| *Supreme Court* **Year in Review** |

The Supreme Court's 2011–2012 term marks the first time in three years that there was not a new justice on the bench. Although the Court was unanimous on several fronts, many times it split along ideological lines: Chief Justice John Roberts and Justices Antonin Scalia, Clarence Thomas, and Samuel Alito on the right, and Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan on the left, with Justice Kennedy as the swing vote. This review is contributed by the Legal Information Institute, a nonprofit activity of Cornell Law School.

Introduction

The 5-4 party line votes leave many wondering if the Court is above politics and illustrate the importance of partisan and ideological divides on the Court. This isn't to say that the Court always divides along ideological lines, but it sometimes achieves unanimity by avoiding the important substantive issue, like in *F.C.C. v. Fox Television Stations*, where the Court avoided a decision on First Amendment rights by deciding that there was lack of fair notice. Yet under Chief Justice Roberts' guidance, the Court has looked past labels and legacy to interpret laws as constitutionally as it can.

The Court came under increasing scrutiny from the media and public as it agreed to hear pivotal cases on polarizing political and social issues, which could even affect the upcoming 2012 presidential election. In the tumultuous final week of the 2011-2012 term, the Court determined "campaign issues" such as illegal immigration (*Arizona v. US*, where Arizona's controversial immigration law was mostly held unconstitutional) and health care (Congress's taxing power upheld the Affordable Care Act individual mandate).

Yet, despite the headline cases, the Court's heavy docket included rulings equally deserving of attention that continue to shape constitutional rights and procedural issues, such as search and seizure, the right to counsel, intellectual property rights, and government immunity.

Federal Pre-emption

The doctrine of pre-emption maintains that a state law cannot conflict with an already existing federal law and that a state must yield where the federal government occupies exclusively a field of regulation. In this term, the Court generally gave deference to the federal government.

In *National Meat Association. v. Harris* (10-224), California passed a law requiring immediate and humane killing of nonambulatory animals. This state law essentially adds additional requirements to the Federal Meat Inspection Act (FMIA) requirement that slaughterhouses hold such animals for disease inspection. California law also barred the sale and purchase of meat from nonambulatory animals for any reasons, whereas the FMIA did not. The unanimous Court opinion written by Justice Kagan held that FMIA pre-empted California law's treatment of nonambulatory animals.

In *Kurns v. Railroad Friction Products* (10-879), a locomotive worker sued railroad-part manufacturers and distributors in Pennsylvania based on state-law tort claims, alleging his cancer was caused by asbestos insulation on locomotives. The Court held that the federal Locomotive Inspection Act (LIA) pre-empts state-law tort claims, concluding that the LIA was intended to occupy the entire field of locomotive claims.

State Immigration Enforcement

In the well-known *Arizona v. US* (11-182), President Obama challenged Arizona's Support Our Law Enforcement and Safe Neighborhoods Act of 2010 (S.B. 1070). Arizona enacted S.B. 1070 as an anti-illegal immigration measure, with four key provisions at issue before the Court.

With Chief Justice Roberts as the swing-vote, the 5-3 Court rejected three of the provisions for violating the Supremacy Clause. First, the Court reaffirmed that immigration policy is solely within the purview of the federal government. Second, the Court made clear that states are barred from adopting a state-level program requiring undocumented immigrants to report as noncitizens. This is what pre-empted Section 3, which would have required aliens to carry legal immigration papers at all times. Third, the Court concluded that states may not make it a crime for undocumented immigrants to work or even apply for work, pre-empting Section 5(C). Fourth, the decision forbids state policies that would lead to deportation of undocumented immigrants who have committed crimes, unless the federal government explicitly asks for such assistance. This wide conclusion undermined Section 6, which directed state police to make warrantless arrests of anyone believed to have committed a crime that could lead to deportation.

However, the Court unanimously allowed Section 2(B) to stand, holding that federal law did not pre-empt the state's instruction to check the immigration status of detainees. Because it was unclear if Arizona was supplanting or supporting federal immigration policy with this requirement, the Court held that it was premature to invalidate this provision at this time.

Justice Kennedy's sweeping statements in his opinion could impact the validity of other states' immigration laws that imitate or go beyond Arizona's attempt at "attrition through enforcement." In contrast, Justice Scalia's dissent was narrow, arguing that states should have the right to make immigration policies if the federal government was not enforcing its own policies. Justice Scalia discussed, at length, the historic and legal significance of sovereign state rights, and that one of those rights is to "protect their borders from foreign

nationals" in the absence of a federal prohibition.

Health Care: Patient Protection and Affordable Care Act

In 2010, Congress enacted the Patient Protection and Affordable Care Act (26 U.S.C. § 5000A) in order to increase the number of Americans covered by health insurance and decrease the cost of health care. The law was the largest and most controversial legislative achievement of President Obama's first two years in office.

Twenty-six states, several individuals, and the National Federation of Independent Business challenged the constitutionality of the individual mandate and the Medicaid expansion [*National Federation of Independent Business v. Sebelius* (11-393), together with *Dept. of Health and Human Services v. Florida* (11–398) and *Florida v. Dept. of Health and Human Services* (11–400)]. The key issue before the Court was the individual mandate, which requires most Americans to maintain "minimum essential" health insurance coverage. Those who do not comply with the mandate must pay a "penalty" tax to the Internal Revenue Service. Another provision brought before the Court was the expansion of Medicaid coverage to more low-income individuals.

The Court voted 5-4, but split unconventionally: Chief Justice Roberts was joined by Justices Breyer, Ginsburg, Sotomayor, and Kagan, while the supposed swing vote, Justice Kennedy, joined Justices Scalia, Thomas, and Alito in the dissent. Chief Justice Roberts ruled that the individual mandate failed to pass constitutional muster under the Commerce Clause, but the penalty was a tax that the government had power to impose. Thus, under Congress' Taxing Power, the individual mandate survived. With regards to the Medicaid expansion provision, the Court's ruling gave states flexibility and the choice to not expand their Medicaid programs without threat of financial penalties. The federal government could withhold new funds if a state refuses to participate in an expanded program but could not revoke federal funds from current, existing programs.

The Court's ruling on the Medicaid expansion has the potential to restrain Congress, limiting the federal government's ability to alter other federally financed programs, and the Commerce Clause ruling defined limits on Congress' power to regulate interstate commerce. Chief Justice Roberts wrote that the decision was not a Court endorsement of the mandates or politics, but "a general reticence to invalidate the acts of the nation's elected leaders." He noted, "It is not our job to protect the people from the consequences of their political choices."

First Amendment

Freedom of Expression

At issue in *Knox v. Service Employees Int'l Union* (10-1121) is whether a state employee union provided sufficient notification to its members about dues used for political advocacy. In a 7-2 ruling, the Court concluded that the union did not give proper notice. However, in a 5-4 opinion, the Court went beyond what was necessary to decide the case at hand, and addressed the larger issue of political spending by unions.

Justice Alito's opinion decided that the long-standing precedent of non-union members covered by union contracts be given the chance to "opt out" of such fees was insufficient. Instead, non-union members must be sent a notice with the option to "opt in," requiring affirmative consent. The majority of the Court now believes that compulsory unionism is a violation of First Amendment rights. By inventing a First Amendment rule whose effect will diminish political speech, *Knox* may be more indicative of the Court's opinion on labor unions, and a willingness to make a deeper commitment to prohibiting involuntary association as well. This ruling is the first significant limit on political spending by unions since the Court's *Citizens United* (2010) decision, which allowed unlimited electoral spending by unions and corporations. *Knox* could be the start of future legal challenges over unions' political spending and the dues collection process in general.

Historically, the Court has been inconsistent about whether the First Amendment protects lying. In *New York Times v. Sullivan* (1964), the Court stressed that there be some protection for false speech to give "breathing" room for freedom of expression. But in other areas, such as false advertising or perjury, false statements are not protected.

In *US v. Alvarez* (11-210), the Court voted 6-3 that the Stolen Valor Act (18 U.S.C. § 704) is unconstitutional under the First Amendment. The Stolen Valor Act makes it a crime to falsely claim to have received a military decoration or medal, even if such statements are made with no prior knowledge of their falsity or resulting harm. There is not even an exception for satire or theatrical performances. It is easy to see why the Court struck down the broad act. Justice Kennedy's plurality opinion noted that content-based restrictions on speech required exacting scrutiny. However, a concurrence by Justices Breyer and Kagan gives Congress an opportunity to redraft the statute to avoid constitutional violations.

Ministerial Exception to Anti-Discrimination Laws

The Supreme Court's unanimous decision in *Hosanna-Tabor v. Equal Employment Opportunity Commission* (10-553) is a landmark victory for religious freedom, affirming the right of religious groups to discriminate when appointing their own ministers. Perich, once employed as a teacher, filed a lawsuit against a church-operated school. She alleged that her employment was terminated in violation of the Americans with Disabilities Act. In an opinion authored by Chief Justice Roberts, the Court used *Watson v. Jones* (1872) to confirm that "it is impermissible for the government to contradict a church's determination of who can act as its ministers." First, the ruling unambiguously affirms the "ministerial exception" to federal anti-discrimination laws. This exception

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is grounded in the First Amendment, which "precludes application of such legislation to claims concerning the employment relationship between a religious institution and its ministers." Second, the Court expressly stated that the ministerial exception "is not limited to the head of a religious congregation," but applied to Perich, who had non-secular duties, including teaching religious and non-religious subjects. Third, the Court clarified that the protections of the ministerial exception are not limited to cases where the minister is fired for only religious reasons.

Chief Justice Roberts' opinion added that the ministerial exception is not a "jurisdictional bar" to all lawsuits claiming workplace bias; rather it is a "defense on the merits." Thus a discrimination lawsuit may still be filed, but the denomination must answer that the employee is a "minister" before the exception is applicable.

Fourth Amendment: Search and Seizure

The Fourth Amendment to the US Constitution is best known as "search and seizure." It can be a divisive topic, as seen in this Term's *Florence v. Board of Chosen Freeholders* (10-945). Florence was arrested for failure to appear at a hearing to enforce a fine; he was subsequently subjected to strip searches at two separate prison facilities. The Court, voting 5-4, held that correctional officers may strip-search prisoners, regardless of the reason for arrest. Justice Kennedy wrote that deference should be given to correctional officials unless substantial evidence is shown that their response to the situation is exaggerated.

However, with regards to new "search" technology, in *US v. Jones* (10-1259) the Court unanimously held that GPS installation and its use to monitor a vehicle's movements constitutes a "search." Therefore, Jones' Fourth Amendment rights were violated when police secretly installed a GPS tracking device on his car after their warrant expired. Although the police had originally procured a warrant to install a GPS tracking device on Jones' vehicle, they installed the device one day after the warrant expired. With this decision, the Court resolved inconsistencies in the lower courts regarding GPS tracking and similar "dragnet"-type monitoring. The majority's analysis was based on a "reasonable expectation of privacy" [*Katz v. US* (1967)], adding it to the common law trespassory test. However, the Court did not decide on whether the Government's argument that attachment and use of GPS was a reasonable and lawful search.

Fifth Amendment: Due Process

The Court avoided the First Amendment issue in *FCC v. Fox Television Stations* (10-1293) by issuing a unanimous but narrow opinion in favor of broadcasters under the Fifth Amendment Due Process clause.

The Federal Communications Commission (FCC) policy for indecency (18 U.S.C. § 1464) is to consider whether a broadcast "dwells on or repeats at length" offensive material. Only after the broadcasts at issue aired did the FCC hold that fleeting expletives and momentary nudity could be found indecent. Justice Kennedy wrote in his opinion that the FCC standards applied to these broadcasts were unconstitutionally vague.

However, the Court did not address the FCC's indecency policy, but instead found that Fox and ABC did not receive fair notice that fleeting expletives and momentary nudity were indecent. As Justice Kennedy noted, "because the court resolves these cases on fair notice grounds under the due process clause, it need not address the First Amendment implications of the Commission's indecency policy."

Both the opinion and Justice Ginsburg's concurrence noted that the Court should consider overruling *FCC v. Pacifica Foundation* (1978), which allows the Government to restrict indecent broadcasting because of its "uniquely pervasive presence." The basis of that case has since changed with the advent of technology and availability of unregulated choices for listeners and viewers. But because the FCC failed to provide due process, the Court deemed it unnecessary to reconsider *Pacifica* at this time.

Sixth Amendment

Coleman "Cause"

Under the Sixth Amendment, a defendant has a right to be represented by counsel. In *Coleman v. Thompson* (1991), the Court held that negligence on the part of a prisoner's post-conviction attorney is not "cause" for procedural default because the attorney acts as the prisoner's agent.

In *Maples v. Thomas* (10-63), Maples lost the chance to appeal his death sentence when his pro bono attorneys left their firm, causing the firm's mailroom to return to sender an unopened court order. Although the district court denied Maples' request for a late appeal, the Court held that in situations where the attorney has abandoned the prisoner without notice, thereby severing the principal-agent relationship, the attorney's negligent acts could no longer be attributed to the prisoner. Therefore, in such circumstances, the prisoner has sufficiently demonstrated cause for a procedural default.

The Court recognized a narrow exception to *Coleman* in *Martinez v. Ryan* (10-1001). In *Martinez*, the 7-2 Court held that if there was no counsel or ineffective counsel during the initial-review collateral proceeding and state law requires the prisoner to raise ineffective counsel claims during collateral proceedings, failure to do so may result in a procedural default as a matter of equity. However, the Court declined to answer the constitutional question of whether a prisoner has a right to effective counsel during such initial-review collateral proceedings.

Effective Assistance of Counsel

In this Term, the Supreme Court also decided that the right to effective assistance of counsel applies to the plea-bargaining stage. The Court had previously ruled that the right to effective counsel applies to the acceptance of plea offers and guilty pleas. These two cases involved defendants who did not take plea deals. In *Missouri v.*

Frye (10-444) and *Lafler v. Cooper* (10-209), both opinions written by Justice Kennedy, the five-justice majority Court found that because plea-bargaining is a critical stage of criminal proceedings, the defendant's Sixth Amendment right should be in effect.

In *Frye*, the defendant was charged with driving with a revoked license. The prosecutor offered two plea deals with a maximum sentence of ninety days in jail; Frye's attorney did not communicate the plea offers to Frye, and subsequently Frye was found guilty and sentenced to three years in prison. Justice Kennedy delivered the opinion of the Court, in which Justices Ginsburg, Breyer, Sotomayor, and Kagan joined, applying the *Strickland v. Washington* (1984) standard, where a defendant must show that counsel's performance was deficient to negate the right to counsel and prejudice arose from inadequate representation. Justice Scalia filed a dissenting opinion, in which Justices Roberts, Thomas, and Alito joined. Justice Scalia stated that plea-bargaining is not a constitutional right, especially after voluntary admission of guilt or a fair trial. In his dissent, Justice Scalia concludes that plea-bargaining is a "necessary evil" that is worthy of regulation but not meant to be protected under the Sixth Amendment.

In *Cooper*, the defendant was charged with assault with intent to murder and other crimes. The prosecutor offered a plea deal for 51 to 85 months in prison. The defendant indicated a willingness to accept the plea, but rejected it after his counsel convinced him that the prosecutor could not prove intent to murder. At trial, the defendant was convicted on all counts and sentenced to 185 to 360 months in prison. Again, Justice Kennedy delivered the opinion in which Justices Ginsburg, Breyer, Sotomayor, and Kagan joined. And again, Justice Scalia, vocalized his dissent, in which Justice Thomas joined and in which Chief Justice Roberts joined as to all but Part IV. Justice Alito also filed his own dissent. In Justice Scalia's dissent, he used *Strickland v. Washington* (1984) and *Weatherford v. Bursey* (1977) to reaffirm that plea-bargaining is not a substantive or procedural right to which a criminal defendant is entitled. Justice Scalia also noted that Cooper's attorney's advice caused Cooper to receive a fair and full trial. Justice Scalia's dissent points out that the Court remanded *Cooper* and also indicated that the trial court could exercise its discretion in determining whether to vacate some, all, or none of the convictions and sentence from the trial, notwithstanding the Supreme Court's finding of a constitutional violation. The majority opinion rejected the argument that there can be no claim of ineffective assistance of counsel if the defendant is convicted after a fair trial. Effective assistance of counsel does not exist solely to ensure a fair trial; the Court found instead, that the trial caused the injury resulting from the error. The Court concluded that the defendant may be prejudiced by going to trial instead of taking a more favorable plea.

These two cases support the Court's belief that the Sixth Amendment right to effective assistance of counsel applies at the plea-bargaining stage. The decisions may change a typically informal plea-bargaining process into a more formal one, with offers made in writing. In addition, as Justice Scalia warned, now that plea-bargaining is a "constitutional entitlement," a flood of defendants may claim ineffective assistance of counsel at the plea-bargaining stage, as approximately 97% of federal court convictions in 2010 were the result of guilty pleas.

Eighth Amendment: Cruel and Unusual Punishment

In *Miller v. Alabama* (10-9646) [argued with *Jackson v. Hobbs* (10-9647)], the Court threw out mandatory life in prison without parole for juveniles, continuing its trend of holding that underage criminals cannot be punished in the same manner as adult criminals. The Court's 5-4 ruling was based on the Constitution's Eighth Amendment prohibition against cruel and unusual punishment.

Miller was convicted in Alabama of capital murder during the course of arson. Intoxicated, Miller and his friend beat his neighbor and set fire to his home, killing the neighbor. Jackson was sentenced in Arkansas after the death of a store clerk during an attempted robbery shooting. Although another boy shot the clerk, because Jackson was present, he was convicted of capital murder and aggravated robbery. Both sentences of life without parole were automatic under their respective state laws.

Justice Kagan delivered the majority opinion in which Justices Kennedy, Ginsburg, Breyer, and Sotomayor joined, deciding that a juvenile's age must be considered and life without parole could no longer be automatically applied to juveniles. Using Jackson's case, Justice Breyer emphasized in a separate opinion that "there is no basis for imposing a sentence of life without parole upon a juvenile who did not himself kill or intend to kill."

This decision is in line with others the Court has made, including ruling out the death penalty for juveniles and life without parole for young people whose crimes did not involve killing. Although the decision still left open the possibility that judges could sentence juveniles to life without parole, three separate dissents from Chief Justice Roberts, Justice Thomas, and Justice Alito, with Justice Scalia joining them all, indicated that this was not the only issue at stake. The dissents uniformly pointed out that with similar mandates in 29 jurisdictions, undermining these state legislatures was not within the Supreme Court's constitutional authority. Justice Thomas felt that this decision "[invalidated] a constitutionally permissible sentencing system" based simply on the Court's beliefs. Justice Alito also strongly criticized the opinion stating that "when the majority of this Court countermands that democratic decision, what the majority is saying is that members of society must be exposed to the risk that these convicted murderers, if released from custody, will murder again."

According to data provided to the Court, approximately 2,500 juveniles have no chance of parole for murders

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they committed. More than 2,000 of them are imprisoned because their sentences were mandated by state legislature. It is unclear how the ruling will affect juvenile offenders previously convicted of life without parole, but it will ensure that future courts take an offender's age into consideration for sentencing.

Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) was intended by Congress to curtail the federal habeas right of state prison inmates to challenge their state convictions and sentences. 28 U.S.C. § 2254(d)(1) bars federal courts from granting any habeas writ on an issue raised in state court, unless the state decision is contrary to or an unreasonable application of federal law.

A slew of cases regarding AEDPA have come before the Court in this Term, allowing the Court to further define the Act's application. In two cases, *Bobby v. Dixon* (10-1540) and *Coleman v. Johnson* (11-053), the Court gave deference to the role of the jury and state courts, finding that federal habeas relief was erroneously granted. Overall, the Court generally found that in most situations, the lower court erroneously granted habeas relief under AEDPA. In *Howes v. Fields* (10-680), the Sixth Circuit erred when the state court refused to suppress the prisoner's confession, and in *Hardy v. Cross* (11-74), the Seventh Circuit erred because the Confrontation Clause was fulfilled. The Court also determined that AEDPA required the Court of Appeals to examine each ground supporting the state's decision and find each ground unreasonable before granting a petitioner's habeas petition [*Wetzel v. Lambert* (10-680)].

Government Qualified Immunity (42 U.S.C. § 1983)

Under 42 U.S.C. § 1983, qualified immunity protects government officials from personal liability for allegedly unlawful conduct if their actions were objectively reasonable in light of clearly established law at the time. In the context of unreasonable searches, the Court has recognized an exception to immunity, allowing suit when "it is obvious that no reasonably competent officer would have concluded that a warrant should issue" [*Malley v. Briggs* (1986)].

In *Filarsky v. Delia* (10-1018), the Court drew a bright line and held that private individuals temporarily hired by the government for work are entitled to seek qualified immunity from lawsuits. The Court unanimously held that the common law principles of immunity were incorporated into Section 1983, which did not distinguish between full-time public servants and private individuals carrying out governmental responsibilities.

Continuing to clarify Section 1983, in *Rehberg v. Paulk* (10-788), the Court settled the Circuits' divide between whether *Briscoe v. LaHue* (1983) or *Malley v. Briggs* (1986) should apply when government officials act as complaining witnesses by perjuring before a grand jury or other judicial proceeding. In *Briscoe*, the Court held that law enforcement officials enjoy absolute immunity from civil liability for perjured testimony at trial. In *Malley*, decided three years later, the Court held that law enforcement officials are not entitled to absolute immunity when they act as complaining witnesses to initiate a criminal prosecution with an invalid arrest warrant. Based on policy reasons, the Court held that complaining witnesses are entitled to the same immunity from civil suits as a witness under *Briscoe*.

The Court then narrowed *Malley*'s scope in *Messerschmidt v. Millender* (10-704). In this case, two officers were entitled to qualified immunity from a suit that alleged that the officers had conducted an unreasonable search pursuant to an overbroad warrant in violation of the Respondent's Fourth Amendment rights. The officers were investigating Millender, a known gang member, for shooting his girlfriend with a sawed-off shotgun. The warrant was held invalid by the Ninth Circuit because any reasonable officer would have recognized that the warrant was overbroad, which included a search for all firearms and a search for gang-related materials. The Court reversed, finding that the case did not fall under *Malley*'s narrow exception. The Court reasoned that it was not entirely unreasonable for the officer to have probable cause to search for all firearms and that gang affiliation may be useful in determining Millender's motivation for the assault. In addition, both a deputy district attorney and magistrate judge approved the warrant.

Intellectual Property

The Court was unanimous in each of its patent case decisions on this Term's docket.

In *Caraco v. Novo* (10-844), Caraco applied for a Food & Drug Administration (FDA) approval to sell the generic version of the diabetes drug Prandin, produced by Novo. Novo then filed a newer, broader description of its patent, which effectively barred the generic version under the Hatch-Waxman Act. Novo's patent only covered one of three FDA approved uses, but its summary included all three. Justice Kagan delivered the opinion of the Court, expanding 21 U.S.C. § 355 by permitting a generic manufacturer to prevail if the patent summary does not include any covered use and where the patent summary inaccurately describes the patent's scope.

In *Kappos v. Hyatt* (10-1219), Hyatt filed patent claims without written descriptions. When the U.S. Patent and Trademark Office (USPTO) rejected his applications, Hyatt appealed and submitted a declaration in support of his invention. Justice Thomas delivered the opinion of the Court, holding that even after the USPTO denies a patent application under 35 U.S.C. § 145, the applicant can still submit new supporting evidence to contradict the USPTO's factual findings.

In *Mayo Collaborative v. Prometheus* (10-1150), Mayo developed a diagnostic blood test that

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Prometheus argued violated its own, patented blood test. Previous Court rulings made clear that natural phenomena are not patentable subject matter. Justice Breyer delivered the opinion, reaffirming that the processes used to determine proper drug dosage levels were not patentable because the steps of the process comprised a natural and common method. As such, Prometheus' patents to these processes were invalid because it did not transform natural law into a patentable application. *Prometheus* has been closely watched by other biotech companies because the ruling may determine the outcome of their own legal battles for the patentability of human genetic material [*Assn. for Molecular Pathology v. Myriad* (11-725) vacated and remanded]. In addition, this decision could be cited for what is deemed patentable for all fields, not just the medical field.

Justice Breyer signaled to Congress the need to "[craft] more finely tailored rules where necessary." Justice Sotomayor's concurring opinion in *Caraco* speaks to the unclear regulations mandated by the FDA. And in *Kappos*, the Court decided to give no deference to the USPTO's administrative process, perhaps due to their inequitable treatment of the applicant. The Court this Term seems to be requesting the government and Congress to clarify or refine its laws to better suit the people. **TFL**

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