

UNITED STATES SUPREME COURT UPDATE

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CHAPTER 9

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UNITED STATES SUPREME COURT UPDATE

REVIEW OF THE UNITED STATES SUPREME COURT 2007 TERM

I. TRENDS & THEMES AT THE HIGH COURT.

The picture that emerges from an overview of the third term of the Roberts Court is a muddled one, full of cross-cutting currents and seemingly contradictory trends. It could be called a term of transition, if only it were clear what the Court was transitioning to. Nevertheless, several trends can be seen among the decisions handed down this term; it is the predictive value of these trends that remains to be seen.

One promising, and to some surprising, development was the apparent diminishment of division among the Justices, at least as measured by the incidence of 5-4 splits. In the 2007 term, eleven cases were decided by a single vote, with another (*Stoneridge Investment Partners*) decided 5-3 with one Justice recused; these twelve cases represented only 17 percent of the Court's signed opinions for the term. That number stands in sharp contrast to the 2006 term, which had been marked by the highest rate of 5-4 decisions of any term in history—22 decisions, fully one-third of the cases decided that term. The rate in the 2007 term marks a return to a more typical historical level, suggesting 2006 may simply have been an aberration in this respect.

A number of potential explanations for this pattern have been offered, including Chief Justice Roberts's professed project to bring judicial minimalism to the fore of the Court's jurisprudence. However, it is unlikely that any single cause can convincingly be attributed to the apparent decline in dissension, in any event. And that decline may itself simply be a fluke in the data from one particular measurement: other measures of divisiveness on the Court, such as the incidence of unanimous opinions and the average number of dissents per case, point toward a greater level of division than in prior terms and thus muddy the overall picture.

Even more surprising than the reduction in the percentage of cases decided by a single vote was the diffusion of the swing-voting position among the Justices. It was widely assumed after the 2006 term, in which Justice Kennedy was in the majority of every case decided by a single vote, that he would continue to cast the predominant swing vote on a Court deeply divided between the "left" and the "right." However, only eight of twelve 5-4 decisions (counting *Stoneridge*) featured the traditional ideological lineup, whereas in 2006, nineteen cases were decided along that particular fault line. Moreover, Justice Kennedy

was in the minority in every 5-4 decision this term that was not split between "left" and "right." Thus while Justice Kennedy remained the Justice most likely to vote with the majority in a narrow decision, he tied with Justice Thomas for that position, and Justices Roberts and Stevens followed closely. The apparent reduction of Justice Kennedy's criticality as the Court's swing vote is closely tied to the decreased prevalence of 5-4 decisions that divide along ideological lines, however, and Justice Kennedy continues to possess significant leverage deriving from his status as the lone possible defector from the "right" wing of the Court in ideological cases.

In terms of trends in the Court's docket management, it continues to grant cases at a historically low rate. This term marked a record low in the number of signed opinions. However, this trend toward a light docket looks as though it may reverse next term; through the summer recess, the Court has granted 40 cases, a rate in excess of the three prior terms so far.

The mix of cases granted this term also presented a contrast from recent terms. There were fewer constitutional law cases decided in October Term 2007, though the handful of these that were heard were truly blockbusters, as we shall see. Virtually no patent cases were heard, although the Court continued its long-term focus on business and commercial issues. Particularly busy areas for the Court this term included employment, criminal sentencing, and election law.

II. REVIEW OF CASES: 2007 TERM

A. Constitutional Law

Despite the general paucity of constitutional blockbusters during this term, several end-of-term decisions nonetheless captured headlines and national attention. Among these, perhaps the Court's marquee decision of the term came in *District of Columbia v. Heller*, No. 07-290, which for the first time squarely confronted the question whether the Second Amendment protected an individual right "to keep and bear arms." The collective nature of the right to bear arms had long been assumed by a majority of federal circuit courts in light of the Amendment's prefatory clause, which was read to limit that right to service in state militias, but *Heller* firmly rejects this view.

The law struck down in *Heller* was a 1976 statute that effectively banned private possession of handguns in the District. Among other restrictions, the District criminalized carrying an unregistered handgun and simultaneously prohibited registration of handguns. The statute was challenged by, among others, Dick Heller, a D.C. police officer licensed to carry a handgun while on duty who sought to register a handgun to keep at home, but was refused.

Writing for a 5-4 majority, Justice Scalia engaged in a thorough historical analysis of practices and

understandings from the Founding era and earlier to determine that the Second Amendment protects an individual right to possess a firearm unconnected to any service in a militia and to use firearms for traditionally lawful purposes, such as self-defense within the home. The Amendment's prefatory language concerning militias, according to Justice Scalia's opinion, merely announces one purpose served by the individual right protected by the Amendment, but that purpose neither limits nor expands the scope of the right itself. It is, however, the text of the operative clause of the Amendment, read in light of the Founders' solicitude for protecting the common-law rights of citizens held under English law against tyrannical practices of the Crown, that demonstrates that it connotes an individual right to keep and bear arms.

Although the right protected by the Second Amendment is an individual one, Justice Scalia acknowledged it is not absolute or unlimited. His opinion stresses that its holding should not cast doubt on the validity of concealed-carry restrictions or bans on firearm possession by felons or in "sensitive places" such as schools or government buildings. But the District's gun ban went far beyond this reasonable regulation of the exercise of Second Amendment rights. It amounted, in the Court's view, to a prohibition on an entire class of firearms that were eminently practical and overwhelmingly chosen by Americans for self-defense purposes. Under any standard employed by the Court to evaluate restrictions on enumerated constitutional rights, such a broadly sweeping prohibition would fail constitutional muster.

Two obvious and substantial questions remain unanswered in *Heller*. First, although Justice Scalia firmly rejects rational-basis review as the appropriate standard by which future restrictions of the right to bear arms will be measured, neither does he openly embrace strict scrutiny or so-called "intermediate" scrutiny as alternatives. Second, *Heller* refrains from expressly addressing incorporation of the Second Amendment into the Due Process Clause of the Fourteenth Amendment, necessitating a future case to make the right to bear arms binding as against states as well as the federal government. Litigation on both of these points will almost surely be a recurring feature in future terms.

Heller also featured notable dissents by Justices Stevens and Breyer. In particular, the latter dissent engaged Justice Scalia's majority opinion on its reading of the historical evidence for interpreting the Second Amendment and offered a well-reasoned alternative view. The notable point is not the contrast between two historical perspectives, but rather the shared methodological emphasis on original meaning and understanding of the constitutional text. This convergence has led to a great deal of academic and

blog commentary on the progress of domesticating originalism as the predominant mechanism for interpreting constitutional text. Or, as one blogger succinctly stated, after *Heller*, "We are all originalists now."

Unfortunately, the near-unanimity of originalist methodology on display in *Heller* was swiftly undercut by another 5-4 end-of-term blockbuster, *Kennedy v. Louisiana*, No. 07-343. Louisiana extended its death-penalty statute to cover the rape of a child under 12 years of age; Patrick Kennedy was sentenced to die under this law for the brutal assault and rape of his step-daughter. In an opinion that divided the Court along ideological lines, Justice Kennedy held that the death penalty cannot constitutionally be imposed for non-fatal crimes against individuals. Whether the Eighth Amendment metric of "cruel and unusual punishment" is measured, as it was in *Roper v. Simmons* and *Atkins v. Virginia*, by the consensus of state punishment regimes or by the "independent judgment" of five Justices, as Justice Kennedy clearly identified the determinative factor here, American society's standards of decency have evolved to prohibit imposition of the death penalty for a non-homicide crime.

Justice Alito wrote a stinging dissent that noted the recent, significant shift among states to make child rape a death-eligible crime and suggested this development could be "the beginning of a new evolutionary line" in American thinking on the meaning of "cruel and unusual punishment." Five states had joined Louisiana in making child rape a death-eligible crime, at least for previously convicted rapists, although no one had been sentenced to death for such crimes outside Louisiana. In a startling post-decision development, a blogger noted that the U.S. Congress had also made child rape a death-penalty offense for military service members under the Uniform Code of Military Justice, a fact missed by all of the parties and the Court itself. In light of the nominal importance of nose-counting to the Court's mode of Eighth Amendment analysis, a petition for rehearing has been filed, and this case may yet appear on next term's docket.

The Court also returned to its biennial ritual of rejecting the Bush Administration's arguments against providing war-on-terror detainees held at Guantanamo Bay, Cuba, with legal process in federal courts. To briefly recap, in 2006, the Court in *Hamdan v. Rumsfeld* struck down the Administration's unilateral organization of combatant status review tribunals (CSRTs) as exceeding executive authority under the Authorization for the Use of Military Force passed in response to the 9/11 attacks. Congress and the President responded to this by passing the Military Commissions Act of 2006 (MCA), which provided explicit congressional authorization for the CSRTs and

purported to strip federal district courts of jurisdiction over petitions by Guantanamo detainees for writs of habeas corpus. Lawyers for the detainees promptly challenged the MCA as a violation of the Constitution's Suspension Clause, which permits Congress to suspend the writ of habeas corpus only in "cases of rebellion or invasion."

In *Boumediene v. Bush*, No. 06-1195, and *Al Odah v. United States*, No. 06-1196, Justice Kennedy, writing for another 5-4 majority comprising solely the liberal wing of the Court, held that the Suspension Clause's reach extended to aliens held at the Guantanamo detention facility. Turning away from the World War II-era precedent of *Johnson v. Eisentrager*, the Court determined that neither extraterritoriality nor the special legal status of "unlawful enemy combatant" was a sufficient basis for denying the availability of the writ of habeas corpus to detainees absent a valid congressional suspension of habeas corpus. Moreover, because of patent deficiencies in the CSRTs charged with adjudicating the legal status of detainees, in comparison to the legal process available in habeas proceedings to challenge the evidence supporting detention, the CSRTs authorized by the MCA failed to provide an adequate substitute for the traditional habeas remedy. Accordingly, the Court held that the MCA constituted an invalid suspension of the writ.

Boumediene provoked an unusually vitriolic reaction from the dissenters. Challenging the majority's reading of both precedent and history, Justice Scalia warned in no uncertain terms that the Court's *ultra vires* meddling in military affairs "will almost certainly cause more Americans to be killed."

Justice Scalia oversells his point, however. The Court neither ordered the release of any detainees nor even indicated that detainees have cognizable rights that could justify their release. Instead, *Boumediene* reaffirms the authority of the judiciary to order their release if it determines a writ of habeas should issue. The narrow upshot of the *Boumediene* ruling is that Guantanamo detainees may now proceed to challenge the legality of their detention as "unlawful enemy combatants" using the vehicle of habeas corpus petitions in federal district court. However, the Court studiously avoided any statement that the detainees had substantive constitutional rights that could be enforced by granting a writ of habeas corpus, leaving resolution of that issue to be developed in the lower courts in the first instance.

In another reversal for the Bush Administration's position on expansive executive authority, the Court rejected the argument that the President may unilaterally override state judicial-procedure rules in order to comply with international treaty obligations. In *Medellin v. Texas*, No. 06-984, a Mexican national on death row in Texas sought to force Texas state

courts to hear a collateral attack on his sentence, despite the fact that his specific claim had been procedurally defaulted. As authority for ignoring the procedural default, Medellin pointed to a letter issued by President Bush that purported to direct Texas courts to consider whether Medellin's underlying conviction had been tainted by the failure of the arresting and prosecuting authorities to inform Medellin of his right to assistance from the Mexican consulate under the Vienna Convention on Consular Rights. The President wrote the letter in response to the *Avena* decision of the International Court of Justice that held that the convictions of Medellin and 58 other Mexican nationals in Texas had violated America's consular-access obligations under the Convention.

In a major ruling on federalism and the scope of presidential power to conduct foreign affairs, Chief Justice Roberts, writing for a 6-3 majority, first held that decisions of the World Court do not independently and automatically have legal effect of their own force in state or federal courts. It is up to the political branches to give effect to World Court rulings like *Avena*, leading to the question of presidential authority to make such rulings binding without congressional involvement. Similarly, the Vienna Convention itself is a non-self-executing treaty, meaning it only has domestic legal effect if Congress passes enabling legislation. Noting that the President "cannot of himself make a law" and that permitting the transmutation of a non-self-executing treaty into a self-executing one would contradict the Senate's understanding of the treaty at the time it consented to adoption, the Court rejected Medellin's argument that the President had unilateral authority to convert the Vienna Convention into domestic federal law and displace contrary state laws.

B. Commercial Law

In a case widely thought to be the most significant securities law decision in a generation, the Court in *Stoneridge Investment Partners, LLP v. Scientific-Atlanta, Inc.*, No. 06-43, refused to read Rule 10b-5 as creating a cause of action against third parties who engage in fraudulent transactions with public companies but make no public statements in furtherance of the fraudulent purpose. Scientific-Atlanta, a maker of set-top cable boxes, had assisted Charter Communications, a cable services provider, in inflating its revenue numbers by purchasing advertising from Charter at inflated rates in exchange for Charter's overpaying for cable boxes. The result of these sham transactions was a short-term boost to Charter's reported earnings, but when the scheme was revealed Charter stock dropped precipitously. Charter stock owners filed suit against Charter and its accountants, but also against Scientific-Atlanta and Motorola, which had participated in similar sham

transactions, claiming that these third parties knew that Charter's earnings statements would be misleading and that investors would rely on them, making Scientific-Atlanta and Motorola liable for engaging in a scheme to defraud. The district court dismissed the shareholder suit, and the Eighth Circuit affirmed, holding that Rule 10b-5 allows private claimants to sue only direct actors who affirmatively make fraudulent statements.

In a 5-3 ruling, with Justice Breyer recused, the Supreme Court affirmed, holding that there can be no "scheme liability" for third-party participants in a scheme or conspiracy to defraud that make no public statements on which investors relied. The private right of action to enforce Rule 10b-5, the Court noted, was an implied one, not an express right created by Congress, and a narrow construction of the right of action best respects the proper balance between court and legislature. Moreover, an extension of liability to secondary actors like Scientific-Atlanta would expand investor reliance in an efficient market to all transactions which factored into a public company's earnings statements, making the implied cause of action sweep in the entire marketplace in which the company participated. Finally, the Court noted that enforcement of Rule 10b-5 by criminal penalties and civil enforcement by the SEC ensured that the lack of a private cause of action did not render the Rule "toothless" against schemes to defraud investors.

The Court also issued several interesting preemption decisions this term. Among them, *Riegel v. Medtronic*, No. 06-179, is likely to have the greatest impact, given its focus on preemption of state consumer-protection laws. The plaintiff in *Riegel* underwent angioplasty surgery, during which a catheter manufactured by Medtronic burst, causing injuries for which the plaintiff sought damages under a variety of state-law product liability theories. In an 8-1 decision authored by Justice Scalia, the Supreme Court held that the plaintiff's claims were preempted by the Medical Device Amendments of 1976. That statute contained a preemption clause precluding states from imposing "any requirement" related to a medical device in addition to the requirements imposed by federal law. It also specified a rigorous "premarket approval" process through which certain new medical devices could obtain FDA approval, and it is the FDA, not juries, that bears the responsibility for evaluating the risks and benefits of medical devices in this federal scheme. This preemptive effect only extends to devices approved via the premarket approval mechanism, while many medical devices are approved in a less rigorous FDA procedure that permits sale of medical devices once they are shown to be "substantially equivalent" to those marketed before the 1976 amendments took effect. The Court will turn to consideration of strikingly similar arguments

concerning preemption of state-law claims for FDA-approved drugs in its next term in *Wyeth v. Levine*, No. 06-1249.

Exxon Shipping Co. v. Baker, No. 07-219, continued the Court's long involvement in the litigation flowing from the Exxon Valdez oil spill. In this latest iteration, Exxon challenged a \$2.5 billion award of punitive damages as excessive and not available under federal maritime law. The Court, with Justice Alito recused because of his ownership of Exxon stock, split equally on the question whether punitive damages were available, resulting in a nonprecedential affirmance of the award's availability. However, taking a rare opportunity to consider punitive damages on the blank slate of maritime common law, the Court, led by Justice Souter, found the award amount excessive in proportion to the \$500 million award of compensatory damages and opined that a default 1:1 ratio of punitives-to-compensatories adequately served the rationales supporting the award of punitive damages. Accordingly, the Court ordered remittitur of the punitive damages award to an amount equal of the compensatory damage award.

Though maritime law is generally of little formal doctrinal interest, the Court's holding reducing the award of punitive damages provides a possible forecast of the future direction of the Court's assessment of punitive damages under the substantive due process analysis of constitutional law. Since the limitation of punitive damages as a matter of due process began in *BMW v. Gore*, courts have struggled to fix a particular ceiling on the ratio of punitive to compensatory damages; *Baker* indicates that the range of permissible single-digit ratios suggested by earlier cases may be further narrowed in the future.

In a term notably bereft of patent cases, *Quanta Computer, Inc. v. LG Electronics, Inc.*, No. 06-937, stands out. It also fits into a recent trend of Supreme Court reversals of Federal Circuit patent decisions that take a particularly aggrandized view of the rights of patent holders. In *Quanta Computer*, LG licensed a method patent to Intel for use in its computer chipsets; Intel then sold the chips to computer manufacturers including Quanta. Quanta, however, refused to pay LG a license fee, contending that LG's patent rights were exhausted by licensing to Intel and LG thus could not impose restrictions on subsequent purchasers of Intel chips that employed LG's patented method. In a unanimous opinion by Justice Thomas, the Court agreed with Quanta. The first sale doctrine of patent law, under which the first sale of the object exhausts the patent, applies to method patents and dissipates the patentee's right to control downstream sales and uses when a licensee sells items that embody essential features of the method patent. Limiting the decision strictly to the rights of patent holders, however, Justice Thomas's opinion does not foreclose such downstream

restrictions imposed by contract between the patentee and the licensee that achieve the same result.

In *Preston v. Ferrer*, No. 06-1463, the Court held that when parties agree to arbitrate all questions arising under a contract, the Federal Arbitration Act (FAA) supersedes state laws establishing primary jurisdiction in another forum, whether judicial or administrative.

Preston, a California entertainment lawyer, initiated an arbitration proceeding against television performer Ferrer, seeking to recover fees allegedly due under their contract. Ferrer subsequently filed a petition to the California Labor Commissioner, charging that Preston had acted as a talent agent without the requisite license and that the contract was therefore invalid and unenforceable under the California Talent Agencies Act (TAA). The Labor Commissioner denied Ferrer's motion to stay the arbitration on the ground that she lacked authority to order such relief. Ferrer then filed suit in the Los Angeles Superior Court, which enjoined Preston from proceeding before the arbitrator unless and until the Labor Commissioner determined that she lacks jurisdiction. While appeal of the superior court decision was pending, the U.S. Supreme Court in *Buckeye Check Cashing, Inc. v. Cardegna* (2006) reaffirmed that challenges to the validity of a contract providing for arbitration ordinarily should be considered by an arbitrator, rather than by a court. The California Court of Appeal nevertheless affirmed the superior court's judgment, finding *Buckeye* to be inapposite because it did not involve an administrative agency with exclusive jurisdiction over a disputed issue. The California Supreme Court denied Preston's petition for review.

In an opinion by Justice Ginsburg, the Court reversed and remanded. The Court clarified that the dispositive issue is not whether the FAA preempts the TAA wholesale, but is instead who decides whether Preston acted as an unlicensed talent agent in violation of the TAA. Noting that the contract falls within the purview of § 2 of the FAA and that there had been no discrete challenge to the validity of the arbitration clause, the Court concluded that *Buckeye* requires that the arbitrator resolve the dispute. Rejecting the argument that the TAA merely requires exhaustion of administrative remedies before the parties proceed to arbitration, the Court asserted that the TAA's procedural proscriptions conflict with the FAA's dispute resolution regime and that postponing arbitration would contravene the FAA's objective of achieving expeditious results. The Court dismissed Ferrer's reliance on *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University* (1989), explaining that the arbitration clause speaks to the matter in controversy and that, in accordance with *Matrobuono v. Shearson Lehman Hutton, Inc.* (1995), the selection of California law should be read to

encompass prescriptions governing the parties' substantive rights and obligations but not the State's rules limiting the authority of arbitrators.

In another significant arbitration ruling, *Hall Street Associates v. Mattel, Inc.*, No. 06-989, the Court held that the Federal Arbitration Act preempts even contractually agreed expansions of review of arbitral awards. In the midst of a property dispute, Hall Street and Mattel agreed to arbitrate portions of their claims, subject to de novo judicial review of the arbitrator's decisions. But the Court, in a 6-3 opinion authored by Justice Souter, rejected the parties' attempt to contract around the FAA. The enumerated bases of review provided by the FAA are intentionally limited to forms of misconduct by the arbitrator, and Congress never intended a fuller review of arbitral awards. Permitting full-blown de novo review, the Court explained, would thwart the policy of encouraging arbitration that undergirds the FAA, and parties cannot escape this effect merely by agreement.

Finally, *Sprint Communications v. APCC Services, Inc.*, No. 07-552, turned on whether an assignee of an injured party has standing to sue when the assignee stands to gain nothing in the suit. Payphone service providers are reimbursed by long-distance providers for payphone calls made to 1-800 numbers, and they assign their reimbursement claims to third-party aggregators like APCC. When APCC sued to force reimbursement, however, Sprint argued it lacked standing, because any recovery would go to the payphone service providers and APCC would gain nothing. Justice Souter, writing for a 5-4 majority, held that the Article III standing requirements were met, because the payphone service providers had been injured and their injury would be redressed by a favorable decision on the claim they had nominated APCC to pursue. The redressability analysis looks only to the existence of a redressable injury, regardless of whether it was an injury suffered by the plaintiff. In dissent, quoting Bob Dylan, the Chief Justice disagreed: "When you've got nothin', you've got nothin' to lose." And that's what passed for "the lighter side" of the cases this term.

C. Voting and Election Law

Crawford v. Marion County Election Board, No. 07-21, considered the constitutionality of an Indiana statute requiring citizens voting in person to present photo identification issued by the government. Promptly after the enactment of the voter identification law, suit was filed to enjoin its enforcement. The district court dismissed the case, finding no evidence that the statute would render any Indiana resident unable to vote or unduly burden the right to vote. A divided panel of the Seventh Circuit affirmed, inferring that the motivation for the suit was that the law could

require the Democratic Party to work harder to increase voter turnout.

In an opinion by Justice Stevens, the Supreme Court affirmed, finding the evidence insufficient to support a facial attack on the statute's validity. The Court recognized the importance of the State's interests in deterring voter fraud, modernizing election procedures, addressing the consequences of bloated voter rolls, and protecting public confidence in the integrity of the electoral process. Acknowledging that the record lacked evidence of in-person voter impersonation in Indiana, the Court recounted instances of fraud in other parts of the country throughout the nation's history. Noting the absence of evidence of the number of registered voters who lack photo identification or of the burden imposed on such voters, the Court concluded that the statute did not impose excessively burdensome requirements on any class of voters.

Justice Scalia, joined by Justices Thomas and Alito, concurred, finding it unnecessary to assemble evidence of the impact on individual voters because the law was justified as a nondiscriminatory voting regulation. Justice Souter, joined by Justice Ginsburg, dissented, concluding that the state interests failed to justify the practical limitations imposed on the right to vote. Justice Breyer also dissented, arguing that the statute disproportionately burdens eligible voters who lack a valid form of photo identification.

The Court revisited the constitutionality of portions of the Bipartisan Campaign Finance Reform Act (BCRA), more commonly known as the McCain-Feingold Act, in *Davis v. Federal Election Commission*, No. 07-320. Among other provisions regulating contributions to political campaigns, the so-called "Millionaires' Amendment" to BCRA raised the caps on contributions to opponents of self-funding candidates for federal office if the self-funding candidate spent more than a threshold amount of his own money on the race. Jeff Davis, a wealthy candidate for a House seat in 2006, sought to prevent enforcement by the FEC of the Millionaires' Amendment and associated reporting requirements that would have been triggered by his plan to spend \$1 million of his own money on his campaign.

In a 5-4 decision that split along ideological lines, the Court held that Congress, by attempting to remedy a perceived imbalance between self-funding candidates and their opponents, violated the First Amendment. While contribution limits may still be imposed to prevent corruption and the appearance of corruption under *Buckley v. Valeo*, Justice Alito wrote for the Court, the imposition of differential contribution limits on candidates competing in the same race impermissibly burdens the self-funding candidate's First Amendment right to spend his own money on his campaign. The self-funding candidate is thus forced

to choose between foregoing the robust exercise of his right to engage in unfettered political speech and being subjected to discriminatory fundraising limitations. Such a burden cannot be justified by the valid governmental interest in eliminating corruption, and the purported interest in leveling the electoral playing field between independently wealthy and other candidates is no legitimate objective of election regulation. Nor can the differential in contribution limits be justified as an amelioration of the deleterious effects of low federal contribution limits, because that rationale fundamentally conflicts with the corruption-eliminating interest which *Buckley* held justified the imposition of contribution limits in the first instance.

In another decision at the intersection of election regulation and the First Amendment, the Court in *Washington State Grange v. Washington Republican Party*, No. 06-730, and *Washington v. Washington Republican Party*, No. 06-713, upheld a Washington state law that mandated the use of a nonpartisan blanket primary system, under which the top two vote-getters in primary voting, regardless of party affiliation, advance to the general election. On the general election ballot, candidates in partisan races may specify their own political-party preference. Justice Thomas, writing for a 7-2 majority, found no First Amendment violation, noting that political parties have no constitutional right to have their nominees designated on the ballot and dismissing the likelihood that voters would confuse a candidate's personally-held party preference with the party's approval of the candidate. Because the ballot could be designed to reduce substantially the risk of any such confusion, Washington's nonpartisan blanket primary system does not, on its face, severely burden the political parties' associational rights. On the other hand, as the concurring opinion by Chief Justice Roberts points out, the failure of a general-election ballot to clearly convey that a party and candidate are not necessarily associated would open the system to future as-applied challenges.

Rounding out a busy term of election-law challenges, *Riley v. Kennedy*, No. 07-77, considered the scope of Section 5 of the Voting Rights Act's requirement that certain jurisdictions obtain "preclearance" from the Justice Department before implementing any "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting." The Alabama Supreme Court struck down, as inconsistent with the state constitution, a state law precleared by the Justice Department that mandated special elections to fill vacancies on a county commission, rather than gubernatorial appointments. When the governor announced his intent to appoint a commissioner to fill a vacancy, several state legislators filed suit under Section 5, contending that the Alabama Supreme Court's decision could not be given effect

because it constituted a change in voting practices that had not been precleared by the Justice Department.

Justice Ginsburg, writing for a 7-2 majority, had little difficulty concluding that no such change requiring preclearance had occurred. Changes in voting practices must be measured against a baseline, and the special-election law struck down by the Alabama Supreme Court had never been in effect: as a matter of state law, the Alabama courts ruled the unconstitutional act was void ab initio, and so it could not establish a Section 5 baseline. The contrary result would have bound Alabama to an unconstitutional practice merely by virtue of the error of a state trial court that was rectified on appeal. Section 5 does not, under these circumstances, preclude a state supreme court from invalidating a state law by applying a provision of the state constitution that is “entirely harmonious with federal law.” Several significant caveats accompany this conclusion, however: that the special-election law had never been in effect turned largely on the immediacy of the state constitutional challenge to it and on the fact that it was the state supreme court that decided that challenge. And it was the court-ordered reversion to the prior practice of gubernatorial appointment, rather than another alternative, which ensured no change subject to Section 5 had occurred.

D. Employment Law

Perhaps reacting subconsciously to the storm of controversy that erupted in response to last term’s decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, the Court largely sided with employees in this term’s bumper crop of employment law cases. Indeed, the striking results in employees’ favor in this term’s cases are one of the key pieces of evidence marshaled against critics’ claims that the Court too heavily favors business interests.

Like other federal employment discrimination statutes, the Age Discrimination in Employment Act of 1967 (ADEA) requires an employee wishing to commence a civil action to first file, at least 60 days prior to initiating suit, a “charge” with the Equal Employment Opportunity Commission (EEOC) alleging unlawful discrimination. In *Federal Express Corp. v. Holowecki*, No. 06-1322, FedEx moved to dismiss an ADEA suit, arguing that the plaintiff did not satisfy this requirement by merely submitting an EEOC Form 283 “Intake Questionnaire” and a detailed affidavit describing the alleged discriminatory employment practices.

In a majority opinion by Justice Kennedy, the Court held that, in order to be deemed a “charge” under the ADEA, a filing must be capable of being reasonably construed as a request that the EEOC take remedial action to protect an employee’s rights or otherwise to settle a dispute between an employer and

an employee. Applying *Skidmore* deference, the Court endorsed the EEOC’s request-to-act requirement as articulated in internal agency directives. The Court then concluded that the plaintiff’s filing satisfied this rule, noting that the affidavit included a request for the EEOC to “force Federal Express to end their age discrimination plan” and that the plaintiff had checked a box on the questionnaire consenting to the release of her identity to her employer.

Justice Thomas, joined by Justice Scalia, dissented. He stated that a document merely describing the alleged discrimination and seeking the EEOC’s assistance—but not objectively manifesting an intent to initiate enforcement proceedings—is not a “charge” under the ADEA. He asserted that a charge must request that the agency take a particular form of remedial action, rather than ambiguously requesting the agency to take “some action.”

In *Sprint/United Management Co. v. Mendelsohn*, No. 06-1221, a plaintiff pressing a claim of age discrimination under the ADEA sought to introduce the testimony of five other former Sprint employees who alleged age discrimination by supervisors other than her own. In a minute order, the district court excluded the testimony, stating that the plaintiff could only offer evidence of discrimination against employees “similarly situated” to her. The Tenth Circuit treated the minute order as invoking a per se rule against admitting evidence involving other supervisors. Finding that the excluded evidence was relevant and not unduly prejudicial, the Tenth Circuit reversed and remanded for a new trial.

In a unanimous opinion by Justice Thomas, the Supreme Court vacated and remanded. The Court ruled that the Tenth Circuit erred in concluding that the district court applied a per se rule, rather than remanding the case for clarification. Emphasizing that district courts possess broad discretion in evidentiary matters, the Court stated that it is improper for an appellate court to presume that a district court reached an incorrect legal conclusion when the order is equally consistent with a properly stated rule. Noting that relevance and prejudice determinations under Rules 401 and 403 are fact-specific inquiries that are not amenable to broad per se rules, the Court remanded the case to the district court to clarify the basis for its evidentiary ruling.

In two retaliation decisions, *CBOCS West v. Humphries*, No. 06-1431, and *Gomez-Perez v. Potter*, No. 06-1321, the Court upheld an expansive view of the availability of retaliation as a liability theory against employers. In *CBOCS West*, a 7-2 majority led by Justice Breyer held that 42 U.S.C. §1981, which bars racial discrimination in private contracting, encompasses a cause of action for employers’ retaliation against employees who complain of racial discrimination in the workplace. Justice Alito led a 6-

3 majority to a similar result in *Gomez-Perez*, which held that retaliation is an available claim to federal employees under the ADEA. Both provisions were silent as to whether retaliation constituted prohibited conduct, suggesting that the Court may be signaling its acceptance of the idea that Congress in passing civil rights statutes generally intends to bar retaliation against those who complain about violations of their civil rights, even when it does not specifically address that situation.

Two decisions on disparate treatment and disparate impact in employment-related age discrimination further highlight the relative importance of employment law cases this term. In *Meacham v. Knolls Atomic Power Laboratory*, No. 06-1505, the Court held that an employer defending a disparate-impact claim under the ADEA bears both the burden of production and that of persuasion when raising an affirmative defense based on “reasonable factors other than age.”

Not every employment decision of the term turned out favorably for employees, however. In the second disparate treatment case, *Kentucky Retirement Systems v. Equal Employment Opportunity Commission*, No. 06-1037, an unusual lineup consisting of Justices Breyer, Stevens, Scalia, Souter, and Thomas held that it is not discriminatory to refuse to provide disability benefits to a worker who becomes disabled after he or she reaches retirement age.

E. Criminal Law

Comparatively few death penalty cases populated the Court’s docket this term, largely due to developments in *Baze v. Rees*, No. 07-5439. When the Court granted certiorari in this Eighth Amendment challenge to Kentucky’s use of a three-drug cocktail in its lethal injection protocol, death chambers around the country were shut down for months, given that every state employing lethal injection makes use of the same cocktail. Two death-row inmates in Kentucky, neither of whom faced an imminent execution date, argued that the failure to administer a sufficient amount of the first drug in the cocktail, a general anesthetic, could lead to excessive pain and suffering at the administration of the final drug in the cocktail, which stops the inmate’s heart. Although the final vote tally was 7-2 to affirm Kentucky’s method of lethal injection, the case produced six opinions, including four individual concurrences in the result. Chief Justice Roberts, writing for a plurality, held that, on the evidentiary record in this case, Kentucky’s lethal injection protocol presented no “substantial risk of serious harm.” No stay based on the method of execution could issue unless a condemned prisoner could show that the method creates a demonstrated risk of severe pain and that the risk is substantial in comparison to the available alternatives.

Most noteworthy among the individual concurrences, Justice Stevens voted to uphold Kentucky’s method of execution as a matter of precedent, but called nevertheless for a reconsideration of the justification for the death penalty itself. Labeling state actions and judicial decisions limited to the mechanics of death “the product of habit and inattention rather than an acceptable deliberative process,” Justice Stevens announced his renunciation of capital punishment.

In *Gall v. United States*, No. 06-7949, and *Kimbrough v. United States*, No. 06-6330, the Court may finally have completed its cycle of cases restructuring judicial review of sentencing decisions in the wake of *Booker*’s loosening of the straitjacket imposed on district judges by the federal Sentencing Guidelines. Both cases addressed the degree to which unusual facts or circumstances, not generally accounted for in the Sentencing Guidelines, are required to justify a deviation from the sentencing ranges the Guidelines prescribe.

In *Gall*, the Court addressed whether a sentence below the low end of a Guidelines range is unlawful unless justified by “extraordinary circumstances,” as several circuit courts had required. *Gall* thus represented a bookend to last term’s decision in *Rita v. United States*, which determined that appellate courts may, but are not required to, presume the reasonableness of a sentence that falls within the Guidelines range. A significant feature of *Rita* was the degree of deference allowed to sentencing judges; in *Gall*, Justice Stevens, writing for a 7-2 majority, held that such deferential review is appropriate even outside the Guidelines range. An abuse of discretion standard, handled deferentially, is appropriate for review of sentencing decisions, the Court said, taking into account the totality of the circumstances, including both the extent of a variance from the Guidelines range and the district court’s analysis of congressionally established factors determining the appropriate sentence length.

Kimbrough, on the other hand, addressed the authority of district judges to impose a sentence for possession of “crack” cocaine that deviated from the Guidelines-specified drug-equivalency ratio of 100:1 relative to powder cocaine. Because this ratio is used directly to calculate sentence lengths, convicted crack users were commonly receiving substantially longer sentences than users of powder cocaine, despite possession of similar amounts of the chemically identical drugs. However, several circuit courts had ruled a district judge’s disagreement with the crack-to-powder sentencing disparity to be a per se unreasonable basis for a downward departure from the applicable Sentencing Guidelines range. In a 7-2 opinion authored by Justice Ginsburg, the Court disagreed. Although federal statutory law continues

to implement a 100:1 ratio in categorizing the minimum amounts of crack and powder cocaine necessary to constitute the predicate for particular crimes, the Guidelines ratio for sentences above the mandatory minimums may be disregarded when circumstances warrant doing so.

In contrast to these cases, *Rothgery v. Gillespie County*, No. 07-440, addressed the initiation, rather than termination, of the prosecution of criminal acts. Rothgery sued the County for failing to appoint him counsel as required by the Sixth Amendment after he was arrested, appeared before a magistrate, and posted bail but before he was indicted. The County argued that Rothgery's Sixth Amendment right to counsel had not yet attached because at the time of Rothgery's appearance before the magistrate, no county prosecutor was even aware of his arrest, much less had committed to prosecuting him. The Court sided with Rothgery in an 8-1 decision written by Justice Souter; the criminal prosecution which is a necessary precondition begins at the point of an arrestee's first appearance before a judge, if constraints on liberty, such as detention or bail, are imposed. As Justice Alito's concurring opinion makes clear, however, the mere initiation of a criminal prosecution is nothing more than one precondition for the appointment of counsel. Although the right may be said to have attached in an abstract sense, it is not activated and no need for appointment of counsel arises until a critical stage of the prosecution, one at which the accused's fundamental right to a fair trial may be impinged, is impending.

III. PREVIEW OF CASES FOR 2008 TERM

The Court has granted numerous cases for the term that will begin on October 6, 2008. The granted cases already reflect a potential for a busy term in Fourth Amendment search and seizure law, preemption, and the First Amendment. Here is a short preview of the issues presented by some of those cases:

Altria Group v. Good, No. 07-562

- Issue: Whether federal law preempts state-law deceptive practice claims in connection with advertising of "light" cigarettes.

Arizona v. Gant, No. 07-542

- Issue: Whether police may conduct a warrantless search of a car if its recently arrested occupant poses no threat to officer safety or preservation of evidence.

Arizona v. Johnson, No. 07-1122

- Issue: Whether, during a vehicular stop a police officer may conduct a pat-down search of a passenger given an articulable suspicion that the

passenger may be armed and dangerous but no reasonable grounds for belief the passenger is committing or has committed a crime.

Bartlett v. Strickland, No. 07-689

- Issue: Whether a racial minority group that constitutes less than 50% of a proposed voting district's population can state a vote-dilution claim under Section 2 of the Voting Rights Act.

FCC v. Fox Television Stations, No. 07-582

- Issue: Whether the FCC acted arbitrarily and capriciously in changing its policy of permitting the use of "fleeting expletives" on broadcast television.

Herring v. United States, No. 07-513

- Issue: Whether the exclusionary rule applies to evidence seized during an arrest rendered unlawful by erroneous information negligently supplied by another law enforcement agency.

Ministry of Defense & Support for the Armed Forces of the Islamic Republic of Iran v. Elahi, No. 07-615

- Issue: Whether attachment against foreign sovereign property pursuant to the Victims of Trafficking and Violence Protection Act is permissible when the property is presently at issue in claims against the United States before an international tribunal.

Pearson v. Callahan, No. 07-751

- Issues: Whether police officers may enter a home without a warrant where the owner had already consented unknowingly to the entry of an undercover informant; whether *Saucier v. Katz*, which requires analysis of a constitutional violation prior to analysis of qualified immunity, should be overruled.

Philip Morris USA, Inc. v. Williams, No. 07-1216

- Issue: Whether the Supreme Court of Oregon improperly asserted a state-law procedural bar precluding Philip Morris from asserting its due process claim to remittitur of a \$79.5 million punitive damages award.

Pleasant Grove City v. Summum, No. 07-665

- Issue: Whether under the First Amendment privately donated monuments placed in a public park qualify as private or government speech.

Winter v. Natural Resources Defense Council, Inc., No. 07-1239

- Issues: Whether the Council on Environmental Quality could properly label an unfavorable court decision requiring an environmental impact statement be conducted on the Navy's use of

sonar during certain training exercises as an “emergency circumstance” justifying suspension of NEPA’s application to the naval exercises.

Wyeth v. Levine, No. 06-1249

- Issue: Whether federal law preempts state-law tort claims imposing liability on drug labeling previously approved by the Food & Drug Administration.