

United States Supreme Court Update:
Highlights of Recent and Upcoming Decisions

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Acknowledgments

First things first: in addition to reading the actual cases, I could not have written this paper without reference to SCOTUSBlog, WikiSCOTUS, and the information online through the U.S. Supreme Court's website. These online resources are invaluable to anyone who follows the Court or who is just interested in catching up on the Court's activities from time to time. Also, I was privileged to attend the Supreme Court presentations given by Dean Erwin Chemerinsky, Dean Ken Starr, Professor Pamela Karlan, and Professor Joe Kobylka at this year's ABA Appellate Judges Education Institute. Their insights broadened my own thoughts about recent and upcoming opinions, and were entertaining, to boot. Next year's AJEI will be held in Dallas, and I encourage everyone to attend!

Highlighted Decisions from Last Term

Ashcroft v. Iqbal, 129 S.Ct. 1937 (2009)

[Civil Procedure – Pleading Requirements]

The Rule 8 pleading standard “does not require ‘detailed factual allegations,’ but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” 129 S.Ct. at 1949. Under the guidelines set forth in *Twombly*,¹ a pleading survives a motion to dismiss if it contains sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face. *Id.* A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* The plausibility standard is not akin to a probability requirement. *Id.* However, it asks for more than “a sheer possibility” that the defendant acted unlawfully. *Id.* A complaint pleading facts that are merely consistent with a defendant's liability stops short of the line between possibility and plausibility. *Id.*

The *Twombly* pronouncements are founded on two basic tenets. *Id.* First, legal conclusions are not governed by the rule that a court must accept all of the allegations in a complaint as true. *Id.* Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. *Id.* at 1950. Plausibility will be a context-specific task that requires a reviewing court to draw on judicial experience and common sense. *Id.*

In analyzing pleadings for compliance with these standards, courts may choose to use a two-pronged approach. *Id.* First, identify pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. *Id.* Legal conclusions may provide the framework of a complaint, but they must be supported by factual allegations in order to have any weight in a *Twombly* analysis. *See id.* Second, if there are well-pleaded factual allegations, the court should assume their veracity and determine whether they plausibly give rise to an entitlement to relief. 129 S.Ct. at 1950. The second prong requires identification of the elements that must be proved in order to obtain relief. *See id.* at 1947,

¹ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).

1950, 1952. The Court provided an example of this approach by recounting the analysis in *Twombly*, and then walked everyone through the approach in analyzing whether the pleadings in the present case satisfied the standard. 129 S.Ct. at 1950-52. Ultimately, the Court concluded that the pleadings against the defendants under consideration did not satisfy Rule 8. *Id.* at 1952.

Caperton v. A.T. Massey Coal Co., 129 S.Ct. 2252 (2009)

[Due Process – Judicial Impartiality]

Most matters relating to judicial disqualification do not rise to a constitutional level. 129 S.Ct. at 2259. This level is achieved when the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable. *Id.* One example is when a judge of a local tribunal has a financial interest in the outcome of the case. *Id.* at 2259-60. Another example is when a judge has a conflict arising from participation in an earlier proceeding. *Id.* at 2261. This case arises from an alleged conflict arising from involvement in a judicial election.

In August 2002, a West Virginia jury returned a \$50 million verdict against Massey. *Id.* at 2257. After the verdict but before the appeal (while post-judgment motions were pending), Massey's chairman, CEO, and president (Don Blankenship) decided to support an attorney, Brent Benjamin, running for election against a sitting Supreme Court of Appeals judge. *Id.* Blankenship:

- contributed the \$1,000 maximum to Benjamin's campaign committee. *Id.*
- donated almost \$2.5 million to "And For The Sake Of The Kids," a section 527 political organization which opposed the sitting judge and supported Benjamin. *Id.* Blankenship's donations accounted for more than two-thirds of the total funds "And For The Sake Of The Kids" raised. *Id.*
- spent over \$500,000 for direct mailings, letters soliciting donations, and television and newspaper ads supporting Benjamin. *Id.*

Blankenship's contributions amounted to more than the total amount spent by all other Benjamin supporters combined, and three times the amount spent by Benjamin's own committee. *Id.* Benjamin won the election. *Id.*

Caperton moved to disqualify now-Justice Benjamin under the Due Process Clause and the West Virginia Code of Judicial Conflict, based on the conflict created by Blankenship's campaign involvement. *Id.* Justice Benjamin denied the motion. *Id.* The West Virginia Supreme Court of Appeals did grant review, and in a 3-2 majority opinion joined by Justice Benjamin, reversed the verdict against Massey. *Id.* at 2258. Justice

Benjamin denied a second disqualification motion, and on rehearing, the opinion was modified, but still reversed the verdict against Massey. *Id.*

The Court noted that not every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal. *Id.* at 2263. However, when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent, a probability of actual bias is created and rises to an unconstitutional level. *Id.* at 2263-64, 2265. The inquiry centers on the contribution's relative size in comparison to the total amount spent in the election, and the apparent effect such contribution had on the election's outcome. *Id.* at 2265.

In determining the "apparent effect," the test is *not* whether the contributions were a necessary and sufficient cause of the candidate's victory. *Id.* Determining what caused the electorate to choose a candidate is too difficult. *See id.* Instead, the question is whether the contributor's influence on the election under all the circumstances would offer a possible temptation to the average judge to lead him not to hold the balance "nice, clear and true." 129 S.Ct. at 2265. In addition, the temporal relationship between the campaign contributions, the justice's election, and the pendency of the case is critical. *Id.* In the case at bar, it was reasonably foreseeable, when the campaign contributions were made, that the pending case would come before the newly elected justice. *Id.*

The Court was clear that due process may disqualify judges who have no actual bias. *Id.* at 2263, 2265. The Court also clarified that this case involved extreme facts. *Id.* at 2265-66. In this case, the Court held that Blankenship's significant and disproportionate influence, coupled with the temporal relationship between the election and the pending case, offer a possible temptation to the average judge to lead him not to hold the balance nice, clear and true. *Id.* at 2265. Therefore, the probability of actual bias rose to an unconstitutional level, disqualifying the judge. *Id.*

In his dissent, Justice Roberts posed a list of questions raised by the holdings of the majority. For example, how does a court determine whether a given expenditure was "disproportionate?" 129 S.Ct. at 2269 (Roberts, C.J., dissenting). Should we assume that elected judges feel a "debt of hostility" towards major opponents of their candidacies? *Id.* It will be interesting to see if any of these questions percolate through state courts in states with elected judiciaries.

Wyeth v. Levine, 129 S.Ct. 1187 (2009)

[Federal Preemption]

This term, the Court broke a trend of finding preemption in cases before it. One of the trend-breaking opinions was *Wyeth*. The plaintiff brought state-law claims of

negligence and strict liability against Wyeth for an injury resulting from an IV-push injection of Phenergan. 129 S.Ct. at 1191. The plaintiff alleged that the labeling was defective because it failed to instruct clinicians to use the IV-drip method when administering the drug. *Id.*

Wyeth argued that state law was preempted by federal drug labeling regulations, under either an “impossibility” or “obstacle” theory of conflicts preemption. The U.S. Food and Drug Administration’s pre-market approval of a new drug application includes approval of the exact text in the proposed label. *Id.* at 1196. In general, a manufacturer cannot change the label until the FDA approves a supplemental application, but a regulation allows a manufacturer to change a label to add or strength a warning or an instruction about administration intended to increase the drug’s safe use. *Id.*

Wyeth argued that it was impossible to comply with the federal drug labeling regulations and state law. The Court noted that impossibility preemption is a demanding defense. *Id.* at 1199. The Court concluding that, under the regulations, the manufacturer retained responsibility for the label content at all times. *Id.* at 1197-98. The regulations allows Wyeth to unilaterally strengthen its warning. *Id.* at 1199. The Court refused to conclude that it was impossible for Wyeth to comply with both federal and state requirements without clear evidence that the FDA would not have approved a change to the Phenergan label. *Id.* at 1198.

Wyeth also argued that requiring it to comply with a state-law duty to provide a stronger warning would interfere with Congress’s purpose to entrust an expert agency to make drug labeling decisions that balance competing objectives. *Id.* at 1199. The Court disagreed that this was actually Congress’s purpose. *Id.* at 1199-1200. Nor did Congress include an express preemption provision in the 70-year history of the Federal Food, Drug and Cosmetic Act. *Id.* at 1200. The Court also discounted the FDA’s own statement in the preamble to an FDA drug labeling regulation. *Id.* at 1200-03. The Court allowed that come state-law claims might frustrate the achievement of Congressional objectives for the FDCA, the Court concluded that this was not such a case. *Id.* at 1204.

In an apparent shift, Justice Thomas concurred in the judgment but wrote separately to express his “increasing[] skeptic[ism] of this Court’s ‘purposes and objective’ preemption jurisprudence.” *Id.* at 1205 (Thomas, J., concurring). He has become increasingly reluctant to expand federal statutes beyond their terms through implied preemption. *Id.* at 1207. In his view, one way to empower state government is to narrowly limit preemption to situations in which there is express preemption or if the federal and state law are truly mutually exclusive. *See id.* at 1205-08. Based on the shift in the Court’s opinions from finding preemption to ruling against it, and the sea change in Justice Thomas’s concurrence, it will be interesting to see whether the Court follows a future course of broadly reading express preemption provisions, while narrowly applying implied preemption principles.

[Employment – Retaliation]

In this opinion, the Court unanimously found that Title VII protection against retaliation extends to an employee who speaks out about discrimination not on her own initiative, but in answering questions during an employer's internal investigation. 129 S.Ct. at 849. It is worth noting that, along with earlier decisions of the "Roberts Court," retaliation is the one place where the Court is unanimously protective of employees.

Metropolitan Government (Metro) conducted an investigation into rumors of sexual harassment by Metro School District's employment relations director, Gene Hughes. *Id.* During the investigation, Crawford, a 30-year Metro employee, was asked whether she had witnessed "inappropriate behavior" by Hughes. *Id.* Crawford recounted several instances of sexually harassing behavior toward her by Hughes. *Id.* Two other employees also reported sexual harassment. *Id.* Metro took no action against Hughes, but fired Crawford and the other two reporting employees. *Id.* Metro claimed that it fired Crawford for embezzlement. *Id.*

Crawford filed a charge with the Equal Employment Opportunity Commission alleging violations of the Title VII antiretaliation provision, followed by a lawsuit. *Id.* at 849-50. Crawford alleged violation of both the "opposition" clause and the "participation" clause. *Id.* at 850. The "opposition" clause prohibits an employer from discriminating against an employee because he has opposed any practice made an unlawful employment practice by Title VII. *Id.* The lower courts held that Crawford could not invoke the "opposition" clause because it demands active, consistent "'opposing' activities," and she had "merely answered questions by investigators in an already-pending internal investigation, initiated by someone else." *Id.* The "participation" clause prohibits discrimination against an employee because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under Title VII. *Id.* The lower courts held that Crawford could not invoke the "participation" clause because the investigation was not conducted pursuant to a pending EEOC charge. *Id.*

The Court disagreed. With regard to the "opposition" clause, the Court set forth the ordinary meaning of "oppose" as "to resist or antagonize . . .; to contend against; to confront; resist; withstand." *Id.* A person can "oppose" by responding to someone else's question just as surely as by provoking the discussion. *Id.* at 851. The Court embraced the concept that, when an employee communicates to her employer a belief that the employer has engaged in a form of employment discrimination, that communication virtually always constitutes the employee's opposition to the activity. *Id.* The Court admitted that exceptions might exist, such as "an employee's description of a supervisor's racial joke as hilarious," but "these will be eccentric cases, and this is not one of them." *Id.* Crawford gave an ostensibly disapproving account of sexually obnoxious behavior toward her by a fellow employee, a statement "resistant" or "antagonistic" to Hughes's treatment. *Id.* at

850-51. The Court explained that “nothing in the statute requires a freakish rule protecting an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when her boss asks a question. *Id.* at 851. Moreover, if the law freely allows an employer to penalize an employee who reported discrimination in answering the employer’s questions, employees would have good reason to keep quiet about Title VII offenses against themselves and others. *Id.* at 852.

Because the Court found that Crawford’s conduct was protected by the “opposition” clause, it did not decide her argument that the lower courts misread the “participation” clause, as well. *Id.* at 853.

Gross v. FBL Fin. Servs., 129 S.Ct. 2343 (2009)

[Employment – Age Discrimination]

Courts have used Title VII to guide their interpretation of the Age Discrimination in Employment Act. This opinion announces a sea change: the Age Discrimination in Employment Act is NOT interpreted identically with Title VII. The opinion may signal a willingness to reconsider the Title VII standard in the future, as well.

In a discrimination claim involving alleged mixed motives, a plurality of the Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989), determined that Title VII uses a shifting burden. *Gross*, 129 S.Ct. at 2349. Once a plaintiff proves that the plaintiff’s membership in a protected class played a motivating part in the employment decision, the defendant may avoid a liability finding only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken that factor into account. *Id.* It was believed that the same burden-shifting framework applied to the ADEA. In *Gross*, the Court rejected that idea.

The Court distinguished Title VII from the ADEA, whose text does not explicitly authorize claims in which an improper consideration was a motivating factor for the adverse employment decision. *Id.* Congress added such a provision to Title VII in recent years, but it did not similarly amend the ADEA. *Id.* Thus, in an ADEA claim, the burden of persuasion does not shift to the defendant, but rather remains with a plaintiff throughout the jury’s decisionmaking process. *Id.* at 2348, 2350.

The Court also clarified the proper standard for establishing an ADEA violation. The ADEA makes it unlawful to discriminate against an individual “because of” the individual’s age. *Id.* The Court interpreted this language to mean that age must rise to the level of the “but-for” cause of the employer’s adverse decision. *Id.* at 2350. The “but-for” causation standard requires the plaintiff to prove “that age was the ‘reason’ that the employer decided to act.” *Id.* A showing that age was a motivating factor in the termination decision is not sufficient to establish discrimination. *Id.* at 2349, 2350.

Although a showing that age was a “motivating factor” is not sufficient to establish a violation, it remains an intermediate consideration in deciding whether age was the “but-for” cause of the adverse decision. In essence, the ultimate “but-for” question involves two elements: (1) age actually played a role in the decision-making process; and (2) age had a *determinative* influence on the outcome. *Id.* (citing *Hazen Paper Co. v. Higgins*, 507 U.S. 604, 610 (1993)). Essentially, the Court changed the burden placement, but not the elements themselves. *See id.* Because the plaintiff bears the burden of persuasion for both elements, they may be presented through one overarching question, but the jury’s intermediate thought process – and the evidence at trial – will necessarily involve the same two steps. *Id.*

Difficulties in applying the burden-shifting standard enunciated in *Price Waterhouse* motivated the Court to distinguish Title VII and announce a different standard for ADEA claims. *Id.* at 2352. The Court noted that “it is far from clear that the Court would have the same approach [to Title VII claims] were it to consider the question today in the first instance.” *Id.* at 2351-52. Thus, there may be future changes to the Title VII standard, as well. In addition, the Court’s interpretation of “because of” to impose a “but for” causation standard likely will have an impact on the interpretation of other statutes that use the same or similar language.

Ricci v. DeStefano, 129 S.Ct. 2658 (2009)

[Employment – Title VII]

This opinion creates real headaches for attorneys advising employers, whether public or private, who are attempting to avoid Title VII liability for racially disparate impact and also to abide by Title VII’s prohibition on racially disparate treatment. However, government employers also face uncertainty about whether compliance with the standards announced in the opinion, as amorphous as they may be, also will satisfy Constitutional requirements of racial equality.

The City of New Haven commissioned written examinations to be given to candidates for lieutenant and captain positions in its fire department. 129 S.Ct. at 2665. Seventy-seven candidates took the lieutenant examination: 43 whites, 19 African-Americans, and 15 Hispanics. *Id.* at 2666. Thirty-four candidates passed: 25 whites, 6 African-Americans, and 3 Hispanics. *Id.* The top ten candidates were eligible for promotion; all ten were white. *Id.* With regard to the captain examination, 41 candidates took the exam: 25 whites, 8 African-Americans, and 8 Hispanics. *Id.* Twenty-two candidates passed: 16 whites, 3 African-Americans, and 3 Hispanics. *Id.* The top nine candidates were eligible for promotion; seven were white, two were Hispanic. *Id.* The New Haven Civil Service Board held several hearings to decide whether the test results

demonstrated racially disparate impact, and in the end, refused to certify the exam results. *Id.* at 2667-71.

Title VII prohibits both intentional discrimination (*i.e.*, disparate treatment) and, in some cases, practices that are not intended to discriminate but that have a disproportionately adverse effect on minorities (*i.e.*, disparate impact). *Id.* at 2672. Seventeen white firefighters and one Hispanic firefighter, who passed the examinations but did not have the chance for promotion when the results were not certified, sued for, among other things, violation of the disparate-treatment prohibition in Title VII. *Id.* at 2671. Defendants alleged they had a good-faith belief that they would have violated Title VII's disparate-impact prohibition if they *had* certified the exam results. *Id.*

The Court began its analysis with a central premise: The City's actions would violate the disparate-treatment prohibition absent a valid defense. *Id.* at 2673. The evidence was undisputed that the City chose not to certify the results because of the statistical disparity based on race, *i.e.*, the performance of minority candidates as compared to the performance of white candidates. *Id.* This was express, race-based decisionmaking, in violation of Title VII's command that employers cannot take adverse employment actions because of an individual's race. *Id.*

In order to balance the disparate-treatment and disparate-impact provisions, the Court appropriated the "strong basis in evidence" standard used in Equal Protection cases. *Id.* at 2675. Under the Equal Protection Clause, certain government actions based on race in order to remedy past racial discrimination are constitutional if, and only if, there is a strong basis in the evidence that the remedial actions are necessary. *Id.* Employing the same standard under Title VII allows an employer to use race in decisionmaking only in "cases in which there is a strong basis in evidence of disparate-impact liability," but does not require a "provable, actual violation" of the disparate-impact provision. *Id.*

Thus, when a job test appears to disfavor minority candidates, the employer must abide by the results unless there is evidence that: (1) the test subjected the employer to disparate-impact liability because it was skewed against minorities; and (2) implementing the results will almost certainly trigger a lawsuit by minorities that the employer would lose. *See id.* at 2675-76, 2680. The evidence of these elements must be objective and strong; a good faith belief is not enough. *Id.* at 2675. The Court noted that Title VII does not prohibit an employer from considering, before administering the test, how to design the test in order to provide a fair opportunity for all individuals, regardless of their race. *Id.* at 2677.

Arthur Andersen v. Carlisle, 129 S.Ct. 1896 (2009)

[Arbitration]

Three individuals sought methods to minimize taxes from the sale of a business. Arthur Andersen, a firm that had served as the business's accountant, auditor, and tax adviser, introduced them to Bricolage Capital, LLC. 129 S.Ct. at 1899. Working with Bricolage and a law firm, the individuals formed several limited liability companies to invest in a tax shelter scheme. *Id.* The LLCs entered into investment-management agreements with Bricolage containing arbitration provisions. *Id.*

The individuals and LLCs eventually sued Bricolage, Arthur Andersen, and the law firm based on claims including fraud and breach of fiduciary duty. *Id.* at 1899-1900. All of the defendants moved to stay the lawsuit in favor of arbitration under the Federal Arbitration Act, arguing that equitable estoppel required enforcement of the arbitration agreements against all the plaintiffs. *Id.* at 1900. The district court denied the stay, and the Sixth Circuit dismissed the appeal for want of jurisdiction. *Id.*

The Court determined that the circuit court had jurisdiction to hear the appeal. *Id.* at 1900-01. An appeal may be taken from an order refusing a stay under section 3 of the FAA. *Id.* at 1900. Courts should not conflate the jurisdictional question with the merits of the appeal, *i.e.*, whether a motion to stay under section 3 based on equitable estoppel is impermissible because it seeks to expand the parties' arbitration agreement. *Id.* The Court went so far as to state that "[t]he jurisdictional statute here unambiguously makes the underlying merits irrelevant, for even utter frivolousness of the underlying request for a § 3 stay cannot turn a denial into something other than "an order ... refusing a stay of any action under section 3.'" *Id.* at 1901.

The Court then turned to the merits: whether those who are not parties to a written arbitration agreement are categorically ineligible for relief under section 3 of the FAA. *Id.* The Sixth Circuit answered this sweeping question such that parties were categorically ineligible. *See id.* The Court disagreed. Section 3 requires a court "on application of one of the parties," to stay the action if it involves an "issue referable to arbitration under an agreement in writing." *Id.* at 1901-02. The Court noted that section 3, as well as section 2, does not purport to alter background principles of state contract law regarding the scope of agreements, including the question of who is bound by them. *Id.* at 1902. Therefore, state law – to the extent that law arose to govern issues concerning the validity, revocability, and enforceability of contracts – generally applies in determining which contracts are binding under section 2 and enforceable under section 3. *Id.*

Because "traditional principles" of state law allow a contract to be enforced by or against nonparties to the contract on theories such as "assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel," the Court concluded that the Sixth Circuit's holding that nonparties to a contract

are categorically barred from section 3 relief was error. *Id.* The Court expressly declined to address whether the relevant state contract law did indeed recognize equitable estoppel as a ground for enforcing contracts against third parties, what standard state law would apply in making that determination in a particular case, and whether the defendants would be entitled to relief under the state law. *Id.* at 1903.

Northwest Austin Mun. Util. Dist. v. Holder, 129 S.Ct. 2504 (2009)

[Civil Rights – Voting Rights Act]

This case can be viewed in two ways: (1) a sign that the Court would be willing to strike down the preclearance requirements of the Voting Rights Act in the future if the law is not changed; or (2) a sign that the Court will avoid opportunities to strike down those requirements, whether now or in the future.

Section 5 of the Voting Rights Act operates in areas where voting discrimination historically has been most flagrant. 129 S.Ct. at 2509. Section 5 suspends any change in state election procedure until it is approved by a three-judge Federal District Court or the Attorney General. *Id.* This preclearance is granted only if the change neither has the purpose nor the effect of denying or abridging the right to vote on account of race or color. *Id.* Preclearance applies both the ballot-access procedures and to the drawing of district lines. *Id.*

A jurisdiction can “bail out” of section 5 coverage by seeking a declaratory judgment from the applicable federal district court. *Id.* In order to obtain the “bail out,” the jurisdiction must make several required showings. *Id.* A jurisdiction, for purposes of the “bail out” provision, is a “State or political subdivision.” *Id.* at 2510.

The jurisdiction at issue (District) challenged the constitutionality of the extension of section 5, which originally was enacted for a period of five years. *Id.* at 2510, 2513. However, the District also argued that it was entitled to use the “bail out” procedure as a “political subdivision,” a question of statutory interpretation. *Id.* at 2513. As the majority opinion noted, “the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case.” *Id.*

The District qualified as a “political subdivision” as that term is commonly understood, but section 14(c)(2) of the Act defined a political subdivision as a county or parish, or another subdivision of the State that conducts voter registration. *Id.* at 2513-14. The District did not meet the narrower definition. *Id.* at 2514. However, the Court determined that a reading of the entire statute, as well as prior decisions and underlying constitutional concerns, compelled the conclusion that “political subdivision” should be read as the term is commonly understood. *Id.* at 2514-16. Accordingly, the District was entitled to invoke the “bail out” provision. *Id.* at 2516.

In closing, the Court noted that “[w]hether conditions continue to justify such legislation is a difficult constitutional question we do not answer today.” *Id.*; *see also id.* at 2512-13. Nevertheless, the broad interpretation of the “bail out” provision’s scope may effectively address the Court’s concerns. Areas without a recent history of voting rights abuse can bail out, and areas with a recent history of voting rights abuses fall within the scope of the Act that even the more conservative justices find constitutional as applied.

Pearson v. Callahan, 129 S.Ct. 808 (2009)

[Civil Rights – Qualified Immunity]

The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. 129 S.Ct. at 815. In *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001), the Court mandated a two-part test for determining whether an official is entitled to qualified immunity. *Id.* at 813. First, the lower court must decide whether the facts that a plaintiff has alleged or shown demonstrate a violation of a constitutional right. *Id.* at 815-16. If so, the district court next must decide whether the right at issue was “clearly established” at the time of the defendant’s conduct. *Id.* at 816. A court could not turn to the second step until it completed the first step. *Id.* The Court opined that skipping the first step might deprive the law of valuable explanation about constitutional rights. *Id.*

Yet, there are cases in which it is plain that a constitutional right is not clearly established at the time of the defendant’s conduct. *Id.* at 818. The lockstep *Saucier* procedure disserves the purpose of qualified immunity when it forces parties and courts to litigate issues that have no effect on the case’s outcome. *Id.* at 818-19. In addition, decisions on the first, constitutional prong are often fact-based and of limited use in other cases. *Id.* at 819. The Court described other problems with the mandatory one-two approach. *Id.* at 819-21. Accordingly, the Court held that the *Saucier* procedure is not an “inflexible requirement;” it can be used if a district court wants, but if the court already knows that the second prong is not met, the court does not have to go through the paces of the first prong. *Id.* at 813, 821.

Haywood v. Drown, 129 S.Ct. 2108 (2009)

[Civil Rights – Interplay of State and Federal Law]

In this 5-4 decision, the Court held that state courts are obligated to hear federal claims brought in state court, although the court may use its own procedures if they are applied in a non-discriminatory manner. In a dissent by Justice Thomas, four justices

agreed that state courts are never obligated to hear federal claims; rather, the court has the right to decide whether to entertain the claim. If one more justice had joined Justice Thomas, there would have been a drastic change in states' rights jurisprudence.

An inmate in New York's Attica Correctional Facility brought two section 1983 actions in New York state court. 129 S.Ct. at 2112. The trial court dismissed the actions on the ground that, under New York Correction Law section 24, the court lacked jurisdiction to entertain any suit arising under state or federal law seeking money damages from correction officers for actions taken in the scope of their employment. *Id.* The Court held that Correction Law section 24 violates the Supremacy Clause because it suggests that an act of Congress is not in harmony with the state's policy, and therefore, that the state's courts are free to decline jurisdiction. *Id.* at 2114-15. A state may not declare a whole category of federal claims to be frivolous, even if it treats identical or similar state claims as equally frivolous. *Id.* at 2115-16. Equality of treatment does not provide a valid excuse for refusing to entertain a federal cause of action. *Id.* at 2116.

The dissent described the history of the Supremacy Clause and concluded that its "exclusive function is to disable state laws that are substantively inconsistent with federal law – not to require state courts to hear federal claims over which the [state] courts lack jurisdiction." *Id.* at 2124 (Thomas, J., dissenting).

Pleasant Grove v. Summum, 129 S.Ct. 1125 (2009)

[First Amendment]

In this case, the Court held that the placement of a permanent monument in a public park is a form of government speech which is not subject to scrutiny under the Free Speech Clause of the First Amendment.

Pleasant Grove is home to Pioneer Park, a 2.5-acre public park that contains 15 permanent displays, at least 11 of which were privately funded. 129 S.Ct. at 1129. One of these monuments is a Ten Commandments monument. *Id.* Summum is a religious organization that repeatedly requested permission to erect in Pioneer Park a stone monument similar in size and nature to the Ten Commandments monument, but containing "the Seven Aphorisms of SUMMUM." *Id.* at 1129-30. Pleasant Grove denied the requests, and later passed a resolution implementing a policy that monuments in the Park would be limited to those that either: (1) directly relate to the history of Pleasant Grove, or (2) were donated by groups with longstanding ties to the Pleasant Grove community. *Id.* at 1130. Summum filed suit, alleging that Pleasant Grove violated the Free Speech Clause by accepting the Ten Commandments monument but rejecting the Seven Aphorisms monument. *Id.*

The First Amendment does not regulate government speech. *Id.* at 1131. A government may exercise the same freedom to express its views when it receives assistance

from private sources for the purpose of delivering a government-controlled message. *Id.* The Court acknowledged that there may be situations in which it is difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech, but this is not such a case. *Id.* at 1132.

Governments historically have used monuments to speak to the public. *Id.* at 1132-33. A government-commissioned and -financed monument placed on public land constitutes government speech. *Id.* at 1133. And, a privately financed and donated monument *that the government accepts for public display on government land* is government speech. *Id.* The selection of privately donated monuments for display on public land is meant to convey a government message. *Id.* (There is also an interesting discussion about the way monuments convey meaning. *Id.* at 1134-36.) Where the government effectively controls its message by exercising final approval authority over privately donated monuments, the message – expressed through the monuments – constitute government speech that is not covered by the First Amendment. *Id.* at 1134.

Highlighted Upcoming Decisions

2008 Term

Citizens United v. Federal Election Comm'n, No. 08-0205 (re-argued 09/09/2009)

Section 203, the “electioneering communications” section of the Bipartisan Campaign Reform Act, does not restrict corporate or union campaign contributions paid out of a political action committee, but it does bar the use of a corporation or union’s treasury funds to finance communications (on radio, television, cable TV, or satellite broadcast) that refer to a clearly identified candidate for the U.S. presidency or for Congress within 30 days before a primary election or nominating convention, or within 60 days before a general election. The BCRA also contains disclosure and disclaimer requirements aimed at creating transparency with regard to corporate and union contributions.

Citizens United is a conservative advocacy group organized as a non-profit corporation. At the center of the battle in this case is the Citizens United film titled “Hillary: The Movie,” which focuses on then-Senator Hillary Clinton, who was at the time a Democratic presidential candidate. Although Citizens United contends that the movie does not expressly advocate Senator Clinton’s election or defeat, the movie was unambiguously a message that Senator Clinton’s presidency would endanger the country and that viewers should vote against her.

Citizens United planned to broadcast three television ads to promote the movie while the primary election season was underway. A federal district court found the movie fell within the scope of section 203, and that although the promotional ads could not be barred

under the Act, the ads were subject to the disclosure and disclaimer requirements. From the petition stage to the merits stage, Citizens United broadened its focus to challenge the constitutionality of any feature-length movie distributed through “video on demand.” Equally broad was its challenge to the disclosure and disclaimer requirements, which Citizens United claimed could not apply to the ads in question because they were not themselves electioneering communications.

After hearing argument in the case, the Court ordered re-argument and requested new briefs on whether the Court, for the proper disposition of the case, should overrule either or both of *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 110 S.Ct. 1391, 108 L.Ed.2d 652 (1990), and/or *McConnell v. Federal Elec. Comm’n*, 540 U.S. 93, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003). In *Austin*, the Court upheld a Michigan law that barred corporations from using their internal funds to support or oppose any state candidate, without regard to whether the spending was done independently of the candidate’s campaign. In *McConnell*, the Court upheld a provision of a campaign finance law that banned profit and non-profit corporations from spending their own treasury funds to pay for radio and TV ads in the weeks before federal elections, if the ads contain the name of an actual candidate for President or Congress. Three Justices on the Court at the time of *Austin* (Justices Stevens, Scalia, and Kennedy), and six Justices on the Court at the time of *McConnell* (Justices Stevens, Breyer, Ginsburg [who were in the majority] and Justices Kennedy, Scalia, and Thomas [who dissented with regard to the “electioneering communications” provision]) are on the Court today.

Through re-briefing, the focus has clearly settled on the larger arena of corporate free speech. The U.S. Chamber of Commerce, in an amicus brief, posited that the corporate form is not a constitutional basis to ban core speech. On the other hand, the FEC argued that the nature of business corporations makes corporate political activity inherently more likely than individual advocacy to cause *quid pro quo* corruption or the appearance thereof. Nevertheless, at re-argument (which was the new Solicitor General Elena Kagan’s debut argument as SG), the government essentially made the point to the Court that it matters how the FEC loses. The Court could either make some sweeping pronouncements with regard to corporate participation in the election process and the constitutional boundaries of that participation, or the Court could confine itself to the narrower issues of the Hillary movie and non-profit advocacy groups like Citizens United. This is the opinion at the top of everyone’s watch list. Stay tuned.

2009 Term

Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp., No. 08-1198 (argued 12/09/2009)

Is class arbitration permitted under the Federal Arbitration Act when the arbitration provision is “silent” on that issue?

In *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 123 S.Ct. 2402, 156 L.Ed.2d 414 (2003), the Supreme Court held that, when parties agree to arbitrate, the question of whether the agreement allows class arbitration is one of contract interpretation to be determined by the arbitrators, not the court. In *Stolt-Nielsen*, the arbitration panel issued a Clause Construction Award deciding that the arbitration agreements permitted class arbitration. The panel based its decision in large part on the fact that, in all twenty-one published clause construction awards issued under the American Arbitration Association's Supplementary Rules for Class Arbitrations, the arbitrators had interpreted silent arbitration clauses to allow class arbitration. *Stolt-Nielsen* filed a motion to vacate the Clause Construction Award, and the district court granted the motion, holding that the award was made in manifest disregard of the law because the arbitrators did not conduct a meaningful choice-of-law analysis. The Second Circuit reversed, holding that, under *Bazzle*, the arbitrators had the power to reach the issue of whether the arbitration agreement allowed class arbitration, and the allegation that the arbitrators decided the issue incorrectly did not provide a ground for vacatur under the FAA. *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, 548 F.3d 85, 101 (2d Cir. 2008).

In *Bazzle*, the Court did not reach the question on "silent" arbitration clauses because of a threshold dispute over whether the arbitration clause in that case actually was "silent" on the issue of class arbitration. The Court remanded the case for the arbitrator to decide that issue. Thus, the Second Circuit interprets *Bazzle* to allow arbitrators to certify class arbitration when arbitration agreements are silent, whereas the Seventh Circuit does not. The question is, when an arbitration agreement is silent on the issue of class treatment, is it an expansion of the parties' agreement to certify a class arbitration?

Oral argument took on an interesting focus: can an agreement ever be truly "silent?" Several Justices questioned whether an agreement is "silent" when it does not mention class arbitration. The arbitrators' job is to interpret the contract and figure out whether it does or does not allow class arbitration. On the other hand, Chief Justice Roberts seemed comfortable with the concept that a contract can be truly silent on an issue when it does not expressly discuss it and none of the background considerations (e.g., parol evidence, custom, practice) shed any light on the issue.

Hertz Corporation v. Friend, No. 08-1107 (argued 11/10/2009)

What standard should apply in determining a company's "principal place of business" for diversity jurisdiction? In particular, can the location of a nationwide corporation's headquarters be considered for purposes of determining the principal place of business?

A company's principal place of business for diversity purposes can be only one state. Hertz Corporation is incorporated in Delaware, with its corporate headquarters in New Jersey. However, the company has the highest percentage of rental facilities in California.

Accordingly, the highest percentage of rentals, revenue generation, and employees are located in California.

The California district court to which the underlying case was removed under diversity jurisdiction applied the Ninth Circuit's "place of operations" test. This test considers a number of factors, such as the location of employees, tangible property, production activities, income sources, and location of sales. Under this test, Hertz's principal place of business was determined to be California. In petitioning for certiorari, Hertz identified four different tests being used by various circuits to determine a corporation's principal place of business: (1) the place of operations test; (2) the nerve center test [*i.e.*, the location of the company's headquarters]; (3) the center of activity test; and (4) the totality of corporate activities test. The respondents argued that the tests generally achieve a uniform outcome, and therefore, the differences aren't that important.

At oral argument, the Court seemed equally concerned with both a multiple-factor approach (like the place of operations test) and a nerve center approach. The multiple-factor approach can be difficult to apply and results in inconsistent treatment of litigants across the system. In addition, this approach may not comport with the statute's language, which Justice Scalia contended could have been written "the principal state in which business is done" if Congress had wanted courts to consider multiple factors. On the other hand, if the nerve center approach is used, how is the concept of "headquarters" defined? Would such a standard encourage corporations to strategically locate an official "headquarters" in a certain state, and then do most of its business from another location? There is no clear sign on what direction the Court may take.

Free Enter. Fund v. Public Co. Accting. Oversight Bd., No. 08-0861 (argued 12/07/2009)

Does the Sarbanes-Oxley Act comply with separation-of-powers principles in that the Public Company Accounting Oversight Board is overseen by the Securities and Exchange Commission, which is in turn overseen by the U.S. President, or does it violate the Appointments Clause of the Constitution in that the Board members are appointed by the SEC?

Regulatory agencies have been characterized by some as the "Fourth Branch" of the federal government. The Board (whose acronym is PCAOB, leading some to refer to this as the "Peekaboo" case) has broad powers in creating and enforcing auditing standards against accounting firms that audit publicly-traded companies. Its five members, who serve for five-year terms, are appointed by the SEC. Free Enterprise Fund contends that Congress set up the Board in such a way that stripped the President of all power to appoint, remove, or otherwise supervise the Board members and the Board's activities. In the Fund's opinion, this makes the Board worse than any other "Fourth Branch" agency, in that it has all the power of a regulatory agency and no executive oversight.

The petition raised questions such as: Does stripping control from the President over the Board's selection and operation violate separation-of-powers? Are the Board members "inferior officers," as that term is used in the Constitution, and if so, does their selection by the SEC violate the Appointments Clause, since the SEC is not a "Department" of government with appointment powers?

In addition to issues regarding independence and oversight of regulatory agencies, this case presents the issue of how the Court will analyze those issues, whether from a practical, what-is-the-ultimate-impact standpoint or a more detail-oriented, what-are-the-step-by-step-limits-on-presidential-power standpoint. The Court spent significant oral argument time exploring the Board in excruciating detail, but it also explored broader themes, so it will be interesting to see how the opinion tackles the issue, in addition to seeing the ultimate holding.

Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., No. 08-1008 (argued 11/02/2009)

Can a state law preclude a federal court from using the class action procedure for certain claims?

This case highlights an area of tension in state law: the balance between defining what remedies consumers are allowed to pursue under state law, and affording consumers the right to join together to pursue their legal claims where individual claims would be difficult to pursue. Not only are states' rights implicated, but also the age-old (or should we say, *Erie*-old) question of whether a state's limitation is procedural in nature (and thus supplanted by Federal Rule of Civil Procedure 23 when in federal court) or substantive (and thus paramount despite any contrary federal rule of procedure). The Court's decision not only will affect the New York state law at issue, but also has the potential to affect many other states' laws that are similar (and included in an appendix to the Respondent's brief).

McDonald v. City of Chicago, No. 08-1521 (set 02/02/2010)

Is the Second Amendment incorporated into the Due Process Clause or the Privileges and Immunities Clause of the Fourteenth Amendment and, therefore, applicable to the states, which would invalidate local ordinances prohibiting possession of handguns in the home?

The Supreme Court adopted an "individual rights" perspective of the Second Amendment, as opposed to a "collective rights" interpretation, in evaluating a District of Columbia ordinance in *District of Columbia v. Heller*, 128 S.Ct. 2783 (2008). The District enjoys a unique status that is unlike that of a state. The question now becomes, does the

Second Amendment also apply to states? And, if so, by what mechanism does it apply: Due Process, or Privileges and Immunities?

It seems likely that the Court will apply the Second Amendment to the states, but the bigger questions are how they will reach that conclusion, and what impact the pronouncements will have on a broader array of precedent and issues.

Briscoe v. Virginia, No. 07-11191 (set 01/11/2010)

If a state allows a prosecutor to introduce a certificate of forensic laboratory analysis, without presenting as a witness the analyst who prepared the certificate, can the state avoid violating the Confrontation Clause of the Sixth Amendment by providing the defendant a right to call the analyst as his own witness?

Earlier this year, in *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009), the Court held that forensic examiner reports are testimonial and a defendant has the right to confront live testimony. The state law here affords the defendant the opportunity to confront live testimony. The law provides that the defendant has the right to examine the analyst as a hostile witness at the government's expense. However, if the "confrontation" required by the Constitution has to occur during the government's case-in-chief, then this law does not avoid a violation. The state's position is that the Confrontation Clause does not have a timing requirement.

This case may illuminate a distinction between Justice Souter and Justice Sotomayor. Justice Souter joined four justices in the majority opinion in *Melendez-Diaz*. But the position in *Melendez-Diaz*, and urged by the petitioner in this case, was opposed by two groups: prosecutors and trial judges. Justice Sotomayor was a prosecutor and a trial judge.