

## | Supreme Court Year in Review |

In the 2009–2010 term, the U.S. Supreme Court revisited state firearms regulations in *McDonald v. City of Chicago* (08-1521), religious symbols on public land in *Salazar v. Buono* (08-472), charitable donations to State Department-designated terrorist organizations in *Holder v. Humanitarian Law Project* (08-1498), and state universities' recognition of student groups that exclude openly gay members in *Christian Legal Society v. Martinez* (08-1371).

The term saw an unusual number of unanimous decisions: 46 percent of decisions were determined by 9-0 or 8-0 votes. The term also saw the lowest percentage of 5-4 votes (18 percent) since the 2005–2006 term (13 percent). Of the 5-4 decisions, 10 were left-right splits, with Justice Kennedy as the determining vote. Justice Stevens, in his last term on the Court, found himself in the majority only 51 percent of the time in cases with at least one dissent, and he penned 24 separate opinions—the most written by any justice.

### First Amendment

#### **Establishment Clause**

In 1934, members of the Veterans of Foreign Wars (VFW) placed a Latin cross on federal land in the Mojave National Preserve in remembrance of American soldiers who died in World War I. Citing the First Amendment's prohibition against state establishment of religion, Frank Buono, a retired employee of the National Park Service and a regular visitor to the preserve, sought an injunction requiring the government to remove the cross. There were four stages of this litigation. The first, in 2002, occurred when the district court ruled in Buono's favor on opposing motions for summary judgment. The Ninth Circuit stayed the 2002 injunction to the extent that it required the cross to be removed but did not forbid alternative methods of complying with the order. On appeal, the judgment of the district court was affirmed, both as to standing and on the merits of the challenge to the Establishment Clause. While this case progressed, Congress enacted several laws, including two forbidding the use

of governmental funds to remove the cross, one designating the cross as a national memorial, and one directing the secretary of the interior to transfer the government's interest in the land to the VFW. Buono returned to the district court in 2005, seeking injunctive relief against the transfer. The district court found that the transfer was invalid, because it was an attempt by the government to keep the cross atop Sunrise Rock. The court of appeals again affirmed.

In *Salazar v. Buono* (08-472), the U.S. Supreme Court issued six opinions that provided no clear majority ruling but ultimately reversed the court of appeals and remanded the case. Counting the votes on certain issues will provide for more clarity than analysis of individual opinions will. Seven justices voted for the notion that a retired National Park Service employee had a legal right to pursue his complaint about a religious symbol on federal property; however, Justice Scalia and Justice Thomas dissented explicitly on that point. Five justices concluded that the federal judge erred in barring a congressionally ordered land transfer, but there were two different rationales. Justice Kennedy, writing for Chief Justice Roberts, Justice Alito, and himself, said it was an incorrect legal proposition. Justice Scalia, writing for Justice Thomas and himself, concluded that the Park Service employee did not have standing to pursue his complaint. Four justices would have upheld the order, but for two different reasons. Justice Breyer, in a solo dissent, rested on the law of injunctions to find no significant federal question. Justice Stevens, writing for the other dissenters, supported the district court's opinion

that the land transfer would violate the 2002 injunction.

#### **Charity and Terrorism**

In 1996, Congress passed 18 U.S.C. § 2339B, which bars Americans from engaging in a list of activities defined within the act as "material support" of State Department-designated terrorist organizations. Groups and individuals supportive of Turkish and Sri Lankan separatist groups that the State Department has classified as terrorist organizations sued to gain exemption from the statute. These groups claimed that they wanted to provide targeted help in the form of financial aid, legal training, and political advocacy to specific portions of the Turkish and Sri Lankan organizations that perform political and humanitarian activities. The plaintiffs asserted that § 2339B was unconstitutionally vague and infringed on their rights to free speech and association.

In *Holder v. Humanitarian Law Project* (08-1498), the Supreme Court decided that § 2339B is constitutional as applied to the activities that the groups' supporters wanted to pursue. Chief Justice Roberts wrote for a six-justice majority that the activities Congress had prohibited were clearly and adequately defined. The Court also decided that the First Amendment concerns about the statute were not significant enough to defeat the statute, both because the Court deferred to Congress' expertise in foreign relations and because the statute only restricts speech that constitutes material support for terrorism, allowing for independent advocacy.

#### **Freedom of Expression**

In order to obtain recognition from the school, the University of California Hastings College of Law requires student groups to comply with the school's nondiscrimination policy, which bars discrimination based on religion and sexual orientation. Hastings interprets this policy as mandating acceptance of all students who want to participate in a group. At the beginning of the 2004–2005 school year, the leaders of the Christian Legal Society required officers

to sign a written statement agreeing to conduct their lives in accord with certain moral principles, including the prohibition of sexual activity outside of marriage between a man and a woman. The society also excludes anyone who engages in “unrepentant homosexual conduct.” Based on these actions, Hastings rejected the society’s application for recognition. The society filed suit for injunctive and declaratory relief, alleging that the refusal to recognize the group violated its First and Fourteenth Amendment rights to free speech, expression, and religion. The district court ruled for Hastings, holding that the “all-comers” condition was reasonable and viewpoint-neutral and that there was no restriction on speech or religious exercise. The Ninth Circuit affirmed.

In *Christian Legal Society v. Martinez* (08-1371), the Supreme Court held that the all-comers policy on access to the limited public forum created by Hastings through recognition is both reasonable and viewpoint-neutral. Thus, Hastings’ policy does not transgress First Amendment limitations. Justice Ginsburg authored the majority opinion, stating that state college leaders may reverse recognition to groups that admit all comers if the policy genuinely seeks and promotes that aim without singling out any set of beliefs. Justice Stevens and Justice Kennedy authored separate concurring opinions, with Kennedy stating that a dialogue between students of differing beliefs is impossible if the students prevent themselves from hearing opposing points of view. Justice Alito’s vehement dissent argued that the all-comers policy has been used only to single out student groups for exclusion based on their beliefs.

### **Depictions of Animal Cruelty**

Federal prosecutors indicted Robert Stevens under 18 U.S.C. § 48 for selling dogfighting videos. Congress enacted § 48 to criminalize the creation, sale, or possession of video or audio depictions of the intentional injury or killing of an animal in a jurisdiction where the depicted conduct is illegal under state or federal law. The law, which applied to depictions intended for interstate or foreign commerce, exempted certain

works of social value. The trial court convicted Stevens under the statute, but on appeal, the Third Circuit agreed with Stevens that § 48 violated the First Amendment.

Upholding the Third Circuit’s determination, Chief Justice Roberts wrote for an eight-justice majority in *United States v. Stevens* (08-769) that § 48 was too broad to survive the First Amendment. The court decided that, despite the federal government’s assurances that it would apply the law only to depictions of extreme cruelty, the statute could apply to depictions that are protected by the First Amendment, such as hunting magazines and videos. As a result, the Supreme Court declined to categorically exempt depictions of animal cruelty from First Amendment protection. Only Justice Alito dissented, stating that the decision would protect “depraved entertainment.”

### **Second Amendment**

In 2008, in *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment protects the right to keep and bear arms for the purpose of self-defense. Chicago’s laws banned handgun possession by almost all private citizens. After *Heller*, Chicago residents who wanted to keep handguns in their homes for self-defense filed federal suit against the city alleging that the ban has left them vulnerable to criminals. The district court followed precedent to uphold the constitutionality of the ban. The Seventh Circuit affirmed, relying on three cases interpreting the Fourteenth Amendment’s Privileges or Immunities Clause.

In *McDonald v. City of Chicago* (08-1521), the Supreme Court voted 5-4 to decide that the Fourteenth Amendment incorporates the Second Amendment right to keep and bear arms for the purpose of self-defense. Justice Alito, supported by the other conservative justices, held that self-defense, the central component of the Second Amendment, makes the right to bear arms fundamental. Alito cited the intentions of the framers of the Constitution and the ratifiers of the Fourteenth Amendment to show that the right to keep and bear arms is necessary to the American system of ordered liberty. However, state

regulations like those listed in *Heller*—including prohibitions of possession of firearms by felons and the mentally ill, restrictions on carrying firearms in sensitive places, and conditions on the commercial sale of arms—are still legitimate under the Court’s decision in *McDonald*. The majority, however, split on how the Fourteenth Amendment incorporates the Second Amendment to apply to the states, as well as the federal government. While Justice Alito and his supporters looked to the Due Process Clause, Justice Thomas in his concurrence stated that the Privileges and Immunities Clause should justify incorporation. Justice Stevens’ dissent questioned whether this decision does not limit the personal right to a gun to having it at home, while Justice Breyer’s dissent argued that the Fourteenth Amendment does not incorporate the Second Amendment.

### **Fourth Amendment**

#### **Public Employment**

In October 2001, the city of Ontario, Calif., issued pagers that could send and receive text messages to Jeff Quon and other members of Ontario’s SWAT Team. Before acquiring the pagers, the city announced a policy that reserved the right to monitor and log all network activity with or without notice but did not explicitly mention text messaging. The notice made it clear, however, that the city would treat text messages the same way it would treat e-mails, which the policy did mention. After Quon had exceeded his monthly text message limit several times, the city contacted the wireless company to obtain the transcripts of the text messages. The transcripts, which included personal messages—including some of a sexually explicit nature—led to disciplinary action against Quon. Quon and the persons with whom he had exchanged text messages filed suit, alleging that Ontario had violated their Fourth Amendment rights against unreasonable search and seizure by reviewing the transcript of the messages on Quon’s pager. The district court denied Quon’s motion for summary judgment, relying on *O’Connor v.*

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*Ortega* to conclude that, even though Quon had a reasonable expectation of privacy in the content of his messages, the issue turned on whether the city had a proper purpose in determining whether Quon was using his pager to waste time. Once the jury concluded that the city's intent was legitimate, the court granted the city's motion for summary judgment. The Ninth Circuit reversed, holding that the search was not reasonable because there were less intrusive means to determine whether Quon was wasting time.

In *City of Ontario v. Quon* (08-1332), the Supreme Court held that the search of Quon's text messages was reasonable and that the city did not violate his Fourth Amendment rights. Justice Kennedy, writing for the majority, used a two-step test from *O'Connor* to consider the impact of the "operational realities of the workplace" on the expectation of privacy and the reasonableness of the employer's intrusion on that expectation. Under this test, the review of the transcript of the messages on the pager was reasonable, because it was motivated by a legitimate work-related purpose and was not excessive. Justice Stevens' concurring opinion addressed the fact that the Court did not answer which approach given in *O'Connor* was correct. Justice Scalia, who concurred with the judgment, would have not used the "operational realities of the workplace" test, a view he had already expressed in his opinion in *O'Connor*.

### **Fifth Amendment**

The Supreme Court decided several cases interpreting *Miranda v. Arizona* with respect to custodial investigations. The Court heard a case that involved two police officers' interrogation of Van Chester Thompkins about a shooting that had occurred outside a mall in Southfield, Mich. After advising the suspect of his rights, the detectives interrogated him for two hours and 45 minutes. During this time, the suspect, though not expressly indicating that he did not want to talk with the police or that he wanted an attorney, remained silent for the most part, but later responded "yes" when the detec-

tive asked him whether he "pray[ed] to God to forgive [him] for shooting that boy down?" The suspect moved to suppress the statements, claiming that he had invoked his Fifth Amendment right to remain silent. The trial court denied the motion and the Michigan Court of Appeals affirmed. The suspect then filed a habeas request, which the federal district court denied. However, the Sixth Circuit reversed, holding that the state court was unreasonable in finding an implied waiver of Thompkins' right to remain silent. In *Bergbuis v. Thompkins* (08-1470), the Supreme Court split 5-4 to hold that the state court's decision rejecting the suspect's claim was correct. Justice Kennedy, writing for the majority, determined that the suspect's silence during the interrogation did not unambiguously invoke his right to remain silent. The suspect waived his Fifth Amendment right when he knowingly and voluntarily made a statement to the police. In her dissenting opinion, Justice Sotomayor concluded that the majority's decision combats the idea in *Miranda* that the prosecution bears a heavy burden to show that the suspect had waived his rights and that the prosecution did not meet that burden here.

Another case in which the Supreme Court interpreted a suspect's *Miranda* rights, *Maryland v. Shatzer* (08-680), involved a police detective's attempt in 2003 to question Michael Shatzer Sr. about allegations that Shatzer had sexually abused his son. Shatzer invoked his right to have counsel present during interrogation, so the detective terminated the interview and returned Shatzer to prison. Three years later, in 2006, another detective attempted to interrogate Shatzer regarding the same allegations, but this time, Shatzer waived his rights and made incriminating statements. The trial court declined to suppress the statements, reasoning that the Supreme Court's holding in *Edwards v. Arizona*, which held that once a suspect invokes the right to counsel any waiver of that right during subsequent police interrogation is involuntary, did not apply because of the break in custody before the 2006 interrogation. The Court of Appeals

of Maryland reversed, holding that the passage of time does not end the protections that *Edwards* provides. In *Maryland v. Shatzer*, the Supreme Court held that, because Shatzer experienced a break in custody lasting more than two weeks between the first and second attempts at interrogation, the trial court did not have to suppress the 2006 statements. Writing for the majority, Justice Scalia determined that a 14-day period is an appropriate length of time for a suspect to readjust to normal life and, as such, is enough time for the coercive effects of prior custody to lapse. Because Shatzer's release constituted a break in custody, Scalia concluded that the original invocation of the right to counsel did not survive in this case. Justice Thomas agreed that the incarceration constituted a break in custody and with the judgment but disagreed with the imposition of the 14-day rule. Justice Stevens, who authored a concurrence, also disagreed with imposition of the 14-day rule.

### **Sixth Amendment**

#### ***Effective Assistance of Counsel***

Jose Padilla, a native of Honduras, lived in the United States for more than 40 years and served in the U.S. military in Vietnam before being arrested on charges of distributing marijuana in his state of residence, Kentucky. Despite Padilla's concerns about the consequences of a drug conviction on his immigration status, before going to trial Padilla pleaded guilty on the advice of his lawyer, who told Padilla that his long-term residence in the United States would protect him from deportation. Once convicted of the crime, Padilla became deportable under federal law. 8 U.S.C. § 1227(a)(2)(B)(i). Later, Padilla appealed the decision on the grounds that, by giving him this erroneous advice, his attorney had provided him with ineffective counsel in violation of the Sixth Amendment. On appeal, the Kentucky Supreme Court denied Padilla relief on the grounds that the deportation was merely a collateral—rather than a direct—consequence of his criminal conviction.

In *Padilla v. Kentucky* (08-651), by a

7-2 decision, with Justices Thomas and Alito dissenting, the Supreme Court reversed the appellate court's decision. Justice Stevens wrote for the majority that the Sixth Amendment right to effective counsel requires that attorneys tell their clients if a criminal conviction will result in deportation. To reach this result, Justice Stevens stated that the Court made no distinction between direct or collateral consequences in its requirement that a lawyer provide his or her client with "reasonable professional assistance," as articulated in *Strickland v. Washington*. In addition, Justice Stevens cited the seriousness of deportation and its impact on the families of legal residents to justify the decision. Despite this general decision, the Court remanded determination of Padilla's particular case.

### **Eighth Amendment**

In July 2003, Terrance Graham, then 16 years old, attempted to rob a barbeque restaurant in Jacksonville, Fla. Police arrested and charged him with armed burglary, assault or battery, and attempted armed robbery. Graham pleaded guilty under a plea agreement, which withheld a decision of guilt as to both charges and sentenced Graham to two concurrent three-year probation terms. In 2004, Graham participated in two armed robberies for which police arrested him again. Because these acts were in violation of Graham's probation, the trial court found Graham guilty of the earlier attempted burglary and attempted armed robbery charges and sentenced him to the maximum sentence authorized by law on each charge: life imprisonment for the armed burglary and 15 years in prison for the attempted armed robbery. Release was impossible under Graham's life sentence because Florida had abolished its parole system. Graham filed a motion challenging his sentence under the Eighth Amendment's Cruel and Unusual Punishments Clause.

In *Graham v. Florida* (08-7412), the Court, in a 6-3 decision, held that the Cruel and Unusual Punishments Clause does not permit a juvenile offender to be sentenced to life in prison without parole for a crime that does not include homicide. Writing for the majority, Justice Kennedy looked to the categorical

rules of *Atkins v. Virginia*, *Roper v. Simmons*, and *Kennedy v. Louisiana*, as well as statistics regarding actual sentencing practices and the number of life sentences without parole given to juvenile offenders whose crimes do not include homicide. Justice Kennedy's analysis led him to conclude that the national consensus finds Florida's sentencing practice unconstitutional. Justice Stevens wrote a brief concurring opinion supporting evolving standards of decency to respond to Justice Thomas' dissenting opinion that argued that this holding was inconsistent with precedent. Justice Roberts concurred with the majority but saw no need to create a categorical rule for juvenile offenders whose crimes did not include homicide. Justice Thomas wrote the dissenting opinion, stating that the Court should have looked to the examples of the 37 states that allow life sentences without parole for such juvenile offenders. Justice Alito joined Justice Thomas' opinion in part and wrote a separate dissent to state that the court had improperly decided the issue of whether Graham's sentence violates the narrow, as-applied proportionality principle that applies to noncapital sentences.

### **Arbitration**

On Feb. 1, 2007, Antonio Jackson filed an employment discrimination suit under 42 U.S.C. § 1981 in the U.S. District Court for Nevada against his former employer, Rent-A-Center. Rent-A-Center filed a motion under the Federal Arbitration Act to dismiss or stay the proceedings in the district court and compel arbitration as per a mutual agreement to arbitrate claims. Jackson opposed the motion on the ground that the entire arbitration agreement was unconscionable. The district court granted Rent-A-Center's motion, finding that the agreement gives the arbitrator authority to decide whether the agreement is enforceable. A divided Ninth Circuit reversed on the question of who had the authority to decide whether the agreement is enforceable and affirmed the conclusion that the provision in question was not unconscionable.

In *Rent-A-Center Inc. v. Jackson* (09-497), the Supreme Court split 5-4 to

hold that, when an agreement to arbitrate includes an agreement that the arbitrator will determine the enforceability of the agreement, the type of challenge determines who determines the enforceability. If a party specifically challenges the validity of the agreement to arbitrate, the district court determines the enforceability. If a party challenges the enforceability of the contract as a whole, the challenge is for the arbitrator. Justice Scalia, writing for the majority, relied on *Prima Paint Corp. v. Flood & Concklin Mfg. Co.* to hold that only a specific challenge to an agreement to arbitrate is relevant to a court's determination of whether the arbitration agreement at issue is enforceable. Because the arbitration agreement is severable from the rest of the agreement, a court should look at only those cases in which the party disputes the arbitration agreement; otherwise, the court should allow the arbitrator to make that determination. Justice Stevens authored a dissent, calling the majority's reasoning "even more fantastic" than the holding in *Prima Paint*. Justice Stevens wrote that he would have relied on a line of cases seeking the parties' intent to decide this case.

*Granite Rock Co. v. Teamsters* (08-1214) was another case involving arbitration. In June 2004, a local union supported by the Teamsters began a strike against Granite Rock, the employer of some of the local union's members, following the expiration of the parties' collective bargaining agreement and an impasse in their negotiations. On July 2, the two sides created a new agreement containing no-strike and arbitration clauses but could not reach an agreement holding the local union harmless for strike-related damages. The Teamsters instructed the union to continuing striking until the hold-harmless clause was included in the agreement. Granite Rock sued both Teamsters and the local union under § 301(a) of the Labor Management Relations Act of 1947, seeking damages from the strike. The unions countered, asserting that the local's members never ratified the new agreement and thus the no-strike clause had no force.

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The district court granted the Teamster's motion to dismiss the tortious interference claim but denied local's motion to send the parties' dispute to arbitration, ruling that a jury should determine when the contract was ratified. The Ninth Circuit affirmed the dismissal of the first claim but reversed the arbitration order.

In *Granite Rock Co. v. Teamsters*, the Supreme Court held that the district court, not the arbitrator, should resolve the parties' dispute over the ratification date. Justice Thomas, writing for the majority, held that the dispute requires judicial resolution, because the district court would need to determine whether the parties consented to arbitrate the agreement. To resolve this issue, *when* a contract is formed is as important as *whether* the contract was formed. Justice Sotomayor concurred in the Court's handling of the Teamsters' motion but dissented on the arbitration issue. Justice Sotomayor used existing case law to determine that the arbitrator should determine the ratification date.

### **Bankruptcy Counseling**

The Supreme Court's decision in *Milavetz v. United States* (08-1119) limits how lawyers may counsel their clients on bankruptcy matters. In 2005, Congress enacted the federal Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCA). 11 U.S.C. §§ 101(12A), 526, 527, 528, which prohibited a class of organizations termed "debt relief agencies"—agencies that provide bankruptcy assistance to consumers—from advising clients to incur more debt before bankruptcy. In addition, the act requires these agencies to include certain disclosures in advertisements. Several plaintiffs associated with the same law firm, here collectively known as Milavetz, filed pre-enforcement suit in federal district court, asking the court to hold that these provisions of the BAPCA do not apply to them. The district court and the Eighth Circuit heard the case, disagreeing about whether attorneys are debt relief agencies under the act and whether disclosure requirements should apply to them, but agreeing that limitations on advising clients

were unconstitutional.

The Supreme Court unanimously held that attorneys who provide bankruptcy assistance are debt relief agencies under the BAPCA when providing qualifying services. In addition, the Court upheld the constitutionality of the act's limitations on client advising. Here, the Court rejected Milavetz's assertion that the statute could punish attorneys who provide responsible advice, stating that the law adequately protected those advising clients to take on an increase in debt for a valid purpose. Finally, the Court held that the BAPCA's advertising disclosure requirements do not violate the First Amendment, because the statute's benefits in protecting consumers from misleading commercial speech outweigh the burden disclosure poses for debt relief agencies.

### **Campaign Financing**

In January 2008, Citizens United, a nonprofit corporation, released a documentary criticizing then-Senator and Democratic presidential candidate Hillary Clinton. To promote the documentary, Citizens United produced television advertisements to run on broadcast and cable television networks. Concerned about violating 2 U.S.C. § 441b, a federal law prohibiting corporations and unions from using their general treasury funds to make independent expenditures for speech that qualifies as "electioneering communication," Citizens United sought declaratory and injunctive relief, arguing that § 441b was unconstitutional as applied to the documentary and that the disclaimer, disclosure, and reporting requirements contained in the Bipartisan Campaign Reform Act (BCRA) of 2002 were unconstitutional as applied to the documentary and the ads. The district court denied a preliminary injunction and granted the Federal Election Commission summary judgment.

In *Citizens United v. Federal Election Commission* (08-205), the Supreme Court split 5-4 to hold that § 441b's restrictions on corporate expenditures are invalid as applied to the documentary. Justice Kennedy, writing for the

majority, overruled *Austin v. Michigan Chamber of Commerce*, which held that corporations could be prohibited from using treasury money to support or oppose candidates in elections without violating the First and Fourteenth Amendments, and part of *McConnell v. Federal Election Commission*, which upheld BCRA § 203's extension of § 441b's restrictions on independent corporate expenditures. Justice Kennedy, joined by Chief Justice Roberts, Justice Scalia, Justice Alito, and Justice Thomas (but only on this issue), concluded that § 441b denied corporations the First Amendment right to political speech. Chief Justice Roberts wrote a concurrence that addressed the issues of judicial restraint and stare decisis. Justice Scalia, in another concurrence, addressed concerns raised in Justice Stevens' dissent that allowing corporations to use their money on campaign finance in this manner threatens the integrity of elections. However, as applied to the television advertisements, the Court voted 8-1 to hold that §§ 201 and 311 of the BCRA are valid. The four dissenting justices in the previous issue joined Part IV of Justice Kennedy's majority opinion that addressed this issue. Justice Thomas, the lone dissenter on the television advertisements question, wrote that he would have struck down the reporting requirements to protect the anonymity of organizations exercising free speech.

### **Diversity Jurisdiction**

In September 2007, Melinda Friend and John Nhieu, who were citizens of California, sued the Hertz Corporation in state court for violations of California's wage and hour laws. Hertz sought removal to a federal court through 28 U.S.C. § 1332(d)(2), claiming that the federal court possessed diversity-of-citizenship jurisdiction under 28 U.S.C. § 1332(c)(1). Friend and Nhieu claimed that Hertz was a California citizen because Hertz's "business activity" was predominantly in California, whereas Hertz argued that its "principal place of business" was in New Jersey because the headquarters or "nerve center" was in that state.

In *Hertz Corp. v. Friend* (08-1107), the Supreme Court unanimously held that the phrase “principal place of business,” as found in § 1332(c)(1), refers to the place where a corporation’s high-level officers direct, control, and coordinate the corporation’s activities. Justice Breyer, writing for a unanimous Court, concluded that the “nerve center” approach, though not perfect, is superior to the “business activity” test in determining the citizenship of corporations. The “nerve center” test provides lower courts a test that is easier to apply, because it does not require courts to weigh corporate functions, assets, or revenues in order to determine where the corporation predominantly has its business activities. However, the Court instructed lower courts to look at the record to determine the source of the corporation’s decisions, so that corporations do not avoid lawsuits by creating a “mail drop box” in a more favorable jurisdiction.

### Immigration

The federal government initiated deportation proceedings against Jose Angel Carachuri-Rosendo, a permanent U.S. resident, after he was convicted in Texas and sentenced to 10 days in jail for misdemeanor possession without a prescription of an anti-anxiety tablet. Even though this was his second charge (the first was for misdemeanor marijuana possession a year earlier), state prosecutors declined to charge him with a felony, a charge authorized for repeat drug crimes under Texas and federal law. Carachuri-Rosendo asked the immigration judge to use discretion and to cancel his deportation, but the judge agreed, instead, with the prosecutors that Carachuri-Rosendo was ineligible for such discretionary relief because the second conviction could be considered an aggravated felony under federal law, 8 U.S.C. §§ 1101(a)(43), 1229b(a)(3). The Board of Immigration Appeals and the Fifth Circuit affirmed the holding.

In *Carachuri-Rosendo v. Holder* (09-60), the Supreme Court unanimously reversed the court of appeals, holding that immigration judges retain discretion to cancel automatic deportations following repeat drug misdemeanors. In his opinion, Justice Stevens reasoned that common sense refuses a reading

of the applicable statutes that equates a simple conviction of possession of illegal drugs that resulted in a short jail sentence with an aggravated felony. He also noted that the prior charge played no role in the second conviction; therefore, the defendant had no chance to defend himself against recidivism charges, and that the federal government should respect Texas prosecutors’ decision to charge Carachuri-Rosendo with a misdemeanor rather than a felony. Justices Alito and Thomas concurred in the judgment, but not the majority’s reasoning, and issued separate opinions.

### Intellectual Property

In 1997, the U.S. Patent and Trademark Office denied Bernard Bilski’s patent application for a business process that allowed commodities traders in the energy market to hedge against risk. A patent appeals board agreed with the Patent Office that the process was ineligible for a patent, and the Court of Appeals affirmed, rejecting its prior multifaceted test of whether a process is patentable—which had asked broadly whether the claimed invention produced a useful, tangible result—deciding, instead, that when interpreting the Patent Act, 35 U.S.C. § 101, the sole inquiry should be whether a claimed new process is tied to a particular machine or transforms a particular article (the “machine-or-transformation” test).

Bilski appealed the ruling, and the Supreme Court granted certiorari. Justice Kennedy delivered the Supreme Court’s opinion in *Bilski v. Kappos* (08-964), which overturned the court of appeals’ decision that the machine-or-transformation test was the only one needed. Justice Kennedy stated that, even though some business methods may be eligible for patents (citing Court precedent and the need for a patent system that recognizes diverse innovations), Bilski’s application remained ineligible because it was, in effect, an abstract idea—a category of claimed inventions that the Court has determined is ineligible for patents. *Parker v. Flook*, 437 U.S. 584 (1978). Finally, the justice clarified that other limitations on patent eligibility were valid as long as they were consistent with the Patent

Act’s text. Justices Roberts, Thomas, and Alito joined the opinion that Justice Kennedy delivered for the Court, and Justice Stevens and Justice Breyer concurred separately.

### International Law

Somali natives sued Mohamed Ali Samantar, a resident of Virginia, in federal district court, alleging that Samantar authorized torture and extrajudicial killings when he held Somali government posts, including defense minister and prime minister, between 1980 and 1990. Samantar denied the allegations and moved to dismiss the case, asserting that the federal Foreign Sovereign Immunities Act of 1976 immunized him from suit. 28 U.S.C. § 1604. The district court agreed with Samantar’s assertion that, because he was an official of the Somali state, the act immunized him, but the Fourth Circuit reversed on appeal, holding that § 1604 did not cover state officials.

The Supreme Court granted certiorari, and in *Samantar v. Yousuf* (08-1555), the Court considered whether the act provides Samantar with “immunity from suit based on actions taken in his official capacity,” and unanimously held that it did not. Justice Stevens wrote for the Court that the language of the act, its legislative history, and common law principles all indicate that § 1604 does not immunize officials acting on behalf of a foreign state from suit in the United States. However, in the opinion he delivered for the Court, Justice Stevens stressed the narrow scope of the decision, noting that other legal principles may immunize Samantar from suit.

### Labor and Employment Law

In 1995, the city of Chicago conducted a written examination of applicants for positions as firefighters. The city announced that it would select candidates randomly from a list of “well-qualified” applicants who scored at least 89 out of 100 points on the examination. The city informed “qualified” applicants—those who scored between 65 and 88 points—that it was unlikely that they would be called for further processing but that they would remain eligible for employment. Begin-

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ning in March 1997, several African-American applicants who scored in the “qualified” range, but were never hired, filed suit, alleging that the city’s practice of selecting only from “well-qualified” applicants had a disparate impact on African-Americans, in violation of Title VII of the Civil Rights Act of 1964. The district court denied the city’s motion for summary judgment, rejecting the city’s claim that the petitioners had failed to file EEOC charges within 300 days after the unlawful employment practice occurred. The Seventh Circuit reversed the judgment, holding that the suit was untimely.

In *Lewis v. City of Chicago* (08-974), the Court unanimously held that a plaintiff who does not file a timely charge challenging the adoption of a practice may assert a disparate-impact claim in a timely charge challenging the employer’s later application of that practice as long as the plaintiff alleges each of the elements of a disparate-impact claim. Writing for the Court, Justice Scalia explained that excluding passing applicants who scored below 89 when selecting those that advance through each round of selection provided for individual unlawful employment practices. Thus, the city’s practice did occur within the 300-day charging period.

### **Property**

In Florida, common law ordinarily dictates the boundary between private beachfront property and the state-owned seabed. Florida common law dictates that landowners of waterfront property gain ownership of land that the sea deposits on their property, as long as the increase is so gradual as to be imperceptible. But if the augmentation is sudden, the owner of the seabed (typically the state) retains ownership of the newly exposed land. In response to erosion on its ocean beaches, Florida’s legislature passed the Beach Renourishment Act, which added sand to the seabed at various Florida beaches and gave ownership of the resulting new waterfront land to the state. A group of owners of beachfront property sued the Florida Department of Environmental Protection in state court for issuing

permits for the project. The landowners said that, by claiming the new land as state property, Florida unconstitutionally took their common law property right to claim as their own new land gradually exposed at the water’s edge. The Florida Supreme Court disagreed with the state court of appeals about whether the Beach Renourishment Act constituted an unconstitutional taking of property.

Justice Scalia wrote for the eight participating justices in *Stop the Beach Renourishment v. Florida Department of Environmental Protection* (08-1151) that Florida’s assignment of property rights to land exposed in its efforts to shore up its eroding beaches did not constitute an unconstitutional taking. The Court reasoned that Florida common law does not distinguish between sudden increases that result from human activities and those that arise from natural events. Although the Court was unanimous that there was no unconstitutional taking in this particular case, it was split on the larger question of whether the actions by courts that terminate an established property right, in addition those by legislatures, can be considered an unconstitutional taking. Justices Scalia, Roberts, Thomas, and Alito agreed that these “judicial takings” exist. Justices Breyer and Kennedy concurred separately, joined by Justices Ginsburg and Sotomayor, holding that this question was not necessary to decide this case. Justice Stevens recused himself.

### **Civil Commitment**

A federal statute related to civil commitment authorizes the U.S. Department of Justice to detain a mentally ill, sexually dangerous federal prisoner beyond the date the prisoner would otherwise have been released. 18 U.S.C. § 4248. That statute allowed for post-sentencing civil commitment of persons who have committed certain sex crimes in the past and who suffer from a mental illness that makes them sexually dangerous to others. In November and December 2006, the government instituted civil commitment proceedings under § 4248 against Graydon Earl Comstock Jr. and others convicted of crimes covered by

§ 4248 who were about to be released from prison. The district court granted the five men’s motions to dismiss the proceedings on constitutional grounds. The Fourth Circuit upheld the dismissal.

A 7-2 majority of the Supreme Court reversed the Fourth Circuit’s decision in *United States v. Comstock* (08-1224), holding that the federal government has the authority to enact the federal civil commitment statute. Justice Breyer, writing for the majority, clarified that the court was only considering whether the law was a necessary and proper exercise of federal power under Article I of the Constitution and did not consider other questions, such as potential due process violations. In concurring opinions, Justices Alito and Kennedy agreed that the statute was constitutional, but Justice Kennedy raised concerns about federalism, and Justice Alito raised concerns about the statute’s broad potential applications. Justice Thomas dissented, joined by Justice Scalia, stating that § 4248 overreached Congress’ enumerated powers.

### **Securities Fraud**

In October 2001, Enron Corp., the nation’s seventh largest business firm, collapsed, devastating Houston’s economy and causing widespread loss of jobs and retirement savings. In 2006, Jeffrey K. Skilling, a former Enron executive, was convicted of conspiracy to commit securities fraud and wire fraud, securities fraud, making false statements to accountants, and insider trading. The Fifth Circuit Court upheld the conviction. Skilling challenged as unconstitutional the “honest services” fraud law, an amendment to 18 U.S.C. § 1346, which criminalizes any form of fraud if the misconduct has deprived another of the right of honest services and which the prosecutors in Skilling’s case used to reinforce the charge against him of conspiring to commit securities and wire fraud. Skilling also challenged the conviction on the ground that pretrial publicity and community prejudice prevented him from receiving a fair trial.

In *Skilling v. United States* (08-1394),

Hillary A. Stern  
Elwood C. Stevens  
Catherine M. Stockwell  
Karen V. Sullivan  
Laszlo M. Szabo  
Mary Katherine Taylor  
Michael J. Thomas  
Orlando J. Torres  
Osiris Torres

Phyllis O. Tousey  
Michael L. Turrill  
Kevin Ueland  
Virginia T. Vance  
Mark L. Vavreck  
Chris P. Villemarette  
Charles M. Viser  
Jonathan Vogel  
Scott A. Wagner

Lisa S. Wahlin  
Holly B. Wardell  
Steve R. Warren  
Asma J. Warsi-Chaudry  
Kevin K. Washburn  
Victoria L. Weatherford  
Jennifer B. Wells  
Frederick Wen  
Bruce E. Wickline

Benjamin J. Wilensky  
David G. Wilhelm  
Thomas H. Wilkins  
James W. Williams  
Jeremy S. Williams  
Samuel L. Winder  
Richard R. Winter  
Carrie A. Wozniak  
Robert T. Wright

Hui-Ju Wu  
Gregory C. York  
Christine M. Young  
Cole M. Young  
Susan C. Yu  
F. Lachicotte Zemp  
Kevin Zolot

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## REVIEWS *continued from page 56*

avoid the puddle I saw the mystery, the unspeakable wrongness, of cutting a life short when it was in full tide.”

Elder’s collection of last words cannot be complete. He makes a selection, and in choosing one quotation over another, he makes a political statement. I would have rather he had left out overt political proclamations, ranging from those of Nathan Hale and Mary Goode (of the Salem witch trials) to Joe Hill and the more recent declarations of Julius and Ethel Rosenberg and Timothy McVeigh. Such political expressions detract from the anonymity of the forgotten.

Elder’s discussions of the methods of execution, serving as organizing themes, are insightful. Each method is touted as humane, and each reflects, in a manner, the era of its use. The changes in methods also illustrate the movement of execution from a public spectacle to a cloistered procedure, away from a shielded public. The methods strive to be painless, and recent litigation has focused on lethal injection. Yet, there are throwbacks. Utah, for example, still allows execution by firing squad for those convicted prior to 2002, if the inmate chooses this method.

In collecting these last words, Elder can rely only so much on what was transcribed. Most last words were the result of reporters’ hastily scribbling down

what they thought they heard, or what witnesses later recounted. And, although we all think there is a right to last words, it is a gift of the state. Pennsylvania, for example, does not provide for last words in its protocol, and neither did Ohio until several years ago. Some last words can only be spoken to the warden; others are required to be brief. It is strange to read that Chaplain Carroll Pickett, who ministered to nearly 100 death row inmates in the Texas prison system, acting on instructions from the warden, advised the condemned that there should be no Gettysburg Address (a speech known for its brevity). Pickett’s last charge indeed! But last words, like last meals (Beuke asked that his be given to a homeless person), have symbolic value. With the advent of the Internet and the ability to collect last words and menus of last meals, is this collection necessary? Perhaps. It will soon be outdated, not because capital punishment will end, as then the book would have historical and social value, but because executions will continue. There will be no last last words in the foreseeable future.<sup>3</sup>

Our office represented Ronnie Gardner, who was executed by a Utah firing squad on June 18, 2010. His life ended with no last words. When asked if he had any final words, he said, “I do not, no.” But, as a sign of

the times, the attorney general of Utah used his Twitter account to get his own last words in, tweeting on his iPhone that he, the attorney general, had just given the go ahead to proceed with the execution. The five gunmen then fired at 12:15 a.m., and Gardner was pronounced dead at 12:17 a.m. **TFL**

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### Endnotes

<sup>1</sup>See Kevin F. O’Neill, *Muzzling Death Row Inmates: Applying the First Amendment to Regulations that Restrict a Condemned Prisoner’s Last Words*, 33 ARIZ. ST. L.J. 1159 (2001).

<sup>2</sup>This admonition was by Robert Comer, who was executed by the state of Arizona on May 22, 2007. Comer was a “volunteer” who had sought his execution. These last words were directed to his counsel, with whom he spent his last minutes talking about the National Football League and of the fact that they were both fans of the Oakland Raiders.

<sup>3</sup>For interesting aspects of the rites of legal executions, see Daniel LaChance, *Last Words, Last Meals, and Last Stands: Agency and Individuality in the Modern Execution Process*, 32 LAW & SOCIAL INQUIRY 701 (2007).

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## COURT *continued from page 48*

the Court held that the “honest services” statute applied only to crimes involving bribery and kickbacks. Therefore, because Skilling and the others had been tried under the statute for other crimes, the convictions could not stand. Justice Ginsburg, writing for a majority of six, held that reading the law as covering anything other than bribes and kickbacks would raise questions of constitutional vagueness. Justice Scalia, writ-

ing for the three dissenters on this issue, argued that the Court had legislated from the bench in its interpretation of the “honest services” law. Ginsburg also wrote for a majority of five, holding that the publicity and community prejudice did not prevent Skilling from receiving a fair trial. Justice Alito wrote a separate concurrence on the right to an impartial jury; Justice Sotomayor dissented on this issue, questioning the adequacy of the

voir dire in this case. **TFL**

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*Prepared by LII Summer Editors Jeffrey Catalano and Bret Brintzenbofe. In addition to the cases highlighted above, the decisions from the Supreme Court’s entire 2009–2010 term can be found on the LII’s Supreme Court website: [www.law.cornell.edu/supct/](http://www.law.cornell.edu/supct/).*