The 2007–2008 U.S. Supreme Court term proved both intriguing and unusual for followers of the Court and legal scholars alike. For the first time in more than 65 years, the Supreme Court expounded on the scope of the Second Amendment's provision pertaining to gun rights and the contemporary relevance of the exhaustion doctrine in patent law.

The Court also addressed a number of issues that resulted in unusual alignments of the justices that deviated from the expected ideological arrangement. For example, in *Greenlaw v. United States*, Justices Ginsburg, Scalia, Thomas, Souter, and Roberts formed the majority, while Justices Alito, Stevens, and Breyer dissented. *Kentucky Retirement Systems v. EEOC* witnessed Breyer, Roberts, Stevens, Souter, and Thomas joining in the majority opinion, with Kennedy, Scalia, Ginsburg, and Alito dissenting together. Such alignments have left commentators wondering whether the academic community overstated its proclamation of a strictly ideological, conservative Court following the appointment of Roberts and Alito. Scholars consider the decisions in *Boumediene v. Bush*, the case involving a detainee held at Guantanamo Bay, and *Kennedy v. Louisiana*, the case that ruled on whether execution is a proper punishment for raping a child, to be liberal opinions, thus demonstrating that ideology alone will not determine the Court's jurisprudence in every case.

The 2006–2007 Supreme Court term left a wake in which 30 percent of the Court's cases ended with a 5-4 split decision. In 2007–2008, however, the Court witnessed considerably fewer 5-4 splits: only 17 percent of the cases ended in this manner. It is surprising to note that the number of unanimous decisions also decreased: 9-0 decisions dropped from 25 percent last term to 18 percent this term, although the number of dissenting votes per decision stayed nearly steady. *See* SCOTUSBlog (www.scotusblog.com/wp/wp-content/uploads/2008/06/superstatpackot07.pdf). The cases described below highlight the decisions the Court reached this past term.

Second Amendment

The District of Columbia passed a statute mandating that owners procure licenses for all handguns and that owners keep all firearms within the District unloaded and disassembled or safety-locked. Private gun owners sued to enjoin the District's enforcement of the law. After the district court dismissed the suit, the D.C. Circuit Court of Appeals reversed the decision, and the Supreme Court granted certiorari to address the meaning of the Second Amendment for the first time in nearly 70 years in the case of *District of Columbia v. Heller* (07-290).

In a 5-4 decision that was split along ideological lines, Justice Scalia wrote for the majority, holding that the Second Amendment's prefatory language referencing the militia does not restrict the operative clause regarding the people's right "to keep and bear Arms." Consequently, according to the majority, the right did not exist only as a collective right, as the dissent asserted, but also as an individual constitutional right. Citing a vast array of historical evidence, the majority argued that the phrase "bear Arms" during the founding era commonly referred to "carrying weapons for individual self-defense." The majority, however, clarified that legislatures can constitutionally take certain actions, such as prohibiting criminals and the mentally ill from possessing firearms. In addition, the Court held that legislatures may still forbid possession of machine guns or types of weaponry that a militia during the founding era would not have possessed.

War Powers

Suspension of Habeas Corpus

Lakhdar Boumediene, an Algerian citizen, sued for habeas corpus after the United States detained him at Guantanamo Bay and classified him as an enemy combatant. The district court dismissed the claim for two reasons: (1) Congress had enacted the Detainee Treatment Act of 2005 (DTA), which provides that "no court, justice, or judge shall have jurisdiction to hear or consider … an application for a writ of habeas corpus filed by … an alien detained … at Guantanamo Bay, Cuba." (2) Congress subsequently modified the DTA through the Military Commissions Act (MCA), making the DTA apply to habeas petitions pending at the time of the DTA's enactment. The D.C. Circuit Court of Appeals affirmed the district court's decision for lack of jurisdiction.

In *Boumediene v. Bush* (06-1195) the Supreme Court reversed the lower court's decision in a 5-4 ruling. Justice Kennedy's majority opinion found § 7 of the MCA an "unconstitutional suspension of the writ" of habeas corpus. The majority focused on the need for a clear, unequivocal suspension of the writ by Congress but found no such clear statement in either the DTA or the MCA. Merely stripping the federal courts of jurisdiction, the majority posited, could not accomplish this task. The majority asserted that questions of extraterritoriality pivot on "objective factors and practical concerns." The majority was greatly concerned about the inadequate procedural safeguards for the detainees to contest their detentions, because detainees lacked not only adequate means to find favorable evidence and but also the assistance of counsel to ascertain the nature of the charges brought against them. In his sharply critical dissent, Justice Scalia warned that "the [n]ation will live to regret what the Court has done today."

Federalism

Article 36 of the Vienna Convention on Consular Relations, a treaty in which the United States participates, permits foreign nationals charged with a crime the right to contact their consulates. After the treaty was signed, the International Court of Justice (ICJ) held in *Case Concerning Avena and Other Mexican Nationals*, 2004 I.C.J. 12, that

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the Vienna Convention bound individual states within the United States to the treaty's provisions, prompting President George W. Bush to issue a memorandum mandating that state courts enforce the treaty's provisions. In *Medellin v. Texas*, (06-984) the Supreme Court addressed whether the President possessed the constitutional authority to require such state enforcement without ratification by the U.S. Senate.

The Court affirmed the Texas Court of Criminal Appeals in a 6-3 opinion written by Chief Justice Roberts. The majority opinion dismissed Medellin's contention that the ICJ's *Avena* decision required Texas to direct him to his consulate, because the President lacked constitutional authority to unilaterally enter into a self-executing treaty requiring state compliance. Such a treaty first demands Senate approval. In addition, the majority held that the United States had only consented to the ICJ's jurisdiction over the United States' international legal obligations but that the ICJ lacked jurisdiction to declare federal law that would bind individual states.

Crime and Punishment

Death Penalty

Method of Execution

The Court took up its first case dealing with the method of execution in 117 years in *Baze v. Rees* (07-5439). Ralph Baze and Thomas C. Bowling, two inmates on Kentucky's death row, sued to enjoin Kentucky from carrying out the death penalty through lethal injection.

Baze and Bowling argued that a one-drug barbiturate should replace the three-drug combination that Kentucky (and 35 other states) currently uses. The inmates claimed that the risk of maladministration exposed them to possible cruel and unusual punishment, in violation of the Eighth Amendment. Furthermore, they noted that sodium pentothal, by rendering the subject unconscious, prevented those administering the injection from discerning whether they had fully anesthetized the subject; thus, the inmate might feel pain but be unable to indicate such pain. Chief Justice Roberts' plurality opinion in the 7-2 decision, however, argued that to violate the Eighth Amendment, the method of execution must meet the "objectively intolerable" test. Because maladministration was merely a possibility and because every jurisdiction imposing the death penalty uses this method, Roberts reasoned that lethal injection does not meet the level of an "unusual punishment" or a wanton infliction of pain.

Capital Punishment for Child Rape

Louisiana passed a state statute in 1995 making the death penalty available as a sentence for the rape of a child less than 12 years of age. In 1998, police arrested and charged Patrick Kennedy with the brutal rape of his eight-year-old stepdaughter. A jury convicted him and sentenced him to death for the crime.

The Supreme Court granted certiorari in *Kennedy v. Louisiana* (07-343) to resolve whether states could use execution as a sentence in cases of child rape. Writing for a five-vote majority, Justice Kennedy reversed the imposition of the statute and argued that execution for a crime that leaves the victim alive is not proportional. Evolving standards of decency, according to Kennedy, prohibit punishing a criminal with death for a crime that does not result in the victim's death. The majority reached this conclusion by highlighting that only six states currently allow capital punishment for child rape, and no one in any state has been executed for child rape since 1964. The Court decided that these facts demonstrated a "national consensus." Further, if a child rapist can die for committing the rape alone, then an incentive exists to kill the victim and not leave a living witness.

Criminal Law

In *Begay v. United States* (06-11543), the Court interpreted the meaning of "violent felony" under the Armed Career Criminal Act (ACCA), which mandates a 15-year prison sentence for a previously convicted felon in possession of a firearm if the felon has previously committed three or more violent felonies. One provision of the ACCA defines a violent felony as "burglary, arson, or extortion, involv[ing] use of explosives, or … conduct that presents a serious risk of physical injury to another." U.S. prosecutors charged Larry Begay for illegal possession of a firearm, and a trial judge sentenced him under this provision, because he had more than three prior convictions for driving while intoxicated (DWI) felonies. Begay appealed with regard to whether a DWI constitutes a "violent felony" under the ACCA.

Writing for a 6-3 majority, Justice Breyer held that the mandatory sentence did not apply in this case, because DWIs are not violent felonies. He reasoned that the enumerated crimes of burglary, arson, extortion, and use of explosives differ too substantially from a DWI, because the former imply that future acts are likely to result in more "violent, aggressive, and purposeful 'armed career criminal' behavior in a way that the latter does not." The disagreement between the majority and dissenters centered on a textualist versus functionalist argument.

Although *Begay* received much less attention than did *Baze* in the popular media, criminal law scholars contend that *Begay* actually has much more practical relevance for practitioners.

Sentencing

Federal Sentencing Minimums

In *Gall v. United States* (06-7949) the Supreme Court was faced with the question of whether district judges have the discretion to impose sentences below those prescribed by the Federal Sentencing Guidelines. Brian Michael Gall distributed ecstasy as part of a drug ring while he was a student at the University of Iowa. After quitting the ring voluntarily, he moved to Arizona, opened a business, and remained crime-free before voluntarily turning himself in and pleading guilty to distributing a controlled substance. The prosecutor asked for a sentence of 30 months in prison, the minimum permitted by the Federal Sentencing Guidelines. Because of the abundance of mitigating circumstances, however, the trial judge imposed a lesser sentence of only three years of probation.

After the Eighth Circuit Court of Appeals found the sentence unreasonable, the Court granted certiorari. In a 7-2 opinion written by Justice Stevens, the majority reversed the lower court's ruling and cited the Supreme Court's recent opinion in *United States v. Booker*, 543 U.S. 220 (2005): "As a result of our decision, the [g]uidelines are now advisory, and appellate review of sentencing guidelines is limited to determining whether they were 'reasonable.'" The majority also held that any trial judge choosing to depart from the guidelines must provide reasons for doing so.

With *Gall* setting the broad rule, the Court decided *Kimbrough v. United States* (06-633) on the same day. In *Kimbrough*, the Court upheld a district judge's decision not to follow the guidelines' 100-to-1 sentencing ratio for crack versus powdered cocaine. Scholars see *Kimbrough* as a practical application of *Gall*'s broader rule.

Amending a Sentence Sua Sponte on Appeal

Police arrested Michael J. Greenlaw for the sale of drugs and illegal possession of firearms, and the trial court subsequently convicted him on multiple counts. Federal law requires that a second conviction for possession of a firearm during a drug trafficking offense requires a mandatory minimum sentence of 25 years in prison, but Greenlaw received a sentence of only 10 years. Regardless, he still appealed his sentence as "unreasonably long." The government did not file a cross-appeal for the 15-year enhancement. The court of appeals denied Greenlaw's appeal and added the 15 years anyway.

In *Greenlaw v. United States* (07-330) Justice Ginsburg's 7-2 majority opinion highlighted the appellate court's mistaken application of Rule 52(b) of the Rules of Criminal Procedure, which grants an appellate court on its own initiative the discretion to raise and correct a trial court's "plain error." Although Rule 52(b) grants such discretion, Justice Ginsburg explained that the rule does not eliminate the cross-appeal requirement. Thus, because the government had not filed an appeal, the appellate court lacked the authority to lengthen the sentence. The majority based this argument on the Organized Crime Control Act, a statute in which Congress included an explicit exception to the cross-appeal requirement. The majority thus took Congress' silence in this statute as evidence that the requirement remained.

Sovereign Immunity

Abdus-Shahid M.S. Ali gave two bags of possessions to prison officials during his transfer to a new prison. Upon arrival at the new location, Ali discovered that several religious items were missing. The Court granted certiorari in *Ali v. Federal Bureau of Prisons* (06-9130) to determine whether sovereign immunity protects federal law enforcement officials from claims regarding the mishandling of citizens' property.

In a 5-4 decision, the majority voted to affirm the Eleventh Circuit's dismissal of Ali's claim. The decision hinged on an interpretation of the Federal Torts Claims Act, which delineates the waiver of sovereign immunity for torts committed by federal employees. Justice Thomas' majority opinion explained that an exception to the waiver exists for "claims arising from the detention of property by … any other law enforcement officer." The Court found this language broad enough to encompass prison officials who handle prisoners' property.

This decision consequently reduces the rights and remedies that prisoners have while incarcerated. From the perspective of statutory interpretation, scholars hail *Ali v. Federal Bureau of Prisons* as a landmark case that law students will study in casebooks for years to come.

Taxation

Trusts

Knight v. Commissioner of Internal Revenue (06-1286) involves the interplay between trusts and the U.S. Tax Code. Under § 67(e) of the code, trusts may fully deduct costs unique to trusts—mainly administrative costs—from their tax returns. Trusts may also deduct other "miscellaneous items" but only if the aggregate sum of these miscellaneous items totals 2 percent or greater of the adjusted gross income. Michael J. Knight sought investment-management advice from a firm for a trust for which he served as trustee. The trust deducted all costs related to procuring the advice from its tax return, but the Internal Revenue Service objected to the deductions as "not unique to trusts." The Tax Court found for the IRS, and the Second Circuit Court of Appeals affirmed the decision.

The Supreme Court granted certiorari to determine whether the 2 percent floor applies to investment advisory fees when incurred by a trust. Chief Justice Roberts, writing for the majority, affirmed the court of appeals' judgment. Knight argued that his fiduciary duties dictated that he act according to "the prudent investor" rule, which requires that a trustee manage the trust in a way a prudent investor would manage it. Roberts reasoned that, if a prudent investor would seek investment-management advice, then individuals must commonly seek such advice as well, and therefore, the costs of outside consultation would not be "unique to trusts." Thus, the Court unanimously sided with the IRS.

Subsidiary Companies

MeadWestvaco v. Illinois Department of Revenue (06-1413) dealt with the question of whether a state can constitutionally tax an out-of-state corporation's capital gain on the sale of one of its business divisions operating in that state. In 1994, MeadWestvaco sold its profitable Lexis/Nexis Division for a $1 billion profit; the state of Illinois asserted the right to tax that revenue.

Justice Alito, writing for the seven-justice majority, explained that the Commerce Clause and Due Process Clause limit a state's power to tax out-of-state activities. Nevertheless, a state may tax an apportioned share of the value generated by a multistate enterprise's "intrastate and extrastate activities" if those activities contribute to a "unitary business." The Court reasoned that, if MeadWestvaco and Lexis/Nexis constituted a unitary business, then functional integration, centralized management, and economies of scale must exist between MeadWestvaco and Lexis/Nexis. Rather than applying this test, however, the Court pointed out that the state courts looked for and found evidence of an "operational purpose." Because the state courts applied this incorrect test, the Supreme Court sent the case back to the appellate court to look for functional integration, centralized management, and economies of scale, instead.

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Dormant Commerce Clause

Forty-two states have tax schemes that tax income earned by out-of-state bondholders but do not tax income earned by in-state bondholders. Federal courts, however, have applied the U.S. Constitution's Dormant Commerce Clause, which prohibits states from passing legislation that burdens or discriminates against interstate commerce. In *Department of Revenue of Kentucky v. Davis* (06-666), the U.S. Supreme Court examined whether the in-state versus out-of-state tax scheme and the Dormant Commerce Clause could co-exist.

The Supreme Court overturned the appellate court's ruling that the Constitution does not support the tax scheme. Although no single opinion commanded a 7-2 majority, the Court recognized that bond proceeds predominantly benefit the public, which indicates that legitimate state objectives, rather than economic protectionism, are likely to drive the scheme. Thus, the 42 states that use this tax scheme stand impervious to constitutional attack via the Dormant Commerce Clause.

Some scholars see the ruling in *Davis*—in combination with the precedent set in *United Haulers Association v. Oneida-Herkimer Solid Waste Management Authority* (05-1345), upon which a number of the opinions in *Davis* rely—as a decision that announced a broad principle that the Roberts Court will use the Dormant Commerce Clause to strike down statutes that benefit purely private, local interests but will except statutes that benefit the government itself.

Election Law

Photo Identification

In 2005, in an effort to decrease voter fraud, Indiana's state legislature passed a law requiring all voters to present government photo identification at the time of voting. The local Democratic Party objected that the law placed an undue burden on an individual's fundamental right to vote. The district court upheld the law, and the Seventh Circuit affirmed the decision.

If the Supreme Court had found an undue burden on the right to vote when deciding *Crawford v. Marion County Election Bd.* (07-21), then Indiana would have had to show that the law achieved a compelling interest and that the legislature had narrowly tailored the law to achieve that interest. Instead of finding the law an undue burden, however, the Court voted 6-3 to uphold the law, delivering a splintered plurality opinion. Justice Stevens, joined by Chief Justice Roberts and Justice Kennedy, applied a balancing test and adopted the view that the law did not place an excessive burden on the right to vote. Justice Scalia, joined by Justice Thomas and Justice Alito, argued for a standard that was highly deferential to the state under the premise that the law served an "important regulatory interest." Justice Souter, joined by Justice Ginsburg, argued that, even if voter fraud prevention was a compelling interest, the state needed a factual record to show that the interest actually existed, which Indiana failed to provide in this case. Finally, Justice Breyer took a position that the law disproportionately burdened voters who did not have photo identification.

Scholars of election law believe that voter identification laws disproportionately burden minorities and voters who live in poverty—demographic groups that heavily favor the Democratic Party. As a result, the law may provide some electoral benefit to conservative candidates in close elections.

Campaign Finance

When self-financing candidates for the U.S. House of Representatives spend personal funds in excess of $350,000 on their own campaigns, § 319(a) of the Bi-Partisan Campaign Reform Act, known as "The Millionaire's Amendment," permits these candidates' opponents to receive triple the amount of personal contributions typically allowed and to accept coordinated party contributions without limit. Meanwhile, § 319(a) holds the self-financing candidate to the normal limit. Jack Davis, a former candidate for the House of Representatives in 2004 and 2006, intended to finance his own campaign with $1 million of his personal funds. When the Federal Election Commission attempted to enforce § 319(a), Davis sued to enjoin the enforcement, claiming that it infringed on his First Amendment rights.

In *Davis v. Federal Election Commission* (07-320), Justice Alito, writing for the 5-4 majority, cited *Buckley v. Valeo*, 424 U.S. 1 (1976), which held that the First Amendment permits candidates to campaign "vigorously and tirelessly" for their own election and struck down a cap on a candidate's use of personal funds. The majority held that § 319(a) effectively worked as a cap by forcing the candidate to choose between unlimited campaign financing and discriminatory fund-raising limits. The Court also refused the argument that "leveling the playing field" between candidates of different levels of wealth served a compelling governmental interest, which the government would need to show in order to justify burdening First Amendment rights. As a result, the Court held § 319(a) unconstitutional and also struck down § 319(b), the mandatory disclosure provision, because compelled disclosure "seriously infringe[s] on privacy of association."

Civil Procedure

Res Judicata: Virtual Representation

Greg Herrick, the owner of two F-45 airplanes, requested specifications for the aircraft from the Federal Aviation Administration (FAA) under the Freedom of Information Act (FOIA). The FAA refused to comply, and Herrick sued. The district court found for the FAA, ruling that the documents constituted "protected trade secrets" and therefore fell outside of the scope of the FOIA. At the time, Brent Taylor was Herrick's partner in restoring the F-45s. Taylor filed suit, on his own behalf, for the records under the FOIA again in district court. The FAA pleaded res judicata, which prohibits a party from suing on a claim that a court has already adjudicated. Both the district court and the D.C. Circuit Court of Appeals agreed with the FAA's theory that Herrick had "virtually represented" Taylor; the courts therefore applied claim preclusion.

In *Taylor v. Sturgell* (07-371), Justice Ginsburg, writing for a unanimous Court, reversed the D.C. Circuit, giving three reasons for the decision: (1) A prior judgment does not bind a litigant that is not a party to the suit. (2) Allowing an expansive doctrine of virtual representation would create "a de facto class-action" in which some parties with the right to intervene would not receive notice. A loss of legal rights without an opportunity to be heard violates the Due Process Clause. (3) A totality of the circumstances that lead to a balanced approach would "complicate the task" of the district court. Such complications prove inefficient because they require wide-ranging, time-consuming, and expensive discovery.

Scholars of legal procedure basically agree with the Court's decision, in part because of a fear that the D.C. Circuit's fact-intensive totality of the circumstances test would increase the likelihood that all courts would not adjudicate similar cases the same way.

Employment

Denial of Benefits Under the Age Discrimination in Employment Act

Kentucky Retirement Systems v. EEOC (06-1037) addressed the issue of whether using age as a factor in determining the allocation of retirement benefits violates the prohibition on age discrimination, as provided by the Age Discrimination in Employment Act (ADEA). Kentucky's retirement disability plan for state employees provides benefits for workers who become disabled as a result of their work before reaching the age of retirement. To receive benefits under the plan, an employee must have either worked for 20 years in the position or have reached the age of 55 and have put in at least five years of service. The EEOC brought a disparate treatment claim.

By a vote of 7-2, the Supreme Court held that the Kentucky plan does not violate the ADEA. Writing for the majority, Justice Breyer cited *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), which held that proving disparate treatment requires demonstrating that age discrimination actually motivated the disparate treatment. Under this standard, the majority found that Kentucky's plan does not rest on the assumptions of age that the ADEA sought to eradicate. Moreover, background circumstances demonstrate that Kentucky's plan does not use pension status as "a proxy for age." The plan treats disabled workers differently only with respect to the timing of their receipt of benefits—not to the amount of benefits received. The Court then allocated to the plaintiff the burden of proving that age alone caused the disparate impact.

Conflict of Interest Review Under the Employee Retirement Income Security Act

Wanda Glenn had worked for Sears, Roebuck & Co. for 14 years before a physician diagnosed her with a serious heart condition and advised her to quit working. Glenn followed her physician's advice and applied to MetLife, Sears' insurance carrier, for disability benefits. MetLife's responsibilities included both authorizing the disbursement of benefits and paying them. Both MetLife and the Social Security Administration (SSA) certified Glenn as disabled. After two years, however, MetLife changed her classification to "fit for sedentary work" in spite of her physician's medical advice and the SSA's assessment. Glenn brought an Employee Retirement Income Security Act (ERISA) action against MetLife for the wrongful denial of benefits. The district court found for MetLife, but the court of appeals reversed.

Justice Breyer's 6-3 majority opinion in *Metropolitan Life Insurance Co. v. Glenn* (06-923) affirmed and argued that MetLife's fiduciary duty counsels in favor of dispensing benefits, but that its financial interest counsels against such dispensation. The ruling also held that ERISA demands a "higher-than-marketplace quality" from insurance services purchased to dole out benefits to participants and employees. For these reasons, Breyer asserted that MetLife's position constituted a conflict of interest. However, Breyer noted that, when reviewing a conflicted administrator's decision, courts should apply a deferential standard and use the conflict of interest as only a factor in assessing the propriety of the decision.

Private Suits for Monetary Damages Under ERISA

A defined contribution plan promises a participant in a disability retirement plan "the value of an individual account at retirement, which is largely a function of the amounts contributed to that account and the investment performance of those contributions." James LaRue held one such account, and during his employment he chose to make certain changes to his investments, a choice allowed by the plan. DeWolff, the plan manager, failed to act, and LaRue's account lost interest in the amount of $150,000. Suing under the Employee Retirement Income Security Act, LaRue claimed "make whole money" in the amount of $150,000 as equitable relief for DeWolff's omission under § 505(a)(2), which allows account owners to claim equitable relief from account managers for fiduciary breach.

In *LaRue v. DeWolff, Boberg & Associates* (06-656), the Court addressed whether ERISA entitles private litigants to sue for money that remedies only their private accounts in cases of fiduciary breach under a claim of "equitable relief." Finding in the affirmative, Justice Stevens' majority opinion for the unanimous vote looked to § 404(c) of ERISA, which "exempts fiduciaries from liability for losses caused by participants' exercise of control over assets in their individual accounts." The Court reasoned that this exemption served no purpose if fiduciaries never faced liability for individual account losses.

Suits Under the ADEA for Retaliation

The Age Discrimination in Employment Act waives federal sovereign immunity to allow a private cause of action for federal employees against the federal government in cases of age discrimination. However, until the decision reached in *Gomez-Perez v. Potter* (06-1321), whether the ADEA permitted federal employees to sue in cases of retaliation for filing an age discrimination complaint remained less clear. In *Gomez-Perez*, a clerk for the U.S. Postal Service (USPS) filed one such complaint against the USPS for refusing her transfer request. Gomez-Perez alleged that this complaint prompted her supervisors to take a series of retaliatory measures against her. The district court granted summary judgment for the USPS, and on appeal, the First Circuit Court of Appeals affirmed the decision, finding that the ADEA did not provide a private cause of action for claims of retaliation.

On behalf of a six-justice majority, Justice Alito reversed. The majority relied on the language of other federal

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anti-discrimination statutes with language similar to the ADEA's. Specifically, the Court looked to Title IX of the Education Amendments of 1972 and to 42 U.S.C. § 1982, both of which the Court had previously interpreted to imply private causes of action. Because the language in the ADEA did not materially differ, the majority held that Gomez-Perez could bring suit.

Business

Arbitration

Judicial Review of Arbitration Agreements

In *Hall Street Assoc. v. Mattel Inc.* (06-989), the Court considered whether the Federal Arbitration Act (FAA) provides the sole basis for federal judicial review of arbitration agreements. Hall Street Associates sued Mattel Inc. for allegedly violating a property lease, and the parties submitted to binding arbitration. The parties agreed, however, to allow a federal court to conduct a judicial review of certain matters decided in arbitration that the act did not characterize as reviewable. In a 6-3 vote, Justice Souter's majority opinion held that the act's provisions exclude judicial review of arbitrated matters not listed in the FAA and disallows contractual modification of these provisions by the parties.

The Federal Arbitration Act and the States

Arnold Preston and Alex Ferrer contracted for Preston to serve as Ferrer's personal manager in exchange for assigning to Preston a portion of Ferrer's earnings from a television deal. The contract provided that any dispute arising under the contract be arbitrated. Preston filed for arbitration, claiming unpaid earnings from Ferrer. Ferrer, meanwhile, filed in state court. In accordance with California state law, the state court stopped the arbitration and sent the case to a state administrative agency, the Labor Commission, for review.

In *Preston v. Ferrer* (06-1463), the Court considered the question of whether the Federal Arbitration Act pre-empts California state law and voids certain contractual arbitration agreements. In an 8-1 opinion, Justice Ginsburg held that the FAA did pre-empt the California state law, stating that § 2 of the FAA makes a contractually agreed-upon arbitration clause valid and irrevocable because of "a national policy favoring arbitration." The majority asserted that a state therefore lacks the power to revoke an arbitration agreement even for the purposes of submitting the dispute to an administrative agency, because the Supremacy Clause of the U.S. Constitution renders state law void when it is incompatible with a federal law. In this case, Ginsburg's opinion declared that the California law and the FAA cannot co-exist and that federal law must therefore prevail.

Securities

In *Stoneridge v. Scientific-Atlanta* (06-43), Charter Communications allegedly paid its equipment vendor, Scientific-Atlanta, prices that were above market value for television set-top boxes. The alleged scheme then provided for Scientific-Atlanta to return the surplus to Charter, and for Charter to account for these returns as revenue as a way to inflate its own stock prices artificially.

Stoneridge sued Scientific-Atlanta under § 10(b) of the Securities Exchange Act, but the district court dismissed the claim, because an "aiding and abetting" charge did not provide grounds for liability under § 10(b). The Eighth Circuit affirmed the decision. Also affirming the decision by a 5-3 ruling, the Supreme Court applied the decision it had reached in *Central Bank v. First International Bank*. 511 U.S. 164 (1994), which held that § 10(b) did not imply a right for securities fraud plaintiffs to bring a private cause of action against aiders and abettors. Justice Kennedy's majority opinion also focused on Congress' response to the *Central Bank* ruling—passage of the Private Securities Litigation Reform Act (PSLRA). The PSLRA authorizes the Securities and Exchange Commission to take action against aiders and abettors but not private litigants. Thus, the Court ruled that adopting Stoneridge's theory that Congress supported third-party liability "would put an unsupportable interpretation on Congress' specific response to *Central Bank*."

Scholars seem to agree that the ruling in this case means that third parties must have directly misled investors and that shareholders must have relied on this fraudulent misdirection. Such stringent requirements, these scholars believe, will have a broad impact on U.S. corporations because, in many cases, the requirements will insulate ex officio members of companies and their legal teams from fraud liability.

Patents

A long-established doctrine of patent law, the exhaustion doctrine, entitles a patentee to a single royalty per patented device. *Quanta Computer Inc. v. LG Electronics Inc.* (06-937) centered on the scope of the doctrine in contemporary patent law. LG Electronics Inc. (LGE) patented three improved components for computer systems and licensed them to Intel Inc. for Intel's use but required Intel to inform its customers that the license prohibited them from combining licensed parts with non-Intel parts. LGE subsequently sued Quanta Computers Inc. for ignoring this warning. Quanta asserted the exhaustion doctrine, claiming that LGE had exhausted its patent by licensing its components to Intel. The Federal Circuit sided with LGE, which had argued that the sale from Intel to Quanta was conditional upon complying with the provision that prohibited the combination of the items.

Writing for a unanimous Court that ruled against LGE, Justice Thomas explained, "The authorized sale of an article that substantially embodies a patent exhausts the patent holder's rights and prevents the patent holder from invoking patent law to control postsale use of the article." In a footnote to the opinion, Justice Thomas suggested that a breach-of-contract action might remedy Quanta's alleged violation of the conditional sale, but he reaffirmed that patent law provides no recourse against third-party purchasers once the patentee has received an initial royalty.

Bankruptcy

Florida Department of Revenue v. Piccadilly Cafeterias Inc. (07-312) presented the Court with a classic case of a split among circuit courts. Section 1146(a) of the Bankruptcy Code exempts any assets transferred "under a plan confirmed" from state taxes. The Third and Fourth Circuit Courts of Appeals had interpreted this provision to mean that to receive exemption status the bankruptcy court must have authorized the plan before the assets were transferred. The Eleventh Circuit, on the other hand, held that the provision protected assets that had been transferred prior to an approved plan as well.

Justice Thomas, writing on behalf of the seven-vote majority, reversed the Eleventh Circuit. The majority, grounded in textualism, concluded that "[t]he most natural reading of § 1146(a)'s text, the provision's placement within the Code, and substantive canons [of interpretation] all lead to the same conclusion: Section 1146(a)'s text affords a stamp-tax exemption only to transfers made pursuant to a [confirmed] Chapter 11 plan. …" The Court, typically, has not permitted federal law to interfere with state tax schemes absent a clear congressional articulation. The majority asserted that even a favorable finding for Piccadilly Cafeterias only proved ambiguity, not the requisite clear articulation.

This decision provides the debtor with incentives to delay the sale of assets in order to avoid the tax. Such delays, some scholars fear, may impair the value of some debtors' assets, make it harder for those debtors to emerge from bankruptcy, and thereby reduce the number of Chapter 11 success stories.

Indian Law

Jurisdiction over non-Indians

Plains Commerce Bank owned land on the Cheyenne River Sioux Indian Tribe's reservation. The Long Family Land and Cattle Company, owned by an Indian couple, leased this property from the bank but defaulted on payments. Plains Commerce Bank then sold the property to individuals who were not members of the tribe. The Longs filed a discrimination claim and sought an injunction from the tribal court, asserting that the bank had offered the land to nonmembers of the tribe on terms that were more favorable than those offered to the Longs. The tribal court awarded damages in the amount of $700,000 and enjoined Plains Commerce Bank from transferring the property's title to the buyers who were not members of the tribe.

Plains Commerce Bank then filed suit in federal district court, but both the district court and Eighth Circuit found for the tribe. In *Plains Commerce Bank v. Long Family Cattle Co.* (07-411), Chief Justice Roberts' 5-4 majority opinion reversed the lower courts. Roberts invoked a long-held principle that tribes do not have jurisdiction over non-Indians who conduct activities on non-Indian fee simple property, even if it was located on an Indian reservation, unless the activity threatens the welfare of the tribe. The Court found that the bank posed no such threat. When tribe members convey land on their reservation to a third party who is not a member of the tribe, the tribe loses jurisdictional authority. Therefore, the Court voided the tribal court's damages award for lack of jurisdiction.

Torts

Punitive Damages

In litigation that has lasted 19 years, the U.S. Supreme Court has finally put its own stamp on the issues arising from the Exxon *Valdez* oil spill in Prince William Sound. Following the spill, individuals who depend on Prince William Sound for their livelihood filed a class action suit against Exxon, and the jury awarded them $287 million in compensatory damages and $5 billion in punitive damages. On appeal, the Ninth Circuit reduced the punitive damages award to $2.5 billion.

The Supreme Court granted certiorari in *Exxon Shipping Company v. Baker* (07-219) to determine the federal common law cap for punitive damages under maritime law. The 5-3 majority opinion, written by Justice Souter, found that the Exxon *Valdez*'s captain had navigated a treacherous course under the influence of alcohol, which constituted recklessness; however, neither Exxon nor the ship captain had profited from the spill. The majority held that when a tortfeasor does not benefit from the tort created and does not act maliciously, punitive damage awards cannot exceed an amount that is equal to the total compensatory damages awarded.

Some scholars believe that this 1:1 cap will govern all federal punitive damage claims for tortious conduct that does not benefit the tortfeasor and that does not occur out of malice, regardless of whether the tort occurs at sea or on land. If so, this decision has a broad impact on the recent developments in Supreme Court punitive damage jurisprudence.

Energy

A spot-market energy industry permits utilities to purchase energy on the day they need it. California had this system in place during summer 2000—an exceptionally hot summer—which significantly drove up prices. Utilities backed out of the spot market and negotiated long-term contracts with wholesale energy suppliers. With energy prices inflated at the time the contracts were formed, the utilities asked the government to allow renegotiation of the prices, but the government refused. Under long-held Supreme Court doctrine, the Federal Energy Regulatory Commission (FERC) must presume that the contract rate is "just and reasonable" if the parties freely negotiated the contract and if the contract's terms do not present a serious harm to the public good.

The Ninth Circuit found that the FERC did need an opportunity to review the contract and held that, when a purchaser challenges a contract, the contract need only exceed a "zone of reasonableness" to overcome the presumption. In *Morgan Stanley Capital Group Inc. v. Public Utility District Number 1* (06-1457), the Supreme Court, in a 5-2 opinion written by Justice Scalia, reversed both parts of the Ninth Circuit's holding. The majority found that the portion of the contract referring to "opportunity for review" too readily undermined the sanctity of contracts and that the latter portion treated the purchaser differently than the way it treated the seller. Both parties may only overcome the presumption of "unequivocal public necessity" or "extraordinary circumstances," neither of which, the majority said, existed in this case. **TFL**

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