The Supreme Court's 2010–2011 term arguably marks the beginning of a new Court. As the first term for Justice Kagan, the second for Justice Sotomayor, and only the sixth for Justice Alito and Chief Justice Roberts, the 2010–2011 term may indicate jurisprudential positions and dynamics between the justices that will give the Supreme Court a new character going forward. This review is contributed by the Legal Information Institute, a nonprofit activity of Cornell Law School.

Justice Kagan's impassioned dissent in *Arizona Christian School Tuition Organization v. Winn* (09-987) may indicate her intention to play a significant role in jurisprudence related to the Establishment Clause. And Justice Sotomayor's independent stances in a number of cases indicate the possibility that she will emerge as an important swing vote in the Court. Of course, all speculation about the future is dangerous; nevertheless, it seems clear that a new institutional personality is emerging within the Court.

In what follows, we offer sketches of the facts and arguments involved in a selection of cases in which the Court ruled this term. Because limitations of space and time prevent us from covering all the cases decided by the Court, we are able to offer only a sample of cases that seem particularly important. We have endeavored to select cases that are significant from doctrinal and public policy perspectives and to represent the range of decisions the Court has issued. Rulings involving the First Amendment seemed particularly dominant this term, and we have focused particularly on those cases in our treatment. In addition to a number of important constitutional cases, we have also selected cases that seem to be of particular economic and social significance. In the areas of bankruptcy, securities law, patent law, and credit regulation, as in the area of labor law, the Court has settled important questions, and, as always, opened up new questions for debate.

First Amendment

Freedom of Expression in Matters of Public Debate

In 1955, Fred Phelps founded the Westboro Baptist Church, which has a congregation that believes that God hates the United States and that the nation will be punished for tolerating homosexuality (particularly in the military). The church has adopted a strategy of communicating its views by picketing, often at military funerals, and issuing press releases and Internet postings to draw public attention to the planned event. In March 2006, the Westboro Baptist Church picketed the funeral of Marine Lance Cpl. Matthew Snyder, who was killed in Iraq. Picketing took place on public land separated from the funeral by 1,000 feet and a temporary fence, and the protestors were in full compliance with police instructions. The picketers held signs stating things like "God Hates the USA/Thank God for 9/11," "America is Doomed," "Thank God for IEDs," "Thank God for Dead Soldiers," and "God Hates You." Snyder's father filed suit against Phelps, his daughters, and the Westboro Baptist Church in the U.S. District Court for the District of Maryland, alleging state tort law claims. At trial, a jury found in favor of Snyder's claims for intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy, holding Westboro liable for $2.9 million in compensatory damages and $8 million in punitive damages. Westboro filed posttrial motions contending that the jury award was grossly excessive and seeking judgment as a matter of law that the First Amendment protects the congregation's speech from all liability. Even though the district court reduced the punitive damages to $2.1 million, it otherwise left the jury verdict intact. The Fourth Circuit Court of Appeals held that Westboro's signs and statements were entitled to First Amendment protection.

In *Snyder v. Phelps* (09-751), an eight-justice majority upheld the determination made by the Fourth Circuit Court of Appeals. Justice Roberts wrote the majority opinion, which concluded that the signs pertained to matters of public concern, thus constituting speech protected by the First Amendment. Acknowledging that the signs "may fall short of refined social or political commentary," the Court nevertheless decided that the issues the signs addressed (the political and moral conduct of the United States and its citizens, the fate of the nation, homosexuality in the military, and scandals involving Catholic clergy) are "matters of public import" protected by the First Amendment. Rejecting Snyder's argument that the "context" of the speech—a private funeral—rendered the incident a matter of private concern not protected by the First Amendment, the Court determined that its public location and public message were not altered by the setting in which the picketing took place—a private funeral. The Court also noted that the picketing was peaceful, did not disrupt the funeral, and was in full compliance with then applicable Maryland law and police guidance. The Court emphasized the narrowness of its ruling and also stressed the importance of First Amendment protections for speech on issues of public debate that may be upsetting or may arouse contempt. The Court also declined to extend the "captive audience" doctrine to the circumstances of this case. A concurring opinion by Justice Breyer noted that the decision was fact specific, relating only to Westboro's picketing activity without considering the effect of online publications or television broadcasting. Justice Alito's dissent argued that any portions of the speech legitimately touching on matters of public concern should not be permitted to protect the remaining content that, in his judgment, was personally directed at

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members of the Snyder family and intended to wound them, thus constituting a legitimate case of intentional infliction of emotional distress.

Public Employees and the Petition Clause

In *Borough of Duryea v. Guarnieri* (09-0146), the Court incorporated a "public concern" limitation into public employees' First Amendment right of petition in disputes with their employers. In so doing, the Court resolved a split among appellate courts.

This case grew out of an employment dispute between Charles Guarnieri and the Borough of Duryea, Pa. After an arbitrator determined that an initial attempt to terminate Guarnieri from his position as chief of police involved procedural errors, the Borough Council issued a series of directives to instruct Guarnieri in the performance of his duties. Guarnieri sued the borough, the Borough Council, and individual members of the Borough Council under 42 U.S.C. § 1983, alleging that the directives were issued as retaliation for his filing of the union grievance that resulted in his reinstatement. Guarnieri claimed that his union grievance and his § 1983 suit were petitions that were protected by the First Amendment.

In an opinion joined by Chief Justice Roberts and by Justices Ginsburg, Breyer, Alito, Sotomayor, and Kagan, Justice Kennedy drew on the history of the First Amendment and on analogies to Speech Clause jurisprudence in concluding that the Petition Clause only protects public employees' activity that involves matters of public concern. To hold otherwise, the Court concluded, would involve the judiciary in wide-ranging supervision of government employees' activities, raising significant constitutional concerns and unduly burdening the legitimate exercise of governmental authority.

Justices Thomas and Scalia disagreed with the decision to draw the public concern limitation into Petition Clause jurisprudence. They would prefer a principle that identifies First Amendment petitions by the fact that they address the governmental entity as sovereign, rather than as employer. Justice Scalia also expressed doubts about whether a lawsuit should be regarded as a petition for purposes of the First Amendment.

Video Games and Free Speech

In *Brown v. Entertainment Merchants Association* (08-1448), the Supreme Court held that California's law restricting the sale or rental of violent video games to minors violates the First Amendment. After California enacted the law in 2005, the Entertainment Merchants Association and the Entertainment Software Association brought a pre-enforcement challenge in the U.S. District Court for the Northern District of California. The court enjoined enforcement of the statute, holding that it violated the First Amendment. The U.S. Court of Appeals for the Ninth Circuit upheld the decision.

Justice Scalia delivered the majority opinion, which concluded that video games (like more familiar media such as books, plays, and movies) qualify for protection under the First Amendment. Arguing that violent video games do not qualify for the same exceptional treatment afforded to obscene materials under First Amendment jurisprudence, the Court held that California's law constituted a content-based restriction subject to strict scrutiny. Applying this high level of scrutiny, the majority held that California had failed to demonstrate that the statute was justified by a compelling government interest and was narrowly drawn to serve that interest. Justice Alito, joined by Chief Justice Roberts, concurred with the Court's holding, arguing that the statute should be struck down on the basis of vagueness, rather than on First Amendment grounds. Justice Alito contended that the majority should not be so hasty in concluding that the experience of playing violent video games is no different than reading a book or watching a movie.

In his dissent, Justice Breyer argued that California had a compelling interest and considerable evidence that the statute would significantly further that compelling interest. He also contended that the law provided fair notice of what was prohibited and was not impermissibly vague. Justice Thomas' separate dissent looked to the original public understanding of the First Amendment. He contended that, in light of the founding generation's history, the framers of the Constitution would have understood freedom of speech to exclude the category of speech to minors.

Commercial Speech

In *Sorrell v. IMS Health* (10-779), the Court held that a Vermont statute limiting pharmaceutical sales representatives' gathering and use of data related to prescriptions written by physicians violated the First Amendment. Upholding a decision made by the U.S. Court of Appeals for the Second Circuit that Vermont's law was unconstitutional, the Court's holding explicitly negated the First Circuit's decisions holding that similar statutes in New Hampshire and Maine are constitutional. The Supreme Court's decision therefore implicates statutes in three states: Vermont, Maine, and New Hampshire.

In an opinion joined by Chief Justice Roberts and by Justices Scalia, Thomas, Alito, and Sotomayor, Justice Kennedy concluded that the Vermont statute imposed restrictions on the gathering and use of information about physicians' prescription activity that targeted particular types of content and speakers. Justice Kennedy came to this conclusion because the statute contained exceptions allowing certain types of people (such as academics)—but not pharmaceutical sales representatives—to gain access to the prescription information, and because disclosure and use for marketing purposes were explicitly prohibited. His conclusion was bolstered by the fact that Vermont's legislature had explicitly stated its intention to address the gathering and use of information about physicians' prescriptions by pharmaceutical companies.

Finding that Vermont's statute explicitly opposed pharmaceutical companies' marketing activities, the Court held that a "heightened" First Amendment scrutiny should be applied. The Court concluded that Vermont's legitimate legislative purposes—protecting medical privacy, keeping the cost of

prescription drugs low, and protecting public health—could have been achieved through less restrictive legislation and therefore held that the statute was unconstitutional under the First Amendment.

Justice Breyer issued a forceful dissent, which was joined by Justices Ginsburg and Kagan. Summarizing the distinctions that have previously been made in First Amendment jurisprudence, Justice Breyer argued that the Court's decision was not supported by any previous decisions and that the Court should either follow its prior holdings related to commercial speech or should treat the Vermont statute as an ordinary case of regulation for public health purposes, irrespective of its indirect effects on commercial speech. Justice Breyer expressed concern that the Court's ruling could bring back the days of judicial involvement in economic legislation characterizing the so-called Lochner Era (in the late 19th and early 20th centuries).

Establishment Clause

In *Arizona Christian School Tuition Organization v. Winn* (09-987), the Court held that the plaintiffs challenging an Arizona law that provides tax credits for contributions to charitable "school tuition organizations" lacked standing to pursue that claim under the Constitution. The plaintiffs had argued that, as Arizona taxpayers, they were being compelled to participate in the financing of religiously affiliated schools, and that this violates the Establishment Clause of the First Amendment. In an opinion joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito, Justice Kennedy concluded that, because the method of financing involves tax credits rather than tax appropriations, the plaintiffs have not been harmed in a way that gives rise to an actual "case or controversy" under Article III of the Constitution. Unlike a situation where an individual pays taxes, and some portion of those taxes are appropriated to finance sectarian religious activity, this case involves contributions by private individuals, which reduce their tax liability under Arizona's law. For the majority, this is a meaningful distinction because no individual is compelled to contribute his or her tax dollars to a sectarian institution.

As Justice Kagan made clear in her dissent—which was joined by Justices Ginsburg, Breyer, and Sotomayor—the general principle that taxpayers lack standing (simply by virtue of paying taxes) to challenge government action is accepted by all members of the Court. However, the question involves the extent to which an exception to the general principle applies to challenges of government action under the Establishment Clause. Prior Supreme Court case law, particularly the decision made in *Flast v. Cohen* (1968), established that tax appropriations for sectarian religious activity give rise to taxpayer standing under the Establishment Clause. The majority, in distinguishing tax credits from tax appropriations, placed limits on the ability of future plaintiffs to rely on *Flast* in challenging governmental activities alleged to violate the Establishment Clause.

According to Justice Kagan and the dissenters who joined her, the majority's ruling "devastates taxpayer standing in Establishment Clause cases." This is because future legislators wishing to provide subsidies for sectarian religious activity need only draft tax provisions as credits rather than direct subsidies in order to eliminate taxpayer standing. Because there is no economic distinction between a tax appropriation and a tax credit, the minority did not believe that a legal doctrine of such crucial importance should hang on the difference.

Justices Scalia and Thomas, on the other hand, while concurring in the outcome, wrote separately to argue that *Flast* should be repudiated as a "misguided decision." In other words, they believe that there should not be any exception to the general principle that taxpayers lack standing to challenge governmental activity in federal court.

Sixth Amendment: Confrontation Clause

A significant case involving the Sixth Amendment that the Court considered during this term was *Bullcoming v. New Mexico* (09-10876). The case involved Donald Bullcoming, who was apprehended by the police after the car he was driving hit a pickup truck in New Mexico. A blood sample taken from Bullcoming was sent to a state forensics lab for analysis of the blood alcohol content (BAC). Curtis Caylor, a forensic analyst, certified in a report that Bullcoming's BAC was 0.21 grams per 100 milliliters, well over the threshold for an aggravated charge of driving while intoxicated. At trial, the state did not call Caylor to testify and did not assert that Caylor was actually unavailable; instead, the state merely announced that Caylor had been placed on unpaid leave. The trial court admitted the report as a business record and permitted another analyst, Gerasimos Razatos, to testify as a surrogate for Caylor. Bullcoming was convicted of aggravated DWI and New Mexico's Supreme Court upheld the conviction.

Justice Ginsburg—joined in full by Justice Scalia and in part by Justices Sotomayor, Kagan, and Thomas—delivered the majority's opinion that the BAC report was inadmissible under the Sixth Amendment's Confrontation Clause. The Court concluded that the report was "testimonial," and that (according to a recent line of cases addressing Confrontation Clause requirements for forensic evidence), the report could be admitted only if Caylor had been unavailable and Bullcoming had been able to cross-examine him previously. The Court argued that Razatos could not substitute for Caylor, because Razatos had not participated in the analysis and was not in a position to provide the kind of testimony that would enable effective cross-examination concerning the report—that is, about the factual circumstances of the analysis, any lapses that might have occurred in conducting it, and the reasons for Caylor's unpaid leave. In a concurring opinion, Justice Sotomayor emphasized a particular test for determining whether a statement is testimonial—that is, whether the primary purpose of the statement is to create an out-of-court substitute for testimony. She also articulated a number of factual scenarios in which forensic evidence

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might be admissible without creating the same kinds of issues under the Confrontation Clause. Justice Kennedy, joined by Chief Justice Roberts and Justices Breyer and Alito, dissented, contending that the admission of Razatos' testimony was in full accordance with the Confrontation Clause. Justice Kennedy, who expressed deep disagreement with the jurisprudential foundations and practical effects of the recent line of cases addressing Confrontation Clause requirements for forensic evidence, argued that good procedural alternatives exist to ensure the reliability of forensic evidence.

Eighth Amendment: Cruel and Unusual Punishment and the Prison Litigation Reform Act

Coleman v. Brown and *Plata v. Brown* involve California state prisons' violations of the Eighth Amendment due to inadequate physical and mental care provided to prisoners. In 1995, the U.S. District Court for the Eastern District of California found in *Coleman* that there was a systematic failure to deliver necessary care to the class of seriously mentally ill persons in California prisons. The district court appointed a special master to oversee a remedial plan. Twelve years later, however, the special master reported that, following a period of slow improvement, the delivery of mental health care was again deteriorating because of overcrowding in the state's prisons. In 2001, the plaintiffs in *Plata* argued that insufficient care was being provided to the class of California prisoners with serious medical conditions. The U.S. District Court for the Northern District of California appointed a receiver to oversee remedial efforts after the state failed to comply with a remedial injunction. After then Gov. Schwarzenegger's declaration of a state of emergency in the prisons in 2006, the *Coleman* and *Plata* plaintiffs moved their respective district courts to convene a three-judge court pursuant to the Prison Litigation Reform Act of 1995 (PLRA), arguing that a reduction in prison population is the only means of remedying the continued constitutional violations in California's prisons. In 2009, the three-judge court ordered California to reduce its prison population to 137.5 percent of design capacity within two years.

In *Brown v. Plata* (09-1233), the Supreme Court ruled 5-4 that the remedial order to release prisoners is consistent with the requirements and procedures set forth in the PLRA. Writing for the majority, Justice Kennedy argued that the three-judge court had jurisdiction to order the release of prisoners because, in accordance with the PLRA, the respective district courts had initially ordered a less intrusive form of relief and had granted California a reasonable time to comply with the orders. The Court concluded that the three-judge court had based its prisoner release order on clear and convincing evidence that crowding was the primary cause of the ongoing Eighth Amendment violations and that no other relief would effectively remedy the situation. A basis for this last conclusion was the "political and fiscal reality behind this case." The majority was clearly not persuaded that California would be able to follow through on alternative proposals involving the expenditure of state funds. The majority also held that, although the remedy might have the potential for adverse effects on public safety and would result in positive collateral effects for prisoners who were not part of the aggrieved class, the order was narrowly tailored and did not extend further than necessary.

Justice Scalia, joined by Justice Thomas, wrote a strongly worded dissent, arguing that the decree for systemwide reform exceeds the boundaries set by the PLRA. He argued that the class of plaintiffs must comprise persons with individually viable claims and that a narrowly drawn remedy must extend no further than to correct the constitutional violations suffered by particular individuals. Justice Scalia also contended that the release order was a vastly expanded "structural injunction," which places judges in the position of engaging in very broad empirical predictions, taking judges beyond the traditional judicial role and allowing them to "indulge incompetent policy preferences."

In a separate dissent, Justice Alito, joined by Chief Justice Roberts, argued that the decree should be reversed because it was based on errors and beyond the three-judge court's authority. Justice Alito contended that the three-judge court improperly refused to consider highly relevant new evidence pertaining to current prison conditions. He also argued that the three-judge court erred by rejecting other plausible and effective remedies, giving inadequate weight to the population reduction order's impact on public safety.

Fourteenth Amendment: Due Process and the Right to a Lawyer in Civil Proceedings

In *Turner v. Rogers* (10-10), the Court held that the Due Process Clause of the 14th Amendment does not automatically require the provision of counsel to an indigent defendant in a civil contempt proceeding, even if the defendant faces incarceration. However, the Court also held that "alternative procedural safeguards" must be provided to ensure a fair determination of the question related to incarceration. This case involved repeated failure by the petitioner, Michael Turner, to pay child support. After a civil contempt hearing, Turner was found to be in willful contempt of his court-ordered obligation to pay child support and was sentenced to 12 months in prison. The sentencing judge made no findings about Turner's ability to pay the accrued child support obligation, and neither Turner nor the mother of his child was represented by legal counsel at the hearing. While serving his sentence, Turner (with the help of pro bono counsel) claimed that his Due Process rights had been violated through the failure to provide legal representation at his civil contempt hearing. The South Carolina Supreme Court denied this claim, and Turner appealed. The U.S. Supreme Court granted certiorari to resolve differences among state courts as to whether there is a right to counsel in civil contempt proceedings enforcing child support orders.

Writing for the majority, Justice Breyer first addressed the question of "mootness." He reasoned that Michael Turner's case should not be deemed "moot" (that is, no longer justiciable because of the lack of a live, continuing controversy), despite the fact that his jail sentence had already been served, because there was insufficient time to fully adjudicate the case before the sentence ended and because there was a reasonable likelihood that Turner could be subjected to the same penalty again. Proceeding to the merits of the case, the Court determined that, under 14th Amendment Due Process principles, states are not obligated to provide counsel in civil contempt cases that carry the potential for incarceration, *so long as* the opposing party is unrepresented by counsel and the state provides adequate alternative procedural safeguards, including notice to the defendant that ability to pay child support obligations is a critical issue in the proceeding. In applying this analysis, the Court concluded that, even though the petitioner, Michael Turner, was not entitled to court-appointed counsel, his rights under the Due Process Clause had nevertheless been violated because the South Carolina family court had failed to apply alternative procedural safeguards, including safeguards that would have involved some assessment of Turner's ability to pay the child support that he owed.

Justice Thomas, joined by Chief Justice Roberts and Justices Scalia and Alito, authored the dissent, which asserted that the majority had imprudently gone beyond the arguments of the parties (at the invitation of the United States as amicus curiae) in holding that 14th Amendment's Due Process Clause requires alternative procedural safeguards in civil contempt cases involving the potential for incarceration. In a portion of the opinion joined only by Justice Scalia, Justice Thomas hinted that an originalist understanding of the Constitution undermines even the established principle that legal representation must be provided in criminal cases.

Criminal Law: Miranda Warnings

A significant case involving the Miranda warning was *J.D.B. v. North Carolina* (09-11121). In this case, the petitioner, J.D.B., was a 13-year-old student suspected of home break-ins who was questioned by the police at his school. J.D.B. confessed to the crimes and was charged with breaking and entering as well as larceny. At trial, J.D.B.'s public defender moved to suppress the youth's statements on the grounds that the interrogation had been conducted in a "custodial setting" and no Miranda warning was given. The trial court denied the motion, holding that J.D.B. was not in custody at the time of the interrogation. The North Carolina Court of Appeals and the Supreme Court of North Carolina affirmed the lower court's decision.

In this case, the Supreme Court split 5-4, holding that a minor's age is a proper consideration in a custody analysis. Writing for the majority, Justice Sotomayor noted that the custody analysis objectively determines whether a reasonable person would feel free to stop the interrogation in the given circumstances. She argued that, because children lack the capacity to make the same reasoned decisions as adults would in similar circumstances, age must be a factor in applying this test. In his dissent, Justice Alito argued that the majority's decision was inconsistent with the perceived need for a clear, "one-size-fits-all reasonable person test" that can be applied in all cases.

State Sovereign Immunity, Federalism, and Pre-emption

The Court decided a number of important cases addressing the relationship between states and the federal government under the Constitution.

In *Virginia Office for Protection and Advocacy v. Stewart* (09-529), the Court held that principles of state sovereign immunity did not prevent Virginia's Office for Protection and Advocacy (VOPA) from suing the commonwealth of Virginia in federal court to enforce federal law. Federal legislation had offered states money for implementing assistance programs for people with disabilities. Virginia had created VOPA as an independent agency pursuant to this legislation, and VOPA was seeking injunctive relief to compel the state to disclose documents pursuant to the federal law. The majority held this to be permissible under 11th Amendment's sovereign immunity principles. Chief Justice Roberts, joined by Justice Alito, dissented strongly, arguing that the majority's holding represents a dangerous intrusion into state sovereign immunity and will lead more state agencies to sue state officers in federal court.

In *Bond v. U.S.* (09-1227), the Court held that a person indicted under a federal statute has standing to challenge the statute on the 10th Amendment grounds that, in enacting the statute, the federal government invaded state powers under the Constitution. The question was whether individuals can assert states' rights under the 10th Amendment, or whether this is something that is left to states. The Court held that an individual's right not to be jailed for violating an allegedly unconsitutional law does not belong to the states. "Federalism secures the freedom of the individual" and thus creates individual rights alongside states' rights, according to the Court.

In three cases involving significant federal legislation, conflicting state law and state law claims were held to be pre-empted. In *AT&T Mobility LLC v. Concepcion* (09-893), a divided Court held that the Federal Arbitration Act pre-empts a California law that rendered arbitration agreements unenforceable if they involved waiver of classwide arbitration. In *Bruesewitz v. Wyeth LLC* (09-152), the Court held that the Federal National Childhood Vaccine Injury Act of 1986 pre-empts design defect claims brought under state law against vaccine manufacturers. And *Pliva Inc. v. Mensing* (09-993, 09-1039, 09-1501) held that federal regulations applicable to generic drug manufacturers pre-empt state tort law claims based on an alleged failure to provide adequate warning labels. Justices Sotomayor and Ginsburg dissented in all three of these cases; Justices Breyer and Kagan joined the dissents in the *Concepcion* and *Mensing* cases.

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In *Chamber of Commerce v. Whiting* (09-115) a divided Court held that Arizona's controversial law penalizing employers for hiring illegal immigrants is not pre-empted by federal immigration law. The majority of the Court reasoned that the Arizona statute does not conflict with federal immigration law; Justices Breyer, Ginsburg, and Sotomayor dissented from the majority opinion.

Bankruptcy

Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) in 2005 to address certain perceived abuses of the bankruptcy system. The act adopts a "means test," which provides a formula for calculating a debtor's disposable income that must be used to pay creditors. Disposable income is defined as monthly income minus "reasonably necessary" expenses in specified categories. For debtors whose income is above the state median, the "means test" identifies the "reasonably necessary" expenses. A debtor calculating "reasonably necessary" expenses must claim allowances for expenses defined by the Internal Revenue Service's National Standards and Local Standards, which specify standardized expense amounts for basic necessities.

Jason Ransom's liabilities included approximately $82,500 in unsecured debt, a portion of which was claimed by FIA Card Services (formerly known as MBNA America Bank). Ransom was an above-median-income debtor who filed for Chapter 13 bankruptcy relief in 2006. In proposing his bankruptcy payment plan, Ransom calculated his monthly expenses to include a deduction for vehicle ownership, together with a separate deduction for the costs of operating the vehicle, a Toyota Camry, which he owned free and clear. FIA Card Services objected to the bankruptcy payment plan, arguing that it did not include all of Ransom's disposable income and that the deduction for vehicle ownership should not have been claimed. The Bankruptcy Court agreed with FIA, holding that a deduction for vehicle ownership could be applied only if the owner was making loan-related or lease-related payments. The Ninth Circuit Bankruptcy Appellate Panel affirmed the decision. On appeal, the Ninth Circuit Court of Appeals also affirmed this interpretation of the "means test," as applied to vehicle-related expenses. The Fifth, Seventh, and Eighth Circuits, however, have held that an above-median debtor may claim deductions for vehicles that are owned free of debt. The Supreme Court granted a writ of certiorari to resolve a split among the U.S. courts of appeal and bankruptcy courts regarding the applicability of vehicle ownership deductions to owners who do not make lease or loan payments.

In *Ransom v. FIA Card Services* (09-907), an 8-1 Supreme Court majority held that a debtor who owns a car free of debt payment obligations cannot claim a deduction for vehicle ownership. Justice Kagan delivered the majority opinion, arguing that the statute's language specifies only "applicable" monthly expenses as claimable in reducing the bankrupt individual's income payable to creditors. She reasoned that "applicable" expenses are those corresponding to an individual debtor's actual financial circumstances and that a debtor should be actually incurring an expense in the relevant category. Justice Kagan also argued that the Court's interpretation of the statute best achieves BAPCPA's statutory objectives by ensuring that debtors pay creditors the maximum amount the debtors can afford. The Court concluded that "applicable" expenses in the category of vehicle ownership include only loan and lease payments, while other costs associated with owning a car may be included in the separate deduction for operating expenses. Acknowledging that application of this interpretation may produce odd results in certain cases (for example, someone with only one payment left at the time of filing a bankruptcy plan will get the deduction for vehicle ownership), the Court determined that, in enacting the BAPCPA, Congress "chose to tolerate the occasional peculiarities that a brighter-line test produces," preferring this to inconsistent case-by-case outcomes. Justice Scalia, the sole dissenter, disagreed with the majority's interpretation of the statute, particularly its reliance on the IRS's explanatory guidelines for applying the National Standards and Local Standards. He argued that the word "applicable" should be read as corresponding to the amounts specified in the National Standards and Local Standards for either one or two cars, whichever of those categories is applicable.

The Truth in Lending Act

Congress enacted the Truth in Lending Act (TILA) to promote the informed use of consumer credit. Pursuant to its authority under the TILA, the Federal Reserve Board promulgated Regulation Z, which requires credit card issuers to disclose certain information to cardholders. In 2004, the Federal Reserve Board issued an advance notice of its intent to consider revisions. Among other things, this notice expressed the board's interpretation that Regulation Z didn't require advance notice when interest rate increases were triggered on the basis of events specified in the credit agreement. In 2009, however, the Federal Reserve Board promulgated a revised final rule consistent with Congress' amendments to the TILA when it passed the Credit Card Accountability, Responsibility and Disclosure Act of 2009. As revised, the TILA and Regulation Z require 45 days advance notice for most increases in annual percentage rates. However, a case filed by James McCoy against Chase Bank arose before these legal changes were enacted.

James McCoy was the holder of a credit card issued by Chase Bank, whose cardholder agreement provided that McCoy was eligible for preferred interest rates, subject to his satisfaction of certain conditions, including making payments when they were due. Upon failure to satisfy the conditions, Chase Bank reserved the right to change McCoy's interest rate up to the maximum rate for nonpreferred cardholders, as described in a pric-

ing schedule. McCoy brought suit in the Superior Court of Orange County, Calif., on behalf of himself and others similarly situated, alleging that Chase had applied the interest rate increase retroactively in violation of Regulation Z. Chase moved the action to the U.S. District Court for the Central District of California, which dismissed the case, holding that the increase did not constitute a "change in terms" as contemplated by § 226.9(c) of Regulation Z. The Ninth Circuit Court of Appeals reversed the district court's ruling, holding that Regulation Z required notice of an interest rate increase prior to its effective date. The Ninth Circuit concluded that the text was ambiguous and relied on the Federal Reserve Board's official interpretation of Regulation Z.

In *Chase v. McCoy* (09-329), a unanimous Supreme Court held that, at the time of the transaction, Regulation Z did not require Chase Bank to provide prior notification to McCoy, because the interest rate increase was an implementation of an agreement term, rather than a change in terms. Justice Sotomayor delivered the Court's opinion, which relied substantially on the Board's interpretation of Regulation Z provided in an amicus brief submitted to the Court. Agreeing that the pre-2009 Regulation Z was unclear as to whether an interest rate increase pursuant to agreements like McCoy's constituted a "change in terms" and triggered a notice requirement, the Court held that the Board's interpretation was consistent with the regulatory text and dispositive of the case. Consistent with its 2004 notice, the Board had argued that Regulation Z didn't require notice when the increase occurred according to specifications in the credit agreement. Because the pre-2009 Regulation Z had done more than merely restate the terms of the TILA, deference to the Board's interpretation of its own regulation was warranted, according to the Court. The fact that the Federal Reserve Board subsequently changed its rules didn't alter the retrospective validity of its interpretation.

Tax Law and Administration

Congress enacted the Federal Insurance Contribution Act (FICA) to collect funds for the Social Security system. FICA provides exemptions for student workers, and the Treasury Department applies the student exception when a student's work is an "incident to and for the purpose of pursuing a course of study." According to a Treasury Department rule issued in 2004, services of a full-time employee working 40 or more hours a week are not considered "incident to and for the purpose of pursuing a course of study."

The Mayo Foundation offers medical residency programs in which residents are required to spend between 50 and 80 hours a week caring for patients under the supervision of senior residents and faculty members. Residents are also assigned textbooks and are expected to attend lectures. In 2005, the Mayo Foundation paid its residents annual stipends and paid FICA taxes on behalf of the residents. Mayo filed suit in the U.S. District Court for the District of Minnesota seeking a refund of the FICA taxes paid and asserting that residents are exempt from FICA taxes. The district court granted summary judgment in favor of Mayo, holding that the full-time employment rule was inconsistent with the text of FICA. The Eighth Circuit Court of Appeals reversed the ruling, concluding that the statute was ambiguous on the question of whether a medical resident was a student under FICA. A question raised by both these lower court rulings as well as the parties was whether Supreme Court precedent required Treasury Department rulemaking to be judged according to a less deferential standard of administrative review than is applied to other administrative agencies under *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.*

In *Mayo Foundation v. United States* (09-837), a unanimous Court, sitting without Justice Kagan, affirmed the judgment of the Eighth Circuit. Writing for the Court, Chief Justice Roberts concluded that the Treasury Department's full-time employee rule was a reasonable construction of the student exception. The Court found no justification for carving out a special standard of administrative review for tax law and therefore held that *Chevron*'s deferential standard should be applied to the Treasury Department's administrative action. In applying the *Chevron* test, the Court held that Congress did not directly address the definition of "student," and that the Treasury Department's rule was a reasonable interpretation of the statute's text.

Securities Law: Private Litigation

The Court decided three cases related to the legal obligations borne by issuers of securities under the Securities Exchange Act of 1934 and the private right of action that is available to enforce those obligations.

Section 10(b) of the Securities Exchange Act makes it unlawful for any person to use manipulation or deception in connection with the purchase or sale of a security (such as a mutual fund share). This statute is implemented by the Securities and Exchange Commission's (SEC) Rule 10b-5, which makes it unlawful to make misleading statements involving untrue statements of "material facts" or omissions of material facts in connection with the purchase or sale of a security. The Court has repeatedly upheld a private right of action to enforce these "anti-fraud" provisions of the Securities Exchange Act.

Erica P. John Fund v. Halliburton (09-1403) concerned the legal standard that must be met by plaintiffs seeking to obtain certification for a class action alleging violation of the antifraud laws. The Court unanimously held that, for purposes of class certification (as opposed to proving their case on the merits) plaintiffs are not required to prove "loss causation"—that is, to allege specific facts showing that the defendant's material misstatements caused the plaintiff to suffer an economic loss. The Court held that such a requirement has no logical connection to the important question commonly involved in a class certification under Federal Rule of Civil Procedure 23—that is, whether or not the plaintiff relied on the defendant's allegedly material misstatements. The Court held that proof of loss causation is not required in order for a court to

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presume reliance based on the theory that market prices reflect all information available (the "fraud-on-the-market" theory).

Janus Capital Group v. First Derivative Traders (09-525) was a case that dealt with the allocation of responsibility for making allegedly fraudulent statements. In this case, two separate legal entities—Janus Capital Management and Janus Investment Fund—were involved in the decision about how to describe Janus Investment Fund's investment practices for its mutual funds. Although the entities met the standard for legal independence, there was no question about their close relationship in fact: all of Janus Investment Fund's officers were also officers of Janus Capital Management. Nevertheless, the Court held 5-4 that only Janus Investment Fund should be considered to have "made" the allegedly misleading statements for purposes of the antifraud laws. Arguing that prior precedents established the need to carefully limit the private right of action under Rule 10b-5, a narrow majority of the Court held that only the person or entity with "ultimate authority" over a statement can be held to have made it. Because Janus Investment Fund was legally a separate entity, and because it was the only entity with a legally binding disclosure obligation, the Court held that Janus Investment Fund should be the only entity deemed to have "made" the allegedly false statements. Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, issued a sharp dissent, arguing that the majority's arguments exalted form over substance, failed to adhere to precedent, and could potentially create a legal loophole for dishonest managers.

Matrixx Initiatives v. Siracusano (09-1156) addressed the standard for "materiality" and the issue of intent ("scienter") for allegedly misleading statements. In this case, the defendant, a pharmaceutical company, had argued that the plaintiffs' class action couldn't proceed because they hadn't met the standard for stating a legal claim under anti-fraud law. Matrixx had chosen not to disclose information about reports from scientists and the general public indicating that one of its leading products (Zicam) might be causing loss of smell in some people. Matrixx also chose not to disclose lawsuits that were initiated on the basis of this information and issued a press release that downplayed concerns about Zicam. Matrixx argued that the information about Zicam wasn't material to the case, because no statistically significant link had been shown between Zicam and the loss of smell. The Court unanimously held that statistical significance is not the only indicator of causality and that, even in the absence of studies showing a statistically significant connection between a product and adverse effects, there may be a basis for concluding that information is material and should be disclosed. For this reason, the Court upheld the determination that the plantiffs had established a sufficient legal basis to proceed with their case against Matrixx.

Patent Jurisprudence

Commercialization of Federally Funded Inventions: The Bayh-Dole Act

The University Small Business Patent Procedures Act (commonly referred to as the Bayh-Dole Act) was passed by Congress in 1980. The act encourages the use and commercialization of federally funded inventions.

In the late 1980s, research scientists at Stanford University collaborated with a private biotechnology company, Cetus, in developing a technique to measure the effectiveness of HIV therapies. Dr. Holodniy, a research scientist at Stanford, used technology developed by Cetus and government funding to contribute to the technique. When Dr. Holodniy joined Stanford, he signed a contract (a Copyright and Patent Agreement), which committed him to assign any future patent rights to Stanford; later he signed another agreement (a Visitor's Confidentiality Agreement), which assigned his patent rights to Cetus. In 1991, Roche Molecular Systems acquired Cetus' assets and commercialized the HIV measurement technique. By 1995, Stanford had filed a patent application relating to the technique (naming Dr. Holodniy and several other scientists as inventors) and notified the government that it intended to retain title to the inventions pursuant to the Bayh-Dole Act. In 2005, the Board of Trustees of Stanford University filed suit against Roche for patent infringement. The U.S. District Court for the Northern District of California ruled for Stanford, but the Court of Appeals for the Federal Circuit disagreed, holding that Holodniy's Copyright and Patent Agreement with Stanford was a mere promise to assign the rights, whereas the Visitor's Confidentiality Agreement was an effective assignment of rights to Cetus. The Federal Circuit rejected Stanford's argument that the Bayh-Dole Act allocated superior rights to the university, thus "negating" any assignment of rights to Cetus.

In *Board of Trustees of Leland Stanford Junior University v. Roche Molecular Systems Inc.* (09-1159), the Supreme Court voted 7-2 to affirm the Federal Circuit's decision and held that the language of the Bayh-Dole Act does not automatically vest title in the recipients of federal research funding (federal contractors). In delivering the majority opinion, Chief Justice Roberts argued that the general rule of U.S. patent jurisprudence is to recognize the inventor as the holder of the rights to an invention, unless there is an agreement to the contrary. He concluded that "invention of the contractor" language in the Bayh-Dole Act does not operate to vest title to inventions in federal contractors but, rather, refers to inventions that belong to the federal contractor for some independent reason. The Court also argued that the Bayh-Dole Act's provision enabling federal contractors to "elect to retain title" confirms the Court's ruling. According to this argument, the word "retain" signals the holding of rights already obtained; such language only assures federal contractors that "they may keep title to whatever it is they already have." Chief Justice Roberts contended that Congress would have used clearer

language if it had intended to make sweeping changes to patent jurisprudence by depriving inventors of their rights in their inventions. Writing for the dissent, Justice Breyer agreed that the statutory objective of the Bayh-Dole Act is to ensure the commercialization of federally funded inventions, but he also argued that this operates against a background of rules that balance public, private, and governmental interests. Taking issue with Federal Circuit jurisprudence in the arena of patent assignment agreements (a point on which Justice Sotomayor concurred), he argued that the case should have been remanded to enable further consideration about how best to ensure a proper balance among the objectives of the Bayh-Dole Act, public interest, and the rights of inventors.

Liability for Actively Inducing Another to Infringe a Patent

In *Global-Tech Appliances Inc. v. SEB S.A.* (10-6), the Court held that liability for inducing another party to infringe a patent requires knowledge that an activity being encouraged or facilitated constitutes patent infringement. Accordingly, the Court overruled the Federal Circuit's determination that deliberate indifference to a known risk of patent infringement would be sufficient to hold a party liable for inducing another to infringe the right. However, drawing on the doctrine of "willful blindness" in criminal law, the Court affirmed the Federal Circuit's conclusion that the defendants, Pentalpha and its owner Global-Tech, should be held liable for inducing other companies (Sunbeam, Fingerhut, and Montgomery Ward) to violate SEB's patent on a design for a deep fryer. Justice Kennedy dissented with respect to the incorporation of the doctrine of willful blindness; he argued that to draw this doctrine into determinations of liability for inducement was to broaden the Patent Act's prohibition by analogy and to substitute willful blindness for a knowledge requirement.

Standard of Proof for Asserting an Invalidity Defense to a Claim of Patent Infringement

In *Microsoft Corporation v. i4i Limited Partnership* (10-290), the Court held that a party wishing to defend itself against a claim of patent infringement by asserting that the patent is invalid (that is, that the invention doesn't meet the legal requirements for granting a patent) must prove the facts involved in that defense by the high standard of "clear and convincing evidence." Writing for the majority, Justice Sotomayor argued that Congress' incorporation of language into the Patent Act expressing a presumption in favor of validity (after an application has been scrutinized by the Patent and Trademark Office and a patent has been granted) carried with it a "cluster of ideas" from prior common law cases dictating the clear and convincing standard of proof for the invalidity defense. She also noted long-standing precedents in the Federal Circuit for applying this heightened standard—precedents that Congress had not elected to legislatively overrule. Justice Breyer, joined by Justices Scalia and Alito, wrote a concurring opinion in order to emphasize that the heightened evidentiary standard would not apply to situations in which an invalidity defense raises mixed questions of fact and law. Although he concurred with the judgment, Justice Thomas disagreed with the argument that Congress' incorporation of a particular presumption could carry with it a cluster of ideas dictating a particular evidentiary standard.

Class Action Certification

Respondent Betty Dukes and other female employees sued Wal-Mart, alleging sexual discrimination pursuant to Title VII of the Civil Rights Act of 1964. The respondents claimed that Wal-Mart's policy of allowing regional and district managers to use their discretion in making pay and promotion decisions has led to an unlawful disparate impact on female employees. The claim also alleged that, because Wal-Mart was aware of the disparate impact, its failure to restrain the abuse amounts to disparate treatment. Representing 1.5 million members of the certified class, the named respondents sought injunctive and declaratory relief, punitive damages, and back pay.

The respondents moved the U.S. District Court for the Northern District of California to certify a plaintiff class consisting of all women employed at any Wal-Mart retail store since December 1998 who have been or may be subjected to Wal-Mart's challenged pay and promotion policy. Seeking to satisfy the standards of class certification set forth in Federal Rule of Civil Procedure 23, the respondents provided statistical evidence, anecdotal reports, and the testimony of a sociologist as evidence that there were questions of law or fact common to all the women. The district court granted the motion and certified the proposed class. The Ninth Circuit Court of Appeals substantially affirmed the decision.

In *Wal-Mart Stores v. Dukes* (10-277), the Court reversed the Ninth Circuit, holding that the class certification was inconsistent with Federal Rule of Civil Procedure 23(a) and that the respondents could not claim back pay under Rule 23(b)(2). Justice Scalia—joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito—concluded that the class members had failed to present sufficient evidence to demonstrate the commonality required by Rule 23(a)(2). Decisively rejecting the "social framework" analysis offered by the sociologist, which sought to demonstrate a "strong corporate culture" causing gender bias to affect all managers at Wal-Mart, the Court held that evidence demonstrating a common mode of exercising discretion (a "specific employment practice") throughout the entire company was necessary in order to establish the requisite commonality for class certification. The statistical evidence offered failed to meet this standard, according to the Court, because it showed disparities only on a regional and national level, not the requisite "store-by-store disparity." Even if such store-by-store disparity had been shown, the Court held, evidence of a "specific employ-

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ment practice" tying all the claims together would also have been necessary. The anecdotal evidence offered was rejected, because it showed only small numbers of incidents relative to the size of Wal-Mart and was geographically nonrepresentative.

Justice Ginsburg, joined by Justices Breyer, Sotomayor, and Kagan, concurred in part and dissented in part. Agreeing with the majority that the class should not have been certified under Rule 23(b)(2), Justice Ginsburg nevertheless concluded that Rule 23(a)(2)'s commonality threshold had been met by Wal-Mart's uniform policy of delegating discretion. She argued that the majority had inappropriately second-guessed factual determinations made by the lower courts and had improperly imported standards from Rule 23(b)(3), which requires some "decisive similarity" across the proposed class, into the determination of class certification under Rule 23(a)(2).

Labor Law

The Court decided several cases that had significance for labor law and employees.

The Fair Labor Standards Act

In *Kasten v. Saint-Gobain Performance Plastics* (09-834), a 6-2 majority held that the anti-retaliation provision of the Fair Labor Standards Act of 1938 protects employees who file oral as well as written complaints. Justice Breyer delivered the Court's opinion, noting that the key phrase "filed any complaint" warrants a broad interpretation. The Court also reasoned that a reading that excluded oral complaints would undermine the basic objectives of the Fair Labor Standards Act. But the Court agreed with Saint-Gobain that the statute requires the complaint to be sufficiently clear and detailed to give fair notice to the employer. Justice Scalia, joined by Justice Thomas, dissented, arguing that the plain meaning of the text contemplates only official grievances filed with a court or agency.

Title VII of the Civil Rights Act of 1964

Thompson v. North American Stainless (09-291) involved Eric Thompson, the petitioner, who had been fired from North American Stainless three weeks after his fiancée, Miriam Regalado, filed a complaint with the Equal Employment Opportunity Commission (EEOC) alleging sex discrimination against their employer. Thompson filed unlawful retaliation charges with the EEOC, and sued North American Stainless in the U.S. District Court for the Eastern District of Kentucky under Title VII of the Civil Rights Act of 1964. The district court granted summary judgment for North American Stainless, and the Sixth Circuit Court of Appeals affirmed the decision.

In *Thompson v. North American Stainless*, a unanimous Court, sitting without Justice Kagan, reversed the lower courts' decision, holding that Title VII allowed Thompson to bring third-party retaliation claims. Justice Scalia, writing for the majority, reasoned that Title VII prohibits employer conduct that could dissuade reasonable employees from making or supporting charges. The Court concluded that an employer's retaliation against third parties, including fiancées, qualifies as action prohibited by Title VII. However, the Court declined to identify a fixed class of relationships, noting only that the standard must be objective. Justice Scalia also noted that Thompson had a cause of action because, as an employee who suffered intentional injuries, he fell within the "zone of interests" protected by Title VII.

Uniformed Services Employment and Reemployment Rights Act

Vincent Staub, a technician employed by Proctor Hospital and a member of the U.S. States Army Reserve, Staub asserted that his employment had been unlawfully terminated because of the antimilitary animus of his direct supervisors, who nevertheless did not make the ultimate decision to fire him. In response to a suit under the Uniformed Services Employment and Reemployment Rights Act of 1994, the district court ruled in Staub's favor and awarded damages. The U.S. Court of Appeals for the Seventh Circuit reversed the district court, holding that Proctor was not liable under the "cat's paw" theory, which holds employers liable for the animus of a supervisor who influences, but does not make, adverse employment decisions.

In *Staub v. Proctor Hospital* (09-400), the Court, sitting without Justice Kagan, reversed the Seventh Circuit, holding that the evidence was sufficient to find Proctor liable for the discriminatory actions of its supervising employees. Noting that the Uniformed Services Employment and Reemployment Rights Act is very similar to Title VII, Justice Scalia drew upon agency and tort law to conclude that the "cat's paw" theory is applicable in cases in which a supervisor acts with a discriminatory motive and unlawful intent to cause the adverse action. The Court also determined that the supervisor's discriminatory act must be a "proximate cause" of the ultimate adverse action, contrary to the Seventh Circuit's holding that the discriminatory act must be the "singular influence" on the decision.

Justices Alito and Thomas concurred in the judgment but contended that the majority of the Court had strayed from the statutory text and adopted an interpretation that is likely to produce confusion. Justice Alito argued that a plain reading of the statute requires a showing that discrimination was the motivating factor behind the actual adverse action, rather than an intermediate act that ultimately caused the adverse action. He also asserted that a decision-maker's reliance on facts provided by another person cannot be considered a delegation of decision-making authority.

Environmental Law: Greenhouse Gas Emissions

In 2004, before the U.S. Environmental Protection Agency (EPA) had initiated a rulemaking process to

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in *Kawakita v. United States*, 343 U.S. 717 (1952), which concerned the treason conviction of a native-born U.S. citizen who through parentage was also a national of Japan. He was visiting Japan when Japan attacked Pearl Harbor and the United States declared war. It became impossible for him to return to the United States, and he took a job with a nickel company, interpreting communications between the Japanese and the American prisoners of war who were assigned to work in the company's mine and factory. After Japan surrendered, he returned to the United States on an American passport, having sworn that he was an American citizen and had performed no acts amounting to expatriation. He was charged with treason for having brutally abused American prisoners of war. In upholding the treason conviction, Justice Douglas wrote:

> Circumstances may compel one who has dual nationality to do acts which otherwise would not be compatible with the obligations of American citizenship. An American with a dual nationality who is charged with playing the role of a traitor may defend by showing that force or coercion compelled such conduct. The jury rejected that version of the facts which petitioner tendered. He is therefore forced to maintain that, being a national and resident of Japan, he owed no allegiance to the United States even though he was an American citizen. That proposition we reject.

A third subject that the book covers is whether extralegal methods of arrest violate a defendant's due process rights under the Fifth Amendment. *Ker v. Illinois*, 119 U.S. 436 (1886), and *Frisbie v. Collins*, 342 U.S. 519 (1952), both involved the forcible abduction of a defendant, one from Peru to Illinois and the other from Illinois to Michigan. The so-called *Ker-Frisbie* doctrine, as stated in *Frisbie*, is that "[t]here is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will." In *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974), this doctrine was somewhat modified but only if the arrest involved torture and the "government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights."

International White Collar Crime devotes almost 200 pages to resolutions, conventions, policies, governing documents, and statements of the goals of the United Nations, the World Bank, INTERPOL, and regional organizations—all of which is useful source material, but difficult reading, and is directed at law professors and their students. The book is an excellent text for a course in law schools, but one might wish it had been aimed at the wider readership that the subject merits. **TFL**

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regulate greenhouse gas emissions, two groups of plaintiffs (including a number of states, New York City, and several nonprofit land trusts) filed suit against five major electric power companies; the plaintiffs requested injunctive relief requiring the defendants to gradually reduce their carbon dioxide emissions. The U.S. District Court for the Southern District of New York dismissed the suits as presenting political questions best resolved by a legislative body. The Second Circuit Court of Appeals reversed the district court, holding that the plaintiffs had standing, had stated a claim under the federal common law of nuisance, and that the Clean Air Act did not displace the federal common law.

In *American Electric Power Company v. Connecticut* (10-174), the Supreme Court, sitting without Justice Sotomayor, held that the Clean Air Act and the EPA rulemaking activity authorized by the act displaced any federal common law right to seek abatement of greenhouse gas emissions. Justice Ginsburg delivered the Court's opinion acknowledging that the Court's decisions in the past have recognized a "specialized" federal common law governing air and water, while also emphasizing the need for prudence and caution by federal courts in contributing to this law. In this case, she argued, recognition of Congress' decision to delegate the regulation of greenhouse gas emissions to the EPA compelled a finding that the federal common law had been displaced. She emphasized that this conclusion doesn't depend on final rulemaking by the EPA; even if the EPA declined to issue final rules, its sphere of expert decision-making would displace the federal common law. However, if the EPA declined to issue final rules, the "prescribed order of decision-making" under the Clean Air Act would at that point enable federal judges (and ultimately the Supreme Court) to review the decision. Although Justices Alito and Thomas concurred in the judgment, their concurrence was based on an "assumption … for the sake of argument" that a 2007 case (*Massachusetts v. EPA*) was correctly decided; this case held that the EPA possesses authority under the Clean Air Act to regulate greenhouse gas emissions.

Full text is available at topics.law.cornell.edu/supct/cert/supreme_court_2010-2011_term_highlights. **TFL**

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