The 2008–2009 U.S. Supreme Court term saw several interesting decisions. The Court revisited "disparate impact" racial discrimination in a high-profile case, *Ricci v. DeStefano* (07-1428), and revisited the Voting Rights Act in *Bartlett v. Strickland* (07-689) and *Northwest Austin Municipal Util. Dist. No. One v. Holder* (08-322).

This term, the Court had more close rulings than it had during last year's term. This term, 29 percent of the Court's decisions were by a vote of 5-4. Although this figure is significantly higher than the 17 percent decided by a 5-4 margin in 2007–2008, the amount does not exceed the 2006–2007 term's 30 percent. Of the 23 rulings that were decided by a vote of 5-4, 16 were standard left-right splits, with Justice Kennedy as the swing vote. Other cases saw some interesting ideological divides. For example, in *Arizona v. Gan*t (07-542) and *Melendez-Diaz v. Massachusetts* (07-591), Justices Scalia and Thomas joined with Justices Ginsburg, Stevens, and Souter to protect defendants' rights in criminal cases. See SCOTUS Blog at www.scotuswiki.com/index.php?title=Case_Index_OT08.

Civil Procedure

In 2004, Javaid Iqbal, a Pakistani Muslim convicted, jailed, and deported on charges of fraud and conspiracy, filed a *Bivens* (*Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971)) claim against federal officials, including former Attorney General John Ashcroft and FBI Director Robert Mueller. Iqbal alleged that his constitutional rights were violated when federal officials used criteria of race, religion, and national origin in order to designate and detain him as a person of "high interest" in their ongoing investigation of the 9/11 attacks. Iqbal's civil complaint also alleged constitutional violations grounded in conduct meted out by lower-ranking officials who acted under the direct auspices of policies designed by Ashcroft and adopted and executed by Mueller. In the District Court, petitioners Ashcroft and Mueller filed a 12(b)(6) motion to dismiss on grounds that Iqbal's claim lacked sufficient factual evidence, but the motion was denied. The petitioners then filed an interlocutory appeal with the Court of Appeals for the Second Circuit. The Second Circuit affirmed the District Court's ruling and furthermore stated that in accordance with the pleading standard established by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 Iqbal's claim was plausible on its face and possessed sufficient facts to state a claim for unlawful discrimination that could withstand the petitioners' qualified immunity defense. The Supreme Court granted certiorari to determine the proper pleading standards when a defendant in a *Bivens* suit is a high-ranking government official.

In *Aschcroft v. Iqbal* (07-1015), by a vote of 5-4, the Supreme Court reversed the Second Circuit's decision but did not remand the case to the District Court so that Iqbal could enhance his deficient claim. Writing for the majority, Justice Kennedy concluded that because the District Court's order to deny petitioners' 12(b)(6) motion to dismiss—a prejudgment order reviewable under the collateral-order doctrine—"turned on an issue of law," it was subject to the Supreme Court's jurisdiction as "a final decision 'subject to immediate appeal.'" The Court did not decide Iqbal's *Bivens* action except to say that under the Federal Rules of Civil Procedure Rule 8(a)(2) as interpreted by *Bell Atlantic Corp. v. Twombly*, it failed to state a plausible claim and therefore was not entitled to pass into the discovery process phase. Dissenting, Justice Souter, joined by Justices Breyer, Ginsburg, and Stevens, argued that the court misapplied the rules by not taking Ashcroft and Mueller's concession as satisfactory statement of a claim. In so doing, the dissent argued, the court completely undermines the doctrine of supervisory liability. Justice Breyer also wrote separately in dissent in order to warn against interpretations of the Federal Rules of Civil Procedure that create "alternative case-management tools" unaligned and perhaps in conflict with the Federal Rules themselves.

Racial Discrimination

In 2003, the city of New Haven administered a test to determine firefighters' eligibility for promotion. However, when the city examined the test's results, it found that Caucasian candidates significantly outperformed African-American and Latino candidates on the test. Federal law not only prohibits employers from intentional racial discrimination but also forbids facially neutral promotion and hiring policies with a racially "disparate impact." 42 U.S.C. § 2000e-2. Cognizant of these rules, the city refused to certify the results of the test, and 18 firefighters who had high scored sued the city, alleging intentional racial discrimination. The District Court granted summary judgment for the city, and the Second Circuit Court of Appeals affirmed the ruling in a brief per curiam opinion.

In this case, *Ricci v. DeStefano* (07-1428), the Supreme Court split by a vote of 5-4 not only to reverse the Second Circuit but also to take the unusual step of granting summary judgment for the plaintiff firefighters instead of allowing the defendants to address the Court's holding on remand. Writing for the majority, Justice Kennedy explicitly avoided the firefighters' constitutional claims. Nevertheless, he drew on the Court's jurisprudence dealing with the Equal Protection Clause to conclude that employers may use race-conscious policies to avoid disparate-impact discrimination, but only when there is a "strong basis in evidence" that the policies are necessary to avoid disparate impact liability. Because Justice Kennedy further concluded that the city could not meet this test, he granted the firefighters' motion for summary judgment. Justice Ginsburg, writing for the dissent, argued that the majority's rule improperly discouraged employers from voluntarily correcting possible statutory violations.

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Age Discrimination

Jack Gross sued his employer, FBL Financial Services, alleging illegal age discrimination in violation of the Age Discrimination in Employment Act (ADEA), codified at 29 U.S.C. 621 *et seq.* The trial judge gave the jury a "mixed-motive" instruction, informing the jury that, if Gross showed that his age was a factor in FBL's actions, then Gross must prevail, unless FBL showed that Gross' age was not the determining factor in its decision. The court based this instruction on *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), a Supreme Court case that considered discrimination suits generally. The Eighth Circuit reversed, relying on *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), a Supreme Court case that considered Title VII discrimination claims.

In *Gross v. FBL Financial Services Inc.* (08-441), the Supreme Court split by a 5-4 vote to hold that ADEA plaintiffs must show that their age was a "but for" cause of their employer's action. Writing for the Court, Justice Thomas examined the legislative history of both Title VII and the ADEA, ultimately concluding that, because they are materially different statutes, courts do not need to apply the same rules to both statutes. Thus freed from *Waterhouse* and other Title VII precedents, Justice Thomas analyzed the ADEA's language to conclude that the statute did not support mixed-motive jury instructions at all. Justice Stevens, writing for the dissent, disputed Justice Thomas' characterization of the legislative history of the statutes. Justice Breyer joined Justice Stevens' dissent but wrote separately in order to emphasize the practical problems involved in applying the Court's rule.

The Voting Rights Act

Vote Dilution

Section 2 of the Voting Rights Act, codified at 42 U.S.C. § 1973, prohibits states from drawing election districts in ways that improperly dilute the voting power of racial minorities. Vote dilution claims may arise when a state splits a minority community between different election districts, minimizing the community's influence at the polls. The Supreme Court previously upheld a vote dilution claim in cases in which a racial minority would constitute a majority of the voting-age population in a single, geographically compact district, and thus could routinely elect its chosen candidate in such a district. On the other hand, the Court rejected a similar claim in which a racial minority would have made up less than 50 percent of the voting-age population and thus been able to "influence," but not determine, which candidate would win. In *Bartlett v. Strickland* (07-689), the Court considered a vote dilution claim involving a "crossover district" in which a racial minority made up less than 50 percent of the voting-age population but could, nevertheless, routinely elect its chosen candidate with the help of "crossover voters" from other racial groups.

Ultimately, the Court split 5-4 to hold that § 2 does not protect crossover districts. Writing for a three-member plurality, Justice Kennedy argued that, because racial minorities in crossover districts have the same political opportunities as other groups of equal size, § 2 does not apply. He rejected the dissent's suggested sliding scale rule, noting the benefits of a bright-line rule that would limit future confusion, and he reserved the question of how evidence of intentional discrimination would have an impact upon his analysis. The dissent argued against a rigid 50 percent requirement for § 2 protection, noting that the standard created perverse incentives for states to reduce minorities' political influence by overconcentrating them in a small number of districts. This idea, the dissent argued, went against the very purpose of the Voting Rights Act. Justice Thomas, joined by Justice Scalia, wrote separately to argue against any recognition of vote dilution claims.

Exemptions and Bailout

Section 5 of the Voting Rights Act, codified at 42 U.S.C. § 1973c, prohibits "covered jurisdictions" from changing any voting law without first obtaining federal preclearance. Section 4(a), codified at 42 U.S.C. § 1973b, allows states or "political subdivisions" to "bail out" of the requirement that there be federal oversight under the act. Texas has been subject to § 5 oversight since 1965. Accordingly, when the Northwest Austin Municipal Utility District was created in the 1980s, § 5 applied to it as well. In 2006, the utility district sued, seeking to bail out of the act's restrictions and, alternatively, arguing that that § 5 was unconstitutional. The District Court rejected both claims, specifically holding that the Northwest Austin Municipal Utility District was not eligible to bail out of the requirement because the utility district did not register voters.

The Supreme Court allowed a direct appeal and, in *Northwest Austin Municipal Util. Dist. No. One v. Holder* (08-322) unanimously reversed the District Court, holding that the utility district was eligible to bail out of the requirement. Writing for the Court, Chief Justice Roberts relied on precedent to conclude that the same definition of political subdivision applied both when considering whether a governmental unit was subject to § 5 oversight and when a governmental unit sought to bail out. The majority avoided the district's constitutional arguments. Justice Thomas wrote separately and argued that the doctrine of constitutional avoidance was not applicable in this case.

Identity Theft

Ignacio Flores-Figueroa, a Mexican immigrant, was arrested after presenting fake Social Security and alien registration cards to a potential employer. Because, unbeknownst to Flores-Figueroa, the cards' numbers belonged to other people, the government charged him with "[a]ggravated identity theft" under 18 U.S.C. § 1028A(a)(1), which applies when an offender "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person." Flores-Figueroa appealed, arguing that § 1028A(a)(1) requires the government to show that a defendant knew that he or she used a "means of identification" belonging to another person. The Eighth Circuit rejected Flores-Figueroa's argument and upheld his conviction.

In *Flores-Figueroa v. United States* (08-108), the Supreme Court unanimously ruled to reverse the Eighth Circuit. Writing for the Court, Justice Breyer noted that the lower courts' reading of the statute was inconsistent with ordinary English usage and grammar and rejected the government's arguments based on legislative intent and practical enforcement problems.

Religious Monuments as Government Speech

Pioneer Park, a public park located in Pleasant Grove, Utah, contains several permanent, privately donated monuments, including a monument inscribed with the Ten Commandments. Summum, a religious group, requested permission to install a similar monument inscribed with the Seven Aphorisms of Summum. When the city refused to accept the monument, Summum sued, alleging that the city's actions violated the group's First Amendment rights. After the District Court denied Summum's request for a preliminary injunction, the Tenth Circuit reversed the district court's decision, categorizing the proposed monument as private speech and the park as a traditional public forum. The Tenth Circuit did not address the religious aspects of the case, because Summum had appealed only its claim of the right of free speech.

In *Pleasant Grove v. Summum* (07-665), the Supreme Court unanimously reversed the Tenth Circuit, holding that the monuments in Pioneer Park were government speech and thus not subject to the Free Speech Clause of the First Amendment. Justice Alito, writing for the Court, noted that, by history and custom, governments have discretion in deciding whether or not to allow private groups to place permanent monuments on public land. He further argued that the Court's public forum doctrine did not apply to this case because it would lead to absurd and self-contradictory results. Finally, Justice Alito rejected Summum's argument that strict safeguards are necessary to avoid viewpoint discrimination by public entities. He did not resolve the Establishment Clause issues implicated by the case.

Justice Scalia, joined by Justice Thomas, wrote separately, arguing that neither Summum's proposed monument nor the existing Ten Commandments monument violated the Establishment Clause. Justice Souter concurred in the judgment but expressed uneasiness about the interaction of the Free Speech Clause and Establishment Clause in the Court's government speech doctrine.

Recusal

In 2002, petitioners won a $50 million jury verdict against A.T. Massey Coal and its affiliates. In 2004, before Massey completed its appeals, Brent Benjamin challenged Justice Warren McGraw for a seat on West Virginia's Supreme Court of Appeals. Massey's chief executive officer and president, Don Blankenship, spent $3 million campaigning against McGraw, and Benjamin won the election. Later, when the West Virginia court heard Massey's appeal, Justice Benjamin repeatedly denied petitioners' request that he recuse himself because he had contibuted to Blankenship's campaign both when the Supreme Court of Appeals initially heard Massey's appeal and at a subsequent rehearing. Petitioners appealed Justice Benjamin's failure to recuse himself.

In *Caperton v. A.T. Massey Coal Co. Inc.* (08-22), the Supreme Court split by a vote of 5-4 to reverse the decision and remand the case. Writing for the Court, Justice Kennedy explained that, because Blankenship's contributions "had a significant and disproportionate influence" on Justice Benjamin's election, there was a "serious risk of actual bias." This risk, Justice Kennedy concluded, compelled recusal under the Due Process Clause, regardless of the presence of actual bias. Although Justice Kennedy did not articulate a clear test for lower courts to apply in similar cases, he emphasized the extreme fact pattern of this case and concluded that the Court's rule applied only in similarly extreme cases. Writing for the dissent, Chief Justice Roberts emphasized the practical difficulties involved in applying the Court's rule to other cases and argued against imposing constitutional requirements regarding recusal.

Qualified Immunity

Utah police officers conducted a warrantless search of Afton Callahan's house based on an informant's tip. After the Utah Court of Appeals vacated Callahan's conviction on the grounds that the search was illegal, Callahan sued under 42 U.S.C. § 1983, seeking damages for the officers' violation of his Fourth Amendment rights. The District Court granted the officers' motion for summary judgment on the grounds that the officers were entitled to qualified immunity because, at the time of the search, they had reasonably believed that the search was proper. The Tenth Circuit overruled the decision based on the Supreme Court's ruling in *Saucier v. Katz*, 53 U.S. 194 (2001), in which the Court held that, when considering whether defendants receive qualified immunity, courts must first address underlying constitutional issues before determining whether the conduct of defendant government officials was unreasonable.

In *Pearson v. Callahan* (07-751), a unanimous Supreme Court reversed the Tenth Circuit, holding that the officers were entitled to qualified immunity and overruling *Saucier*. Writing for the Court, Justice Alito recognized that the two-part *Saucier* rule had created unnecessary confusion and expense by forcing lower courts to fulfill the first part of the *Saucier* test by grappling with difficult constitutional issues even when the defendants' conduct was not unreasonable. He also recognized that the rule could lead to inequitable results, such as when defendants win based on the second prong of the test but not its first prong, leaving defendants open to later suits based on their "proven" unconstitutional activities while making it difficult to appeal because, after all, they "won." Accordingly, the Court held that, even though the *Saucier* approach might be appropriate in many cases, it is no longer mandatory in all cases.

The Fourth Amendment

Searches by School Officials

Officials at Safford Middle School caught a student with prescription-strength ibuprofen pills in violation of school rules. Relying on the student's uncorroborated statement that 13-year-

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old Savana Redding gave her the pills, school officials required Redding to remove her outer clothing and briefly pull away her underwear. Redding's mother sued the school under 42 U.S.C. § 1983, alleging that school officials had violated Redding's Fourth Amendment right to be free from unreasonable searches. The District Court granted defendants' motion for summary judgment on the grounds that the search was reasonable. After initially affirming the decision, the Ninth Circuit reversed en banc, finding that the search was unreasonable and denying the school officials' claim of qualified immunity.

In *Safford Unified School Dist. #1 v. Redding* (08-479), the Supreme Court voted 8-1 to affirm that the strip search violated the Fourth Amendment. Writing for the Court, Justice Souter reaffirmed the Court's holding in *New Jersey v. T.L.O.*, 469 U.S. 325, that, when school officials search students, the scope of the search must be justified by the circumstances involved. Accordingly, the Court ruled that the school officials were justified in searching Redding's outer clothing and backpack and in strip-searching the student caught with pills. However, in light of the power of the suspected contraband and a lack of evidence that Redding had drugs—in her underwear or elsewhere—Justice Souter concluded that a strip search was unjustified. Despite this position, Justice Souter concluded that, because, at the time of the search, circuits were split on whether the search was justified, the defendant school officials were entitled to qualified immunity. Although Justices Ginsburg and Stevens agreed with Justice Souter's other conclusions, they split from the majority on the issue of qualified immunity. Justice Thomas, writing by himself, argued that the search was not unreasonable.

Warrantless Searches of Cars

After arresting Rodney Gant for driving with a suspended license, police handcuffed him and locked him in the back of a police car. They then searched Gant's car. The state later used evidence from this search, which had been introduced in the trial over Gant's objections, to convict him on drug charges. The Arizona Supreme Court reversed the verdict, finding that the search violated the Fourth Amendment.

In *Arizona v. Gant* (07-542), the Supreme Court affirmed the Arizona court's ruling in a 5-4 decision. Writing for the Court, Justice Stevens explained that police may conduct a warrantless search of a vehicle incident to its recent occupant's arrest only if they reasonably believe that (1) the arrestee might access the vehicle to get a weapon or to destroy evidence, or (2) the vehicle contained evidence relevant to the offense for which the occupant was arrested. Justice Stevens reasoned that, even though there are exceptions to the Fourth Amendment's rule that warrantless searches are per se unreasonable, none of those exceptions applied in this case.

The Sixth Amendment

Confrontation Clause

The Sixth Amendment's Confrontation Clause gives criminal defendants the right to cross-examine witnesses testifying against them. Luis Melendez-Diaz appealed his drug conviction on the grounds that the state had violated his rights under the Sixth Amendment's Confrontation Clause by admitting laboratory reports without allowing him to cross-examine the analysts who had prepared the reports. Both the Massachusetts Appeals Court and the Massachusetts Supreme Judicial Court rejected Melendez-Diaz's argument.

In *Melendez-Diaz v. Massachusetts* (07-591), the U.S. Supreme Court reversed the decision in a characteristic 5-4 split comprised of two unusual alliances. Justice Scalia, writing for the majority, concluded that a drug laboratory's reports are within the core class of testimonial statements covered by the Confrontation Clause. Thus, prosecutors may not use these reports as evidence unless defendants waive their right to cross-examine the analysts who prepared them. In reaching this conclusion, Justice Scalia emphasized that the courts may not ignore constitutional rights simply because compliance is inconvenient or expensive. Justices Stevens, Souter, Thomas, and Ginsburg joined Justice Scalia's majority opinion. Justice Kennedy, writing for the dissent and joined by Chief Justice Roberts and Justices Alito and Breyer, argued that the Court's holding unnecessarily broke with precedent and was dangerously ambiguous and impractical. Finally, the majority and dissent disputed the breadth of the Court's rule: the dissent argued that the rule could disrupt the entire criminal justice system, and the majority suggested that the rule was only narrowly applicable.

Right to Counsel

Uncounseled Interrogations

Jesse Montego was arrested on suspicion of murder. At an initial preliminary hearing, he was declared indigent, and counsel was automatically appointed to represent him. Montejo stood silent at this hearing. After the hearing, but before Montejo met with his counsel, Montejo consented to an uncounseled police-initiated interrogation. Over objections by defense counsel, the state introduced evidence from this uncounseled interrogation at trial. Montejo appealed, arguing that his consent to the interrogation was void according to *Michigan v. Jackson*, 475 U.S. 625 (1986), in which the Supreme Court held that, once indigent defendants request that the state appoint counsel to represent them, their waivers of their right to counsel during subsequent police-initiated interrogations are void. Montejo proposed that, under this rule, a state may never approach defendants who are represented by counsel and request that they consent to uncounseled interrogation. The Louisiana Supreme Court rejected this interpretation, holding that *Jackson* did not apply because Montejo did not *affirmatively* assert his rights.

In *Montejo v. Louisiana* (07-1529), the Supreme Court overruled *Jackson* by a 5-4 vote. Justice Scalia, writing for the Court, considered the interpretations of both the Louisiana Supreme Court and Montejo's argument and rejected both. Instead, relying on "anti-badgering" ideas underlying *Jackson*,

Justice Scalia turned to *Edwards v. Arizona*, 451 U.S. 477 (1981), a case that preceded *Jackson* and prevented police-initiated custodial interrogations only after defendants had affirmatively asserted their right to counsel. Justice Scalia reasoned that, in light of the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966), defendants are unlikely to ignorantly waive their Sixth Amendment rights. He further argued that the Court should ensure that defendants' waivers are proper, but it does not need to try to make such waivers impossible. The dissent, written by Justice Stevens, disputed the majority's characterization of *Jackson* as an anti-badgering provision and emphasized that uncounseled defendants may not realize the significance of waiving their right to have counsel present during interrogations.

Jailhouse Informants

In *Kansas v. Ventris* (07-1356), the Supreme Court considered the application of the Sixth Amendment to cases in which police deliberately place an informant in a defendant's cell. Although the court concluded that states may not use such an informant's testimony to show a defendant's guilt, they may use the testimony for the purpose of impeaching the witness. Writing for a seven-member majority, Justice Scalia first concluded that, when the state violates the Sixth Amendment by subjecting a defendant to uncounseled pretrial questioning, the constitutional violation occurs at the time of questioning, not when the state subsequently introduces tainted evidence at trial. Accordingly, he argued that this case did not involve preventing constitutional violations but involved remedying them. Noting that the exclusionary rule prohibiting government use of tainted evidence was a deterrent created by courts, not a constitutional right, he further argued that, in this case, prohibiting government use of tainted evidence to show that the defendant is guilty was already a strong deterrent against governmental misconduct and that the importance of preventing perjury outweighed the additional deterrent effect gained by prohibiting governmental use of tainted evidence in order to impeach the witness.

Ineffectiveness of Counsel

The Court addressed defendants' claims of ineffectiveness of counsel in *Vermont v. Brillon* (08-88) and in *Knowles v. Mirzayance* (07-1315). In *Brillon*, the Court concluded that a defendant's Sixth Amendment right to a speedy trial was not violated when the defendant's public defenders caused the relevant delays. Writing for the Court's seven-member majority, Justice Ginsburg rejected the Vermont Supreme Court's conclusion that Brillon's public defenders were, in effect, state actors. Justice Ginsburg cautioned, however, that notwithstanding the Court's decision in this case, delays caused by a breakdown in a state's public defender system as a whole might violate the Sixth Amendment.

In *Knowles*, the Court rejected a defendant's claim of ineffectiveness of counsel in a case in which the defendant's attorney had failed to advance his only available defense because the attorney felt that the defense would almost certainly fail. Justice Thomas, writing for a unanimous court, rejected the Ninth Circuit's application of a "nothing to lose" test as entirely unsupported by Supreme Court precedent and thus inappropriate under 28 U.S.C. § 2254(d)(1), the federal law governing this type of habeas corpus claim. Applying the Court's more deferential general test from *Strickland v. Washington*, 466 U.S. 668 (1984), Justice Thomas concluded that the state's courts were not unreasonable in denying Mirzayance's requests for post-conviction relief.

The Exclusionary Rule

Police officers arrested Bennie Herring on a warrant issued by a neighboring county. Unbeknownst to the arresting officers, the warrant was no longer valid and remained in the neighboring county's database only because of a clerical error. At trial, Herring moved to suppress evidence gathered in a search incident to his improper arrest on the grounds that the search was unreasonable—in violation of the Fourth Amendment. Under the exclusionary rule, courts must suppress most evidence gathered in violation of the Constitution. The District Court, however, denied Herring's motion on the grounds that the arresting officers acted in good faith and that applying the exclusionary rule would not deter future misconduct by the police. The Eleventh Circuit affirmed the decision.

In *Herring v. United States* (07-513), the Supreme Court affirmed by a 5-4 vote. As Chief Justice Roberts, writing for the Court, explained, "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." Reasoning that the rule is merely a mechanism created by courts to deter police misconduct and not an individual constitutional right, the Chief Justice concluded that "isolated police negligence attenuated from [an] improper arrest" does not necessarily require application of the rule.

Justice Ginsburg, writing for the dissent, objected to the Court's narrow reading of the exclusionary rule, noting the neighboring county's inadequate procedures to ensure the accuracy of warrants and emphasizing the lack of effective remedies for illegal searches. She rejected as insufficient Chief Justice Roberts' assurances that, under the Court's approach, instances of reckless or deliberate errors in record keeping would still invoke application of the rule.

Plain Error and Plea Bargains

The plain-error rule is a limited exception to the normal rule that states: if parties do not object to a court's errors when they occur, the parties cannot raise those "unpreserved" errors on appeal. James Puckett invoked this rule after he had failed to properly object to the government's breach of its plea-bargain agreement with him at his sentencing. Although the Fifth Circuit agreed that the plain-error rule applies, it nevertheless affirmed Puckett's conviction and sentence, reasoning that the state's breach did not harm Puckett, because he would have received the same sentence even if the government had honored its agreement.

In *Puckett v. United States* (07-9712), the Supreme Court affirmed the Fifth Circuit's decision by a 7-2 vote. Writing for the Court, Justice Scalia rejected

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Puckett's argument that the government's violation of plea-bargain agreements per se justifies reversal under the plain-error rule, reasoning that not all unpreserved violations of plea-bargain arrangements prejudice defendants. He also emphasized the importance of limiting parties' ability to raise unpreserved errors on appeal. Justice Stevens, writing for the dissent, argued that the Court misconstrued Puckett's harm by focusing on his sentence and not his conviction, reasoning that the government's breach of its plea-bargain agreement voided Puckett's guilty plea.

Pre-emption

The Supreme Court rejected federal pre-emption of state law in three cases: *Altria Group v. Good* (07-562), *Wyeth v. Levine* (06-1249), and *Cuomo v. Clearing House* (08-453). In each of these cases, Justices Stevens, Souter, Ginsburg, and Breyer sided with the majority. They were joined by Justice Kennedy in *Altria* and *Wyeth*, and by Justice Scalia in *Cuomo*.

Of these cases, *Cuomo* had the narrowest holding. The case turns on 12 U.S.C. § 484(a), part of the National Banking Act, which exempts national banks from states' "visitation powers." The Office of the Comptroller of the Currency, which enforces the National Banking Act, interpreted § 484(a) as prohibiting the state from enforcing even nonpre-empted state laws. New York's attorney general disagreed and initiated administrative investigations of national banks for possible violations of state laws. The Office of the Comptroller of the Currency successfully sued, and the Second Circuit affirmed the decision. Writing for the Court, Justice Scalia carefully distinguished "visitation" from "law enforcement," ultimately concluding that, even though the state's attorney general could sue to enforce state law, the attorney general could not conduct purely administrative investigations. Justice Thomas, writing for the dissent, rejected the majority's definition of "visitation." In reaching these different conclusions, the two opinions drew on many of the same sources.

Both *Altria* and *Wyeth* involved appeals of decisions in private tort suits. In *Altria*, the Court held that exclusive federal control over cigarette advertising claims regarding smoking and health did not prevent state law suits against cigarette manufacturers for fraudulent deception. Writing for the Court, Justice Stevens focused on the defendants' deceptive practices and concluded that, regardless of whether the Federal Trade Commission had authorized the defendants' marketing claims, the parties still had a "duty not to deceive." Justice Thomas, writing for the dissent, argued that the Court's decision undermines the Labeling Act, 15 U.S.C. § 1334(b), by allowing state juries to revisit federal evaluations of defendants' advertising claims about smoking and health.

In *Wyeth*, the Court rejected the defendant drug maker's argument that states could not impose warning label standards that were more strenuous than those imposed by the Food and Drug Administration. Writing for the majority, Justice Stevens emphasized that drug companies, not the Federal Drug Administration, are responsible for drugs' labels and that Congress did not expressly or implicitly prohibit states from applying heightened warning requirements. Justice Alito, writing for the dissent, argued that the real issue was whether state law juries may overturn the Federal Drug Administration's carefully considered determination that a drug is "safe" when it is distributed with its approved label.

Racketeering

The federal Racketeering Influenced and Corrupt Organizations (RICO) Act, 18 U.S.C. § 1961 *et seq.*, inflicts harsh penalties on members of an "enterprise" who conduct the enterprise's affairs through a "pattern of racketeering activity." 18 U.S.C. § 1962(c). "Enterprise" includes both formal legal entities and informal "association-in-fact" enterprises.

A jury convicted Edmund Boyle under RICO, based on his membership in an informal group that committed several racketeering crimes. Edmund Boyle appealed, arguing that, because the group was informal and existed solely to commit its crimes, the District Court had erred when it instructed the jury that the group could constitute a RICO association-in-fact enterprise. The Second Circuit rejected Boyle's arguments, and the Supreme Court granted certiorari to resolve a three-way split in the circuits.

In *Boyle v. United States* (07-1309), the Supreme Court affirmed the decisions by a 7-2 vote. Writing for the Court, Justice Alito explained that RICO association-in-fact enterprises must have a "structure," and that proving the presence of this structure requires proof of at least three elements: "[A] purpose, relationships among the associates, and longevity sufficient to permit the associates to pursue the enterprise's purpose." He reaffirmed that, when appropriate, the same evidence may be used to show both an enterprise's racketeering activities and also its structure. Finally, Justice Alito rejected Boyle's reading of RICO's association-in-fact enterprise requirement as unsupported by the text of the statute. Justice Stevens, writing for the dissent, argued that RICO applied only to "business-like" enterprises and cautioned that the Court's reading of RICO might make the act effectively indistinguishable from federal conspiracy law in some cases.

Standing to Challenge Administrative Regulations

Following a fire in the Sequoia National Forest, the U.S. Forest Service approved the Burnt Ridge Project, "a salvage sale of timber on 238 acres damaged by the fire." The Forest Service had not followed its usual notice, comment, and appeals process in approving the project, because its regulations exempted salvage sales covering fewer than 250 acres from those requirements. Several environmental groups sued, attacking the Forest Service's handling of the Burnt Ridge Project and also facially challenging several Forest Service regulations. To establish standing for their Burnt Ridge Project claims, the groups presented an affidavit from a member who regularly used the project site and intended to do so again in the future. To support stand-

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Verne College of Law in Ontario, Calif., and a past president of the Inland Empire Chapter of the Federal Bar Association.

Correction

In the July 2009 issue of *The Federal Lawyer*, in the review of *JFK and the Unspeakable*, in the last full paragraph on page 70, the sentence, "These insiders had decided that Oswald would not be identified as a security risk prior to the assassination and his value as a patsy would not be identified as destroyed. ...," should have read, "These insiders had decided that Oswald would not be identified as a security risk prior to the assassination and his value as a patsy thereby destroyed. ..." In other words, if Oswald had been identified as a security risk, he could not have been used as a patsy. The editors apologize for the error.

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ing for their facial attack on the Forest Service's regulations, the plaintiffs presented similar affidavits from members who regularly used National Forest sites around the country.

After the parties settled their dispute over the Burnt Ridge Project, the government argued that the plaintiffs no longer had standing to facially challenge the Forest Service's regulations. The District Court disagreed and issued a nationwide injunction barring the enforcement of several specific regulations. The Ninth Circuit affirmed the ruling.

In *Summers v. Earth Island Institute* (07-463), the Supreme Court overruled the Ninth Circuit. In a 5-4 vote, the Court held that the plaintiffs lacked standing to challenge the regulations. Justice Scalia, writing for the Court, highlighted the plaintiffs' failure to identify concrete, nonhypothetical situations in which the regulations would cause future harm to them or to their members. He further noted that the plaintiffs had failed to meet the imminence standard required for injunctive relief. The dissent, authored by Justice Breyer, argued that the Court's standard was too strict and criticized the Court for improperly ignoring several of the plaintiffs' affidavits that outlined expected future harm. Justices Scalia and Breyer disputed the significance of the size of the environmental organizations, the frequency of allegedly improper Forest Service timber sales, and the adequacy of the plaintiffs' affidavits.

Separation of Powers

Plaintiff environmental groups sued to enjoin the Navy's use of "mid-frequency active" sonar in training exercises off the coast of Southern California, alleging that the Navy's training plan took inadequate precautions to mitigate this sonar's negative effects on marine mammals. The Navy bitterly contested the plaintiffs' claims, noting the necessity of training in mid-frequency active sonar and disputing the plaintiffs' allegations about the extent and severity of the probable impact of the exercises on marine life. After two losses in District Court and one trip to the Ninth Circuit, the Navy sought and received relief from the executive branch, which exempted the Navy's exercises from the environmental laws underlying the injunction. The District Court refused to vacate its injunction in light of this waiver, and the Ninth Circuit affirmed the decision.

In *Winter v. National Resources Defense Council* (07-1239), the Supreme Court overruled the Ninth Circuit in a 6-3 vote. Writing for the Court, Chief Justice Roberts explained that, even if the plaintiffs demonstrated that the Navy's training exercises were likely to cause irreparable harm to marine life, the balance of equities still favored the Navy because of the weight of the public's interest in strong national defense and the Navy's interest in conducting realistic training exercises. He also emphasized the necessity of deferring to military judgment on military matters, including the reasonableness of proposed restrictions on training exercises. In a dissent, Justice Ginsberg, joined by Justice Souter, strongly objected to the executive branch's intervention in this case and suggested that the Navy should have sought congressional intervention instead of going to the executive branch.

Environmental Regulation

The Clean Water Act (CWA) of 1972, codified at 33 U.S.C. § 1251 et seq., prohibits unauthorized pollution of protected waterways. Section 404 of the act, codified at 33 U.S.C. § 1344, directs the Army Corps of Engineers to regulate discharges of "fill materials," and § 402, codified at 33 U.S.C. § 1342, directs the Environmental Protection Agency (EPA) to regulate all other pollutant discharges. Both agencies treat mine tailings as fill material. In 2005, the Army Corps of Engineers issued Coeur Alaska Inc. a permit to use a lake as a tailing pond. Coeur Alaska also obtained an EPA permit for the lake's runoff. Environmental groups sued, arguing that the tailings should be subject to § 404 of the EPA regulation as well as § 402 of the Army Corps regulation. The District Court rejected the plaintiffs' arguments, but the Ninth Circuit reversed the decision, holding that the EPA regulations did apply.

In *Coeur Alaska Inc. v. Southeast Alaska Conservation Council* (07-984), the Supreme Court reversed the Ninth Circuit's ruling by a 6-3 vote, holding that the pollution restrictions included in the Clean Water Act do not apply to EPA's § 404 discharges. Writing for the Court, Justice Kennedy relied on EPA and Army Corps interpretations of the CWA to conclude that the Corps had exclusive permitting authority over tailings. He rejected the environmental groups' proposed reading of the CWA as unworkably ambiguous. He also emphasized Coeur Alaska's claim that its proposal would cause less long-term environmental harm than constructing a new tailing pond nearby would. Justice Ginsburg, writing for the dissent, argued that the majority's decision opened a dangerous loophole in the CWA and emphasized Congress' intent to prohibit polluters from using protected waters as waste treatment systems. **TFL**

Prepared by LII Summer Editor David Carlson, Cornell Law School Class of 2011.