sued his office under the Congressional Accountability Act of 1995 (CAA), which makes certain federal employment laws applicable to Congress. Dayton moved to dismiss, claiming immunity under the Speech and Debate Clause of the Constitution, which provides: "[F]or any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place." The district court denied Dayton's motion, and the D.C. Circuit affirmed. Dayton then appealed to the Court under section 412 of the CAA, which allows direct appeal from an order "upon the constitutionality of any provision of [the CAA]." Justice Stevens authored the Court's unanimous, four-page opinion (the Chief did not participate) dismissing the case. The district court's order, which did not state the rationale for denying Dayton's motion, was not a ruling on the constitutionality of the Act. Similarly, the Court of Appeals did not address the validity of the CAA, ruling only that requiring Dayton to defend the action did not contravene the Speech and Debate Clause even though the Clause might limit the proceedings in some respects. Further, the CAA expressly states that it does not waive immunity provided by the Clause. Therefore, the lower court decisions were "ruling[s] on the scope of the Act, not its constitutionality." So section 412 jurisdiction was unavailable, and no special circumstances justified granting cert.

In ***Watson v. Philip Morris Cos.* (05-1284)**, the Court held that private companies cannot claim the benefit of the federal officer removal statute, 28 U.S.C. § 1442, which applies to suits against a federal officer "or any person acting under that officer," simply because they are heavily regulated. Watson sued Philip Morris in Arkansas state court for deceptive trade practices concerning the "light" label on its cigarettes. Philip Morris removed the case to federal court, arguing that it undertook its allegedly unlawful conduct in accordance with the FTC's method of testing the nicotine content of cigarettes and that it therefore was "acting under" the FTC. The district court and Eighth Circuit agreed, but the Court reversed. Justice Breyer's opinion marched through a somewhat lengthy (but interesting, really) history of the law, which dates to the War of 1812—the upshot is that the statute was enacted to counteract state courts' hostility to federal officials (e.g., officers enforcing the war-era shipping embargo, revenue collectors, etc.). These considerations can apply to private persons who truly "act under" and assist federal officials, but they do not apply to Philip Morris, which was simply complying (or not) with relevant FTC regulations. Allowing removal here would expand the scope of the removal statute well beyond the intent of Congress. The Court distinguished government contractors, who sometimes can claim the benefit of the statute, on the ground that they perform a function in lieu of the government and are not merely following regulations. It also rejected Philip Morris's contention that the FTC had delegated legal testing authority to the cigarette industry.

Powerex Corp. v. Reliant Energy Services, Inc.* (05-85)** took up one of Justice Scalia's pet issues: appellate review of district court orders remanding removed cases to state court notwithstanding 28 U.S.C. § 1447(d), which provides that such orders are not reviewable "on appeal or otherwise." Despite that clear language, the Court has interpreted the statute to preclude review only of remands for lack of subject-matter jurisdiction or for defects in removal procedure. (Justice Scalia takes a strong view on this statute: So long as the district court *purports* to remand for lack of subject matter jurisdiction, even if that conclusion is clearly wrong, there can be no appeal. For more, see the summary of ***Osborn v. Haley* (05-593)** in the EMPLOYMENT section.) The issue was whether ***Powerex fit into the subject matter jurisdiction

box. The case was convoluted: California sued various energy companies for price-fixing, and they in turn cross-claimed against various federal agencies and entities tied to the Canadian government (including Powerex). The cross-defendants all removed the case to federal court as either federal agencies or foreign entities, but the district court remanded, finding that Powerex did not qualify as a foreign sovereign that could remove under the Foreign Sovereign Immunities Act (FSIA). On appeal, the Ninth Circuit affirmed the holding as to Powerex; the Court granted cert, but also asked the parties to brief whether the Ninth Circuit had jurisdiction over the appeal in the first place in light of § 1447(d). As it turns out, the answer was no. Justice Scalia's majority opinion is even more complicated than the facts, so we'll leave it at this: The district court essentially held that it had no power to adjudicate the claims against Powerex once it ruled on the foreign sovereign question; this was colorably characterized as a matter of subject matter of jurisdiction, so the ruling was unreviewable. Section 1447(d) represents Congress's determination that lengthy disputes over removal should be avoided, so there should be no review of colorable jurisdictional grounds invoked by district courts. Justice Kennedy concurred, along with Justice Alito, to say that if today's decision poses a policy issue in our relations with foreign sovereigns, then Congress should step in to fix the problem.

Justice Breyer dissented, joined by Justice Stevens. For them, the FSIA created a conflict with § 1147(d), and they would read the subsequent and more specific FSIA to create an exception to the no-review rule. In their view, the Ninth Circuit had jurisdiction over the appeal, but got it wrong on the merits: They thought Powerex was an organ of the Canadian government.

Other rulings also had procedural elements. In ***Hein v. Freedom from Religion Foundation, Inc.* (06-157)**, the Court limited the Establishment Clause exception to the rule against federal taxpayer standing to challenge government expenditures. In ***Federal Election Commission v. Wisconsin Right to Life, Inc.* (06-969)**, the Court utilized the exception to the mootness doctrine where a dispute is "capable of repetition, yet evading review." Both cases appear in the FIRST AMENDMENT section. Finally, ***Lance v. Coffman* (06-641)**, discussed in the ELECTIONS section, held that Colorado citizens lacked standing to challenge a judicially crafted redistricting plan.

PREVAILING PARTY

In ***Sole v. Wyner* (06-531)**, the Court unanimously held that a party who succeeds in obtaining a preliminary injunction at the start of her case, but ultimately loses on the merits, does not qualify as a "prevailing party" who can receive an award of attorney's fees pertaining to her initial injunction. Wyner wanted to organize an antiwar protest involving nude protesters assembled in a peace sign on a Florida state beach, and she filed a declaratory judgment action seeking an advance ruling that Florida's "bathing suit rule" violated the First Amendment. (As author Justice Ginsburg so interestingly characterized the rule, it requires patrons in state parks to wear, "at a minimum, a thong and, if female, a bikini top.") The district court granted a preliminary injunction allowing the protest on the condition that the "artwork" be screened off by a large curtain. As it turned out, the protesters were so overcome with expressive exuberance that they ignored the screen and romped all over the beach—leading the court to conclude later, on the merits, that Florida's rule was a reasonable restriction to protect the experiences of other park visitors. The court nevertheless awarded Wyner fees for the injunction stage of the proceedings, reasoning that she succeeded in getting the injunction, and the Eleventh Circuit affirmed.

The Court reversed, holding that Wyner's loss on the merits superseded her preliminary injunction victory, which rested on the district court's incorrect premise that a screen would adequately protect the state's interests. At the end of the day, Wyner had not changed her relationship with the state—she won a battle, but lost the war—so she was not entitled to fees. (The Court left open whether success in getting a preliminary injunction entitles a party to fees when the case does *not* result in any decision on the merits—which happens frequently.)

PUNITIVE DAMAGES

The Court sided with the Petitioner in a highly publicized case—***Philip Morris USA v. Williams* (05-1256)**, which involved an $80 million punitive damages award against the tobacco company. While the case represents a victory (for now) for Philip Morris, the 5-4 opinion is not necessarily as revolutionary as the headlines have made it appear. Here are the details: After Williams died of lung cancer, his estate claimed that Philip Morris had deceived him into thinking that smoking was safe, and an Oregon jury agreed, awarding the estate about $800,000 in compensatory damages and almost $80 million in punitive damages. On appeal, Philip Morris argued that Williams' counsel improperly had asked the jury to think about "all the other Williamses" whom the company had deceived in Oregon, and that the trial court should have instructed the jury that it could not punish Philip Morris for misconduct toward anyone but Williams. The Oregon court disagreed, holding that the Constitution does not bar a jury from punishing a defendant for harm to nonparties. It also rejected the company's second argument that the award was "grossly excessive" under the Supreme Court's recent decisions limiting punitive damage awards under the Due Process Clause (*BMW of North America v. Gore*, 517 U.S. 559 (1996), and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), among others).

The Court took both questions but reached only the issue of punishment for harm to nonparties. The majority, led by Justice Breyer (with the Chief and Justices Kennedy, Souter and Alito) held that the Due Process Clause bars states from using punitive damages to punish defendants for their actions regarding "strangers to the litigation" (here, other smokers who could sue in their own right). The majority characterized this as an issue of the "procedures" used to award punitive damages, in that: a defendant is deprived of the chance to present every available defense; the question of damages necessarily becomes speculative and arbitrary; and there is no way that a defendant can have "fair notice" of the penalties it may face. So the jury could not punish Philip Morris for any harm it caused to people other than Williams. That said (and here is where the majority opinion becomes tenuous), evidence of harm to others still can be relevant. The jury can consider "evidence of actual harm to others," not to punish a defendant, but to gauge how *reprehensible* its conduct was—the idea being that conduct that harmed or threatened the general public is particularly egregious (and therefore merits more punishment). Courts must guide juries in making these determinations so that defendants do not face an unreasonable risk that the juries will punish them *directly* for harm to nonparties. So now the Oregon Supreme Court has to figure out whether the verdict runs afoul of these standards.

To which the four dissenters said, in essence: "Good luck." Justice Stevens saw no reason to rule out punishment for harm to nonparties, since punitive damages are meant to be retributive; in any event, as to the majority's distinction between punishing and measuring reprehensibility, "[t]his nuance eludes me." Justice Ginsburg (joined by Justices Scalia and Thomas) noted that

the Oregon courts faithfully followed *Gore* and *State Farm* and had done nothing to contradict the majority's new reprehensibility-only rule. They would have disposed of the case on procedural grounds, since in their view Philip Morris had not preserved all the claims considered by the majority. Finally, Thomas wrote to express his long-held view that the Constitution simply has nothing to say about the size of punitive damages awards.

One more note: The Court did not set aside the $80 million award—it merely sent the case back to Oregon to review the award under the new rule. The Court passed on the second question, whether the $80 million award was "grossly excessive," because its ruling on the first question may lead to a new trial. But if the Oregon Supreme Court follows Ginsburg's lead, it still could find that everything at the trial court was proper and hold that the verdict was not excessive. Philip Morris may yet be back with another cert petition next term, with no guarantee of success.

RACE

On the Term's final day, the Court issued its biggest (and longest) decision of the Term in ***Parents Involved in Community Schools v. Seattle School District No. 1*** **(05-908)** and ***Meredith v. Jefferson County Board of Education*** **(05-915)**, in which a 5-4 majority found that Seattle's and Louisville's race-conscious "voluntary integration" school assignment plans were unconstitutional. Seattle, which had never been subject to a desegregation order but was concerned about *de facto* segregation due to housing patterns, allowed incoming ninth graders to choose from among the district's high schools. Where schools were oversubscribed, it employed a series of tiebreakers, one of which used race—if a school was not within ten percentage points of the district's overall white/nonwhite balance (roughly 40/60), students were assigned to bring the school "into balance." Louisville, which had just emerged from a court-ordered desegregation plan, required its elementary schools to maintain black student populations of between 15 and 50 percent; it initially assigned students based on geography but could reassign them to facilitate integration. Lower courts upheld both plans under strict scrutiny, finding that they were narrowly tailored to achieving a compelling interest in racially diverse schools.

The Court reversed both rulings in a judgment announced by the Chief. There was a full five-Justice majority (the Chief and Justices Scalia, Kennedy, Thomas and Alito) for the following holdings. First, the plans must undergo strict scrutiny because they allocate benefits or burdens based on race. Therefore, they must further a compelling interest, and the Court has recognized two: (1) remedying the effects of past *de jure* segregation, and (2) diversity, which the Court recognized in the context of *higher* education in the University of Michigan affirmative action cases (*Grutter v. Bollinger*, 539 U.S. 306 (2003), upholding the law school's admissions program, and *Gratz v. Bollinger*, 539 U.S. 244 (2003), striking down the undergraduate admissions program). Neither of those rationales applied here: Seattle never had *de jure* segregation, and Louisville's emergence from court supervision meant that it had eliminated the vestiges of its past discrimination. As for diversity, the Court had blessed that rationale in the special case of higher education (with its important concern for academic freedom), and the "diversity" at issue was not focused on race alone but encompassed all factors that make a student body diverse, with each applicant considered as an individual. The Seattle and Louisville plans, by contrast, focused solely and mechanically on race, and an odd, binary notion of race to boot (white/nonwhite or black/nonblack). Second, the plans ultimately had little impact on

overall student assignments—not that the Court wished to see *more* of an impact, but the results suggested that racial classifications were not necessary to achieve the districts' stated goals. Given the psychic and social costs of assigning students by race, and the need for districts to consider alternatives in good faith, the districts could not meet their burden on narrow tailoring.

There was more to the Chief's opinion, but the remainder garnered only the votes of Scalia, Thomas and Alito. The districts had argued that racial diversity, by itself, was a compelling interest due to its educational and social benefits. Noting that this was a disputed issue in the social science, the plurality declined to step into the debate, finding that the plans were not narrowly tailored to achieving these purported benefits because they were directed solely at the illegitimate goal of racial balancing for its own sake, measured only by each district's demographics rather than some diversity target at which the benefits presumably flowed. This rationale had no stopping point (some schools would *always* be out of balance, as demographics shift over time), and accepting racial balancing as a compelling interest would ensure that race-conscious decisionmaking would always be part of American life. To the extent that the goal is for students to see each other as individuals rather than members of a group, "using means that treat students solely as members of a racial group is fundamentally at cross-purposes with that end." Invoking the plaintiffs' brief from *Brown v. Board of Education*, 347 U.S. 483 (1954), the plurality noted that the Fourteenth Amendment "prevents states from according differential treatment to American children because of their color or race," and closed by stating that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."

These portions of the Chief's opinion were too much, apparently, for Justice Kennedy, who issued his own concurrence in the judgment. For Kennedy, the districts had identified a compelling interest in diversity that the plurality should have acknowledged; the districts simply had not proved that their means were narrowly tailored. Louisville had failed to explain how its plan worked in practice, and he construed the ambiguities against the district under strict scrutiny; Seattle did a little better, but it still could not explain its choice of a crude white/nonwhite distinction (in which a 50/50 Asian/white split would be OK, but a four-way split of Asians, blacks, Latinos and whites would not). Kennedy, however, thought that the plurality's rhetoric implied an "all-too unyielding insistence that race cannot be a factor," yet the fact remained that, despite our best hopes, race often does matter. In particular, he could not accept the plurality's implication that the Constitution requires districts to ignore *de facto* resegregation. Districts could pursue diversity by means such as strategic site selection of new schools, drawing attendance zones with an eye to neighborhood demographics, and recruiting students and teachers. What they cannot do is assign students based on racial classifications.

Justice Breyer wrote a lengthy dissent (seventy-seven pages, which he read from the bench), which Justices Stevens, Souter and Ginsburg joined. He accused the plurality of breaking "the promise of *Brown*" and called the decision one "that the Court and the Nation will come to regret." Breyer noted that both plans stemmed from longstanding efforts to remedy real-world segregation that was challenged in lawsuits in both cities (Seattle settled its suit, so there was no court finding of *de jure* segregation—but Breyer found the *de jure* vs. *de facto* distinction "meaningless in the present context"). He then invoked the principal of local control by school districts in the implementation of educational policy, and noted the Court's language in past cases (especially the 9-0 decision in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971)) blessing the idea of voluntary desegregation efforts as within the broad

discretionary powers of school authorities. This statement was technically dicta, but it embodied a basic principle of constitutional law that had found wide acceptance, and which distinguished the use of race to *exclude* from its benign use to *include*. For the former, strict scrutiny is "fatal in fact," but not so for the latter—a distinction the plurality ignored. Indeed, given the choice, Breyer would apply a "contextual" form of scrutiny, being less than strict though still "careful" in the present case. Purporting to apply strict scrutiny anyway, Breyer would have upheld the plans because: (1) they furthered a compelling interest in remedying past segregation, overcoming the adverse educational effects of segregated schools, and producing an educational environment reflecting our pluralistic society; and (2) they were narrowly tailored because they used broad ranges as only one among other, nonracial aspects of student assignment. Noting that the plurality failed to identify a model that would make less use of race and achieve the districts' objectives, Breyer thought the plurality's take on narrow tailoring could never be satisfied. Finally, he thought that the plurality opinion threatened a flood of litigation, as "hundreds" of state and federal statutes and regulations used racial classifications for educational or other purposes. Justice Stevens also wrote a short dissent, noting that Breyer's dissent was "eloquent and unanswerable," calling the Chief's invocation of *Brown* a "cruel irony," and boldly claiming that "no Member of the Court that I joined in 1975 would have agreed with today's decision."

Breyer's dissent struck a nerve—the Chief and Kennedy devoted whole sections of their opinions to responding to it, and Thomas wrote his own concurrence aimed solely at debunking it. For the Chief, Breyer: (1) ignored the distinction between *de jure* and *de facto* segregation, which has been central to the Court's jurisprudence (Breyer replied that the distinction mattered for what the Constitution *required* districts to do, but not for what it *permitted* them to do); (2) relied on inapplicable dicta in *Swann*; and (3) incorporated a "motives" test for the use of race that would depend on our changing notions of what was "benign" and would "do no more than move us from 'separate but equal' to 'unequal but benign.'" For Kennedy, Breyer's gloss on strict scrutiny looked suspiciously like rational-basis review that would allow racial classifications far and wide. But the real passion came from Thomas, who gave a ringing endorsement of the "color-blind Constitution" that Justice Harlan first invoked in dissent in *Plessy v. Ferguson*, 163 U.S. 537 (1896). He pointedly noted that many of Breyer's arguments—such as the need for local control, a focus on the practical effects of school assignment policies, and a desire to avoid a flood of litigation—were the very arguments segregationists made for decades. "What was wrong in 1954 cannot be right today. . . . [*Brown*] certainly made clear that state and local governments cannot take from the Constitution a right to make decisions on the basis of race by adverse possession." While "today's faddish social theories" distinguish between inclusive and exclusive uses of race, "history . . . has taught us to beware of elites bearing racial theories." Thomas did not doubt Breyer's good intentions, but the Constitution does not allow us to gamble that future theories will be so beneficent.

RICO

In ***Wilkie v. Robbins*** **(06-219)**, the Court found that Robbins had neither a *Bivens* action nor a RICO action against Bureau of Land Management (BLM) officials that allegedly harassed and intimidated him in an attempt to extract an easement across his private property. The case is summarized in the *BIVENS* ACTIONS section.

SECURITIES

There were two securities-related rulings this Term. ***Credit Suisse Securities (USA) LLC v. Billing*** **(05-1157)** involved a claim by investors that a number of investment banks, acting as underwriters, violated antitrust laws when they formed syndicates to execute initial public offerings (IPOs) and jointly agreed to give priority to investors that would (1) buy additional shares of the IPO stock later at escalating prices (a/k/a "laddering"); (2) buy less desirable securities from a broker (a/k/a "tying"); or (3) pay "excessive" commissions on subsequent securities purchases. The underwriters argued for dismissal because securities laws preempted applying antitrust laws to this conduct, and the district court agreed. The case split the Government, with the SEC arguing that the securities laws completely preempted applying antitrust laws and the Antitrust Division of the DOJ arguing for no preclusion. The Second Circuit agreed with the Antitrust Division and would have allowed the case to go forward, but the Court reversed. (High-fives all around at the SEC.) In doing so, the Court managed to disagree not just with the Antitrust Division and, in part, with the SEC, but also with the face-saving middle ground suggested by the Solicitor General.

Justice Breyer led the six-Justice majority (which included the Chief and Justices Scalia, Souter, Ginsburg and Alito; Kennedy did not participate), holding that the securities laws implicitly precluded applying antitrust laws to the allegedly unlawful IPO practices. Four factors were relevant to the Court's preemption inquiry: (1) Is the activity a heartland securities activity? (2) Does the SEC have authority to regulate the activity? (3) Does the SEC exercise this authority? and (4) Would allowing an antitrust suit be incompatible with the SEC's administration of securities laws? The majority quickly answered the first three questions in the affirmative. IPOs, which raise capital by spreading ownership among a wide sphere of investors, "lie at the very heart of the securities marketing enterprise." To prepare for an IPO, investment banks form syndicates (a practice to which no party objected and which is perfectly appropriate under securities laws) and engage in certain activities (including "road shows" and "book-building efforts," also generally appropriate) to gauge investor interest in the securities and set an appropriate price. The SEC has authority to, and does, regulate all of these activities through very detailed and nuanced rules. Question four proved more challenging because the plaintiffs contended that SEC regulations also precluded the conduct alleged in the complaint—thus no direct conflict existed between the antitrust laws and the securities laws. As Justice Breyer explained, however, "only a fine, complex, detailed line separates activity that the SEC permits or encourages . . . from activity that the SEC must . . . forbid." (That line is so fine that, without quoting the language of the different regulations verbatim, we'd likely mislead you about what is legal and what is not.) As a result, the Court found it very unlikely that inexpert judges and juries could make these determinations accurately, questioning: "Who but the SEC itself could do so with confidence?" The Court thus found no practical way to confine antitrust suits only to activity that the SEC also forbids. ("[A]ntitrust courts are likely to make unusually serious mistakes in this respect." Thus, the Court also rejected the SG's procedural suggestion that the case be remanded to the district court to determine if the allegedly unlawful conduct could be separated from conduct permitted by the regulatory scheme and, in so doing, determine whether SEC-permitted and SEC-prohibited conduct were "inextricably intertwined.") The majority also noted that Congress had taken precautions to weed out unmeritorious securities suits by strengthening pleading standards (see the ***Tellabs*** discussion below); permitting antitrust claims for this same conduct would allow plaintiffs to circumvent these requirements. It is interesting

that Breyer's pragmatic concerns won the day here, but failed to garner a majority of the Court in ***Leegin*** (see the ANTITRUST section), where Breyer advocated maintaining a *per se* rule prohibiting retail price maintenance agreements for similar administrative reasons.

Justice Stevens concurred in the judgment only. He was not concerned about the ability of courts and juries to do their jobs, but felt that agreements among underwriters on how to market and price an IPO should be considered "procompetitive joint ventures" and therefore not in violation of the antitrust laws. Justice Thomas registered the lone dissent. His analysis was simple: The Securities Act and the Securities and Exchange Act both have broad savings clauses that preserve other rights and remedies. Since securities protections are in addition to, rather than in lieu of, other protections, plaintiffs' antitrust claims were not preempted.

In ***Tellabs, Inc. v. Makor Issues & Rights, Ltd.*** **(06-484)**, the Court held that a suit under the Private Securities Litigation Reform Act (PSLRA), which requires securities-fraud plaintiffs to allege facts giving rise to a "strong inference" of a defendant's intent to deceive investors, can survive a motion to dismiss only if the inference of intent is "cogent and at least as compelling as any opposing inference of nonfraudulent intent." In a class-action suit against Tellabs and its CEO, the Seventh Circuit had adopted a less stringent standard—whether a reasonable person could infer the requisite intent—but the Court reversed in an opinion by Justice Ginsburg. She began by noting that Congress enacted the PSLRA to stop abusive securities fraud suits and, in particular, to establish a uniform, heightened pleading standard for intent. The Court then set out a framework for applying the requirement. First, on a motion to dismiss the court must accept all allegations in the complaint as true. Second, the court must assess the complaint and other sources considered on motions to dismiss in their entirety to see if they establish intent, rather than test individual allegations in isolation. Third, the court must consider competing inferences; by requiring a "strong inference" of intent, Congress clearly meant for the test to be comparative. The inference need not be irrefutable, but it must be more than merely permissible—it must be cogent and compelling in light of the alternatives. Weighing inferences would not usurp the jury's role; so long as plaintiffs had satisfied Congress's heightened rule for making intent an issue, the jury would still weigh in on whether it was more likely than not that the defendant had acted with the requisite intent. The Court then sent the case back for the lower courts to reexamine the complaint against Tellabs in light of this ruling.

Justice Scalia concurred only in the judgment. He disagreed that an inference that was only "as compelling as any opposing inference" could count as a "strong inference." He cited the example of a jade falcon stolen from a room to which only two people had access; while there was a strong *possibility* that either was the thief, there was not a strong *inference* either way. Instead, he would give the PSLRA its "natural reading" and require an inference of intent that was "more plausible" than any inference of innocence. He also criticized the Court's reliance on legislative history, which he characterized as "its frequent indulgence of the last remaining legal fiction of the West: that the report of a single committee of a single House expresses the will of Congress." Justice Alito also concurred in the judgment. He agreed with Scalia's "more plausible" construction and, echoing Federal Rule 9(b)'s requirements for pleading fraud, noted that only facts alleged "with particularity" should be considered in the analysis.

Justice Stevens dissented. While he viewed the majority's rule as "perfectly workable," he thought "probable cause" would be a better standard because it would avoid, in some

circumstances, a *requirement* to weigh alternative inferences—if a known drug dealer leaves a building after a confirmed drug deal with a suspicious package, the inference of drug possession is strong enough without having to consider if he might have been doing something else.

TAX

The Court issued rulings this Term in three very different tax cases. ***Limtiaco v. Camacho* (06-116)** concerned tax law in the organized, unincorporated U.S. territory of Guam, where the Attorney General and the Governor were suing each other. (An unincorporated territory is one for which Congress has determined that only parts of the Constitution apply to its government, and is more a possession than an integral part of the United States.) The result was a decision that was both 5-4 and 9-0. Here are the details: The Guam legislature authorized the governor to issue bonds, but the AG refused to authorize them because he thought they violated the debt limits in Guam's organizing statute, which caps its debt at ten percent of its "aggregate tax valuation." The AG thought that phrase meant Guam's total assessed property value, while the governor thought it meant its higher *appraised* or market value. The Guam Supreme Court sided with the governor. The AG appealed to the Ninth Circuit, but then Congress took away the Circuit's jurisdiction over Guam and the appeal was dismissed. The AG then filed for cert, but by then it was more than ninety days after the Guam ruling. A 9-0 Court agreed, however, that the Guam judgment did not become final for the purposes of a cert petition until the Ninth Circuit dismissed the appeal. The 5-4 split came on the merits: Justice Thomas wrote for the majority, which included the Chief and Justices Scalia, Kennedy and Breyer. In essence, the opinion holds that "tax valuation" means the traditional understanding used by most states of assessed value for property tax purposes, rather than market value. The four dissenters (Justice Souter, with Justices Stevens, Ginsburg and Alito) thought that Guam's statute was unique and offered no real guidance (Souter said it was a "coin flip"). They would take a practical approach and go with real-world market value—otherwise, the Guam legislature could double its assessments, and its debt limit, whenever it wanted to.

In ***EC Term of Years Trust v. United States* (05-1541)**, the Court (Souter, J.) held unanimously that a third party claiming that its property was wrongfully seized to pay the taxes of another cannot bring an action for a "tax refund" under 28 U.S.C. § 1345(a)(1) (generally applicable to debtor challenges of IRS seizures), but instead must bring suit under 26 U.S.C. § 7426(a)(1). Section 7426(a)(1) was enacted specifically to protect against "wrongful imposition upon property which is *not* the taxpayer's" and contains a nine-month statute of limitations—far shorter than the two years to bring an administrative tax refund challenge under § 1345. "The demand for greater haste was no accident." Congress noted that if the IRS "made a mistake the first time," it needed to know quickly so it could pursue the taxpayer's true property. Since § 7426(a)(1) is specifically targeted at third-party challenges, it preempts the more general tax refund remedy and is the exclusive means by which a third party can challenge a wrongful IRS seizure. The primary lesson here is that if the IRS mistakenly seizes a person's property to pay the debts of another, the aggrieved party must act quickly to regain the property.

In ***Hinck v. United States* (06-376)**, a unanimous Court held that the Tax Court has exclusive jurisdiction over challenges to IRS decisions not to abate interest penalties on back taxes. Section 6404 of the Internal Revenue Code allows the Secretary of the Treasury to abate an

interest charge if it is due to the IRS's own delay in reviewing a case. Before 1996, the Code said nothing about judicial review of that decision, and courts had held that it was an exercise of complete agency discretion insulated from court challenge. In 1996, Congress amended the section to include a provision that "The Tax Court shall have jurisdiction . . . to determine whether the Secretary's failure to abate interest under this section was an abuse of discretion." Hinck brought such a challenge in the Court of Federal Claims, which usually hears post-payment claims on tax matters, arguing that the new provision did not give the Tax Court exclusive jurisdiction but only concurrent jurisdiction. The Court unanimously disagreed, in a characteristically efficient opinion by the Chief. In essence, the Court fell back on the principle that a "precisely drawn, detailed statute preempts more general remedies," particularly when Congress has created a remedy where none previously existed—all conditions that applied here.

TELECOMMUNICATIONS

In ***Global Crossing Telecommunications, Inc. v. Metrophones Telecommunications, Inc.*** **(06-705)**, the Court agreed with the FCC that a violation of its regulation mandating cost-sharing for pay telephone calls was an "unreasonable practice," allowing a payphone operator to sue a long-distance carrier under section 207 of the Communications Act of 1934. The FCC, recognizing that a long-distance payphone call often involves services provided by both a payphone operator and a long-distance carrier, enacted a rate-sharing regulation requiring long-distance carriers to compensate payphone operators for each call. Global Crossing refused to pay this compensation to Metrophones, and the district court held that this could serve as a predicate for a suit under section 207. On appeal, Global Crossing contended that the alleged violation of a regulation was not an "unreasonable practice" under section 201(b) of the Act, but the Ninth Circuit affirmed.

Writing for a seven-Justice majority, Justice Breyer accepted the FCC's conclusion that a long-distance carrier's failure to pay its fair share under the FCC's regulations was an "unjust and unreasonable" practice actionable under section 207. The Court reviewed the lively history of the Communications Act and the FCC's traditional rate-making functions, concluding that the regulation fell within the FCC's authority. The Court noted that even as new telecom laws were enacted in the 1990s, deregulating the industry and usurping much of the FCC's traditional authority, Congress did not "totally abandon[] traditional regulatory requirements." In further holding that a violation of the FCC's regulation is a violation of the Communications Act (thus invoking section 207), the Court rejected Justice Scalia's dissenting attempt to distinguish between "interpretive" regulations (which, in Scalia's view, support section 207 suits) and "substantive" regulations (which do not). The Court observed that "the text does not suggest that, of all violations of regulations, only violations of *interpretive* regulations can amount to unjust or unreasonable practices." The Court also rejected Justice Thomas's dissenting argument that section 201(b) only reached "practices" that damaged customers, not other carriers.

PART TWO: CRIMINAL AND RELATED CASES

ARMED CAREER CRIMINAL ACT

In ***James v. United States*** **(05-9264)**, the Court considered whether attempted burglary, as defined by Florida law, is a "violent felony" under the Armed Career Criminal Act (ACCA). ACCA provides a fifteen-year mandatory minimum prison term for defendants convicted of three "violent felonies" or serious drug offenses prior to conviction under 18 U.S.C. § 922(g) (felon in possession of a firearm). The "violent felonies" specifically listed under ACCA are burglary, arson, extortion, and a crime involving the use of explosives; ACCA also includes crimes that "otherwise involve[] conduct that presents a serious potential risk of physical injury to another." Justice Alito, writing for a 5-4 majority, affirmed the Eleventh Circuit's conclusion that an attempted burglary is a "violent felony" under the "otherwise" clause. The Court rejected James's argument that attempts *per se* were excluded from consideration as violent felonies, holding that the salient inquiry was not whether the crime was completed but whether the crime seriously risked physical injury. The majority (including the Chief and Justices Kennedy, Souter and Breyer) found that an attempted burglary involved the risk of a potential confrontation between the would-be burglar and a third party, making an attempted burglary perhaps even more dangerous than a completed burglary. The Court also noted that an attempted burglary would count as a "crime of violence" under the federal sentencing guidelines.

Justice Scalia dissented, joined by Justices Stevens and Ginsburg, accusing the majority of an "ad hoc" holding and complaining about the lack of interpretive guidance regarding the "entirely reasonable and entirely indeterminate line" demarcating those crimes that present a serious potential risk of physical injury under ACCA. He scoffed at the majority's reasoning, insisting that an attempted burglary was not as dangerous as a completed burglary because the "confrontation" described by the majority "while the burglar is still outside the home is likely to consist of nothing more than the occupant's yelling 'Who's there?' from his window, and the burglar's running away." Less colorfully, Justice Thomas dissented to register his ongoing disagreement with what he believed to be "judicial factfinding" that unconstitutionally enhances a defendant's sentence beyond the facts determined by a jury.

CONFRONTATION CLAUSE

Whorton v. Bockting **(05-595)** resolved a circuit split regarding the applicability of *Crawford v. Washington*, 541 U.S. 36 (2004), to cases that already were final on direct review when *Crawford* came down. *Crawford* held that testimonial statements of absent witnesses can be admitted only where the witness is unavailable and the defendant has had a prior opportunity for cross-examination. The case overruled *Ohio v. Roberts*, 448 U.S. 56 (1980), which had permitted such evidence to be introduced so long as the witness was unavailable and there were sufficient indicia of reliability. Whorton's conviction became final on direct review about a decade before *Crawford*, but he sought to take advantage of the ruling on collateral review. Under *Teague v. Lane*, 489 U.S. 288 (1989), an "old rule" (one in existence at the time of conviction) is applicable to cases on both direct and collateral review, while a "new rule" applies only on direct review unless it is a substantive rule (not applicable here) or a "watershed" procedural rule implicating "the fundamental fairness and accuracy of the criminal proceedings."

A unanimous Court, led by Justice Alito, found that the *Crawford* rule requiring the opportunity for cross-examination was not old (since *Crawford* explicitly overruled *Roberts*); nor was it a "watershed" rule—one that (1) is necessary to prevent an impermissibly large risk of an inaccurate conviction or (2) alters our understanding of the bedrock procedural elements essential to the fairness of a proceeding. *Crawford* merely recognized that the Constitution expressed a preference for assessing testimonial statements through cross-examination. *Crawford's* rule is more restrictive than *Roberts*, but *Crawford* also eliminated Confrontation Clause protection for non-testimonial out-of-court statements—so *Crawford*'s net effect on the accuracy of criminal fact-finding is unknown. Further, the rule simply does not compare to the right of indigent defendants to counsel announced in *Gideon v. Wainwright*, 372 U.S. 335 (1963), the only case to recognize a "watershed" rule. Criminal defendants whose convictions became final before *Crawford* will simply have to serve out their sentences.

DEATH PENALTY

It was a busy Term on the death-penalty front from the get-go. The Court issued its first authored opinion on November 13, 2006, giving Justice Kennedy the distinction of winning the semi-secret race to get out the first opinion. A bit of a harbinger of things to come for the Term, the 5-4 decision in ***Ayers v. Belmontes*** **(05-493)** featured the bloc of the Chief and Justices Scalia, Kennedy, Thomas and Alito reversing a Ninth Circuit ruling overturning Belmontes's death sentence.

The issue was whether the trial court's jury instructions unconstitutionally precluded the jury from considering forward-looking mitigation evidence (that Belmontes could be a contributing member of society if incarcerated) in deciding whether to sentence Belmontes to death. The jury was charged on a variety of specific mitigating factors and with "factor (k)," which instructed the jury to consider "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." Belmontes claimed that this instruction only permitted the jury to consider mitigating evidence relating to the specifics of the crime itself and not evidence about his ability to be rehabilitated. Justice Kennedy quickly rejected this argument in light of two prior cases: *Boyde v. California*, 494 U.S. 370 (1990), in which the Court held that factor (k) did not preclude the jury from considering evidence of a defendant's background and character; and *Brown v. Payton*, 544 U.S. 133 (2005), in which the Court held that factor (k) did not preclude considering post-crime rehabilitation. Given this case law, the result would seem clear, but the defendant argued that *Brown* was not controlling because it was a habeas case decided under the Anti-Terrorism and Effective Death Penalty Act (AEDPA), which imposed a highly deferential standard of review of the state court's decision. Belmontes's habeas petition was filed before AEDPA, so no deference was required. Rejecting this argument, the majority explained that the key issue is whether "there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." The majority found it unlikely that the jury did not consider Belmontes's evidence because the trial court permitted him to introduce it (which would be strange, if the jury could not even consider it), both the prosecutor and defense counsel focused on the evidence during argument, and the court instructed the jury that it should consider "all evidence" presented and that the specific mitigation factors charged were not exclusive but were merely examples. Under these circumstances, it was highly unlikely that the jury would interpret factor (k) to preclude

considering post-crime evidence, which the majority believed would constitute an extenuating circumstance under factor (k). Justices Scalia and Thomas issued a short concurrence to reiterate their position that states could limit the types of mitigating evidence considered by the jury without violating the Eighth Amendment.

The dissent, led by Justice Stevens, focused on the language of factor (k) and the history of states' efforts to limit consideration of mitigating evidence. At the time of Belmontes's trial, the limits on states were unclear, and California's scheme of enumerated mitigating factors certainly appeared to constrain juries. Further, the California Supreme Court effectively amended factor (k) not long after Belmontes's trial, requiring trial courts to allow juries to consider "any other aspect of the defendant's character or record" offered as a basis for a sentence less than death. And the legislature later amended factor (k) to make clear this evidence could be considered (suggesting that the previous statute did not allow it). Under these circumstances, it was not reasonable to assume that the jury considered Belmontes's forward-looking evidence. In fact, the prosecutor did not think the evidence fell under factor (k), and there was some evidence of jury confusion about what it could consider.

In another of the Court's more controversial decisions, ***Uttecht v. Brown* (06-413)**, a 5-4 Court upheld Brown's death sentence over his claim that his Sixth and Fourteenth Amendment rights were violated when a Washington State trial court excused "Juror Z," who the prosecution claimed was confused and had an attitude that might prevent him from voting for the death penalty. At voir dire, Juror Z said that he could follow the law and that he agreed with the death penalty in certain circumstances (such as if the defendant were "incorrigible and would reviolate if released"). (There's far more to this exchange, the transcript of which was attached to the Court's opinion.) The prosecution challenged Juror Z for cause because he seemed to believe death was only appropriate where there was a risk of recidivisim, a risk not present in Brown's case because the only other option was life without parole. Defense counsel responded "no objection," and Juror Z was struck. The Washington courts affirmed Brown's sentence on direct review, as did the federal district court reviewing Brown's habeas claim, but the Ninth Circuit reversed, finding that excusing Juror Z violated Brown's right to a fair trial.

In a decision that will give trial courts wide latitude in deciding when to excuse a juror for cause, the Court reversed. Under *Witherspoon v. Illinois*, 391 U.S. 510 (1968), a person cannot be excluded from serving as a juror in a death case simply because he has a general moral or religious objection to the death penalty if he can and will follow the law. But under *Wainwright v. Witt*, 469 U.S. 412 (1985), a juror may be excused if his views would "prevent or substantially impair" his ability to follow instructions and fulfill his oath. For the majority, again led by Justice Kennedy (and again joined by the Chief and Justices Scalia, Thomas and Alito), the key was deference to the trial court. Juror Z's voir dire testimony was conflicting; it was not clear whether he would be able to impose death since Brown could never be paroled (and thus would never reviolate). The trial court, which observed Juror Z's demeanor, was better able to evaluate his equivocal responses. Further, the fact that defense counsel did not object suggested that all involved felt Juror Z was fairly struck. Finally, federal courts should accord even more deference to a trial court's decision when reviewing it under AEDPA.

Justice Stevens authored the main dissent, joined by Justices Souter, Ginsburg and Breyer. For the dissenters, the best reading of the voir dire was that, while Juror Z had reservations about the

death penalty, he would consider it and impose it where appropriate. With respect to Juror Z's comment about recidivism, this was only *an example* of when he would find death appropriate, not the only circumstance. After being told that Brown could never be released, Juror Z repeatedly affirmed that he could still consider and vote for death. There was no cause to strike under *Witherspoon-Witt*, and the trial court's ability to observe Juror Z's "demeanor" cannot overcome his actual voir dire responses. Otherwise, there will be no way to challenge trial court decisions in this area. Moreover, defense counsel's failure to object was not a procedural bar under Washington law. (Breyer wrote a separate dissent, joined by Souter, to emphasize this point.) And given that the trial judge had just asked whether either party had any problems with Juror Z, the "no objection" comment by defense counsel may have meant that the defense did not object to *keeping* Juror Z on the panel, rather than that he consented to his excusal.

Justice Kennedy clearly was the key to the Court's death-penalty rulings this Term. He sided with the more conservative Justices in ***Belmontes*** and ***Uttecht***, but he went with the more liberal bloc in several cases arising out of Texas state courts. On the last day of the Term, he announced the ruling in ***Panetti v. Quarterman*** **(06-6407)**, where yet another 5-4 majority blocked, for the time being, the execution of a mentally ill Texas man. Panetti was sentenced to death after killing his wife's parents, despite what the Court described as obvious signs of mental illness before and during his trial (at which he represented himself, badly). After losing his Texas appeals, Panetti filed a federal habeas petition arguing that he was incompetent to stand trial or to waive counsel, but not arguing that he was incompetent to be executed. Only later did he raise that issue, arguing first in Texas and then in a second federal habeas petition that he could not be executed under *Ford v. Wainwright*, 477 U.S. 399 (1986), which held that the Eighth Amendment bars executing the presently insane. Both efforts failed; the district court held that the Texas court proceedings were constitutionally inadequate, but still denied habeas relief because, under Fifth Circuit precedent, the test for competence required only that the inmate know "the fact of his impending execution and the factual predicate for the execution."

The Court sent the case back after rejecting the Fifth Circuit test for competency. First, however, it held that it had jurisdiction even though Panetti did not raise the competency issue until his second habeas petition. Ordinarily, courts must dismiss new claims in a "second or successive" habeas petition, but the Court made an exception for *Ford* claims, which now need only be raised when they become ripe. The issue was that *Ford* bars executing the *presently* insane—including inmates competent at trial but who develop mental illness on death row. As a result, a *Ford* claim may not become ripe for years, long after the one-year deadline for most habeas petitions following conviction. The Court was worried that applying the "second or successive" bar would lead inmates to file a slew of unripe and meritless *Ford* petitions to avoid waiving the issue—a waste of resources for states and the courts. Second, the Court held that the Texas procedures ran afoul of clearly established Eighth Amendment law; Panetti had made a substantial showing of incompetency, entitling him to an adequate means of submitting expert evidence in response to the state's, and the state court's failure to give him this process meant that no deference was due to its rulings under AEDPA. (This part of the opinion was quite harsh on the Texas court, which did not transcribe its proceedings despite Panetti's request and which apparently gave notice of some proceedings only to the state.) Finally, the Court reached the Fifth Circuit's test for competency, finding that it was too restrictive. Panetti argued that he should be allowed to show that, while he knew that Texas *said* he was being executed for killing his wife's parents, his mental state precluded him from having a "rational understanding" of that

reason (apparently, he thought the real reason he was being killed was "to stop him from preaching" as part of an ongoing struggle between angels and demons). *Ford* did not establish a precise competency standard, but the Court held that it did not foreclose inquiry into whether a prisoner's delusions precluded his understanding the stated reason for his execution. So the Court sent the case back to the district court to pass on that question in the first instance.

Justice Thomas led the dissenters (the Chief and Justices Scalia and Alito), who disagreed with each of the majority's rulings. First, they thought that Panetti's *Ford* claim clearly ran afoul of the "second or successive" rule, and the majority had "bent over backwards" to let him bring it despite no evidence that his condition had worsened. They rejected Kennedy's "judicial economy" argument—district courts can simply reject unripe *Ford* claims, and petitioners can re-raise them later. Second, the Texas court did not misapply *Ford* because Panetti had the opportunity to submit evidence and respond to the state's experts; as a result, the Court should have deferred to its competency ruling. Third, the dissent would not have reached the Fifth Circuit competency standard in light of the first two points, but it rejected the majority's "half-baked holding that leaves the details of the insanity standard for the District Court to work out." That approach "settled upon a preferred outcome without resort to the law."

Panetti was only one of several cases in which the Court messed with Texas. In ***Abdul-Kabir v. Quarterman*** **(05-11284)** and ***Brewer v. Quarterman*** **(05-11287)**, the Court considered whether jury instructions involving "special issues" under Texas law "prevented jurors from giving meaningful consideration to constitutionally relevant mitigating evidence." If this question sounds familiar, it may be because, as Chief Justice Roberts's dissent notes, the Court "had considered similar challenges to the *same* instructions no fewer than five times in the years before the state habeas courts considered the challenges at issue here."

Abdul-Kabir was convicted of capital murder for strangling a 66-year-old man with a dog leash so that he could steal $20 to buy beer. The sentencing jury was asked to consider two special issues: whether he deliberately meant to cause the death of another, and whether he posed a risk of future dangerousness. Although Abdul-Kabir presented mitigating evidence, including evidence of childhood abuse and abandonment and a brain injury, the jury was not instructed to consider it, and the prosecutor had commented to the jurors during voir dire that they must answer only the special issues and not consider their own views about an appropriate punishment for the defendant. Justice Stevens's majority opinion, joined by Justices Kennedy, Souter, Ginsburg and Breyer, concluded that the jury instructions as presented (compounded by the prosecutor's comments) precluded the jury from considering mitigating evidence, stripped the jury of its ability to exercise a reasoned moral judgment, and were contrary to clearly established federal law and thus reversible error under AEDPA. The Court painstakingly reviewed precedent relating to the circumstances that allow juries to give "full consideration and full effect" to mitigating evidence, and it emphasized that "the mere ability to present [mitigating] evidence is not sufficient" if the evidence is effectively excluded "from meaningful consideration by the jury." Under the majority's view, the rule announced in *Penry v. Lynaugh*, 492 U.S. 302 (1989), that "in the absence of an appropriate instruction directing the jury to consider fully mitigating evidence as it bears on the extent to which a defendant is undeserving of a death sentence, we cannot be sure that it did so," controlled the analysis. Subsequent jurisprudence was consistent with *Penry* (or, at least, any inconsistency had since been disavowed). Rooting its holding in the "basic legal principle" that a jury must be allowed "to give meaningful effect to

any mitigating evidence providing a basis for a sentence of life rather than death," the Court reversed the Fifth Circuit's judgment denying the petitioner habeas relief.

The same five Justices found constitutional error with the same instructions in ***Brewer***, which had the additional wrinkle that the mitigating evidence at issue amounted to the "two-edged sword" mentioned in *Penry*—that is, it "may diminish [the petitioner's] blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future." Brewer was convicted in 1991 of committing murder during the course of a robbery. He presented mitigating evidence of childhood abuse, substance abuse, and a brief hospitalization for depression. The prosecutor informed the jurors that, if they found that Brewer deliberately caused the death of another and posed a continuing danger to society, they essentially had no choice but to sentence Brewer to death. The majority concluded that "there is surely a reasonable likelihood that the jurors accepted the prosecutor's argument" and failed to consider whether, "given Brewer's troubled background, he may not be deserving of a death sentence."

In a dissenting opinion joined by Justices Scalia, Thomas and Alito in part, Chief Justice Roberts strongly disagreed with the majority's conclusions in ***Abdul-Kabir*** and ***Brewer*** that the federal law was "clearly established." He felt that the pertinent precedents were *Graham v. Collins*, 506 U.S. 461 (1993), and *Johnson v. Texas*, 509 U.S. 350 (1993), which adopted a more limited view of *Penry* and found no error in the same jury instructions. "We give ourselves far too much credit in claiming that our sharply divided, ebbing and flowing decisions in this area gave rise to 'clearly established' federal case law." Since prior precedent was ambiguous at best, the law was not "clearly established," and the lower courts' decisions could not be reversed under AEDPA. The dissent also thought Brewer's evidence was quantitatively and qualitatively less compelling than that presented in *Penry*, and, as such, the lower courts reasonably applied *Penry* in declining to grant relief. Scalia's separate dissent (joined by Thomas and Alito in part) registered his continuing belief that "limiting a jury's discretion to consider all mitigating evidence does not violate the Eighth Amendment." Scalia also complained that the Court's jurisprudence in this area has been guided "by the moral perceptions of the Justices *du jour*" rather than the public understanding of the Eighth Amendment at its adoption.

Smith v. Texas **(05-11304)** dealt, yet again, with "special issues" in a Texas capital case. Even Smith himself was not new to the issue. He made a prior trip to the Court, *Smith v. Texas*, 543 U.S. 37 (2004) (per curiam) ("*Smith I*"), during which the Court found error and remanded. The state court again denied relief, and the Court (Justice Kennedy yet again, joined by Justices Stevens, Souter, Ginsburg and Breyer) again granted Smith relief.

The bulk of the majority's opinion was devoted to reciting the case's procedural history. Briefly, at Smith's trial the judge had instructed the sentencing jury to consider the two special issues of deliberateness and future dangerousness. The court, mindful of *Penry*, considered Smith's pretrial objection to the special issues statute and crafted a "nullification charge" to attempt to give the jury the ability to consider and give effect to the mitigating evidence Smith intended to present. The nullification charge consisted of the judge's informing the jurors that, if they believed the answers to the special issues were "yes" but nevertheless believed that death was not an appropriate punishment, the jury could answer one special-issue question "no." The verdict form did not have a separate written portion to account for this nullification charge. The defendant did not object to the language of this charge, and the jury sentenced him to death. In

Smith I, the Court concluded that the nullification charge did not cure the *Penry* error because the nullification instruction "had no practical effect," and remanded the case to the state court for further proceedings. On remand, the state court held that Smith had not preserved his claim of error given that his objection at trial was to the special-issues statute and not to the language of the nullification charge. The court further held that Smith's failure to object to the nullification charge required him to demonstrate "egregious harm" to be entitled to relief (akin to the federal "harmless error" analysis) and Smith had failed to do so.

The Court disagreed, finding that Smith had preserved the claim based on his objections to the special issues and that he did not abandon that claim during his post-trial proceedings. Accordingly, the majority ruled that the state court erred in finding a procedural bar and requiring Smith to show "egregious harm." Justice Souter concurred to note that, while this case did not address whether harmless error is ever the appropriate analysis, he believes that it is a question the Court must confront in the future (apparently we can look forward to one more Texas "special issues" case). Justice Alito dissented; he and the Chief and Justices Scalia and Thomas would have upheld the state court's determination of a procedural bar because Smith "never objected to the text of the instructions and declined the trial judge's invitation to suggest modifications" to the nullification charge. The dissent did not believe that Smith's pretrial objection to the special issues statute was enough. Smith's failure to object, and failure to show egregious harm, was an adequate and independent state-law ground for the state court's decision.

Later, in ***Schriro v. Landrigan*** **(05-1575)**, a 5-4 Court reversed a Ninth Circuit habeas ruling. Landrigan, while serving time for multiple violent crimes, escaped and killed another man. At his sentencing hearing for that murder, his counsel was prepared to offer mitigation testimony from Landrigan's mother and ex-wife regarding his rough upbringing and substance abuse problems, but Landrigan stopped him, telling the judge that he did not want them to testify and that, "as far as I'm concerned," there was no mitigating evidence to offer: "[I]f you want to give me the death penalty, just bring it right on." The judge obliged, but Landrigan later discovered that he suffered from an organic brain disorder. He sought to challenge his death sentence by claiming that his counsel was ineffective in that he did not obtain a psychological evaluation or fully develop evidence regarding Landrigan's horrific background. After the Arizona courts rejected his claims, Landrigan filed a habeas application in federal court asking for an evidentiary hearing, which the court rejected on the ground that Landrigan could not show prejudice given his instructions to counsel not to offer mitigating evidence. The Ninth Circuit first unanimously affirmed, but then reversed *en banc*, holding that Landrigan's counsel had not performed a reasonable investigation before trial and that Landrigan's comments at sentencing were limited to the testimony of the two witnesses at issue, not all mitigating evidence generally. The Court reversed, led by Justice Thomas, who was joined by the Chief and Justices Scalia, Kennedy and Alito. Whether to grant an evidentiary hearing is a discretionary matter for a federal court, which must defer to the state court's findings so long as they are reasonable. Landrigan instructed his counsel not to offer mitigating evidence, the Arizona courts were entirely reasonable in construing that to apply to any and all mitigating evidence, and the district court was within its discretion in concluding that, regardless of what his counsel might have uncovered with a more thorough investigation, Landrigan would not have let him offer it.

Justice Stevens led the dissenters (Justices Souter, Ginsburg, and Breyer). For Stevens, the Court's holding amounted to a finding that Landrigan likely would have waived his right to offer

new mitigating evidence had he known about it. But waivers must be knowing and voluntary, and Landrigan could not have waived the right to offer a full psychological assessment that had not yet been performed. While his mitigating evidence might not have been enough to avoid a death sentence, at the very least the district court should have given him an evidentiary hearing. Such hearings are not burdensome, so "doing justice does not always cause the heavens to fall."

Finally, the Court dismissed cert as improvidently granted in ***Roper v. Weaver* (06-313)**, which concerned the Eighth Circuit's decision to set aside Weaver's death sentence because of the prosecutor's inflammatory statements during closing argument. The Court had granted cert out of concern that the Eighth Circuit did not review Weaver's habeas petition under the strict standard of review required by AEDPA, but it let the Eighth Circuit ruling stand after learning the rather sad history of Weaver's case. After being convicted in state court and losing his appeals, Weaver sought cert in the U.S. Supreme Court. He also filed a habeas petition in the federal district court *before* AEDPA went into effect, but that court dismissed the petition without prejudice as premature in light of Weaver's cert petition. That ruling was wrong, however, given the Court's decision this Term in ***Lawrence v. Florida*** (see below in the HABEAS CORPUS section), which held that a prisoner need not seek certiorari to exhaust state court remedies prior to filing a habeas petition. And because of the district court's error, after the Court denied cert Weaver had to file a new habeas petition *after* AEDPA's effective date that was subject to AEDPA's more stringent standard of review. The Court could not stomach this result—particularly since Weaver's codefendant had obtained pre-AEDPA habeas relief due to the same prosecutorial misconduct—so they let the Eighth Circuit's decision stand. The Chief penned an oblique one-sentence concurrence in the result indicating that he did not agree with all the reasons in the *per curiam* decision, but he did agree with the result.

Justice Scalia dissented, joined by Justices Thomas and Alito. They agreed that Weaver was disserved by the district court's dismissal of his first habeas petition, but they would not absolve him from complying with AEDPA. Weaver could have sought further review of the dismissal of his first petition, but he "simply gave up too early." More fundamentally, there is no relief available for "the collateral consequences of uncorrected judicial error." This is simply part of the system that we live with. Given that AEDPA does apply to Weaver's *current* petition, it makes no sense to dismiss a fully briefed and argued case, particularly when doing so allows an erroneous Eighth Circuit decision to stand. The dissent warned that other courts "would be well advised to do unto the Eighth Circuit's decision just what it did unto AEDPA: ignore it."

FALSE ARREST

In ***Wallace v. Kato* (05-1240)**, the Court ruled that a claim under 42 U.S.C. § 1983 for false arrest accrues with the end of the arrest, not with the end of the ensuing criminal proceedings, and threw out a suit where the petitioner waited nine years after his wrongful arrest to sue. Wallace was arrested for murder (without a warrant) in Illinois in 1994, and coerced into confessing. The state appellate court overturned his conviction on Fourth Amendment grounds, and the prosecutor ultimately dropped the charges in 2002. In 2003, Wallace sued the police for false arrest, but the Court held 7-2 that this was untimely. Justice Scalia's majority opinion began by noting one of the intricacies of § 1983: While federal courts use the general tort limitations period of the relevant state (two years in Illinois), the accrual date—when that clock

starts to run—is an issue of federal law. The majority then analogized Wallace's suit to the traditional tort of false imprisonment, defined (critically, it turns out) as "detention without legal process." On the assumption that one falsely imprisoned may be unable to sue while still in detention, that tort does not accrue until the false imprisonment is over—that is, until the prisoner gets process (e.g., an arraignment). At that point, the false arrest is complete and the clock starts to run on a lawsuit. (The Court conceded that the arrestee might still suffer harm after arraignment, but noted that this would fall under malicious prosecution, an entirely separate tort claim—against not the police but the prosecutor—that accrues only when the plaintiff wins his criminal case.) While parallel criminal and civil proceedings might be unwieldy, the district court can always stay the § 1983 case until the criminal case is over.

Justice Stevens, joined by Justice Souter, concurred in the judgment only. He began by rejecting (as did the majority) Wallace's argument that the Court's decision in *Heck v. Humphrey*, 512 U.S. 477 (1994), favored his position. There, the Court held that a § 1983 suit that, if proved, actually would invalidate an outstanding criminal conviction did have to wait until the end of any criminal appeals or habeas challenges, because those vehicles, and not civil rights suits, were the proper means to challenge improper convictions. *Heck* did not apply to Wallace because, for multiple reasons, he had no habeas claim in the first place, and there simply was no reason to hold that his false arrest claim did not accrue once his arrest had ended. (The differences between Stevens's and Scalia's positions are subtle and spelled out at length in the footnotes.)

Justice Breyer dissented, along with Justice Ginsburg. Breyer was uncomfortable with a rule of immediate filing plus an uncertain system of possible stays; instead, he would allow "equitable tolling" of the limitations period where a plaintiff reasonably claims he was disabled from filing immediately or would face troublesome concurrent litigation. The majority thought this was "ironic," as equitable tolling would be more unwieldy in practice than a file-and-stay system.

FOURTH AMENDMENT

The Court heard three Fourth Amendment cases this Term. The most significant was probably ***Brendlin v. California* (06-8120)**, where the Court unanimously held that when police make a traffic stop, all passengers in the car as well as the driver have been "seized" within the meaning of the Fourth Amendment—meaning that the passengers, like the driver, can challenge the constitutionality of the stop. Brendlin, a passenger in a car stopped despite no suspicion of illegal activity, was arrested for drug possession after officers recognized him as a possible parole violator and searched him. He moved to suppress, but the California Supreme Court held that he had not been "seized" under the Fourth Amendment because the target of the traffic stop was not Brendlin but the driver of the car. Led by Justice Souter, the Court vacated and remanded. The issue was familiar: Would a reasonable person in Brendlin's position have felt free to terminate his encounter with police? The answer was no. Even where the cause of the stop is bad driving, passengers reasonably would expect that officers would not let them just leave the scene; rather, they would expect to be subject to some scrutiny, even if only for the sake of the officer's safety. The California ruling wrongly converted the test into a subjective one concerning officer's motives rather than an objective test based on passengers' reasonable expectations. Further, the California rule would give police a perverse incentive to stop cars

with passengers without probable cause or reasonable suspicion (since the evidence would always be admissible against the passengers), thereby violating drivers' rights.

In ***Scott v. Harris*** **(05-1631)**, the Court considered whether police tactics during a high-speed chase constituted excessive force and an unreasonable seizure under the Fourth Amendment. The Court ushered in a new day by deciding the case based on video evidence, which it posted on its website alongside the opinion. Harris was speeding on a rural Georgia road, and a high-speed chase ensued when he did not stop for police. Scott, one of the pursuers, bumped Harris from behind in an effort to get him off the road, causing a crash that left Harris a quadriplegic. Most of the chase was captured on video from a cruiser-mounted camera. The Eleventh Circuit agreed with the district court that Scott was not entitled to qualified immunity because there was a factual issue as to whether his bumping maneuver constituted excessive force.

The Court reversed. Writing for an eight-Justice majority, Justice Scalia concluded that because the undisputed facts showed that the speeding car posed a substantial risk of injury to others, Scott's attempt to ease the car off the road was justified and he was entitled to summary judgment. Remarkably, the Court rejected the Eleventh Circuit's reliance on the usual standard for summary judgment, which requires taking facts in the light most favorable to the nonmoving party (and, in this case, crediting Harris's assertion that he was in control of his vehicle and that there was little danger to others). Instead, the Court rested its analysis on its own viewing of the video tape, concluding that Harris was driving "shockingly fast," dangerously running red lights and forcing other cars onto the shoulder. Scalia concluded that a reasonable jury could only find that Harris "was driving in such a fashion as to endanger human life," and that in this context—mandated by the videotaped evidence—Scott's actions were reasonable.

Justice Stevens dissented, disagreeing with the majority's reliance on the videotape and its disregard of the typical summary judgment standard. He also believed that the tape showed that Harris's driving was comparable to a speeding ambulance or fire engine. (Scalia retorted that society has accepted a certain amount of risk from rescuers but not from fleeing criminals.) Stevens also jibed at his younger colleagues: "Had they learned to drive when most high-speed driving took place on two-lane roads rather than on superhighways . . . they might well have reacted to the videotape more dispassionately."

Finally, ***Los Angeles County v. Rettele*** **(06-605)** has some practical advice for us all: Wear pajamas to bed. Rettele, his girlfriend Sadler, and her son Hall were home sleeping when L.A. County deputies executed a warrant to search their home. The deputies were investigating four African American suspects involved in an identity-theft crime ring and had a valid warrant to search the home where some of the suspects had resided. (The operative word here: had. Unbeknownst to the deputies, the suspects had since moved and Rettele, Sanders and Hall—all Caucasian—were new residents.) When the deputies knocked and announced, Hall answered. Deputies then entered the home, found Rettele and Saunders naked in bed, and held them at gunpoint for a few minutes while they searched the home before allowing them to dress. Rettele and the others sued under 42 U.S.C. § 1983, asserting violations of their Fourth Amendment right to be free from unreasonable searches and seizures. The district court granted summary judgment for the deputies, but the Ninth Circuit reversed, finding that the deputies violated the Fourth Amendment and were not entitled to qualified immunity because a reasonable deputy would have stopped the search upon discovering that Rettele and the others were Caucasian.

In a *per curiam* decision, the Court reversed. Six of the Justices found that the deputies' conduct was not a violation of the Fourth Amendment because officers acting pursuant to a valid search warrant can take reasonable actions to secure the premises and ensure their own safety. The deputies detained Rettele and Sadler no longer than necessary and permitted them to dress within a few minutes. The fact that they were not the same race as the suspects did not require the deputies to halt their search immediately because people of different races frequently live together and may engage in crime together. Justices Stevens and Ginsburg concurred in the judgment only. Rather than reach the constitutional question of the legality of the search, they would have held that the deputies had qualified immunity since the law regarding this type of detention was not clearly established. Justice Souter would not have granted cert, but he wrote no separate opinion.

HABEAS CORPUS

As always, procedural matters in habeas cases took up a significant portion of the Court's docket this Term. First up, ***Bowles v. Russell* (06-5306)** announced a procedural rule with big implications. Backing away from language in a number of recent decisions calling time limits mandatory but not jurisdictional (i.e., they can be waived or excused for good cause), the Court ruled that statutory time limits for filing an appeal truly are jurisdictional in nature. After challenging his conviction on direct appeal, Bowles filed a habeas petition with the district court, which was denied. Bowles failed to appeal the denial within thirty days, but later moved to reopen the time period for filing an appeal pursuant to 28 U.S.C. § 2107(c) and FRAP 4(a)(6), which permit the district court to reopen the filing period for an additional fourteen days. The district court granted the motion, but "inexplicably" gave Bowles seventeen days instead of fourteen. Bowles filed his notice of appeal on the sixteenth day. Despite the fact that Bowles relied on the district court's order, the Sixth Circuit found his notice of appeal untimely and dismissed. The Court, splitting 5-4 along partisan lines, affirmed. Justice Thomas's majority opinion emphasized that because the fourteen-day time limit was created by statute (as opposed to judicial rule), it is a substantive limit on courts' authority. Since Congress can limit the categories of cases federal courts can hear, it likewise can "forbid[] federal courts from adjudicating an otherwise legitimate 'class of cases' after a certain period has elapsed from final judgment." Because the time limit here is jurisdictional, there is no place for a "unique circumstances" exception, as was recognized in *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962) (per curiam) and *Thompson v. INS*, 375 U.S. 384 (1964) (per curiam). So Bowles's appeal was correctly dismissed, and *Harris Truck Lines* and *Thompson* are overruled to the extent they purport to allow an exception to a jurisdictional time limit.

A visibly worked-up dissent (Justice Souter, joined by Justices Ginsburg, Stevens and Breyer) responded: "It is intolerable for the judicial system to treat people this way." For the last four years, the Court has made a concerted effort to clear up confusion about the use of the term "jurisdictional" (which has "many, too many, meanings") and has explained that time limits generally are not jurisdictional, but should be treated as mandatory claims-processing rules; generally enforceable, but waivable and excusable if circumstances warrant it. Souter chastised the majority for "not even admit[ting] that we deliberately changed courses, let along explain[ing] why it is now changing courses again," with severe consequences for individual litigants. Even when the Court did "thoughtlessly call time limits jurisdictional, [it] did not

actually treat them as beyond exemption to the point of shrugging at the inequality of penalizing a party for relying on what a federal judge has said to him." The dissent would adhere to the view that time limits contained in statutes are not jurisdictional unless Congress explicitly says so, and would have allowed Bowles's appeal to proceed.

In ***Fry v. Pliler* (06-5247)**, the Court unanimously held that a federal habeas court must review constitutional errors in state-court criminal trials under the deferential "substantial and injurious effect" standard, even when the state appellate courts have failed to review them under the more stringent "harmless beyond a reasonable doubt" standard. Fry was convicted in a California court of double homicide, but he argued that the exclusion of witness testimony implicating another man amounted to a due-process violation under *Chambers v. Mississippi*, 410 U.S. 284 (1973). The state appellate court upheld the conviction, reasoning that the testimony was cumulative and that Fry suffered "no possible prejudice," but it did not address the *Chambers* due-process argument or specify that it found the errors to be harmless beyond a reasonable doubt. On habeas review, the district court held that the state court was wrong to find no error or possible prejudice, but it still denied relief because Fry had not shown that the error had a "substantial and injurious effect" on his trial, the standard the Court announced in *Brecht v. Abramson*, 507 U.S. 619 (1993), for federal habeas review of state-court criminal judgments. The Ninth Circuit affirmed . . .

. . . as did the Court (led by Justice Scalia). When reviewing a state-court conviction *directly*, a federal court must determine whether an error was harmless beyond a reasonable doubt, but it must apply *Brecht*'s more lenient "substantial and injurious effect" standard on *collateral* habeas review. This deference is necessary to respect state sovereignty and the finality of criminal judgments, as habeas relief should be limited to those who have been "grievously wronged." These considerations apply regardless of whether the state appellate courts have first scrubbed a criminal trial under the stronger reasonable-doubt standard, so the *Brecht* rule applies to Fry (i.e., the Court actually *agreed* with the Ninth Circuit this time). The Court, however, declined to review whether the errors at Fry's trial were substantial and injurious, because the issue before the Court was only which standard to apply, not its ultimate application, which would require delving into all sorts of "tangential and fact-bound" questions the Court would rather leave to the lower federal courts. (Yet another practitioners' lesson: frame your questions carefully, as the Roberts Court will take them literally—for another example, see ***Norfolk Southern Railway Co. v. Sorrell* (05-746)**, discussed in the EMPLOYMENT section.)

Justice Stevens dissented from this part of the ruling, along with Justices Souter, Ginsburg and Breyer (in part). In their view, the *Brecht* standard applies but still imposes a substantial burden on state courts. *Chambers*-style constitutional errors are by nature prejudicial as they deal with evidence exclusion that undermines fundamental elements of the defense, and it would be impossible to conclude that a *Chambers* error had no effect on a trial. *Brecht*, therefore, requires "fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error." Using that standard, the dissenters thought Fry's conviction might been affected by the error, and would have reversed the Ninth Circuit. Breyer, writing on his own, agreed with all of the above, but he would have remanded for the Ninth Circuit to decide whether there was *Chambers* error in the first place.

In ***Carey v. Musladin*** **(05-785)**, the Court addressed the standard for granting a habeas petition under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which requires that a state court decision be "contrary to" or involve an "unreasonable applicable of" federal law as determined by the Supreme Court before habeas relief may be granted. Musladin claimed that his trial was tainted because members of the victim's family appeared in court wearing large buttons bearing the victim's photograph. The trial court denied his request to require the spectators to remove the buttons, and the California appellate courts rejected his claim that the buttons deprived him of a fair trial. The Ninth Circuit granted Musladin's habeas petition, finding that the state courts' decisions involved an unreasonable application of federal law as established by *Holbrook v. Flynn*, 475 U.S. 560 (1986) and *Estelle v. Williams*, 425 U.S. 501 (1976), which held that trial practices that "create an unacceptable risk of inappropriate factors coming into play" violate a defendant's right to a fair trial. Both of those cases involved actions by the state, not spectators. (In *Williams*, the defendant was required to stand trial in prison clothes, while in *Flynn* multiple state troopers were seated directly behind defendant during the trial.) In reversing the Ninth Circuit, Justice Thomas, writing for the majority, found that federal law was not clearly established regarding how courts should review actions by spectators. Therefore, the California courts' decisions could not involve an unreasonable application of federal law, and habeas relief was inappropriate. Thomas also stated (ironically in dictum not necessary to the Court's decision) that only the Supreme Court's holdings—not dicta—can create federal law for AEDPA purposes. Thus, through its holding (which seems to require that a state court be faced with a nearly identical situation to one already decided by the Supreme Court before habeas relief will be available) and through its statement about dicta, this decision is likely to reduce significantly the cases in which habeas relief can be granted.

This conclusion sparked three separate concurrences in the judgment by Justices Stevens, Kennedy and Souter. Stevens wrote separately because he believed that the Court's explanatory reasoning (which might be perceived as dicta), as well as its holdings create the federal law that states must apply. He and Souter, however, could not say that the risk posed by the buttons necessarily rose to an "unacceptable" level. Kennedy also wrote separately to emphasize that "AEDPA does not require state and federal courts to wait for a nearly identical factual pattern until a legal rule must be applied." If the Supreme Court chooses to create a rule using general terms, state courts must apply that rule reasonably or habeas relief should be available.

Lawrence v. Florida **(05-8820)** brought yet another decision interpreting the one-year limitations period for filing a federal habeas petition. Under AEDPA, the limitations period begins running when the prisoner's conviction becomes final, but it is tolled while any "application for State post-conviction or other collateral review" is pending. The question: whether a petition for cert to the U.S. Supreme Court for review of the state court decision tolls the limitations period. The short answer: no. The five-Justice majority, led by Justice Thomas, emphasized the *state* in "State post-conviction or other collateral review," explaining that *those* proceedings are no longer pending once the state's highest court has acted. A petition for cert is a separate *federal* proceeding that does not toll the limitations period. This determination is congruent with the Court's prior holding that a prisoner need not file a cert petition in order to exhaust his state remedies before filing a federal habeas petition. Finally, a decision allowing tolling during the pendency of a cert petition would encourage the filing of non-meritorious petitions merely to extend the time for filing a federal habeas petition. (The Court's decision may very well have been influenced by a desire to avoid reviewing those petitions.)

Justice Ginsburg penned the dissent (joined by Justices Stevens, Souter and Breyer). The dissenters emphasized that direct review always has been interpreted to encompass a cert petition. Thus, it makes little sense to consider such a petition a "separate" federal action—it is merely the continuation of the underlying state application for post-conviction relief. Further, where Congress has sought to exclude from the tolling period the time when a cert petition is pending, it has done so expressly—as it did in the death penalty context. Moreover, the majority's result will encourage duplicative litigation in that any prisoner wishing to seek cert also will have to file a federal habeas petition to preserve his right to do so. Also, in the situation in which the prisoner has *prevailed* in state court and it is the state that petitions for cert, the prisoner still would have to file a prophylactic federal habeas petition in order to preserve his ability to do so, even though it is not clear a court would have jurisdiction over such a petition. Lastly, the majority's notion that prisoners will be spurred to file frivolous cert petitions to toll the limitations period is nonsensical—prisoners are presumably driven to get relief at the earliest possible time, not to extend their time in jail by making fruitless filings.

Finally, the Court issued two rulings dealing with the ban on "second or successive" habeas petitions absent court permission. In ***Burton v. Stewart* (05-9222)**, discussed in the SENTENCING section, the Court declined to consider whether its ruling in *Blakely v. Washington*, 542 U.S. 296 (2004) applied retroactively because the petitioner raised it in a second petition filed without court permission. But in ***Panetti v. Quarterman* (06-6407)**, discussed in the DEATH PENALTY section, the Court held that challenges to a death sentence based on present mental illness need only be raised when ripe, even in a second or successive habeas petition, because these claims often do not become ripe until after the one-year deadline for most habeas petitions.

IMMIGRATION/DEPORTATION

The Court weighed in on an important immigration issue in ***Lopez v. Gonzalez* (05-547)**, holding that conduct that is punishable as a felony under state law, but only as a misdemeanor under the Controlled Substances Act (CSA), is not a felony under the CSA for Immigration and Nationality Act (INA) purposes. Lopez, a legal permanent resident, pled guilty to aiding and abetting another person's possession of cocaine, a felony under South Dakota law but not federal law. After Lopez completed his sentence, the INS began removal proceedings on the ground that his state conviction was both a controlled substance violation and an aggravated felony. Lopez conceded the controlled substance violation but argued that it was not an aggravated felony. The nature of the violation was critical to Lopez because, if found to have committed an aggravated felony, Lopez would not be eligible for discretionary cancellation of removal. The immigration judge found that Lopez's conviction constituted an aggravated felony, and the Board of Immigration Appeals and Eighth Circuit affirmed.

The Court reversed in an opinion by Justice Souter (joined by all except Justice Thomas). Under the INA, "illicit trafficking in a controlled substance," which includes "a drug trafficking crime", constitutes an aggravated felony. "Drug trafficking crime" is defined as "any felony punishable under the [CSA]." Possession of drugs is treated as a misdemeanor under the CSA, but the Government argued that since Lopez's conduct was a felony (under South Dakota law) and was punishable under the CSA (albeit as a misdemeanor), Lopez committed a "felony punishable under the CSA" and therefore a "drug trafficking crime" that constitutes an aggravated felony

under the INA. Rejecting this interpretation, the Court again emphasized the plain meaning of the statute. The INA refers to illicit "trafficking" and this term must be kept in mind when following the chain of definitions. Lopez's aiding and abetting another person's possession of cocaine hardly constituted "trafficking," which ordinarily involves the commercial sale of drugs. Further, the most reasonable interpretation of "felony punishable under the CSA," is a crime that is punishable as a felony under the CSA—not a crime that is punishable under the CSA (but not as a felony) and that is a felony under state law (but a misdemeanor under the CSA). Finally, the Court found it unlikely that Congress would leave it to states to determine how a crime should be viewed for immigration purposes, particularly where Congress specifically decided to treat possession offenses as misdemeanors while treating trafficking as a felony.

United States v. Resendiz-Ponce **(05-998)** concerned a Mexican national's conviction for illegally attempting to reenter the United States. The Ninth Circuit set aside the conviction on the ground that his indictment failed to allege a critical element of the offense—an overt act committed in the effort to reenter the country. The Government successfully sought cert on the issue of harmless error (there was no dispute that the defendant did try to reenter), but in the end the Court did not reach that question. Instead, led by Justice Stevens, it held 8-1 that the indictment was not defective because it alleged that the defendant "attempted" to reenter the United States at a specific date and time. The word "attempt" long has connoted both an intention and an overt action, and further specificity was not necessary; also, the reference to time gave the defendant fair notice of the alleged offense and protected him against multiple prosecutions for the same crime. Justice Scalia dissented on the ground that the Court has always required an indictment to allege all elements expressly. Even if "attempt" did imply both intention and action (which Scalia disputed), those implications would not be enough. Instead, the Government must allege that the defendant took "a substantial step" toward reentering the United States, although Scalia would not require the Government to be more specific than that. (Stevens thought Scalia's position, while "principled," would not mean much in real life, as "took a substantial step toward reentering" doesn't say much more than "attempted to reenter").

And in ***Gonzales v. Duenas-Alvarez*** **(05-1629)**, a unanimous Court held that the federal statute that provides for deporting an alien convicted of a "theft offense" also applies to aliens convicted of aiding and abetting theft. Applying a longstanding rule of construction from *Taylor v. United States*, 495 U.S. 575 (1990), the Court held that Congress intended terms like "theft offense" to refer to crimes in the "generic" sense used in most states. In this case, the Ninth Circuit had held that a California motor vehicle theft statute went beyond the generic sense (and therefore could not support deportation) because it also encompassed aiding and abetting. Justice Breyer wrote for the Court and quickly rejected that reasoning. Most states long ago collapsed any distinction between those who commit crimes, those who aid them at the scene, and accessories before the fact—so the California law was hardly unique and fell within *Taylor*'s "generic" rule. Duenas-Alvarez notably did not even try to defend the Ninth Circuit's ruling, but instead offered his own arguments for why the California law was not generic. The Court rejected those reasons too. (Justice Stevens did not join this part of the opinion. He was "not prepared to disagree with anything said in [it]," but he would leave those arguments for the lower courts to address first.)

JURY SELECTION

For a discussion of ***Uttecht v. Brown*** **(06-413)**, concerning jury selection in death-penalty cases, see the DEATH PENALTY section.

PRISON LITIGATION

In ***Jones v. Bock*** **(05-7058)**, a unanimous Court struck down the Sixth Circuit's procedural rules governing litigation under the Prison Litigation Reform Act (PLRA). The PLRA requires inmates challenging prison conditions or bringing civil rights claims to exhaust prison grievance procedures before filing suit. To weed out many of these suits (which clog the federal system), the Sixth Circuit "implemented" this exhaustion rule by (1) requiring a prisoner plaintiff to allege and demonstrate exhaustion within his complaint; (2) permitting suit only against defendants identified in the plaintiff's grievance; and (3) requiring dismissal of the whole case if the plaintiff did not satisfy the exhaustion requirement as to any one of his claims, even if he did so for all the rest. Three Michigan inmates succeeded in convincing the entire Court, led by the Chief, that the Sixth Circuit rules were out of bounds. The opinion is very thorough, but the main points are as follows: (1) the PLRA is silent on pleading requirements, so the standard federal practice applies that the plaintiff need not plead exhaustion, but failure to exhaust remains an affirmative defense for the defendants; (2) exhaustion is not *per se* inadequate because a defendant was not named in the earlier grievance—the issue is whether the inmates complied with the relevant state grievance procedures (Michigan's did not require them to name anyone specifically), not Sixth Circuit rules; and (3) if a complaint contains exhausted and unexhausted claims, a court cannot dismiss them all but must "proceed[] with the good and leave[] the bad."

Erickson v. Pardus **(06-7317)** generated a brief *per curiam* opinion. Acting *pro se*, Erickson claimed that prison officials violated his Eighth and Fourteenth Amendment protections against cruel and unusual punishment by denying him treatment for hepatitis C, with life-threatening consequences including possible liver damage. The district court dismissed Erickson's case, and the Tenth Circuit affirmed on the ground that Erickson's allegations were "too conclusory" to support a claim. Because this holding "depart[ed] in so stark a manner from the pleading standard mandated by the Federal Rules of Civil Procedure," the Court felt compelled to reverse. The Rules require only a "short and plain statement," and "specific facts are not necessary"; allegations are sufficient if they give fair notice of the claims asserted. This is undoubtedly reassuring to those who worried that ***Bell Atlantic v. Twombly*** **(05-1126)** (see the ANTITRUST section) would affect the pleading standard for all cases. Further, since Erickson was acting *pro se*, his complaint should have been "liberally construed" and "held to less stringent standards than formal pleadings drafted by lawyers." Justice Thomas dissented, arguing that the Eighth Amendment only addresses injuries caused by the criminal sentence itself, and that, in any event, the mere *risk* of injury is insufficient to state a claim. Justice Scalia would not have granted cert.

SENTENCING

Sentencing cases continued to figure prominently at the Court. The cases require a bit of background. The Court held in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), that the Sixth

Amendment right to a jury trial requires that a defendant cannot get more than the statutory maximum sentence for his offense unless the jury finds all the facts justifying the increase beyond a reasonable doubt. The Court followed up with *Blakely v. Washington*, 542 U.S. 296 (2004), where it invalidated that state's sentencing guidelines because they authorized upward departures from standard sentences based on post-trial judicial factfinding rather than on the jury's verdict. And in *United States v. Booker*, 543 U.S. 220 (2005), two different five-Justice majorities (bridged only by Justice Ginsburg, who oddly declined to write anything at the time) held that, on the one hand, the same rule applied to the federal sentencing guidelines but, on the other hand, the guidelines could remain in place so long as they were merely "advisory" for judges (principally because five Justices were unwilling to graft a jury-trial requirement onto the whole of the guidelines). In other words, if a statutory sentencing scheme imposes "mandatory" sentences based on the facts of a case, then only a jury finding can justify a harsher sentence; if the sentencing scheme is "discretionary," however, with a judge choosing from within a range of sentencing options dictated by the verdict, judicial factfinding is acceptable.

Cunningham v. California **(05-6551)** turned the Court's attention to California, where a rather unsympathetic defendant was convicted of continuous sexual abuse of a child. Under California's sentencing system, the judge had to sentence him to a standard term of twelve years unless the judge found certain "circumstances in aggravation," which could yield an "upper" term of sixteen years (there also was a "lower" term option, not relevant here, of six years). Cunningham got the upper term, and he argued that the whole scheme ran afoul of *Apprendi* and its progeny. The Court agreed. Justice Ginsburg (silent in *Booker*) wrote for the majority, which included the Chief and Justices Stevens, Scalia, Souter and Thomas. Given the background, the result in ***Cunningham*** was hardly surprising: By giving sentence-elevating factfinding to the judge, the California guidelines violate the right to a jury trial. The California courts had tried to avoid *Apprendi* by reasoning that the judge had not sentenced Cunningham beyond the statutory maximum—the statute did provide for sixteen years, only subject to a judge's "traditional discretion" in choosing a sentence within a given range. The Court did not agree: "If the jury's verdict alone does not authorize the sentence, if, instead, the judge must find an additional fact [beyond the verdict] to impose the longer term, the Sixth Amendment requirement is not satisfied." The judge here had no discretion—he could impose twelve years, nothing more, unless he found aggravating circumstances allowing the upper term. Therefore, California must discard its current system, though California can decide what it will do in future cases—namely, have juries find all sentencing facts or give judges truly discretionary sentencing power.

Justice Alito wrote the principal dissent, which Justices Kennedy and Breyer joined. *Apprendi* and its successors make clear that fully discretionary sentencing decisions, subject to reasonableness review, can be based on judicial factfinding. California's system gives judges broad discretion, in that they can look to "practically everything which has a legitimate bearing on the case" to decide whether to depart from the middle term for a crime (and many of these factors, Alito argued, are not necessarily "facts" in the context of jury trials and the Sixth Amendment). Given those similarities to the new federal system, Alito (a former prosecutor) would have let the California system stand. Kennedy wrote his own dissent (which Breyer joined) to say that the Court has deviated from the rule since *Apprendi*. He suggested limiting that case's holding to enhancements based on the nature of the offense (heinousness, etc., which easily could go to the jury), but not to enhancements based on the nature of the offender (i.e., prior convictions, remorse or lack thereof).

In ***Rita v. United States*** **(06-5754)**, the Court returned to the federal sentencing guidelines and held that federal appellate courts, when reviewing sentences for reasonableness, may presume that a within-guidelines sentence is reasonable. Rita was convicted of perjury, and the court sentenced him to a term at the low end of the relevant guidelines range; on appeal, the Fourth Circuit held that a properly calculated guidelines sentence was "presumptively reasonable" and upheld the sentence. Led by Justice Breyer (himself instrumental in writing the guidelines some years ago), the Court affirmed. First, the presumption was not binding, imposed no burden on either prosecution or defendant, and simply reflected that the sentencing judge and the Sentencing Commission had reached the same conclusion as to the proper sentence. (The opinion discussed at length the nature of Congress's delegation of sentencing functions at two levels—to the Sentencing Commission at the "wholesale" or regulation level, and to the judge at the "retail" level—and noted that when the two agree, the sentence is probably reasonable). Also, the presumption only applies on appellate review and does not itself guide the trial judge. The assumption also does not run afoul of the Sixth Amendment, even though sentencing judges will sometimes issue sentences based on facts not found by juries—the presumption simply has nothing to do with the sentencing judge's decision. In Rita's case, while the judge could have said more about his reasons for issuing Rita's sentence, the arguments before him were straightforward, he clearly listened to both sides, and his statement of reasons was sufficient.

Justice Stevens, joined in large part by Justice Ginsburg, concurred. For him, the key was that an appellate court still must review the sentencing judge's individualized determination for abuse of discretion only—it may presume that a within-guidelines sentence is reasonable, but it still must defer to the sentencing judge *even if* the sentence is outside the range. Further, any presumption must indeed be rebuttable—the guidelines truly are advisory, not mandatory, after *Booker*.

Justice Scalia concurred in part and in the judgment, joined by Justice Thomas. He worried that the majority had reintroduced the Sixth Amendment problem *Booker* purported to resolve, in that some sentences would survive on appeal because the sentencing judge, contrary to *Booker*, had found facts beyond those authorized by the jury's verdict. As a result, he would rather see a system in which appellate courts only reviewed sentences for procedural propriety and did not look to the substance of a sentence (i.e., was it unreasonably high or low). Scalia's opinion is quite lengthy—we cannot do it justice here, so if you are interested in post-*Booker* jurisprudence you would be well advised to check it out in its entirety.

Finally, Justice Souter dissented. In his view, the presumption of reasonableness for within-guidelines sentences would undo *Booker* in that the guidelines essentially would go back to being mandatory—why would a sentencing judge go through all the factfinding necessary to justify a sentence outside the guidelines, when he could avoid reversal simply by sticking within the range? For Souter, the only solution is for Congress to reenact the mandatory guidelines with a provision for jury factfinding for any facts necessary for sentencing.

Burton v. Stewart **(05-9222)** was a unanimous *per curiam* ruling in which the Court declined to decide whether its ruling in *Blakeley* was a new rule of law and whether it applied retroactively on habeas review. Burton had challenged his sentence on *Blakely* grounds, but the Ninth Circuit held that *Blakely*, while new, did not apply retroactively. The Court granted cert, but on further review realized that Burton's habeas petition was his second challenge to his confinement. Under federal law, an inmate must get permission from the Court of Appeals to file a second or

"successive" petition, but Burton had not even bothered to ask. Therefore, the federal courts did not have the jurisdiction to hear his claim.

In ***Claiborne v. United States*** **(06-5618)**, the Court was to consider the Eighth Circuit's conclusion that a sentence below the range established by the federal sentencing guidelines is presumptively unreasonable absent extraordinary circumstances. But before the Court could rule, Claiborne died in prison, and the Court issued a *per curiam* opinion vacating the Eighth Circuit's decision as moot. Because of the importance of the issue, Claiborne's counsel had urged the Court either to decide the case notwithstanding his client's death or to grant expedited review in *Beal v. United States* (06-8498), which raised the same issue. Instead, the Court granted cert in *Gall v. United States* (06-7949), yet another case raising the same issue, which it will hear next Term after full briefing and argument.

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