When Chief Justice John Roberts joined the Supreme Court in 2005, he urged the Court to "promote clarity and guidance" and to rule with "a greater degree of consensus." The 2006–2007 term offered some clarity, but consensus proved elusive. Although some of the narrow decision-making that was a hallmark of the 2005–2006 term remained, ambitious, divided decisions were far more prominent.

Perhaps the most striking characteristic of the Roberts Court in its first full term was the solidification of Justice Anthony Kennedy's role as the post-O'Connor median justice. During the 2006–2007 term, Kennedy voted with the majority in every 5-4 decision as well as in every split decision. He was also the only justice whose vote was in agreement with every other justice at least half the time. Liberals and conservatives alike noted the changes this new alignment began to make in the outcomes of cases and in the Court's opinions.

Followers of voting patterns also noted that the Supreme Court continued its well-known recent trend of reversing decisions made by the U.S. Court of Appeals for the Ninth Circuit. As it did last term, this term the Supreme Court affirmed fewer than one in five Ninth Circuit decisions. A less prominent but also evocative trend, however, was the reversal of several Texas Court of Criminal Appeals decisions, with the Court ruling in favor of habeas appellants.

The term gave Court watchers their fill of suspense. Certainly, the Court took on cases in several areas of perennial curiosity to the public at large: abortion, the environment, affirmative action, the death penalty. More quietly, though, the Court granted certiorari to address questions involving patent law, antitrust law, and administrative law and procedure—all of which had the potential to result in equally, if not more, profound changes. The Court's own procedures enhanced this topical suspense as it compressed the period from granting certiorari to argument and followed a sparse calendar in March with a grueling 17 cases in April. Shunning anti-climax, the Court capped its usual late-June barrage of high-profile decisions with a stunning reversal granting certiorari in the cases of Guantanamo detainees: *Boumediene v. Bush* (06-1195) and *Al Odah v. U.S.* (06-1196).

At the beginning of the term, three sets of cases stood out as being of great prospective interest to the public at large: the environmental regulation case, *Massachusetts v. Environmental Protection Agency*; the partial-birth abortion cases, *Gonzales v. Carhart* and *Gonzales v. Planned Parenthood*; and the affirmative action cases, *Meredith v. Jefferson County* and *Parents Involved in Community Schools v. Seattle School District No. 1*. As anticipated, each decision generated a great deal of commentary within the press and among the public at large. Many other commentators, however, found other decisions to be equally noteworthy: rulings in antitrust cases, *Leegin Creative Leather Products v. PSKS Inc.* and *Bell Atlantic v. Twombly*; in patent cases, *KSR International Co. v. Teleflex Inc.* and *MedImmune v. Genentech*; and in a case involving criminal procedure, *Bowles v. Russell*.

Highlights of the 2006–2007 Supreme Court Term

Business Cases

Antitrust

Vertical Price Agreements and the Per Se Rule

Leegin Creative Leather Products v. PSKS Inc. (06-480) arose from a dispute over a vertical pricing agreement in which a manufacturer required retailers not to sell their products below a minimum price. Under a nearly centenarian precedent, *Dr. Miles Medical Co. v. John D. Park & Sons, Co.*, such resale price maintenance agreements were per se illegal under § 1 of the Sherman Antitrust Act, because it was considered that the practice "would always or almost always tend to restrict competition."

In the 5-4 *Leegin* decision, one of the final three decisions released during the term, Justice Kennedy wrote for the majority: "The Court has abandoned the rule of *per se* illegality for other vertical restraints a manufacturer imposes on its distributors. Respected economic analysts, furthermore, conclude that vertical price restraints can have procompetitive effects. We now hold that *Dr. Miles* should be overruled and that vertical price restraints are to be judged by the rule of reason." This overturning of precedent generated immediate discussion on topics ranging from the bare fact of the shattered precedent, to the majority's prominent use of economic analysis, to more practical speculations on the potential impact of a post-*Dr. Miles* standard on industries as specific as comic book publishing and as broad as e-commerce retailing.

Specificity of Antitrust Complaints

Followers of antitrust law found the Court's decision in *Bell Atlantic Corp. v. Twombly* (05-1126) interesting; followers of civil procedure found it startling. In this class action antitrust suit, respondent Twombly alleged that "Incumbent Local Exchange Carriers" (ILECs) maintained regional monopolies by agreeing not to compete with one another and by agreeing to prevent "Competitive Local Exchange Carriers" (CLECs) from competing successfully. Twombly's complaint, however, pointed only to "conspiracy" and "parallel conduct," which the district court had found to be insufficient to survive a motion to dismiss under Rule 8 of the Federal Rules of Civil Procedure. The Second Circuit reversed the lower court's ruling, and the Supreme Court, by a 7-2 majority, reversed the Second Circuit.

Writing for the Court, Justice Souter explained: "This case presents the antecedent question of what a plaintiff must

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plead in order to state a claim under § 1 of the Sherman Act." Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the … claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U. S. 41, 47 (1957). Although the ruling did not overturn the *Conley v. Gibson* precedent, which articulated that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," the Court did raise the bar for antitrust plaintiffs, requiring them to make more factual allegations before they can compel discovery.

In his dissent, Justice Stevens decried the shift in the pleading standard, writing "I would not rewrite the Nation's civil procedure textbooks and call into doubt the pleading rules of most of its States without far more informed deliberation as to the costs of doing so. Congress has established a process—a rulemaking process—for revisions of that order. … I fear 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."

Application of Predatory-Pricing Test to Predatory Bidding

Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co. Inc. (05-381) addressed an alleged predatory bidding scheme, in which Weyerhaeuser bid up prices of raw materials, driving Ross-Simmons Hardwood Lumber out of business and allowing Weyerhaeuser to gain the advantages of being the sole remaining (monopsonist) buyer. In a case heard in 1993, *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, the Supreme Court had set forth a two-part test for showing that a company engaged in predatory pricing: (1) the production cost must exceed the price charged, and (2) the company must have had a "dangerous probability" of recovering the investment in below-cost pricing. In *Weyerhaeuser*, the Court now determined, unanimously, that the *Brooke Group* predatory-pricing rule also applies to predatory bidding. Specifically, (1) the purchase price of inputs must lead to below-cost output pricing, and (2) the company must have a "dangerous probability" of recovering this investment in above-cost inputs.

Securities

Antitrust Immunity for Securities Underwriting

In *Credit Suisse Securities (USA) v. Billing* (05-1157), the Supreme Court took up the question: "Whether, in a private damages action under the antitrust laws challenging conduct that occurs in a highly regulated securities offering, the standard for implying antitrust immunity is the potential for conflict with the securities laws or, as the Second Circuit held, a specific expression of Congressional intent to immunize such conduct and a showing that the SEC has power to compel the specific practices at issue." Here, the Supreme Court found that there was a "plain repugnancy" between antitrust claims and federal securities law pertaining to securities underwriting around initial public offerings. Pointing to the precedent in *Gordon v. New York Stock Exchange Inc.*, 422. U.S. 659, 682 (1975), the Court found that "... all four elements present in *Gordon* are present here: (1) an area of conduct squarely within the heartland of securities regulations; (2) clear and adequate SEC authority to regulate; (3) active and ongoing agency regulation; and (4) a serious conflict between the antitrust and regulatory regimes. We therefore conclude that the securities laws are 'clearly incompatible' with the application of the antitrust laws in this context." Although this case involved a specific securities underwriting situation, the decision appears to extend broad antitrust immunity to securities underwriters.

Securities Fraud Litigation

Tellabs Inc. v. Makor Issues & Rights LTD (06-484) took up the question of how specific a securities fraud complaint must be in order to survive a motion to dismiss. Congress passed the Private Securities Litigation and Reform Act (PSLRA) of 1995 in an effort to create clear guidelines for securities fraud cases. In an effort to limit frivolous securities suits, the PSLRA established threshold pleading rules requiring that "with respect to each act or omission alleged to violate this chapter, [the complaint must] state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind," 15 U.S.C. § 78u-4(b)(2). However, Congress failed to define how "a strong inference" must be proven under the act, and circuit courts each developed different standards. In an 8-1 ruling, the Supreme Court articulated the standard that, in order to proceed with fraud litigation, a complaint must show "cogent and compelling evidence of scienter—that is, knowledge and intention—to break the law."

Patents

Obviousness

In a much-anticipated patent case, *KSR International Co. v. Teleflex Inc.* (04-1350), the Court took up the Federal Circuit's test for determining the obviousness of an invention. The Patent Act of 1952 prescribes that an invention cannot be patented if it "would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains" (35 U.S.C. § 103). *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1 (1966).

In this case, the appeal arose out of Teleflex's suit alleging patent infringement by KSR. KSR claimed that Teleflex's patented technology was obvious and therefore the patent was invalid. The Supreme Court reviewed the Federal Circuit's holding that a patent was not obvious, because the party claiming obviousness failed to establish that some "'suggestion, teaching, or motivation' would have led a person of ordinary skill" in the field "to combine the prior art teachings" to create the patented device. Although the Supreme Court dismissed the Federal Circuit's test, it did not put forth a formula for determining obviousness.

Invalidation Without Infringement

MedImmune v. Genentech (05-608) challenged the Court to determine how much risk a licensee must incur in order to challenge the validity of a licensor's patent. Two biotechnology firms—MedImmune Inc. and Genentech Inc.—had entered into a patent license agreement under which MedImmune licensed a patented Genentech technology as well as a patent pending technology, should it receive patent protection. When the second patent was granted, Genentech informed MedImmune that MedImmune's product was subject to royalties under that patent as well as under the first. MedImmune filed a declaratory judgment action seeking to establish that the second patent was invalid, thus allowing the company not to pay the royalties but at the same time not exposing it to patent infringement litigation. The Supreme Court found that such a situation does present an actual controversy, despite the lack of infringement, because the plaintiff is coerced into compliance by a threat of liability. In practical terms, this means that a patent licensee need not breach the terms of its contract in order to challenge the underlying patent in court.

Government Cases

Commerce Clause and Regulatory Favoritism Toward Government Entities

Appearances to the contrary, *United Haulers Assn. Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.* (05-1345) was not a case that was just about garbage. To be sure, the case did represent the latest attempt by local governments to protect local waste processing facilities. But the analogies to other government activities and the potential to favor corresponding government entities inspired a great deal more interest than an ordinary trash disposal case might otherwise generate. Here, because the flow-control ordinance in question favored a public facility rather than a private one, the Second Circuit found that the ordinance did not impermissibly burden interstate commerce. The Supreme Court affirmed the Second Circuit's judgment by a margin of 6-3.

Writing for the Court, Chief Justice Roberts distinguished the ordinance in question from one that the Court had found impermissible in *C & A Carbone Inc. v. Clarkstown*, 511 U. S. 383 (1994), writing:

> The only salient difference is that the laws at issue here require haulers to bring waste to facilities owned and operated by a state-created public benefit corporation. We find this difference constitutionally significant. Disposing of trash has been a traditional government activity for years, and laws that favor the government in such areas—but treat every private business, whether in-state or out-of-state, exactly the same—do not discriminate against interstate commerce for purposes of the Commerce Clause. Applying the Commerce Clause test reserved for regulations that do not discriminate against interstate commerce, we uphold these ordinances because any incidental burden they may have on interstate commerce does not outweigh the benefits they confer on the citizens of Oneida and Herkimer Counties.

Guam's Debt Burden and Appellate Jurisdiction

Under the Organic Act of Guam, the government of Guam can incur no more than 10 percent of the "aggregate tax valuation" of property in the territory. This case arose from a dispute between the governor of Guam, who wanted to borrow money based on the full appraised value of the property at issue, and Guam's attorney general, who read the statute as requiring that the calculation be based on the assessed value of the property. The Supreme Court of Guam ruled in favor of the governor. While the attorney general's appeal was pending in the Ninth Circuit, the U.S. Congress changed the court hierarchy, granting jurisdiction over decisions of the Supreme Court of Guam to the U.S. Supreme Court. By the time the Ninth Circuit dismissed the case, it had been far longer than 90 days since the Supreme Court of Guam had announced its decision. The U.S. Supreme Court granted certiorari to consider whether the time limit was tolled while the case was pending before the Ninth Circuit as well as to determine which formula Guam must use to determine its borrowing limit. The U.S. Supreme Court handed down a split decision. It found, unanimously, that the Ninth Circuit's certiorari grant suspended the 90-day deadline. A majority found that Guam must use the assessed value, not the appraised value, of its property when calculating how much it can borrow.

False Claims Act

The False Claims Act creates special protections and incentives for whistleblowers against corporations that defraud the government. A private individual who is an "original source" of information about the fraud may initiate a suit in the name of the government—known as a qui tam suit—and share in the proceeds of any resulting judgment. Only if the individual has "direct and independent knowledge" of the fraud, however, may that individual be considered an original source and therefore function as a qui tam source. *Rockwell International Corp. v. United States* (05-1272) started as a qui tam suit initiated by James Stone, a former engineer at Rockwell International who alleged environmental health and safety violations at Rockwell's Rocky Flats weapons production facility. Rockwell sought to dismiss the complaint by challenging Stone's status as an original source. The Tenth Circuit Court of Appeals found in favor of Stone, holding that an independent source need only have "information underlying or supporting the fraud allegations." Because circuit courts disagreed on the definition, the Supreme Court granted certiorari to resolve the split. In a 6-2 decision, the Court found that Stone was not an "original source" and reversed the Tenth Circuit's decision.

Federal Regulation and Jurisdiction

Watson v. Philip Morris Companies Inc. (05-1284) was the sort of nail-biter that happens when the Supreme Court grants certiorari to consider an audacious argument. Philip Morris removed a class action tobacco lawsuit from an Arkansas state court to the Federal District Court for the Eastern District of Arkansas. Plaintiffs Watson and Law-

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son sought to remand the case to state court, but their motion was denied. The Eighth Circuit held that Philip Morris was a corporation qualifying as a "person acting under a federal officer" and thus entitled to removal under 28 U.S.C. § 1442(a)(1). The Supreme Court took up the question of whether parties operating in an arena of heavy federal regulation qualify under this federal officer removal statute or, to the contrary, if the statute's origins and history preclude such interpretation. In a unanimous decision, the Court reversed the Eighth Circuit's decision, confirming the boundary between regulatory compliance and government officer status.

Public Education

Race and School Assignments

In the final week of its term, the Court handed down its decision in two affirmative action cases involving public education: *Parents Involved in Community Schools v. Seattle School District No. 1* (05-908) and *Meredith v. Jefferson County Board of Education* (05-915). Each case involved a school district that used race as one way to break a tie between students competing for spots in the same public school. The Court decided by a margin of 5-4 that the programs in question impermissibly used individual racial classification to place students in particular schools. The justices did not agree on all of the reasoning behind their judgment, however.

Individuals with Disabilities Education Act

Winkelman v. Parma City School District (05-983) addressed the question of whether the Individuals with Disabilities Education Act (IDEA) creates enforceable rights for parents of disabled children. Under IDEA, Jeff and Sandee Winkelman contested the adequacy of the Parma City School District's Individual Education Plan for their eight-year-old autistic son Jacob. Without representation by an attorney, the Winkelmans appealed the district court's decision to approve the plan. As in many such cases, the school district alleged that by proceeding without counsel, the Winkelmans were practicing law without a license (because, the school district argued, they were representing their son). Noting disagreement among the circuit courts, the Supreme Court granted certiorari to consider whether nonlawyer parents of disabled children may pursue an IDEA claim pro se in federal court. In its decision, the Court reviewed the IDEA statute, noting both specific instances in which it anticipated parents initiating and participating in administrative proceedings and pointing to the language that presumes and affirms parents' rights under the act. Concluding that parents do indeed have enforceable rights under the IDEA, the Court reversed the Sixth Circuit's ruling.

Federal Impact Aid Offsets

The Federal Impact Aid Act provides subsidies to school districts in areas where a federal presence adversely affects a local school district (because children who reside on federal land require schooling even though the district cannot tax the land on which they reside). If a state can show, however, that it equalizes expenditures among local school districts, then the act permits that state to reduce its contribution to offset the federal aid. In *Zuni Public School Dist. No. 89 v. Department of Education* (05-1508), the school district challenged the secretary of education's method of applying the equalization formula. By a 5-4 majority, the Court found in favor of the Department of Education, holding that the statutory language is "broad enough to permit the Secretary's reading" and that the secretary's method of calculation is a reasonable interpretation of the statute and, therefore, lawful. The majority opinion was sufficiently technical that it included an appendix republishing both the statute and the regulations in question.

Pro-drug Speech

In one of the more colorful cases in recent Supreme Court history, *Morse v. Frederick* (06-278) began when, at a public event heavily attended and endorsed by the local public high school, students displayed a banner that read "BONG HITS 4 JESUS." Aghast, Morse, the school administrator, demanded that the students remove the banner. When Frederick, the student, refused to do so, Morse confiscated the banner and suspended Frederick. Frederick sued, alleging a violation of his First Amendment right to free expression and further arguing that school administrators should not be immune from liability. The Supreme Court overturned the Ninth Circuit's finding that the First Amendment had been violated, because the school had not established a "risk of substantial disruption" from Frederick's speech. Writing for the majority, Chief Justice Roberts reasoned that the "'special characteristics of the school environment,' Tinker, 393 U.S., at 506, and the governmental interest in stopping student drug abuse—reflected in the policies of Congress and myriad school boards, including JDHS—allow schools to restrict student expression that they reasonably regard as promoting illegal drug use." Because the Court found that Frederick's speech was not protected, the justices did not address the question of qualified immunity (which, negated in the case that the right violated was "clearly established," was not at issue).

Environment

Global Warming Regulation

Massachusetts v. Environmental Protection Agency (05-1120) arose from a 1999 rulemaking petition in which the International Center for Technology Assessment (CTA) asked the U.S. Environmental Protection Agency (EPA) to regulate "greenhouse gas emissions from new motor vehicles under § 202 of the Clean Air Act." Although two EPA general counsels had agreed that EPA could regulate greenhouse gases, and a subsequent report by the National Research Council had affirmed the connection between greenhouse gases and climate change, EPA denied the rulemaking petition, reasoning that it had no authority to regulate global greenhouse gas emissions and that, even if it could, the agency would not do so for political reasons. In response to EPA's decision, several states, cities, and organizations joined the CTA in suing EPA. By a 5-4 majority, the Court found for the petitioners. Justice Ste-

vens, writing for the majority, delivered a fierce rebuke of EPA's deference to priorities set by the executive branch, holding that the state of Massachusetts does have standing to sue EPA, that EPA does have the authority to regulate greenhouse gas emissions from new vehicles, and that the agency's refusal to regulate despite its authority to do so "rests on reasoning divorced from the statutory text."

Transfer of Permitting Authority from Federal to State Government

Two cases involving environmental regulation—*Environmental Protection Agency v. Defenders of Wildlife* (06-549) and *Natl. Assoc. of Home Builders v. Defenders of Wildlife* (06-340)—challenged a transfer of authority from a federal agency (EPA) to a state (Arizona). Although the Clean Water Act allows the EPA to transfer to state governments the authority to issue water-pollution permits, the Endangered Species Act requires that agencies not take actions that will harm endangered species. Because states are not bound by this provision of the Endangered Species Act, Defenders of Wildlife challenged EPA's transfer of authority to the state. In a 5-4 decision, authored by Justice Alito, the Supreme Court reversed the Ninth Circuit's decision, finding that the Endangered Species Act does not, in fact, create an additional criterion for EPA's transfer of permitting authority.

Standards for Measuring Emissions

In a technical case arising from the Clean Air Act (CAA), *Environmental Defense v. Duke Energy Corp.* (05-848), the Court took up the relationship between the CAA's New Source Performance Standards (NSPS) regulations, which measure hourly emissions from in-use equipment, and the subsequent Prevention of Significant Deterioration (PSD) regulations, which measure total pollution emitted per year. Finding that the PSD regulations need not employ the same standards as the NSPS regulations, the Court vacated the Fourth Circuit's decision and remanded the case.

Reproductive Law

The Court addressed the issue of state regulation of the right to choose to have an abortion in two cases: *Gonzales v. Carhart* (05-380); *Gonzales v. Planned Parenthood Federation of America Inc.*, (05-1382). In *Roe v. Wade*, 410 U.S. 113, 153 (1973), the Supreme Court ruled that the Due Process Clause of the Fourteenth Amendment protects a woman's right to terminate a pregnancy. In a 1992 decision—*Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 877—the Court ruled that the state may regulate abortion, but it may not impose an "undue burden" on a woman's right to choose abortion prior to viability. In 2000, in *Stenberg v. Carhart*, 530 U.S. 914, 930, the Court extended the *Casey* decision, holding that Nebraska's ban on partial-birth abortion was unconstitutional because it lacked a health exception. In 2003, Congress passed the Partial Birth Abortion Ban Act. Both Carhart and Planned Parenthood sought to enjoin enforcement of this ban, because the petitioners believed that the act suffered from the same flaw as Nebraska's ban did. In one of the more medically graphic opinions rendered by the Court in recent history, the Supreme Court held, by a 5-4 margin, that the act "is not void for vagueness, does not impose an undue burden from any overbreadth, and is not invalid on its face."

Establishment Clause

Hein v. Freedom from Religion (06-157) involved a challenge brought by the Freedom from Religion Foundation against the Faith-Based and Community Initiatives, a program that uses funds appropriated by Congress to fund a series of conferences dealing with the provision of social services through religious organizations. The Supreme Court granted certiorari to consider whether taxpayers have the ability to challenge the actions of the executive branch based on the Establishment Clause of the First Amendment, which prohibits the legislative branch from making laws that violate freedom of religion. In a split decision, the Court distinguished this case from *Flast v. Cohen*, 392 U.S. 83, 88 (1968), a case in which taxpayers were found to have standing to challenge a direct appropriation of federal funds to provide educational materials for parochial schools. In the current case, the Court found that the taxpayer did not have standing to challenge the Faith-Based and Community Initiatives program.

Employment

Consequences of Past Discrimination

Ledbetter v. Goodyear Tire & Rubber Co. (05-1074) asked the Court to consider whether a claimant alleging illegal pay discrimination under Title VII of the Civil Rights Act of 1964 may use evidence of an allegedly discriminatory act from outside the statutory time limit to prove that pay she received within the statutory period was illegally discriminatory. Generally, under Title VII, when employees believe that they have been subject to discrimination, they have 180 days to file a charge with the Equal Employment Opportunity Commission. In this case, Ledbetter argued that, even though the alleged discriminatory acts had taken place years before she filed her claim, each paycheck in which her pay differed from that of her male colleagues was a new discriminatory act. By a 5-4 majority, the Court found that "a pay-setting decision is a discrete act," and thus the Court affirmed the Eleventh Circuit's judgment that Ledbetter could only use the pay decision that immediately preceded the allegedly discriminatory paychecks.

Household Caregivers Employed by Third-Party Service Providers

The Fair Labor Standards Act sets the minimum wage and other mandatory benefits for workers. Home care workers, such as babysitters and companions to the elderly, are exempt from its provisions when employed directly for the families they work for, but in this case the worker was employed by a third-party provider of home care services. After following a notice-and-comment rulemaking procedure, the Department of Labor said, in 29 C.F.R. § 552.109(a) under the heading "interpretations," that such workers employed by third-party service providers are exempt from the minimum wage requirement. This case, *Long Island Care at Home Ltd. v. Coke* (06-593), involved a suit brought by

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Coke, a home care worker employed by Long Island Care at Home, a third-party provider, questioning the validity of § 109(a). The Second Circuit Court of Appeals held that the regulation was unenforceable. In a unanimous decision, the Supreme Court reversed the judgment of the Second Circuit, finding that the courts should defer to the Department of Labor.

ERISA Requirements for Terminating Pension Plans

Beck v. PACE Int'l Union (05-1448) questioned an employer's obligations under the Employee Retirement Income Security Act of 1974 (ERISA) when an employer terminates a pension plan by purchasing an annuity. ERISA requires private-sector pension plan managers to discharge their management duties solely in the interest of plan participants and their beneficiaries. When Crown Vantage Inc. entered into bankruptcy proceedings, it terminated its existing single-employer defined-benefit pension plan by purchasing an annuity rather than merging the plan into a group of plans administered by PACE International Union, which represented a number of Crown's employees. On behalf of those employees, PACE then sued Crown for failure to discharge its ERISA duties by adequately investigating the proposed merger. The Court of Appeals for the Ninth Circuit upheld the lower court's decision that Crown's failure to consider the merger adequately was a violation of its fiduciary duty under ERISA. In a unanimous decision, the Supreme Court reversed the Ninth Circuit and held not only that Crown was not required to consider a merger but also that the company was not permitted to merge as a way of terminating this type of pension plan.

Campaign Reform

The Bipartisan Campaign Reform Act of 2002 (BCRA) tightened federal election rules for fund-raising and election communications. Companion cases—*Federal Election Commission v. Wisconsin Right to Life* (06-969) and *McCain v. Wisconsin Right to Life* (06-970)—originated when an organization, Wisconsin Right to Life (WRTL), sought a preliminary injunction to allow it to continue running ads within the restricted period before the election. The district court dismissed WRTL's complaint, interpreting the Supreme Court's decision in *McConnell v. FEC*, 540 U.S. 93 (2003), to preclude facial as well as as-applied challenges to the BCRA. The litigation reached the Supreme Court in the 2005–2006 term, at which point the Supreme Court clarified that its decision in *McConnell* did not preclude as-applied challenges. On remand, the district court granted summary judgment to WRTL, and the FEC brought its appeal to the Supreme Court. This time the Supreme Court affirmed the lower court's judgment in favor of Wisconsin Right to Life. Chief Justice Roberts announced the decision of the court, writing that "the First Amendment requires us to err on the side of protecting political speech rather than suppressing it. We conclude that the speech at issue in this as-applied challenge is not the 'functional equivalent' of express campaign speech. We further conclude that the interests held to justify restricting corporate campaign speech or its functional equivalent do not justify restricting issue advocacy, and accordingly we hold that BCRA § 203 is unconstitutional as applied to the advertisements at issue in these cases."

Crime and Punishment

Fourth Amendment

Much of the suspense in *Brendlin v. California* (06-8120) was in the certiorari itself. In this case, a passenger in a car that was detained in an unwarranted traffic stop challenged the constitutionality of a search that led to his criminal conviction. In an argument that strained credulity, the state claimed that passengers were free to leave the scene of a traffic stop and were thus not seized for Fourth Amendment purposes. In a 9-0 decision, Justice Souter made clear that "[w]hen a police officer makes a traffic stop, the driver of the car is seized within the meaning of the Fourth Amendment. The question in this case is whether the same is true of a passenger. We hold that a passenger is seized as well and so may challenge the constitutionality of the stop."

Eighth Amendment

Panetti v. Quarterman (06-6407) appealed the Fifth Circuit's holding that a mentally ill death-row inmate who understood his crime but believed that his execution was being imposed for fantastical reasons was nonetheless mentally competent and could be executed. In a 5-4 decision handed down at the end of the term, the Supreme Court reversed the Fifth Circuit's judgment, citing the controlling opinion in *Ford v. Wainwright*, 477 U.S. 399 (1986). Nonetheless, the Court declined to put forth a rule for determining competency.

Sixth Amendment and Sentencing

In the past six years, the U.S. Supreme Court has devoted considerable attention to the constitutionality of state and federal sentencing laws. In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Court held that, in order for a judge to impose a sentence above the prescribed statutory maximum, all the facts used to support the enhanced sentence, except for the fact of prior convictions, must be found by the jury beyond a reasonable doubt. In *Blakely v. Washington*, 542 US 296 (2004), the Court considered a Washington state scheme that first established a maximum sentence for a class of crimes and then provided a "standard range" for particular crimes within that class, holding that the "standard range" was the "statutory maximum," because it constituted the maximum sentence a judge could impose on the basis of facts found by the jury. Most recently, in *United States v. Booker*, 543 US 220, 233 (2005), the Supreme Court followed its reasoning in *Blakely* and held that the Federal Sentencing Guidelines were unconstitutional to the extent that they required judges to increase a defendant's sentence upon finding aggravating factors not found by the jury. Two related cases considered by the Court this term—*Claiborne v. United States* (06-5618) and *Rita v. United States* (06-5754)—posed questions about post-*Blakely* Federal Sentencing Guidelines, with Claiborne defending against a government challenge that his below-guidelines sentence was unreasonably

lenient, and Rita contending that his within-guidelines sentence was unreasonably harsh. In a bizarre twist, Claiborne died shortly before the end of the Court's term, and the Court vacated the Eighth Circuit's judgment, which was no longer relevant. Rita, however, yielded a complicated decision that grants circuit courts permission to presume within-guidelines sentences to be reasonable. In another case, *Cunningham v. California* (05-6551), the Court found California's Determinate Sentencing Law to be unconstitutional.

Courtroom Conduct of Private Individuals

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), a federal court may grant habeas relief only if a state court's proceedings "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" 28 U.S.C. § 2254(d)(1). In *Carey v. Musladin* (05-785), the Ninth Circuit, interpreting Supreme Court precedent, found such a flaw in the state court's proceedings. During Musladin's murder trial, visible to the jury and over Musladin's objection, the victim's family wore buttons displaying the victim's photo. Claiming that the buttons eroded his presumption of innocence, Musladin appealed his conviction and, when that failed, filed a habeas petition in federal district court; his second appeal also failed. The Ninth Circuit, however, disagreed, leading to the appeal brought to the Supreme Court, which vacated the Ninth Circuit's decision. Writing for the majority, Justice Thomas explained that "in contrast to state-sponsored courtroom practices, the effect on a defendant's fair-trial rights of the spectator conduct to which Musladin objects is an open question in our jurisprudence. This Court has never addressed a claim that such private-actor courtroom conduct was so inherently prejudicial that it deprived a defendant of a fair trial." Therefore, the lack of precedent precluded a finding that the law in this situation was "clearly established."

Prison Litigation Reform Act

In 1995, to address prisoner complaints filed in federal court, Congress enacted the Prison Litigation Reform Act (PLRA). Two cases—*Jones v. Bock* (05-7058) and *Williams v. Overton* (05-7142)—asked the Court to analyze the administrative procedures prisoners must follow to their conclusion before filing a civil rights lawsuit in federal court as well as how a prisoner's procedural mistakes can affect such a lawsuit. The cases challenged procedural rules adopted by the Sixth Circuit, which required the district court to dismiss cases in which the prisoner sued someone not mentioned in the prisoner's grievance or in which the prisoner failed to establish exhaustion of administrative procedures in any one of the prisoner's claims. The Supreme Court unanimously found that the PLRA did not require such strict rules and that the circuit courts could not adopt the rules without following established administrative rulemaking procedures.

Late Petitions

Bowles v. Russell (06-5306) took up the case of a tardy habeas petition. The petitioner, Bowles, was convicted of felony murder in state court. After unsuccessfully appealing within the state court system, Bowles filed a habeas petition in federal court. After his petition was denied, he moved for a new trial on the petition. The district court denied that motion, but Bowles was not informed of the denial. The district court, following the applicable provision in the Federal Rules of Appellate Procedure, re-opened the period for Bowles to file an appeal. In its order, however, the court set a deadline 17 days after the new period began—three days beyond the allowable 14 days. Bowles filed his appeal one day before the judicially stated deadline—two days after the deadline in the rules. The Sixth Circuit, noting the lateness, found that the district court did not have the authority to extend the deadline by three days, vacillated on whether to allow the appeal, and ultimately dismissed it based on lack of jurisdiction because of the lateness.

In a 5-4 decision, the Supreme Court affirmed the Sixth Circuit's decision, finding that, even though Bowles had relied on the district court's order, the appellate court still had no jurisdiction. Justice Thomas, writing for the majority, explained the decision in this way: "Today we make clear that the timely filing of a notice of appeal in a civil case is a jurisdictional requirement. Because this Court has no authority to create equitable exceptions to jurisdictional requirements, use of the 'unique circumstances' doctrine is illegitimate." Justice Souter, in a bitter dissent joined by Justices Breyer, Ginsburg, and Stevens, wrote, "It is intolerable for the judicial system to treat people this way, and there is not even a technical justification for condoning this bait and switch." **TFL**

These highlights were compiled from the work of the 2006-2007 Legal Information Institute Bulletin Editorial Board. LII is a public service of Cornell Law School.