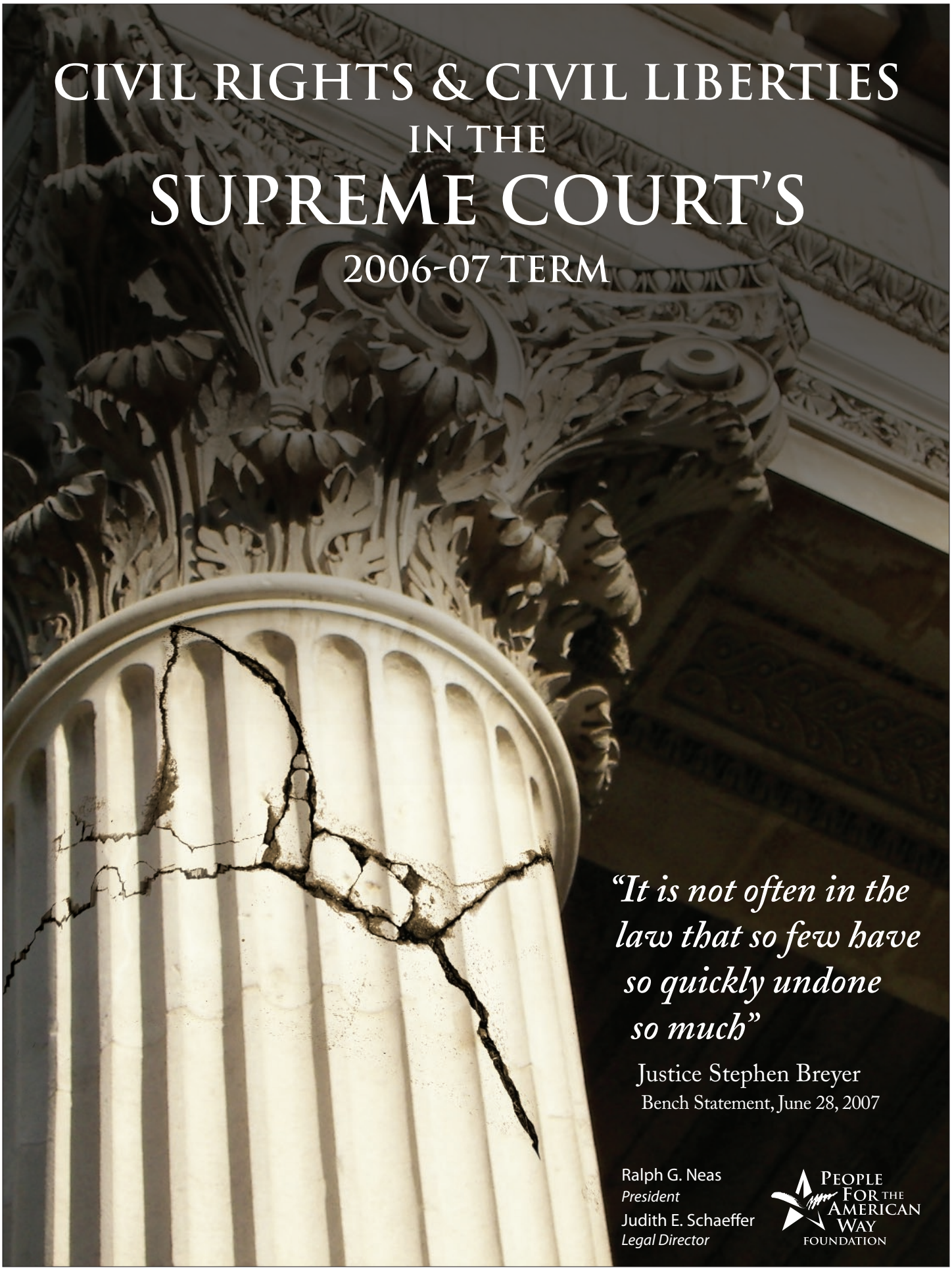

CIVIL RIGHTS & CIVIL LIBERTIES IN THE SUPREME COURT'S 2006-07 TERM

"It is not often in the law that so few have so quickly undone so much"

Justice Stephen Breyer
Bench Statement, June 28, 2007

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Introduction

The Supreme Court moved sharply to the right this past term, the first full term in which the Court's newest justices -- Chief Justice John Roberts and Justice Samuel Alito -- served together on the bench. In fact, the 2006-07 term gave truth to the many predictions made when Roberts and Alito were nominated about the direction in which they would move the Court if confirmed, including weakening legal protections for Americans and limiting their ability to seek justice in the courts.

In particular, this past term underscored the predictable impact that replacing moderate conservative Justice Sandra Day O'Connor by the ultraconservative Alito would have on the Court's jurisprudence. And, as reflected by the significant number of narrowly divided rulings this term, that impact has been accelerated by Justice Anthony Kennedy's replacement of Justice O'Connor as the Court's "swing" vote, as Justice Kennedy gave the new four-justice ultraconservative plurality a crucial majority vote in case after case.

As we observed at the end of the 2005-06 term, which was joined mid-session by Justice Alito, the Court's two newest justices had already begun to shift the Court to the right in a number of divided rulings.[1] A year later, that shift is palpable. During the past term, Chief Justice Roberts and Justice Alito joined Justices Antonin Scalia and Clarence Thomas to form a reliable, ultraconservative voting bloc in critical, divided rulings, which, when joined by Justice Kennedy, has pushed the Court sharply to the right. For example, in 5-4 rulings with Chief Justice Roberts and Justices Alito, Scalia, Thomas and Kennedy in the majority, the Court:

- struck down the voluntary integration plans of two public school districts, undermining the ability of school districts to promote racial diversity in their schools (*Parents Involved in Community Schools v. Seattle School Dist. No. 1)*

- severely limited the ability of victims of pay discrimination under Title VII to obtain compensation for the discrimination (*Ledbetter v. Goodyear Tire and Rubber Co.)*

[1] People For the American Way Foundation, "Civil Rights and Civil Liberties in the Supreme Court's 2005-06 Term" (June 30, 2006), available at <http://media.pfaw.org/pdf/6-30-06SCOTUSEndOfTermReport.pdf>.

- upheld the federal ban on so-called "partial birth" abortions, despite the absence of an exception in the law to protect a woman's health (*Gonzales v. Carhart)*

- limited the ability of federal taxpayers to challenge government expenditures that violate the Establishment Clause, undermining the separation of church and state (*Hein v. Freedom From Religion Foundation*)

- undermined the Endangered Species Act (*National Association of Home Builders v. Defenders of Wildlife)*

- held that a litigant's appeal was too late, even though he had filed it within the time given to him by a federal district court judge (*Bowles v. Russell)*

Many of the Court's divided rulings provoked harsh dissents (discussed further below) and immediate public criticism, and, with respect to the *Ledbetter* Title VII case, the introduction of legislation in Congress to overturn the decision.[2] The divided rulings also evidenced the sharp ideological split on the Court, underscored by the fact that a remarkable 24 decisions this past term -- more than one-third of the Court's rulings -- were decided by 5-4 votes, with 19 of those 24 divided rulings "decided along ideological lines."[3] And the fact that Justice Kennedy was "in the majority in all 24 of the 5-4 cases"[4] underscores his new position as the tie-breaker on a polarized Court.

In addition, while this term saw Justice Kennedy's position as the Court's swing vote solidified, it also dramatically indicated the effect that replacing Justice O'Connor with Justice Alito has had on the Court's jurisprudence. Perhaps the clearest example of that effect was the Court's 5-4 ruling in *Gonzales v. Carhart* to uphold the federal abortion ban, as the Court in 2000 had *stuck down* a similar state ban, 5-4, with Justice O'Connor in the majority and Justice Kennedy dissenting.[5] Indeed, the stark discrepancy between the two rulings prompted Justice Ginsburg, dissenting in *Gonzales*, to suggest that the result was due solely to the change in justices: "the Court, differently composed than it was when we last considered a restrictive abortion regulation, is hardly faithful to our earlier invocations of 'the rule of law' and the 'principles of *stare decisis*.'" *Gonzales v. Carhart*, 127 S. Ct. 1610, 1652 (2007) (Ginsburg, J., dissenting).

Justice Ginsburg's dissent in *Gonzales* also illuminated the fact that precedent did not fare well in the Court's divided rulings this term. Although John Roberts and Samuel Alito paid homage to the principle of *stare decisis* and respect for precedent in their confirmation hearings, as Supreme Court Justices they have shown a willingness to ignore or undermine precedent (as in *Gonzales*) or to overturn it completely (as in *Bowles*).

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[2] This is possible only because the ruling was an interpretation of a federal statute.

[3] Linda Greenhouse, "In Steps Big and Small, Supreme Court Moved Right," *New York Times* (July 1, 2007). The 68 cases decided this term "were the fewest since the 65 cases the Court decided in 1953." *Id*.

[4] Linda Greenhouse, "In Steps Big and Small, Supreme Court Moved Right," *New York Times* (July 1, 2007).

[5] *Stenberg v. Carhart*, 530 U.S. 914 (2000).

Chief Justice Roberts and Justice Alito have also indicated, through their dissents as well as their majority rulings, a willingness to close the courthouse doors and deny access to justice to ordinary Americans, a judicial ideology that we have seen among many of President Bush's federal appellate court nominees as well.[6] In fact, the Court's trend in this area "was so pronounced that Professor Judith Resnik of Yale Law School proposed as a label for the term: 'the year they closed the courts.'"[7]

Although Justice Kennedy played a critical role in moving the Court to the right this session, he nonetheless did not always join the new ultraconservative bloc. In *Massachusetts v. EPA*, for example, he joined Justices Ginsburg, Stevens, Souter and Breyer to provide the crucial fifth vote holding that the Clean Air Act gives the EPA the authority to regulate the emission of carbon dioxide and other greenhouse gases from new motor vehicles.

With Justice Kennedy still providing only a "swing" vote -- albeit one that is markedly and more often to the right in divided cases -- there can be little question that the addition of just one more justice to the Court in the mold of Roberts, Alito, Scalia, and Thomas would create a very reliable ultraconservative majority that would turn back the clock even further on decades of social justice progress. The Court's decisions this term in numerous critical cases have underscored the importance of who is chosen to fill vacant seats on the Court, and who is elected to the White House to nominate them and the Senate to confirm them.

This report summarizes the Court's key decisions in 2006-07 on civil rights, civil liberties and other non-criminal law subjects discussed in our *Courting Disaster 2005* report.[8] It includes cases in which PFAWF filed *amicus curiae* briefs as well as cases in which PFAWF took no position and has no position on the outcome. In this term, as in any term, a number of cases presented narrow issues that will not necessarily have far-reaching consequences. And, as in any term, some cases were decided unanimously or otherwise did not fall along ideological lines. But in many critical cases that will in fact have significant impact on American law and society, the Court was sharply divided along ideological lines, abandoned or undermined long-established principles and precedent, and moved markedly to the right. It is those cases among the larger body of the Court's decisions that define this term and indicate the disturbing direction that the new Roberts Court is taking.

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6 *See, e.g.*, People For the American Way Foundation, "Confirmed Judges, Confirmed Fears" (Sept. 2006), available at <http://media.pfaw.org/PDF/Judiciary/09-28_ConfirmedJudgesReportFinal.pdf>.

7 Linda Greenhouse, "In Steps Big and Small, Supreme Court Moved Right," *New York Times* (July 1, 2007).

8 Available at: <http://www.pfaw.org/pfaw/dfiles/file_533.pdf>.

Civil Rights and Discrimination

In two of its most controversial divided rulings this term, the Court majority weakened remedies for victims of employment discrimination and undermined the ability of public school districts to achieve and maintain racial diversity in their schools.

- ***Ledbetter v. Goodyear Tire & Rubber Co.,*** 127 S. Ct. 2162 (2007)

In a 5-4 ruling over a harsh dissent, Justice Kennedy joined Chief Justice Roberts and Justices Scalia, Thomas, and Alito to severely limit remedies for victims of pay discrimination under Title VII. The decision has already prompted the introduction of legislation in Congress to overturn it.

Lilly Ledbetter worked as a supervisor for Goodyear for nearly two decades at its plant in Gadsden, Alabama. Late in her career, she learned that she had, over the years, been subjected to salary discrimination on the basis of her sex, and she brought suit under Title VII. A jury awarded her approximately $3.8 million in back pay and damages; however, due to Title VII's cap on damage awards, the trial judge reduced the verdict to $360,000. *See Ledbetter v. Goodyear Tire & Rubber Co.*, 2003 U.S. Dist. LEXIS 27406 (N.D. Ala. 2003). The Supreme Court, however, eliminated the verdict in Ledbetter's favor entirely.

In an opinion written by Justice Alito and joined by Chief Justice Roberts and Justices Scalia, Thomas, and Kennedy, the Court held that Ledbetter could not seek redress for any discrimination that took place outside of the 180-day time limit within which an employee must bring a charge of discrimination under Title VII. The majority rejected Ledbetter's argument that sex discrimination during her earlier years of employment affected her job status and pay later into her career, continuing forward in such a manner as to make her present claim of unlawful discrimination timely. Instead, the majority held that Ledbetter had alleged a series of discrete discriminatory acts (the various salary-setting decisions) that each triggered Title VII's 180-day time limit. In so holding, the Court rejected a "paycheck accrual" rule under which each *paycheck* would trigger a new 180-day filing period during which an employee could challenge prior discriminatory conduct that had reduced the amount of her paycheck. Although the Court acknowledged that the EEOC -- the federal agency charged with enforcing Title VII -- had itself interpreted the statute in a manner consistent with the "paycheck accrual" rule, the Court declined to defer to the EEOC's statutory interpretation (127 S.Ct. at 2177 n.11), and held that Ledbetter's discrimination claim was untimely.

Justice Ginsburg, in a sharply worded dissent that was joined by Justices Souter, Stevens, and Breyer, accused the majority of having "strayed [far] from interpretation of Title VII with fidelity to the Act's core purpose." 127 S.Ct. at 2187. She criticized the majority for a "cramped interpretation of Title VII [that was] incompatible with the statute's broad remedial purpose," and wrote that the consequences of the majority's decision were "totally at odds with the robust protection against workplace discrimination Congress intended Title VII to secure." *Id.* at 2188. Justice Ginsburg explained that the nature of pay discrimination renders it different from other forms of employment discrimination due to its "incremental" nature, which is generally only recognized by the victim over a longer period of time, as the differences in pay

become more apparent. *Id.* at 2182. According to Justice Ginsburg, discriminatory pay is often hidden by employers and is not as easy to identify as a single, overt act of discrimination, such as a discriminatory firing or hiring. Justice Ginsburg also criticized the majority's dismissal of the EEOC's interpretation of Title VII, stating that "the EEOC's interpretations mirror workplace realities and merit at least respectful attention." *Id.* at 2185 n.6.

- ***Parents Involved in Community Schools v. Seattle School District No. 1,*** 2007 U.S. LEXIS 8670 (2007)

In two consolidated cases handed down on the last day of the term, the Court in a 5-4 decision, with Justice Kennedy providing the critical fifth vote for the result, invalidated school integration plans voluntarily adopted by public school districts in Seattle, Washington and Louisville, Kentucky. The ruling provoked harsh dissents, as well as a statement from the bench by Justice Breyer on June 28, 2007 when the Court issued its decision that "it is not often in the law that so few have so quickly undone so much."[9]

The plans each took students' race into account in assigning certain students to particular schools in order to achieve racially integrated schools. They were challenged as violating the Equal Protection Clause of the Fourteenth Amendment and were upheld as constitutional in each case by the Court of Appeals.

In an opinion for the Court written by Chief Justice Roberts and joined by Justices Scalia, Thomas, Kennedy, and Alito, the Court reversed. According to the majority, the plans were not narrowly tailored to serve a compelling government interest, and thus their use of race was unconstitutional. In particular, the majority held that a different result was not required by *Grutter v. Bollinger*, 539 U.S. 306 (2003), in which a divided Court upheld the affirmative action admissions program of the University of Michigan Law School. The majority distinguished *Grutter* on the basis that "the program at issue there focused on each applicant as an individual, and not simply as a member of a particular racial group," and also because the Court in that case had "relied upon considerations unique to institutions of higher education." 2007 U.S. LEXIS 8670, at *39, *43.

In a lengthy portion of Chief Justice Roberts's opinion that Justice Kennedy did not join, the plurality of Roberts, Scalia, Thomas and Alito took the position that the school districts' goal of racial diversity -- which the four justices called "racial balancing" -- is "illegitimate" and not a compelling governmental interest. 2007 U.S. LEXIS 8670, at *46. "Accepting racial balancing as a compelling state interest would justify the imposition of racial proportionality throughout American society . . . ." *Id.* at *52**.** According to the plurality, "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Id.* at *84.

In a separate concurrence, Justice Kennedy was critical of the plurality for its failure to "acknowledge that the school districts have identified a compelling interest here." 2007 U.S. LEXIS 8670, at *150. According to Justice Kennedy, "[d]iversity, depending on its meaning and

[9] Justice Stephen Breyer, "Hand-Down Statement," *Parents Involved in Community Schools v. Seattle School District No. 1*, at 10 (June 28, 2007).

definition, is a compelling educational goal a school district may pursue." *Id.* at *150. In Justice Kennedy's view, the plurality had implied

> an all-too-unyielding insistence that race cannot be a factor in instances when . . . it may be taken into account. The plurality opinion is too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race . . . The plurality opinion is at least open to the interpretation that the Constitution requires school districts to ignore the problem of *de facto* resegregation in schooling. I cannot endorse that conclusion.

Id. at *158. Justice Kennedy also identified a number of alternative means by which he thought school districts could pursue the goal of diversity, including "strategic site selection of new schools" and "drawing attendance zones with general recognition of the demographics of neighborhoods." *Id.* at *160.

In addition to joining all of Chief Justice Roberts's opinion, Justice Thomas wrote a lengthy concurring opinion criticizing Justice Breyer's dissent (discussed below). Justice Thomas characterized the dissent's approach as "reminiscent of that advocated by the segregationists in *Brown v. Board of Education*." 2007 U.S. LEXIS 8670, at *91 (citation omitted). According to Justice Thomas, "if our history has taught us anything, it has taught us to beware of elites bearing racial theories." *Id.* at *145-46. In a footnote, Justice Thomas added, "Justice Breyer's good intentions, which I do not doubt, have the shelf life of Justice Breyer's tenure." *Id.* at *147.

Justice Breyer wrote the main dissent, joined by Justices Stevens, Souter, and Ginsburg**,** explaining at great length why they believed the challenged programs were constitutional. The dissent would have held that the school districts had a compelling interest in achieving racial diversity and preserving racial integration, and that the plans were narrowly tailored to serve that interest. The dissent accused the majority of undermining *stare decisis*, viewing the compelling interest at stake here as even stronger than it was in *Grutter*.

The dissent was also sharply critical of the plurality, which it claimed "parts company from this Court's prior cases, and . . . takes from local governments the longstanding legal right to use race-conscious criteria for inclusive purposes in limited ways." 2007 U.S. LEXIS 8670, at *236. The dissent also criticized Justice Kennedy's concurrence, and in particular did not agree that the school districts could have accomplished their goals through the alternative means that he identified. *See id.* at *267-73. Justice Breyer concluded the dissent by predicting that the decision is one "that the Court and the Nation will come to regret." *Id.* at *295.

In addition to joining Justice Breyer's dissent, Justice Stevens also issued a brief, separate dissent of his own in which he called it a "cruel irony" that Chief Justice Roberts had relied on *Brown*, accusing him of "rewrit[ing] the history of one of this Court's most important decisions." 2007 U.S. LEXIS 8670, at *177. Justice Stevens noted that the Court had greatly changed, and stated that it "is my firm conviction that no Member of the Court that I joined in 1975 would have agreed with today's decision." *Id.* at *184.

Free Expression

The Court decided several cases involving free speech issues this past term (in addition to the campaign finance case discussed in a separate section below), including a divided ruling limiting the First Amendment rights of public school students.

- ***Davenport v. Washington Education Association***, 127 S.Ct. 2372 (2007)

In a unanimous decision written by Justice Scalia, the Court held that the First Amendment permits states to require that public sector unions obtain non-members' affirmative authorization before using their fees for election-related purposes.

The state of Washington allows unions representing public employees to collect fees (known as agency shop fees) from non-members as a payroll deduction. These fees, which can equal full membership dues, prevent non-members from enjoying a "free ride" on the unions' collective bargaining efforts. In *Abood v. Detroit Bd. Of Ed.*, 431 U.S. 209 (1977), the Supreme Court held that the Constitution prohibits unions from using the fees of objecting non-members for ideological purposes unrelated to its collective bargaining duties, and in *Teachers v. Hudson*, 475 U.S. 292 (1986), the Court required that unions follow certain procedures to ensure that objecting non-members can prevent their fees from being used impermissibly.

A Washington state initiative -- the Fair Campaign Practices Act -- requires in pertinent part (hereafter, "the Act") that unions obtain affirmative authorization from non-members in order to use their agency shop fees for political and election-related purposes. The Supreme Court of Washington held that this affirmative authorization requirement violated the First Amendment of the U.S. Constitution. It reasoned that the Act disrupted the balance that *Abood* and *Hudson* had set between the union's free speech rights and those of non-members.

The Supreme Court unanimously reversed the state court's ruling. In an opinion by Justice Scalia, the Court reasoned that the Act is a far less restrictive limitation than the limitations that the union in this case, the Washington Education Association (WEA), conceded Washington could exercise: the state could restrict agency fees to the portion of union dues devoted to collective bargaining or even eliminate them altogether. According to the Court, unions have "no constitutional entitlement to the fees of nonmember-employees." 127 S.Ct. at 2379.

Justice Scalia, joined by Justices Stevens, Kennedy, Souter, Thomas and Ginsburg, also rejected WEA's claims, raised for the first time in its briefs before the Supreme Court, that under the Court's campaign finance precedents, the Act violated the First Amendment because it imposed an unconstitutional limitation on how the union could spend its money. According to the six justices, the union collects agency fees through "governmental coercion;" hence the Act "is a condition placed upon the union's extraordinary *state* entitlement to acquire and spend *other people's* money." 127 S.Ct. at 2380 (emphasis in original). Campaign finance cases, on the other hand, address the expenditure of one's own money. The six justices further rejected the contention that the Act, which applies only to election-related expenditures, constitutes an impermissible content-based burden on speech, noting the "unique context of public-sector

agency-shop arrangements," as well as the fact that the law is viewpoint-neutral and the fact that "no suppression of ideas is afoot." *Id.* at 2382.

Justice Breyer, along with Chief Justice Roberts and Justice Alito, would have declined to address these newly-raised arguments until the lower courts first had an opportunity to do so.

- ***Morse v. Frederick***, 2007 U.S. LEXIS 8514 (2007)

In a decision limiting the free speech rights of public school students, the Court ruled 6-3 against Joseph Frederick, a high school student who had been suspended by the principal for 10 days for unfurling and refusing to take down a banner reading "Bong Hits 4 Jesus" on a street outside the school during a school-sanctioned student-viewing of the Olympic Torch Relay. Frederick sued the principal, claiming that she had violated his First Amendment rights. Five justices held that the student's free speech rights were not violated in this case, while one would have ruled for the principal on the basis of qualified immunity.

In an opinion by Chief Justice Roberts joined by Justices Scalia, Kennedy, Thomas, and Alito, the Court held that even though the message on the banner was "cryptic," the principal had reasonably interpreted the banner as promoting illegal drug use in violation of school policy, and further held that students have no First Amendment right to engage in such speech. 2007 U.S. LEXIS 8514, at *15. In so ruling, the Court cited the serious problem of drug abuse and the importance of deterring "drug use by schoolchildren." *Id.* at *25. The Court found that the principal, upon seeing the banner, had to act swiftly, and that "failing to act would send a powerful message to the students in her charge, including Frederick, about how serious the school was about the dangers of illegal drug use. The First Amendment does not require schools to tolerate at school events student expression that contributes to those dangers." *Id.* at *19.

The Court explained that a different result was not required by *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506 (1969), which held that public school students had a free speech right to wear black armbands to school to protest the Vietnam War and famously stated that students do not "shed their constitutional rights . . . at the schoolhouse gate." According to the Court, *Tinker* involved political speech and therefore implicated "concerns at the heart of the First Amendment." 2007 U.S. LEXIS 8514, at *19. The Court found no similar protection for student speech that it believed could be interpreted as promoting illegal drug use.

Justice Alito, joined by Justice Kennedy, issued a concurring opinion stating that he joined the Court's opinion "on the understanding that (a) it goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use and (b) it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue . . . ." 2007 U.S. LEXIS 8514, at *51. Justice Alito also made the point that the Court's opinion did not "endorse the broad argument advanced by petitioners and the United States that the First Amendment permits public school officials to censor any student speech that interferes with a school's 'educational mission,'" an argument striking "at the very heart of the First Amendment." *Id.* at *53-54 (citations omitted).

Justice Thomas issued a concurring opinion in which he stated that he joined the Court's opinion in full, but also stated his belief that *Tinker* "is without basis in the Constitution" and should be overruled. 2007 U.S. LEXIS 8514, at *31. According to Justice Thomas, whose concurrence reached back to education in colonial America, public schools stand *in loco parentis*, and there is "no constitutional imperative requiring [such schools] to allow all student speech." *Id.* at *48. Also according to Justice Thomas, "[p]arents decide whether to send their children to public schools . . . . If parents do not like the rules imposed by those schools . . .they can simply move." *Id.*

Justice Breyer concurred in the judgment in part and dissented in part. Consistent with a position he has previously expressed as to the proper order of determining constitutional claims and claims of qualified immunity (*see, e.g.*, his concurring opinion in *Scott v. Harris*, 127. S.Ct. 1769 (2007)), Justice Breyer would not have ruled on the First Amendment question but instead would have resolved the case by holding that the principal had qualified immunity from the student's damages claim. According to Justice Breyer, "a decision on the underlying First Amendment issue is both difficult and unusually portentous. And that is a reason for us *not to decide* the issue unless we must." 2007 U.S. LEXIS 8514, at *86 (emphasis in original). Since all members of the Court agreed that the principal was immune from the damages claim, Justice Breyer saw no need for the Court to go further and deal with the free speech issue.

Justice Stevens, joined by Justices Souter and Ginsburg, dissented. While the three justices agreed that the principal should not be held liable for damages, they considered the content of the banner to be "nonsense," and would have held that Frederick could not properly have been disciplined "for his attempt to make an ambiguous statement to a television audience simply because it contained an oblique reference to drugs. The First Amendment demands more, indeed, much more." 2007 U.S. LEXIS 8514, at *59, 58. According to the dissent, "the First Amendment protects student speech if the message itself neither violates a permissible rule nor expressly advocates conduct that is illegal and harmful to students." *Id.* at *59. The dissent criticized the majority for "fashion[ing] a test that trivializes the two cardinal principles upon which *Tinker* rests," a test that "invites stark viewpoint discrimination." *Id.* at *63. And indeed, the dissent noted that the principal admitted that she had punished Frederick because she disagreed "with the pro-drug viewpoint she ascribed to the message on the banner." *Id.* The dissent concluded by accusing the Court of "inventing out of whole cloth a special First Amendment rule permitting the censorship of any student speech that mentions drugs, or at least so long as someone could perceive that speech to contain a latent pro-drug message." *Id.* at *78-79.

- ***Tennessee Secondary School Athletic Association v. Brentwood Academy,*** 2007 U.S. LEXIS 8271 (2007)

In a unanimous judgment, the Court held that a no-recruiting rule of a private association regulating interscholastic athletics among public and private high schools in the state of Tennessee did not violate the First Amendment rights of a member school. The rule prohibits high school coaches from recruiting middle school athletes. In an opinion in the same case in 2001, the Court held, 5-4, that the association is a state actor and thus subject to the constraints of the Constitution. *Brentwood v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288

(2001) ("*Brentwood I*"). In the instant case, the association not only defended its no-recruiting rule as constitutional, but also urged the Court to overturn its prior holding that it is a state actor. Except for Justice Thomas (one of the dissenters in *Brentwood I*), the Court ignored that issue, and proceeded on the basis of its prior holding that the association is a state actor.

Justice Stevens wrote the principal opinion for the Court. In the portion of that opinion joined by all members of the Court except Justice Thomas, the Court rejected the school's challenge to the no-recruiting rule, stating that while the school has the First Amendment right "to publish truthful information about the school and its athletic programs," the school's free speech rights are not absolute. 2007 U.S. LEXIS 8271, at *8. As the Court reasoned, the school chose to join the association, which has "a three-fold obligation to prevent the exploitation of children, to ensure that high school athletics remain secondary to academics, and to promote fair competition among its members." *Id.* The association may impose restrictions on speech insofar, and only insofar, as they "are necessary to managing an efficient and effective state-sponsored high school athletic league." *Id.* at *15. The Court held that the restrictions at issue in this case were necessary to achieving the association's three goals and hence to managing an efficient and effective athletic league.

In the portion of Justice Stevens's opinion joined only by Justices Ginsburg, Breyer, and Souter, Justice Stevens would also have categorized the prohibited recruitment as "more akin to a conduct regulation than a speech restriction." 2007 U.S. LEXIS 8271, at *11. Justice Stevens distinguished in-person solicitation from appeals to the public at large, relying on *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447 (1978), which upheld a state bar association's prohibition on lawyers' in-person solicitation of clients.

Justice Kennedy, in a concurring opinion joined by Chief Justice Roberts and Justices Alito and Scalia, disagreed with Justice Stevens's reliance on *Ohralik*, noting that the Court has never extended that case beyond the attorney-client relationship. Justice Kennedy believed the reliance on *Ohralik* was both "unnecessary and ill-advised," particularly as it suggested that "the speech at issue is subject to state regulation whether or not" the school had voluntarily joined the association. 2007 U.S. LEXIS 8271, at *25.

Justice Thomas wrote a brief opinion concurring in the judgment, in which he claimed that *Brentwood I* was a dramatic departure from prior state action cases, and said that he would have overruled *Brentwood I* rather than go through what he called the Court's "bizarre exercise of extending obviously inapplicable First Amendment doctrine" to the present circumstances. 2007 U.S. LEXIS 8271, at *27. Justice Thomas also agreed with Justice Kennedy's concurrence that *Ohralik* was not applicable in this case, thus forming a majority on that view.

Voting Rights

- ***Purcell v. Gonzalez***, 127 S.Ct. 5 (2006)

The Supreme Court in this case vacated the Arizona Court of Appeals' order preliminarily enjoining the implementation of Proposition 200, a law that required Arizonans to provide proof of citizenship to register to vote and present identification to vote on Election Day.

The law permitted a registered voter attempting to vote on Election Day without identification to cast a conditional provisional ballot, but provided that the ballot would only count if the voter returned to a designated site with proper identification within five business days.

Residents of Arizona, Indian tribes, and community organizations brought suit to challenge the law's voter identification and proof of citizenship requirements. Without issuing any findings of fact or conclusions of law, the district court denied the plaintiffs' request for a preliminary injunction to prohibit implementation of these requirements for the November 2006 election. Facing time constraints imposed by the upcoming election, the Court of Appeals was forced to evaluate the district court's decision without waiting for the lower court to issue findings. The Court of Appeals decided to grant the preliminary injunction without explanation. A week later, the district court issued its findings of fact and conclusions of law, explaining that it had decided to deny the injunction even though the plaintiffs had demonstrated a possibility of success on the merits, because they had failed to show the "strong likelihood" of success that was required to obtain a preliminary injunction. 127 S.Ct. at 7. The district court held that the balance between the harms and public interest weighed in favor of denying the injunction.

In a *per curiam* decision, the Supreme Court vacated the Court of Appeals' order and reinstated the district court's decision to deny the injunction, making clear that it was not issuing an opinion on the correct disposition of the case. The Supreme Court explained that as a procedural matter, the Court of Appeals should have given deference to the District Court's discretion to deny the preliminary injunction.

In a concurring opinion, Justice Stevens opined that allowing the election to take place with the new identification requirements would make this case more fit for review by providing evidence of the "scope of the disenfranchisement" caused by the new requirements and "the prevalence and character of the fraudulent practices that allegedly justify those requirements." 127 S.Ct. at 8.

States' Rights / Federalism

The Court issued several rulings this term concerning the authority of states and the federal government. In the divided rulings, the justices did not split according to the ideological lines seen in other types of cases.

- ***United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Management Authority***, 127 S. Ct. 1786 (2007)

In this 6-3 decision, the Court upheld a state law that required private waste management companies to dispose of the trash that they collected at a public dumping site owned and operated by a state-created public benefit corporation, holding that the law did not violate the Commerce Clause by discriminating against interstate commerce. After suffering from decades of a solid waste "crisis" -- a range of problems in dealing with solid waste and waste management companies -- two New York counties convinced the state legislature to create the Oneida-Herkimer Solid Waste Management Authority ("Authority"), a public benefit corporation. The Authority entered into an agreement with the counties under which it agreed to

manage all solid waste. The agreement required private haulers to dispose of solid waste and recyclables at a site designated by the Authority and to pay "tipping fees," which exceeded those for waste removal on the open market, to cover the maintenance costs of the facilities. Alleging that the state was restraining interstate commerce in violation of the Commerce Clause, the United Haulers Association filed suit against the counties and the Authority, challenging the constitutionality of the state law.

The Association relied on a previous Supreme Court decision, *C & A Carbone Inc., v. Clarkstown*, 511 U.S. 383 (1994), in which the Court struck down a similar law that required waste management companies to deliver waste to a particular private processing facility. However, in an opinion written by Chief Justice Roberts and joined in full by Justices Souter, Ginsburg, and Breyer, and joined in relevant part by Justices Scalia and Thomas, the Court distinguished this case from *Carbone* by explaining that it was constitutionally significant that the law at issue here required haulers to bring waste to a facility that was owned by a state-created public benefit corporation rather than to a private facility. The Court held that because the law treated all private businesses exactly the same by making them all dispose of waste at the same public facility, it did not discriminate against interstate commerce, and thus did not violate the "dormant" Commerce Clause (referred to by Justices Scalia and Thomas as the "negative" Commerce Clause.)[10] A plurality, excluding Justices Scalia and Thomas, also took the position that the law did not violate the dormant Commerce Clause because the burden of the law would likely fall on the citizens in the counties who voted for them, rather than on interests outside of the state.

Although they agreed, for the most part, with the plurality, Justices Scalia and Thomas filed independent concurring opinions to reiterate their concerns about the so-called "negative" Commerce Clause. Justice Scalia explained that although he opposes reading into the Commerce Clause anything beyond what it says, under grounds of *stare decisis* he was willing to enforce the "negative" Commerce Clause when a state law facially discriminates against interstate commerce or is indistinguishable from a law previously held unconstitutional by the Court. Because Justice Scalia believed the law at issue here was neither, he joined the Court's opinion concerning the analysis of whether the law violated the dormant Commerce Clause. In a separate concurrence, Justice Thomas wrote that dormant Commerce Clause jurisprudence has no basis in the Constitution and is only driven by policy considerations. Although Justice Thomas concurred in the judgment, because he saw no policy role for the Court in regulating interstate commerce and believed the dormant Commerce Clause "has no basis in the Constitution and has proved unworkable in practice," Justice Thomas would "discard the Court's negative Commerce Clause jurisprudence." 127 S.Ct. at 1799.

Justice Alito wrote a dissenting opinion, joined by Justices Stevens and Kennedy, in which he contended that the law in question was essentially identical to that struck down in *Carbone* and therefore unconstitutional. The dissent argued that the majority's public/private

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[10] The Commerce Clause grants Congress the authority to enact legislation affecting interstate commerce. The so-called "dormant"/"negative" Commerce Clause is the implied restriction on states from passing legislation that burdens or discriminates against interstate commerce.

distinction was misguided and that the Court should have focused its inquiry on whether there existed non-discriminatory means for the state to achieve its purpose.

- ***Watson v. Philip Morris***, 127 S.Ct. 2301 (2007)

In a unanimous opinion written by Justice Breyer, the Court held that defendant Philip Morris could not remove a state court action to federal court under the federal "officer removal statute," 28 U.S.C. § 1442(a)(1). In relevant part, the statute allows an agency or officer of the United States, "or any person acting under that officer," to remove a state lawsuit to federal court when the suit has been brought "for any act under color of such office." The Court rejected Philip Morris's contention that its regulation and monitoring by a federal agency brought the company within the scope of the removal statute when it had been sued in state court by plaintiffs who contended that the tobacco company had violated state laws prohibiting deceptive business practices.

Specifically, Philip Morris had argued that, since it was accused of violating Arkansas law by manipulating the design of its cigarettes so as to register low tar and nicotine under testing methods developed and monitored by the Federal Trade Commission, it was effectively "acting under" the supervision of the federal agency and therefore could remove the lawsuit to federal court. In rejecting this argument, the Court held that even if the federal regulation "is highly detailed and even if the private firm's activities are highly supervised and monitored," this does not bring the company within the scope of the federal officer removal statute. 127 S.Ct. at 2308.

Although recognizing that the language of the statute is broad and historically has been interpreted liberally, the Court explained that the essential function of the statute is to prevent state interference with federal officers and agents who are acting within the scope of their authority to perform their official duties for the government. While the scope of the statute includes private parties who "lawfully assist" federal agents or officers, 127 S.Ct. at 2306, a private party who does no more than comply with federal law is merely being regulated, not assisting in the enforcement or carrying out of the law.

- ***Watters v. Wachovia Bank***, 127 S. Ct. 1559 (2007)

This case was decided 5-3, with Justice Thomas taking no part in the decision. In an opinion written by Justice Ginsburg and joined by Justices Kennedy, Souter, Breyer and Alito, the Court held that a bank's wholly owned, state-chartered entity licensed as its operating subsidiary is governed by the federal National Bank Act (NBA) and subject to oversight and regulation by the Office of Comptroller of the Currency, not by state licensing and auditing agencies.

The NBA controls business activities of national banks -- including their mortgage lending activities -- and the Office of Comptroller of the Currency (OCC) exclusively oversees and regulates the operations of national banks. National banks are exempt from state regulations. Wachovia Bank (a national bank) conducted its real estate lending business through Wachovia Mortgage Corporation, which became a wholly owned, state-chartered entity, licensed by the

OCC as an operating subsidiary of Wachovia Bank. Michigan's statutory regime exempted national and state banks from state mortgage lending regulation, but required subsidiaries of national banks to register with the State's Office of Insurance and Financial Services (OIFS) and submit to state supervision. Linda Watters (OIFS's commissioner) argued that Wachovia Mortgage was subject to state regulation, even after becoming a wholly owned, operating subsidiary of Wachovia Bank, because it was not itself a national bank. She also contended that the Tenth Amendment prohibited OCC's exclusive control of national bank lending activities conducted through operating subsidiaries.

The Court rejected Watters's arguments, explaining that the NBA shields national banking from unduly burdensome and duplicative state regulation. Therefore, a state may regulate banking activities as long as it does not interfere with the bank's or the federal regulator's powers, in which instance the state regulation is preempted. The Court held that state regulation of operating subsidiaries in this case was duplicative and burdensome to the national bank itself. The Court also held that the Tenth Amendment was not implicated here because the regulation of national bank operations is a power delegated to Congress under the Commerce and Necessary and Proper Clauses.

In a lengthy dissent, Justice Stevens, joined by Chief Justice Roberts and Justice Scalia, argued that Congress had neither enacted legislation that expressly authorized national banks to use subsidiaries incorporated under state law to perform traditional banking functions nor did it authorize the OCC to "license" any state-chartered entities to do so. Moreover, the dissenters contended that Congress had not explicitly "immunized" subsidiaries of national banks from compliance with state legislation regulating its mortgage and lending activities nor authorized an executive agency to preempt state laws when it determines that they will interfere with national bank activities. For these reasons, the dissenters would have held that Wachovia Mortgage should be subject to state regulation.

Religious Liberty

- ***Hein v. Freedom From Religion Foundation***, 2007 U.S. LEXIS 8512 (2007)

In a blow to church-state separation, the Court ruled, 5-4, that federal taxpayers do not have standing to bring a lawsuit challenging President Bush's "Faith-Based and Community Initiatives Program" on the ground that it unconstitutionally promotes religion. The Court majority was split in its reasoning, with three justices holding that the taxpayers lacked standing under *Flast v. Cohen*, 392 U.S. 83 (1968), the seminal case recognizing taxpayer standing in Establishment Clause cases, and two urging the Court to overrule *Flast* altogether.

In a plurality opinion written by Justice Alito and joined by Chief Justice Roberts and Justice Kennedy, the three justices expressed the view that *Flast v. Cohen* is not only a narrow exception to the general prohibition on taxpayer standing but also that it is limited to situations in which the challenged expenditures are "expressly authorized or mandated by [a] specific congressional enactment." 2007 U.S. LEXIS 8512, at *40. Because the President's "Faith-Based" program was not funded through a specific congressional appropriation but through general appropriations to the Executive Branch, the plurality opinion held that the taxpayers

lacked standing under *Flast*. The three justices expressed the concern that a contrary ruling applying *Flast* "to purely executive expenditures would effectively subject every federal action . . . to Establishment Clause challenge by any taxpayer in federal court," and would also "raise serious separation-of-powers concerns." *Id.* at *43-44. As to the future of *Flast*, they wrote, "We do not extend *Flast*, but we also do not overrule it. We leave *Flast* as we found it." *Id.* at *51.

Justice Kennedy issued a concurring opinion stating his belief that "the result reached in *Flast* is correct and should not be called into question," but that for the reasons set out in Justice Alito's opinion, *Flast* "should not be extended to permit taxpayer standing in the instant matter," and that he joined Justice Alito's opinion "in full." 2007 U.S. LEXIS 8512, at *52. Justice Kennedy went on to state that to find standing in this case would hamper the ability of the Executive Branch to be "free, as a general matter, to discover new ideas, to understand pressing demands, and to find creative responses to address governmental concerns . . . Permitting any and all taxpayers to challenge the content of these prototypical executive operations and dialogues would lead to judicial intervention so far exceeding traditional boundaries on the Judiciary that there would arise a real danger of judicial oversight of executive duties. *Id.* at *53-54.

Justice Scalia, joined by Justice Thomas, issued an opinion concurring in the judgment, in which they expressed the view that *Flast v. Cohen* should be overruled, calling it "wholly irreconcilable with the Article III restrictions on federal-court jurisdiction" and a "blot on our jurisprudence." 2007 U.S. LEXIS 8512, at *57, *88. The two justices harshly criticized the plurality for declining to overrule *Flast*, stating that the plurality opinion was consistent with previous Establishment Clause cases involving taxpayer standing, but only because "the consistency lies in the creation of utterly meaningless distinctions which separate the case at hand from the precedents that have come out differently, but which cannot possibly be (in any sane world) the reason it comes out differently." *Id.* at *56. And they agreed with the dissent (see below) that the line drawn by the plurality -- prohibiting standing in this case because the challenged expenditures were not "expressly allocated by a specific congressional enactment" -- "*has absolutely no relevance*" to the criteria for Article III standing. *Id.* at *75 (emphasis in original).

Justice Souter wrote a dissenting opinion, joined by Justices Stevens, Ginsburg, and Breyer, expressing the view that there was no basis "in either logic or precedent" for the plurality's drawing a distinction for taxpayer standing purposes between injuries caused by the Executive Branch and by the Legislative Branch. 2007 U.S. LEXIS 8512, at *90. Justice Souter stressed that the importance of this type of injury -- the "extraction and spending of tax money in aid of religion" -- "has deep historical roots going back to the ideal of religious liberty in James Madison's Memorial and Remonstrance Against Religious Assessments, that a government in a free society may not 'force a citizen to contribute three pence only of his property for the support of any one establishment' of religion." *Id.* at *90 (citations omitted). The dissent would have held that "[w]hen executive agencies spend identifiable sums of taxpayer money for religious purposes, no less than when Congress authorizes the same thing, taxpayers suffer injury." *Id.* at *92-93. The dissent also noted that "Establishment Clause protection

would melt away" if "the Executive could accomplish through the exercise of discretion exactly what Congress cannot through legislation." *Id.* at *94.

Environmental Regulation

The Court had a mixed record in environmental cases this term, among other things issuing a pro-environmental ruling concerning global warming and the Clean Air Act in one case, but undermining the Endangered Species Act in another.

- ***Environmental Defense v. Duke Energy Corp***, 127 S. Ct. 1423 (2007)

In an opinion written by Justice Souter, the Court unanimously ruled in favor of environmental groups against Duke Energy Corp. for its failure to obtain an upgraded permit when it renovated units in its plants that resulted in an increase in the amount of air pollutants released by the plants. The Court unanimously rejected Duke Energy's contention that it was not required to obtain a new permit when it made renovations to its coal-fired electric generating units that allowed them to run longer each day. Instead, the Court held that the EPA's determination that it had the authority to regulate "modifications" that resulted in an increase in the rate that pollutants were released each hour into the air as well as those resulting in an increase in the amount of air pollutants released on a yearly basis was a reasonable interpretation of the Clean Air Act.

With Justice Thomas disagreeing, the other eight members of the Court also held that the EPA could define the same term ("modification") differently in two different sections of the Clean Air Act in order to regulate changes made in stationary sources of air pollution that enabled them to run longer each day and thus release a larger amount of pollutants over a period of time. The majority held that although there is an initial presumption that the same term has the same meaning in different parts of the same statute, that presumption is not irrebuttable. While Justice Thomas joined virtually all of the Court's opinion, he wrote a separate concurrence expressing his belief that the majority had not overcome the presumption that the term "modification" had the same meaning throughout the statute.

- ***Massachusetts v. EPA***, 127 S.Ct. 1438 (2007)

In a major environmental ruling, the sharply divided Court held, 5-4, that the EPA has authority under the Clean Air Act to regulate the emissions of carbon dioxide and other greenhouse gases from new motor vehicles, and that it cannot refuse to regulate those emissions without grounding any such refusal in the statute. Massachusetts, a number of other states, and environmental groups had sued the EPA for denying a rulemaking petition asking that it regulate "greenhouse gas emissions from new motor vehicles under § 202 of the Clean Air Act." 127 S.Ct. at 1449. The EPA claimed that it had no statutory authority to do so, and that even if it did, it would be "unwise" to exercise that authority. *Id.* at 1451. The Court of Appeals for the D.C. Circuit ruled in favor of the EPA, and the Supreme Court reversed.

In an opinion written by Justice Stevens and joined by Justices Kennedy, Souter, Ginsburg, and Breyer, the Court first held that the state of Massachusetts had standing to

challenge the EPA's denial of the rulemaking petition. In so holding, the Court explained that Massachusetts, acting to protect its quasi-sovereign interests, was entitled to "special solicitude" in the Court's standing analysis. 127 S.Ct. at 1455. In terms of the state's assertion of an injury need to satisfy standing requirements, the Court noted that "[t]he harms associated with climate change are serious and well recognized," and also that the state had "alleged a particularized injury in its capacity as a landowner." *Id*. at 1455, 1456. The Court held that Massachusetts had an interest in the outcome of the litigation to preserve its sovereign territory, and that the state had already been harmed and would continue to be harmed by rising sea levels associated with global warming.

Turning to the merits, the Court rejected the EPA's contention that carbon dioxide and other greenhouse gases are not pollutants under the Clean Air Act, acknowledging scientific studies finding that such gases affected climate change. The Court explained that Congress intended the Clean Air Act's sweeping definition of "air pollutant" to embrace all airborne compounds, as evidenced by the repeated use of the word "any" in the statute. The Court remanded the case to the EPA, ordering it to "ground its reasons for action or inaction in the statute." 127 S.Ct. at 1463.

Chief Justice Roberts and Justices Alito, Scalia and Thomas dissented both on the issue of standing and on the EPA's refusal to regulate greenhouse gas emissions. First, in a dissenting opinion written by Chief Justice Roberts and joined by the three other justices, the dissenters would have held that Massachusetts lacked standing to pursue its claims against the EPA. According to the dissent, Massachusetts had asserted only a generalized grievance, insufficient, in their opinion, to confer standing, and had presented a "nonjusticiable" question. Moreover, the dissent contended that precedent cast significant doubt on a state's standing to assert a "quasi-sovereign interest -- as opposed to a direct injury -- against the Federal Government." 127 S.Ct. at 1466. The dissent further contended that the long-term nature of the threat posed by global warming precluded a finding of actual or imminent harm, and that allegations of possible future injury did not satisfy standing requirements. The dissent also challenged Massachusetts' ability to obtain redress, suggesting that worldwide global greenhouse gas emissions made it unlikely that EPA regulation of new automobile emissions would prevent injury to Massachusetts, and would also have held that it is the function of Congress and the President, not the courts, to provide redress for the types of grievances presented in this case.

In a separate dissenting opinion written by Justice Scalia, the four dissenting justices would have upheld the EPA's interpretation of its discretion to define "pollutant" under the Clean Air Act as reasonable and a natural reading of the text. According to the dissent, even if there been a textual ambiguity, the Court should have given deference to the EPA's interpretation of "air pollutant," as called for under *Chevron*. The dissent criticized the majority for not explaining why the EPA's interpretation was incorrect or why it was not entitled to *Chevron* deference.

- ***National Association of Home Builders v. Defenders of Wildlife,*** 2007 U.S. LEXIS 8312 (2007)

This case involved the intersection of two federal environmental statutes, the Clean Water Act (CWA) -- which requires the Environmental Protection Agency (EPA) to transfer certain permitting powers to state authorities upon an application showing that nine specified criteria are met -- and the Endangered Species Act of 1973 (ESA) -- which provides that a federal agency must consult with certain other agencies to ensure that any action that it authorizes will not likely jeopardize the existence of any endangered or threatened species. In a 5-4 decision, the Court held that the EPA's authority to transfer water pollution permitting powers under the CWA if the nine criteria are met trumps the ESA.

In an opinion written by Justice Alito and joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas, the Court upheld the EPA's transfer of permitting authority to the state of Arizona under the CWA, despite the fact that the EPA had approved the transfer without considering provisions of the later enacted ESA. Previously, the Ninth Circuit had vacated the EPA's decision, holding that although the transfer complied with CWA's standards, the EPA's decision eviscerated the ESA, and therefore was "arbitrary and capricious." 2007 U.S. LEXIS 8312, at *23. The Supreme Court disagreed and held that the CWA's language indicated that the standards for transfer set forth within it were the only relevant criteria that the EPA should consider and that the ESA could not essentially be treated as a tenth criterion. According to the majority, once the CWA's requirements are met the statute affirmatively mandates the transfer; therefore, the ESA is inapplicable because it only applies to discretionary agency actions.

Justice Stevens, in a dissent joined by Justices Breyer, Ginsburg, and Souter, charged the majority with erroneously creating an exception for nondiscretionary agency action and contravening an earlier decision regarding the broad applicability of the ESA provisions, *TVA v. Hill*, 437 U.S. 153 (1978). He also challenged the majority's interpretation of the EPA's action as being nondiscretionary, pointing out that the EPA itself in its administrative hearings did not argue that its actions were mandatory. Justice Stevens explained that when faced with competing statutory mandates, it is the Court's duty to give full effect to both statutes if possible. He provided various ways in which the ESA and CWA could be harmonized.

In a separate dissent, Justice Breyer wrote that he joined Justice Stevens's dissent but would reserve judgment on whether or not the ESA in fact covered every federal agency action. He also took the position that the ESA altered the environmental regulatory landscape once it was enacted by Congress, and that, accordingly, the CWA must be interpreted in relation to the new emphasis that Congress had placed on the preservation of endangered species through enactment of the ESA.

- ***U.S. v. Atlantic Research Corp.***, 127 S.Ct. 2331 (2007)

In this case, the Court resolved a circuit split on the issue of the right of potentially responsible parties (PRPs) to recover costs when they clean up hazardous materials voluntarily. In a unanimous opinion written by Justice Thomas, the Court held that § 107(a)(4)(B) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)

gives PRPs a cause of action to recover costs of voluntarily-incurred cleanup and response costs from other PRPs (in this case, the federal government).

Atlantic Research Corp. retrofitted rocket motors for the government, in the process contaminating soil and groundwater at the site. After undertaking the cleanup of the environmental hazards at its own expense, Atlantic Research sued the government for the recovery of some of its cleanup costs. The Court held that Atlantic Research's action could proceed because the plain meaning of the statutory provision provides "any private party, including PRPs," with a private right of action, 127 S.Ct. at 2336, rejecting the government's argument that the statutory language only gave a private right of action to parties *other than* PRPs.

Privacy and Reproductive Freedom

- ***Gonzales v. Carhart***, 127 S. Ct. 1610 (2007)

In the first ruling by the Roberts Court involving abortion, and the first ruling by the Supreme Court since *Roe v. Wade* to uphold an abortion restriction in the absence of an exception to protect a woman's health, the Court in a sharply divided 5-4 decision upheld the federal "Partial-Birth Abortion Ban Act" of 2003, which prohibits a medically-accepted method of abortion. The Court upheld the law despite the absence of an exception allowing the procedure when necessary to safeguard a woman's health, and did so even though it had struck down a virtually identical state law in 2000 as imposing an undue burden on a woman seeking to obtain an abortion. *See Stenberg v. Carhart*, 530 U.S. 914 (2000). In *Stenberg*, also a 5-4 ruling, Justice O'Connor was in the majority, and Justice Kennedy in the dissent, along with Chief Justice Rehnquist and Justices Thomas and Scalia. In *Gonzales*, Justice O'Connor's successor, Justice Alito, joined Chief Justice Roberts and Justices Kennedy, Scalia and Thomas to form the new majority. The ruling brought a stinging dissent from the other four justices, who accused the majority of ignoring *stare decisis* and suggested that the ruling was based on the change in the Court's composition since *Stenberg*.

In an opinion by Justice Kennedy, the Court held that the Act was not unconstitutionally vague on its face. Moreover, the Court held that the Act did not impose an undue burden on women seeking abortions, reversing the lower courts on this point, which had held to the contrary, given the absence of a health exception. The Court also held that the government had an interest in "protecting the integrity and ethics" of the medical profession, and also that the type of abortion proscribed by the Act required regulation because it "implicate[d] additional ethical and moral concerns that justify a special prohibition." 127 S.Ct. at 1633. The Court further held that the government's interest in protecting "the bond of love the mother has for her child" and in protecting a woman from the psychological consequences of having an abortion, and of possibly regretting her choice even more when she learned of the method of abortion, could justify restrictions on a woman's access to abortion. *Id.* at 1634.

Finally, the Court held that a facial attack on the statute should not even have been entertained, although it had previously considered facial challenges to abortion restrictions. And

while the Court claimed to leave open the possibility of an as-applied challenge to the Act, it did not explain under what possible circumstances this could occur.

Justice Thomas wrote a concurring opinion, joined by Justice Scalia, to state that while he joined the Court's opinion as a proper application of "current jurisprudence," he continued to believe that "the Court's abortion jurisprudence, including *Roe v. Wade*, has no basis in the Constitution." 127 S.Ct. at 1639.

Justice Ginsburg, joined by Justices Stevens, Breyer, and Souter, wrote a heated dissent stating that "the Court, differently composed that it was when we last considered a restrictive abortion regulation, is hardly faithful to our early invocations of 'the rule of law' and the 'principles of *stare decisis*.'" 127 S.Ct. at 1652. Justice Ginsburg criticized the majority for weakening the "undue burden" standard by stating that the government only needed a "rational basis" for enacting the ban. "Instead of the heightened scrutiny we have previously applied, the Court determines that a 'rational' ground is enough to uphold the Act." *Id.* at 1650. She further criticized the majority for "refus[ing] to take *Casey* and *Stenberg* seriously" and, "for the first time since *Roe* . . . bless[ing] a prohibition with no exception safeguarding a woman's health." *Id.* at 1641.

Justice Ginsburg further took the majority to task for ignoring expert medical evidence that the prohibited abortion method was possibly the safest method of abortion for certain women, and for "brush[ing] under the rug the District Courts' well-supported findings that the physicians who testified that [this method] is never necessary to preserve the health of a woman had slim authority for their opinions." 127 S.Ct. at 1646. Justice Ginsburg also challenged the majority's contention that the Act furthered the government's interest in protecting life, because "surely the statute was not designed to protect the lives or health of pregnant women," and it could not further an interest in protecting the life of the fetus, for it only targeted one method of performing an abortion. *Id.* at 1647. Justice Ginsburg further contended that "the Court invokes an antiabortion shibboleth for which it concededly has no . . . evidence: Women who have . . . abortions regret their choices, and consequently suffer from 'severe depression.'" *Id.* at 1648.

Justice Ginsburg disagreed with the majority's decision to deprive women of the right to make an autonomous choice, rather than require doctors to accurately and adequately inform women of different abortion procedures and their risks. According to Justice Ginsburg, "[t]hough today's majority may regard women's feelings on the matter as 'self-evident,' this Court has repeatedly confirmed that 'the destiny of the woman must be shaped . . . on her own conception of her spiritual imperatives and her place in society.'" 127. S.Ct. at 1649 (citation omitted). Justice Ginsburg found "most troubling" that "*Casey's* principles, confirming the continuing validity of 'the essential holding of *Roe*,' are merely 'assumed' for the moment, rather than 'retained' or 'reaffirmed.'" *Id.* at 1650.

The Right to Privacy and the Fourth Amendment

Plaintiffs pursuing civil rights actions in the Court this term for violation of their Fourth Amendment rights had mixed success. Moreover, the Court in these cases achieved a level of consensus not seen in many other rulings discussed in this report.

- ***Brendlin v. California,*** 127 S.Ct. 2400 (2007)

In an opinion by Justice Souter, the Court in this case held unanimously that when the police stop a car, the passengers as well as the driver are "seized" and thus, like the driver, may challenge the constitutionality of the traffic stop. The Court noted that under prior precedent, a seizure of a person within the meaning of the Fourth Amendment has occurred if, "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." 127 S.Ct. at 2405 (citation omitted). Applying this test to the circumstances of this case, the Court held that when the police pulled the car over, "any reasonable passenger would have understood the police officers to be exercising control to the point that no one in the car was free to depart without police permission." *Id.* at 2406-07.

- ***Los Angeles County v. Rettele***, 127 S.Ct. 1989 (2007)

The plaintiffs in this case charged that they had been subjected to an unreasonable search and seizure in violation of their Fourth Amendment rights. In a *per curiam* opinion, the Court held that the Fourth Amendment rights of Max Rettele, his girlfriend, and his girlfriend's son had not been violated when police officers entered their home with a valid warrant but under the mistaken belief that prior residents of the house (who had been identified as crime suspects) still lived there, and ordered Rettele and his girlfriend (who had been sleeping unclothed) to get out of bed and stand naked at gunpoint for several minutes, while the officers determined if the suspects were present. The Court held that, even though the officers were aware that the suspects being pursued were African American and the plaintiffs were Caucasian, it was not unreasonable for the officers to hold the residents at gunpoint until confirming that the house was secure and not shared with the suspects, since people of different races commonly live together and criminals often conceal weapons near their beds.

Justice Stevens, joined by Justice Ginsburg, concurred in the judgment, but expressed the view that the Fourth Amendment question should not have been decided. Instead, they opined that the Court should simply have reversed the Ninth Circuit's decision because the defendants were entitled to qualified immunity, and thus there was no reason to determine whether the Constitution had been violated.

Justice Souter would have denied the petition for a writ of *certiorari*, which would have had the effect of upholding the Ninth Circuit's decision that the police had violated the residents' Fourth Amendment rights and were not entitled to qualified immunity.

- ***Scott v. Harris,*** 127 S. Ct. 1769 (2007)

In an 8-1 decision written by Justice Scalia, the Court held that a police officer did not violate a fleeing suspect's Fourth Amendment rights when, in pursuit of the suspect, he rammed the suspect's car from behind during a high speed chase at night and caused the suspect to crash, suffer serious injuries, and be rendered a quadriplegic. In a civil rights action brought by the suspect, Victor Harris, against the officer, Harris contended that the police had used excessive force resulting in an unreasonable seizure in violation of his Fourth Amendment rights. The officer moved for summary judgment on the basis that he had qualified immunity. The district

court denied his motion, holding that the issue of immunity turned on material issues of fact, entitling Harris to a trial, and the Eleventh Circuit affirmed.

The Supreme Court reversed, relying in large measure on a videotape of the chase showing, in the Court's opinion, that no reasonable jury could have found that Harris's actions had not posed a threat to human life. For this reason, the Court held that the officer's use of excessive force did not result in an unreasonable seizure of Harris and thus did not violate his Fourth Amendment rights.

In holding that the officer had acted reasonably and had not violated Harris's constitutional rights, the Court explained that although the officer's actions posed a high likelihood of injury or death to Harris, Harris had threatened innocent lives. The Court also took the position that ending the chase would not have equally protected the public, because there was no certainty that Harris would have realized that the chase had been broken off. Moreover, the Court concluded that a rule requiring police to allow fleeing suspects to get away whenever they drive so recklessly that they endanger others would be perverse. At the end of the day, the Court created a new *per se* rule: "[a] police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death." 127 S.Ct. at 1779.

In separate concurrences, Justices Ginsburg and Breyer rejected the Court's "mechanical, *per se* rule." 127 S.Ct. at 1779. Although they agreed with the judgment in this case, they contended that the Court's inquiry in similar cases should be situation-specific and conducted on a case-by-case basis. Justice Breyer added in his opinion that the Court should actually overturn precedent and change the rule in cases in which an officer (or other party) asserts qualified immunity, so that a court would not first have to decide whether there has been a constitutional violation before determining whether an officer is entitled to qualified immunity. Justice Breyer would have held that courts should be able to decide the qualified immunity question first if they so desired. In her concurring opinion, Justice Ginsburg disagreed, stating that the constitutional question in this case warranted an answer and that Justice Breyer's attempt to revisit precedent was thus "properly reserved for another day and case." *Id.* at 1780.

In a lone dissent, Justice Stevens argued that the majority had inappropriately decided facts and "depriv[ed] [Harris] of his right to have a jury evaluate the question whether the police officers' decision to use deadly force to bring the chase to an end was reasonable." 127 S.Ct. at 1782. Justice Stevens contended that the videotape actually confirmed the lower courts' appraisal that there were material issues of fact. He criticized the Court for "us[ing] its observation of the video as an excuse for replacing the rule of law with its ad hoc judgment" that dangers caused by flight from a police pursuit will not end if the pursuit ends. *Id.* at 1784.

Access to Justice and Due Process

With some exceptions, the Court in a number of cases this term ruled against, or made it more difficult for, litigants seeking access to the courts to pursue their claims. Indeed, in one of the Court's most criticized 5-4 rulings, the majority went so far as to hold that an individual who

had filed an appeal within the deadline given to him by a federal judge was nonetheless barred from appealing, because the judge had given him an incorrect deadline.[11]

- ***Ayers v. Belmontes***, 127 S.Ct. 469 (2006)

In this 5-4 decision, the Supreme Court upheld the use of a catchall jury instruction during the sentencing phase of a criminal defendant's trial, which directed jurors to consider "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime" when deciding whether to impose the death penalty. 127 S.Ct. at 477, *citing* Cal. Penal Code Ann. § 190.3(k).

During the sentencing phase of his capital murder trial, Fernando Belmontes introduced mitigating evidence to show that being incarcerated, rather than put to death, would benefit him and other inmates. Belmontes testified that during a previous incarceration he had led a constructive life, having turned to Christianity. His Christian sponsors and two prison chaplains from that earlier incarceration testified as to the positive impact that Belmontes would have had on others if incarcerated rather than executed. At the sentencing phase of Belmontes's trial, the jury was issued a catchall instruction that directed it to consider as a mitigating factor "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." Belmontes argued that the jury instruction prevented the jury from properly considering all of his mitigating evidence in violation of his Eighth Amendment right to present such evidence in his sentencing proceeding. He alleged that the restrictive language of this instruction led the jury to believe that it did not have authority to consider his forward-looking mitigating evidence, specifically the evidence that he would lead a constructive life if incarcerated, because that evidence did not extenuate the severity of his crime.

In an opinion written by Justice Kennedy and joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito, the Court held that the challenged jury instruction did not violate Belmontes's Eighth Amendment rights. The Court explained that the appropriate test required a determination of whether the jury instruction created a reasonable likelihood that the jury would not consider constitutionally relevant evidence. The Court held that it was unreasonable to believe that the challenged jury instruction would prevent the jury from considering Belmontes's forward-looking mitigating evidence, particularly given the fact that the closing and other arguments of both the prosecution and the defense were based on a presumption that this evidence was relevant. Justices Scalia and Thomas went even further in a concurring opinion (written by Justice Scalia) and expressed the belief that a court could limit a jury's discretion to consider all mitigating evidence without violating a capital defendant's Eighth Amendment rights.

In a lengthy dissent, Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, would have held that the jurors had been improperly instructed and forbidden from considering any evidence other than that which the judge had enumerated for them. In the view of the

[11] *See, e.g.*, Editorial, "Don't Listen to What the Man Says," *New York Times* (June 17, 2007); Editorial, "Beware of the Judge," *Washington Post* (June 17, 2007).

dissenters, the California death penalty statute rested on the assumption that the state could preclude the consideration of forward-looking mitigating evidence.

According to the dissenters, when the judge finally gave the catchall jury instruction, the jury's attention was focused on circumstances that "extenuate[d] the gravity of the crime," and it was not reasonable to "believe that jurors took it upon themselves to consider testimony they were all but told they were forbidden from considering," or saw "evidence relating to future conduct even arguably 'extenuated the gravity of the crime.'" 127 S.Ct. at 492, 488. The dissenters also noted that a year after Belmontes was sentenced, the California Supreme Court discussed the possible unconstitutionality of giving a jury this catchall instruction, and amended the instruction to expand the evidence that a jury could properly consider to include any aspect of a defendant's character or record.

- ***Bell Atlantic Corp. v. Twombly***, 127 S.Ct. 1955 (2007)

In this antitrust case, the Court effectively raised the pleading standards for individuals seeking to bring antitrust conspiracy actions under § 1 of the Sherman Act, with possible repercussions for any individual who files a federal civil complaint in non-antitrust matters. In an opinion written by Justice Souter, the Court held, 7-2, that in order to avoid dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a party filing an antirust complaint alleging conspiracy against a group of corporations must provide specific factual evidence demonstrating that the companies were acting in collusion, and that an allegation of circumstantial evidence of conspiracy is not enough.

Specifically, the Court upheld the dismissal of a class action lawsuit brought by telephone and high speed internet subscribers against multiple large telecommunications providers, alleging that the providers had conspired to engage in conduct that diminished the level of market competition and led to inflated charges for telephone and internet services. The Court held that the subscribers' allegations concerning the parallel behavior of the telecommunications providers as circumstantial evidence of a conspiracy was not enough to state a claim. Instead, the Court held that the subscribers were required to provide actual factual evidence that the providers were involved in collusion to properly plead a claim and to withstand dismissal under Rule 12(b)(6). Because the subscribers had failed to do so, the Court dismissed their claims. The Court rationalized the dismissal by mentioning the "expensive" cost of antitrust discovery and alluding to the danger of bogging down the judiciary and counsel with the costs of investigating conspiracy claims that lack merit.

In a heated dissent, Justice Stevens, joined by Justice Ginsburg, criticized the majority for its "dramatic departure from settled procedural law." 127 S.Ct. at 1975. The dissenters contended that the Court's concerns regarding the expense of antitrust litigation and risk that jurors may mistakenly conclude that evidence of parallel conduct proves conspiracy did "not justify an interpretation of the Federal Rule of Civil Procedure 12(b)(6) that seems to be driven by the majority's appraisal of the plausibility of the ultimate factual allegations rather than its legal sufficiency." *Id.* at 1975. They cited Court precedent setting forth the well-established rule that a complaint should not be dismissed under Rule 12(b)(6) for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which

would entitle him to relief," and criticized the majority for "scrap[ping]" the "'no set of facts' language." *Id.* at 1977-78.

- ***Bowles v. Russell***, 127 S.Ct. 2360 (2007)

In a 5-4 decision, the Court held that a litigant who had filed an appeal within the time given to him by a federal district court judge nonetheless could not pursue that appeal when it turned out that the judge's order had given the litigant three days longer to appeal than the applicable statute allowed.

Keith Bowles, whose petition for a writ of *habeas corpus* had been denied by the district court, moved the court for additional time in which to file a notice of appeal from the denial of his petition. The district court granted Bowles's motion, and informed Bowles that his notice of appeal was due on February 27, 2004. Bowles filed his notice of appeal on February 26. In fact, by statute, the notice was due on February 24 (14 days rather than 17 days after the district court entered its order granting Bowles's motion for additional time). Although Bowles had filed his notice of appeal within the period stated by the district court, the Court of Appeals refused to consider his appeal, holding that it lacked jurisdiction because the notice of appeal was filed after the statutory 14-day time limit.

In a sharply divided ruling, the Supreme Court affirmed. In a majority opinion written by Justice Thomas and joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Alito, the Court held that the 14-day time limit for filing the notice of appeal was "jurisdictional" and therefore could not be waived. Moreover, the majority held that Bowles's "untimely filing" could not be excused under the doctrine of "unique circumstances," which "has its roots in *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962) (*per curiam*)." 127 S.Ct. at 2366. According to the majority, because the time limit was "jurisdictional," the Court had no authority to create an equitable exception to it. And, for good measure, the Court went on to overrule *Harris Truck Lines* and an additional case that had applied it, "to the extent they purport to authorize an exception to the jurisdictional rule." 127 S.Ct. at 2366.

Justice Souter wrote a sharp dissent, joined by Justices Stevens, Ginsburg and Breyer, noting that Bowles had done precisely what a federal district court told him to, only to be informed by higher courts that he had missed a deadline and could not appeal, stating that "[i]t is intolerable for the judicial system to treat people this way." 127 S.Ct. at 2367. The dissent disagreed with the majority's characterization of the 14-day time limit as "jurisdictional," arguing that unless Congress specifically called for a certain statute to be jurisdictional in nature, it was the general rule to treat a time limit as non-jurisdictional. The dissent likened the majority's result to be "shrugging at the inequity of penalizing a party for relying on what a federal judge had said to him." *Id.* at 2369. Finally, the dissent would have held that the Court had the authority to "recognize an equitable exception to the 14-day limit, and we should do that here, as it certainly seems reasonable to rely on an order from a federal judge." *Id.* at 2370.

- ***Cunningham v. California***, 127 S.Ct. 856 (2007)

In an opinion by Justice Ginsburg, joined by Chief Justice Roberts and Justices Stevens, Scalia, Souter, and Thomas, the Court held that California's determinate sentencing law (DSL) was unconstitutional because it violated criminal defendants' jury trial rights by placing sentence-elevating factfinding within the province of the judge rather than the jury.

The California DSL in this case made John Cunningham's crime -- sexual abuse of a child under the age of 14 -- punishable by exactly 6, 12, or 16 years. Like other California DSLs, the DSL in this case required the judge to sentence Cunningham to the middle term (12 years) unless the judge found by a preponderance of the evidence circumstances in aggravation or mitigation of the crime. Here, the trial judge found that six aggravating factors outweighed one mitigating factor, and sentenced Cunningham to a 16-year term.

The Supreme Court majority explained that (as the Court had held in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000)), the Sixth Amendment requires that any fact that exposes a criminal defendant to a greater potential sentence must be found by a jury, not a judge, and that the fact must be proven beyond a reasonable doubt, not merely by a preponderance of the evidence. Accordingly, the Court held that "because the DSL authorizes the judge, not the jury, to find the facts permitting an upper term sentence, the system cannot withstand measurement against [the Supreme Court's] Sixth Amendment precedent." 127 S.Ct. at 871.

Justices Kennedy, Alito, and Breyer disagreed and would have held California's DSL to be constitutional. Justice Kennedy, in a dissent joined by Justice Breyer, expressed the view that "the *Apprendi* line of cases remains incorrect," because the Court has consistently expanded the *Apprendi* doctrine "far beyond its necessary boundaries." 127 S.Ct. at 872. The dissenters contended that the rule set forth in *Apprendi* should be limited to sentencing enhancements based on the nature of the offense. In a separate dissenting opinion written by Justice Alito and joined by Justices Kennedy and Breyer, the dissenters expressed their belief that sentencing judges had considerable discretion in identifying aggravating factors and in enhancing criminal sentences. They contended that Court precedent anticipated that judges would consider facts outside of the trial record and jury verdict, take into account policy considerations (such as deterrence and restitution), and even consider their own "subjective belief[s]" as judges when sentencing convicted criminals. *Id.* at 863.

- ***Erickson v. Pardus***, 127 S. Ct. 2197 (2007)

In this *per curiam* decision, the Court reversed the dismissal of a *pro se* complaint brought pursuant to 42 U.S.C. §1983 by a state prisoner who alleged that prison officials had violated his Eighth Amendment rights by denying him access to medical care and intentionally interfering with his medical treatment. William Erickson, a prisoner in Colorado, had been receiving treatment for Hepatitis C. After one of the syringes made available to him and to other prisoners was found in communal garbage, modified in a manner suggestive of use for injection of illegal drugs, prison officials terminated Erickson's medical treatment under the belief that he had taken the syringe to use illicit drugs. The Court held that the lower courts had erred by holding that Erickson's allegations were "too conclusory" to establish a claim that he had

suffered a "cognizable independent [substantial] harm." 127 S.Ct. at 2199. The Court explained that a civil complainant need not provide specific facts to sufficiently allege a claim, but must only give the other party fair notice of the claim and the grounds of it. The Court held that the Court of Appeals' "departure from the liberal pleading standards set forth by [the civil procedure rules]" was more pronounced in this case because petitioner had been proceeding *pro se* (without counsel). *Id.* at 2200.

Justice Thomas issued a dissent in which he called for the overruling of precedent, which he referred to as "the Court's flawed Eighth Amendment jurisprudence." 127 S.Ct. at 2201. According to Justice Thomas, the Eighth Amendment's prohibition on cruel and unusual punishment should only protect individuals from serious injuries, not exposures to risks of injury. Justice Scalia would have denied the writ of *certiorari* and thus not heard Erickson's appeal at all.

- ***Lance v. Coffman***, 127 S.Ct. 1194 (2007)

This case involved congressional redistricting in Colorado and the ability of state residents to challenge an alleged violation of their rights under the Election Clause of the United States Constitution, which grants state legislatures the authority and responsibility to draw congressional districts. The Colorado Constitution limits redistricting to once per census. When Colorado's state legislature was unable to redraw the state's congressional districts after the 2000 census to accommodate an additional representative, a state court redrew the districts in 2002. The legislature finally passed its own redistricting plan in 2003, but because this was the second redistricting plan relating to the 2000 census, the Colorado Attorney General brought an action in the Colorado Supreme Court seeking to enjoin the implementation of the legislature's plan. In *People ex rel. Salazar v. Davidson*, 79 P.3d 1221 (Colo. 2003), the Colorado Supreme Court granted the Attorney General's motion for an injunction and held that judicially created districts were as binding as legislatively created districts. The state Supreme Court further held that the court-drawn plan did not violate the state's right to draw congressional districts, protected by the Election Clause of the U.S. Constitution.

Four Colorado citizens who did not participate in *Salazar* filed suit in federal district court charging that the decision in *Salazar* violated their rights under the Election Clause. In a *per curiam* decision, the U.S. Supreme Court unanimously held that the citizens did not have standing to bring a claim because they had failed to allege an actual injury, having claimed only that the Elections Clause had not been followed. The Court held that the citizens had alleged nothing more than a "generalized grievance" about the conduct of government that the Court has refused to countenance in the past and, therefore, lacked standing.

- ***Lawrence v. Florida***, 127 S.Ct. 1079 (2007)

The Supreme Court held in this 5-4 decision that the one-year statute of limitations for seeking federal *habeas corpus* relief from a state court judgment is not "tolled" (*i.e.*, suspended) while a criminal defendant's petition for a writ of *certiorari* on state post-conviction relief is pending before the Supreme Court.

A Florida jury convicted Gary Lawrence of, among other crimes, first-degree murder and sentenced him to death. The Florida Supreme Court affirmed Lawrence's conviction and sentence and the U.S. Supreme Court denied *certiorari* on January 20, 1998. On January 19, 1999, Lawrence filed an application for state post-conviction relief in a Florida trial court. The state court denied relief, and the Florida Supreme Court affirmed the denial, issuing its mandate on November 18, 2002. Lawrence then sought review of the denial of state post-conviction relief in the U.S. Supreme Court, which denied *certiorari* on March 24, 2003. While Lawrence's petition for *certiorari* was pending, he filed a federal *habeas* application. The federal district court dismissed the *habeas* application as untimely under the one-year statute of limitations set out in 28 U.S.C. § 2244(d) .

In an opinion written by Justice Thomas and joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Alito, the Court acknowledged that the statute of limitations for seeking federal *habeas corpus* relief is tolled while an "application for State post-conviction or other collateral review is pending," but held that this period does not include the time during which a petition for *certiorari* on this application is pending in the Supreme Court. 127 S.Ct. at 1081, citing § 2244(d). The Court found that all but one day of the one-year statute of limitations period had lapsed between the time Lawrence's conviction became final and when he filed for post-conviction relief, but the limitations period was tolled when the Florida courts were handling his state application for post-conviction relief.

The Court held that because Lawrence had waited 113 days after the Florida Supreme Court issued its mandate before filing his federal *habeas* application, that application could only be considered timely if the limitations period were tolled during the Supreme Court's consideration of his petition for *certiorari* on the denial of post-conviction relief. The majority held that the Supreme Court was "not a part of a 'State's post-conviction procedures,'" and thus, a post-conviction application only remains pending and tolled up to the date at which the highest state court issues its mandate or denies review. 127 S.Ct. at 1083. Under this rule, the Court held that the one-year limitations period was not tolled during the pendency of Lawrence's petition for *certiorari* and that his petition for *habeas corpus* relief was therefore untimely. The Court expressed concern that allowing the limitations period to be tolled by *certiorari* petitions would provide state prisoners with incentives to file *certiorari* petitions as a delaying tactic.

Justice Ginsburg, joined by Justices Stevens, Souter, and Breyer, dissented, criticizing the majority for "cut[ting] short the tolling period" before the Supreme Court has had an opportunity to consider an application for state post-conviction relief. 127 S.Ct. at 1087. The dissenters would have held that until the Supreme Court has disposed of a *certiorari* petition, the application is still one for state post-conviction relief; it does not automatically become a federal application merely because the state court applicant petitions for review in the U.S. Supreme Court. The dissenters rejected the majority's contention that if an application for state post-conviction review were considered to be pending while a *certiorari* petition was pending, then a state prisoner could not exhaust state post-conviction remedies without filing a petition for *certiorari*. The dissenters distinguished exhaustion (which promotes comity and federalism by giving state courts the first opportunity to adjudicate prisoners' claims) from tolling (which concerns the suspension of time within which a procedural action must be taken). They also

explained that tolling in this situation would protect a litigant's ability to pursue federal claims in a federal forum and avoid simultaneous litigation in multiple courts.

- ***Panetti v. Quarterman,*** No. 06-6407, 2007 U.S. LEXIS 8667 (2007)

In a 5-4 decision authored by Justice Kennedy and joined by Justices Ginsburg, Stevens, Souter, and Breyer, the Court reversed the Fifth Circuit's holding that Scott Louis Panetti, a schizophrenic death row inmate, was competent to be executed notwithstanding his belief that the state wanted to execute him to "stop him from preaching." Previously, in *Ford v. Wainwright*, 477 U.S. 399 (1986), the Court held that the Eighth Amendment prohibits a state from executing a prisoner who is insane. In Panetti's case, the Court held that pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the Court had the authority to adjudicate claims of incompetency raised in Panetti's second federal *habeas corpus* application. It also held that, pursuant to *Ford*, the state court had erred and violated Panetti's Eighth Amendment rights by failing to provide him a fair hearing at which he could present evidence of incompetency to be executed, and further held that the incompetency standard employed by the Fifth Circuit was too restrictive to afford Panetti adequate protection for his Eighth Amendment rights.

The AEDPA requires that courts dismiss claims raised "in a second or successive" application for *habeas* relief that were not raised in an earlier application. 28 U.S.C. § 2244(b)(2). The Court held that this law did not bar consideration of Panetti's claim that he was too delusional to understand the state's reasons for putting him to death, even though he did not raise the claim until he filed a second application for *habeas* relief. Panetti filed a *habeas corpus* petition challenging his murder conviction on the grounds that he was mentally incompetent to stand trial and waive counsel, but the district court found him competent and denied his petition. After new evidence was uncovered showing that Panetti did not understand the reason for his execution and after a date had been set for his execution, Panetti filed another petition challenging his competency to be executed. In the instant case, the Supreme Court sustained jurisdiction by "treat[ing] the two filings as a single application." 2007 U.S. LEXIS 8667, at *28. The Court reasoned that treating the filings as separate applications would require prisoners to file incompetency claims in *habeas* petitions before they display any symptoms of mental incapacity and when their claims would be unripe. It would also cause them to run the risk of losing their opportunity to ever have such claims reviewed if they did not raise them before they were ripe. The Court believed that this interpretation was in accord with AEDPA's purpose to conserve judicial resources and to promote finality.

The Court also held that the Eighth Amendment entitles death row prisoners to a fair hearing at which they can present expert evidence of mental incompetence in "response to evidence solicited by the state court." 2007 U.S. LEXIS 8667, at *42. Accordingly, the Court ruled that the state court had violated Panetti's Eighth Amendment rights by failing to provide him a fair hearing at which he could present expert evidence of mental incompetence to counter the evidence presented in the report filed by court-appointed experts who determined that Panetti was competent to be executed.

Finally, the Court ruled that in order to be mentally competent for execution, death row prisoners must have a rational understanding of the state's reason for their execution. The Fifth Circuit had concluded that *Ford* created a standard that only required a court to evaluate whether a death row inmate is mentally aware of the reason the state has given for his execution. According to the Fifth Circuit, it is irrelevant whether the inmate shows that his mental illness obstructs his rational understanding of the state's reason for his execution. Although Panetti understood that the state's reason for his execution was murder, he allegedly believed that this reason was merely pretense for executing him to prevent him from preaching. The Supreme Court rejected the Fifth Circuit's standard as too restrictive, explaining that failing to determine whether Panetti could not appreciate the connection between his crimes and execution was a mistaken application of *Ford*'s holding, logic, and its substantive threshold of mental competence. The Court explained that if a death row prisoner is unable to appreciate this connection, capital punishment would not serve any retributive purpose.

Justice Thomas, joined by joined by Chief Justice Roberts and Justices Alito and Scalia, dissented. They would have held that the Court lacked jurisdiction because Panetti did not raise his claim until his second *habeas* application and failed to meet the statutory requirements for filing a successive application. They also disagreed with the Court's determination that the state court had unreasonably applied *Ford* by failing to afford Panetti adequate procedural protections, contending that Panetti had an "unlimited opportunity to submit evidence" to the state court but had failed to present enough evidence to demonstrate a "substantial threshold showing of insanity" and trigger *Ford*'s procedural protections. 2007 U.S. LEXIS 8667, at *81, *71. They argued that what Panetti sought "was not the opportunity to submit additional evidence . . . but state funding for his pursuit of more evidence." *Id.* at *83.

- ***Schriro v. Landrigan***, 127 S. Ct. 1933 (2007)

In this Texas death penalty case, the Court held, 5-4, that Jeffrey Landrigan, a death row inmate who had applied for federal *habeas corpus* relief, did not have the right to an evidentiary hearing on a claim of ineffective assistance of counsel for his counsel's failure to explore additional grounds of mitigating evidence at his sentencing. The Court held that Landrigan had waived his right to present mitigating evidence, and thus any error by his counsel was not prejudicial.

When Landrigan was sentenced for felony murder and other crimes, his counsel attempted to present the testimony of two witnesses as mitigating evidence. However, the witnesses refused to testify because Landrigan had asked them not to. The trial judge asked Landrigan whether he had instructed his lawyer not to "bring any mitigating circumstances" to the court's attention and whether he knew what that meant. Landrigan answered in the affirmative, and when asked by the trial judge whether there were mitigating circumstances that the judge should have been aware of, answered that there were not. When Landrigan's attorney attempted to offer other mitigating evidence, Landrigan interrupted and told the trial judge that he did not wish to present any of the evidence offered by his attorney and to "bring . . . on" the death penalty. 127 S.Ct. at 1938. The judge sentenced Landrigan to death.

After his petition for state post-conviction relief -- in which he alleged ineffective assistance of counsel for his counsel's failure to explore additional grounds of mitigating evidence -- was denied, Landrigan filed a federal *habeas corpus* application under 28 U.S.C. § 2254. In an opinion written by Justice Thomas and joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Alito, the Court upheld the district court's decision to deny Landrigan an evidentiary hearing on his claim of ineffective assistance of counsel, reversing the Court of Appeals' decision to remand the case for such a hearing. The Supreme Court explained that it is within the district court's discretion to grant or deny an evidentiary hearing, and that *habeas* relief is only warranted if the state court's determination was unreasonable. The Court held that if the state court's factual record refutes the factual allegations of a *habeas* petitioner, the district court is not required to hold an evidentiary hearing. The Court further held that the state court's factual record supported the district court's finding that Landrigan had knowingly instructed his counsel not to present any mitigating evidence. The Court also held that the failure of Landrigan's counsel to investigate any additional mitigating evidence was not prejudicial, because Landrigan would have undermined the presentation of any additional mitigating evidence that his attorney might have uncovered, just as he had done with the other mitigating evidence that his attorney attempted to present at his sentencing hearing.

Justice Stevens, in a dissenting opinion joined by Justices Breyer, Ginsburg and Souter, criticized the majority for assuming that Landrigan had waived his right to introduce any and all mitigating evidence that his counsel might have uncovered. The dissent contended that Landrigan's statements at the sentencing hearing "d[id] not qualify as an informed waiver under our precedents." 127 S.Ct. at 1947. According to the dissent, significant mitigating evidence showing that Landrigan suffered from a serious psychological condition, which may have explained his behavior at his sentencing hearing, was unknown at the time of his sentencing. In addition, it was due to the failure of Landrigan's counsel to conduct a constitutionally adequate investigation that the information about Landrigan's psychological disorder was not known when he was sentenced. The dissent contended that the relevant issue in this case should have been whether the undisputed inadequate investigation conducted by Landrigan's counsel prejudiced the outcome of the sentencing, which was Landrigan's only claim. Justice Stevens wrote, "[w]hile I believe that neither the Constitution nor the record supports the Court's waiver holding, [Landrigan] is at least entitled to an evidentiary hearing on this question as well as his broader claim of ineffective assistance of counsel . . . [T]he Court is wrong to decide this case before any evidence regarding [Landrigan's] instructions can be developed." 127 S.Ct. at 1952-53. "Without the benefit of an evidentiary hearing, this [determining whether Landrigan would have waived the introduction of any other mitigating evidence] is pure guesswork." *Id.* at 1944.

- ***Sole v. Wyner***, 127 S. Ct. 2188 (2007)

This case concerned the ability of plaintiffs in "fee-shifting cases," such as constitutional and civil rights cases, to recover their attorneys' fees from the defendant when they obtain a preliminary injunction but do not later secure a final judgment on the merits. In a unanimous decision written by Justice Ginsburg, the Court held that a plaintiff cannot recover attorneys' fees related to winning a preliminary injunction if the preliminary injunction is later reversed, dissolved, or otherwise undone by the final decision on the merits in the same case. Specifically,

the Court held that such a plaintiff is not a "prevailing party" within the scope of 42 U.S.C. § 1988(b) and thus not entitled to attorneys' fees from the defendant.

The Court expressly refrained from ruling on whether, absent a final judgment on the merits, a plaintiff who had been awarded a preliminary injunction may be able to recover attorneys' fees: "We express no view on whether, in the absence of a final decision on the merits of a claim for permanent injunctive relief, success in gaining a preliminary injunction may sometimes warrant an award of counsel fees." 127 S.Ct. at 2196. The Solicitor General, as an *amicus curiae*, had argued to the Court that such a plaintiff could never be considered a "prevailing party," a broad rule that would have undermined the ability of individuals whose civil and constitutional rights have been violated to obtain counsel to help vindicate their rights.

- ***Tellabs, Inc. v Makor Issues & Rights, Ltd.,*** 2007 U.S. LEXIS 8270 (2007)

In this 8-1 decision, the Court upheld the dismissal of a complaint for failure to meet the heightened pleading requirements of the Private Securities Litigation Reform Act of 1995 (PSLRA). Shareholders of Tellabs stock sued Tellabs, a manufacturer of equipment used in fiber optic cables, for allegedly deceiving the public about the true value of its stock. Under the PSLRA, individuals alleging securities fraud must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind [also referred to as scienter]." 15 U.S.C. § 78u-4(b)(2). The district court dismissed the shareholders' complaint, holding that they had insufficiently alleged that Tellabs officials had acted with scienter. The Seventh Circuit reversed in relevant part, holding that in evaluating whether the PSLRA's pleading standard is met, courts should examine all of a complaint's allegations to determine whether they establish a reasonable inference of scienter, and that the standard for determining this should be whether a "reasonable person" could infer from the complaint's allegations that a defendant had acted with the requisite state of mind.

In reversing the Seventh Circuit and affirming the dismissal of the complaint, the Supreme Court reasoned that in choosing the words "strong inference" in the PSLRA, Congress intended to require plaintiffs to plead more than sufficient facts from which a reasonable person could infer scienter. In an opinion authored by Justice Ginsburg and joined by Chief Justice Roberts and Justices Kennedy, Souter, Thomas, and Breyer, the Court held that in order to successfully allege facts giving rise to a "strong inference" of scienter, a plaintiff must plead facts rendering an inference of scienter "at least as likely as any plausible opposing inference [of nonfraudulent intent]." 2007 U.S. LEXIS 8270, at *8, *38.

Justices Scalia and Alito each wrote a separate opinion concurring in the judgment but arguing that the test for what qualifies as a "strong inference" should require an individual alleging securities fraud to plead even more facts. Justice Scalia contended that the inference of scienter should have to be more plausible than that of innocence, since that would "give ['strong inference'] its normal meaning." 2007 U.S. LEXIS 8270, at *40. Justice Scalia also criticized the majority for citing congressional committee report notes as support for its interpretation of the statute, as the Court's "frequent indulgence in the last remaining legal fiction of the West: that the report of a single committee of a single House expresses the will of Congress." *Id.* at *45. In his own concurring opinion, Justice Alito expressed disagreement with the majority's

belief that "omissions and ambiguities count against inferring scienter." *Id.* at *32. He opined that this would allow the consideration of nonparticularized inferences, even though the statute explicitly states that a court must only consider facts stated "with particularity." *Id.* at *46.

In a dissenting opinion, Justice Stevens advocated a probable cause standard which, he contended, would use a familiar legal concept, be easier to implement, and not require any comparison of opposing inferences.

- ***Uttecht v. Brown***, 127 S. Ct. 2218 (2007)

In a 5-4 decision, the Court reversed the Ninth Circuit's grant of *habeas corpus* relief to Cal Coburn Brown, who had been sentenced to death by a state court in Washington. In an opinion delivered by Justice Kennedy and joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito, the Court held that it was improper for the Court of Appeals to decide that the state trial court had violated Brown's Sixth and Fourteenth Amendment rights by improperly excusing a potential juror for indicating during *voir dire* (the examination of potential jurors before their appointment to determine their integrity and impartiality) that he would only consider the death penalty if there were a possibility that the defendant would be released and would possibly commit more crimes, even though it was made clear to the potential juror that the defendant would either be sentenced to death or imprisoned for life without possibility of parole. The majority held that deference must be given to a trial court's determination of the demeanor of a potential juror and whether he or she would be "substantially impaired" in serving as an impartial juror. The Court further held that without evidence of an abuse of discretion by the trial court, such determination should be upheld.

Justice Stevens, in a dissent joined by Justices Breyer, Ginsburg and Souter, criticized the majority for having "fundamentally redefined -- or maybe just misunderstood -- the meaning of 'substantially impaired,' and, in doing so, ha[ving] gotten it horribly backwards." 127 S.Ct. at 2244. The dissent charged that the majority had "ignore[d]" the "well-established" principle that a potential juror who believes that a life sentence should be imposed in all but the most heinous cases or even opposes the death penalty cannot be challenged for cause on such beliefs; rather, the majority "defer[red] blindly to a state court's erroneous characterization of a juror's *voir dire* testimony." *Id.* at 2239. The dissent further criticized the majority for ignoring Court precedent holding that potential jurors who oppose the death penalty may nevertheless serve as jurors in capital cases as long as they state that they are willing to temporarily set aside their personal beliefs and defer to the law. The dissent also disagreed with the majority's decision to take into account what it determined to be Brown's failure to object to the state court's decision to strike the challenged juror, explaining that Washington law did not require an objection to preserve an error for review.

Justice Breyer wrote a separate dissent to reiterate his disagreement with the majority's consideration of Brown's counsel's utterance of the words "no objection" in its analysis of whether the dismissal of the potential juror was appropriate.

- ***Wallace v. Kato***, 127 S.Ct. 1091 (2007)

In a 7-2 decision, the Supreme Court held that Andre Wallace's claim seeking damages for his unlawful arrest in violation of the Fourth Amendment was barred by the statute of limitations. In 1994, Wallace was apprehended and questioned by police about the death of a gunshot victim. He eventually signed a written confession to the shooting and a written waiver of his *Miranda* rights. Before his state court trial, Wallace unsuccessfully attempted to suppress his statements and confession as the product of an unlawful arrest. In 1998, after Wallace was convicted of and sentenced for first-degree murder, the Appellate Court of Illinois held that the officers had violated Wallace's Fourth Amendment rights by arresting him without probable cause. On August 31, 2001, after a second round of appeals, the appellate court concluded that Wallace's statements were inadmissible as a product of this Fourth Amendment violation, and the state dropped its charges on April 10, 2002. Wallace filed a lawsuit pursuant to 28 U.S.C. §1983 against the city of Chicago and several officers on April 2, 2003, seeking damages for his unlawful arrest. The District Court granted summary judgment to the city and officers, and the Court of Appeals affirmed, holding that the two-year statute of limitations period on Wallace's claim began to run at the time of his arrest, not when his conviction was set aside; therefore, his lawsuit was untimely.

In an opinion by Justice Scalia, joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito, the Court held that Wallace could not proceed with his §1983 action because he had failed to file his complaint within the statute of limitations period. The Court explained that although §1983 provides a federal cause of action, in determining the length of the statute of limitations for a claim of unlawful arrest, a court must look to the statute of limitations for personal injury torts, which in Illinois is two years. The Court further explained that, under common law tort principles, the statute of limitations period begins to run when a complainant has "a complete and present cause of action." 127 S.Ct. at 1095 (citation omitted). The Court held that, because Wallace could have filed suit as soon as he was wrongfully arrested and involuntarily detained, the statute of limitations began to run from the date of his arrest. However, the Court reasoned that a refinement had to be considered in this case and compared Wallace's claim of unlawful arrest to a cause of action for false arrest and false imprisonment. The Court acknowledged that an individual being falsely imprisoned may not be able to file suit until the false imprisonment ends but explained that false imprisonment ends when a complainant is held pursuant to legal processes, in this case when Wallace appeared before the magistrate judge and was detained until trial. Since more than two years had elapsed between Wallace's appearance before the magistrate and the time that he filed his §1983 action, the Court held that his suit was barred by the statute of limitations.

The majority also rejected Wallace's argument that *Heck v. Humphrey*, 512 U.S. 477 (1994), mandated that his claim could not accrue until the charges against him were dropped, and thus, that his suit was timely. In *Heck*, a state prisoner filed suit under §1983 raising claims which, if true, would have invalidated his conviction. The Court in *Heck* held that a §1983 plaintiff must prove that his or her conviction or sentence has been reversed, expunged, or declared invalid before bringing a claim of an unconstitutional conviction or imprisonment. In the instant case, the Court held that the *Heck* rule for deferred accrual only applies where there

exists a conviction or sentence that has not been invalidated, but, in Wallace's situation, there was no existing conviction at the time his claim accrued.

Justice Stevens wrote a concurring opinion, which was joined by Justice Souter, explaining that although he agreed with the Court's holding, he did not find it necessary to look to the Illinois statute of limitations to bar Wallace's action. He explained that the Court could have reached its decision "by a more direct route." 127 S.Ct. at 1100. According to Justice Stevens, "the crux of [Wallace's] argument" was that *Heck* provided the appropriate accrual period for his claim; however, because the *habeas corpus* remedy afforded by *Heck* was not available to Wallace (since he did not have a pending conviction), Wallace's claim could not be postponed pursuant to *Heck*.

In dissent, Justice Breyer, joined by Justice Ginsburg, argued that equitable tolling should be used in a case such as Wallace's to prevent an individual from being forced either to forego a civil claim or to litigate both civil and criminal cases at the same time. The dissent contended that the majority's rule would force criminal defendants to file §1983 suits immediately, some of which would be stayed, dismissed, or refiled and entitled to tolling. The dissenting justices suggested the use of equitable tolling from both "the time charges are brought until the time they are dismissed or the defendant is acquitted or convicted" and any time after a conviction "in which the criminal defendant challenges" it. 127 S.Ct. at 1102.

- ***Whorton v. Bockting***, 127 S.Ct. 1173 (2007)

In this unanimous decision written by Justice Alito, the Supreme Court held that its previous decision in *Crawford v. Washington*, 541 U.S. 36 (2004), did not apply retroactively to cases already final on direct review. For this reason, Marvin Bockting was not entitled to the out-of-court statement protections outlined in the *Crawford* decision.

During Bockting's trial for sexual assault of his wife's six-year-old daughter from a previous relationship, the court permitted Bockting's wife and a police officer to recount the victim's out-of-court statements about the sexual assault. After being convicted and sentenced, Bockting filed an appeal in the Nevada Supreme Court alleging that his Sixth Amendment Confrontation Clause rights had been violated by the admission of the out-of-court statements. Bockting's conviction was affirmed in 1993. A decade later, in 2004, the U.S. Supreme Court held in *Crawford* that testimony from a witness absent at trial was only permissible if the witness were unavailable and the defendant had a prior opportunity to cross-examine the witness. This holding was intended to protect individuals' Confrontation Clause rights. Thereafter, on appeal of his *habeas* petition, Bockting claimed that the *Crawford* rule should apply to his case and that his conviction should be overturned due to a violation of his Confrontation Clause rights.

The Supreme Court unanimously held that *Crawford* did not retroactively apply to Bockting's case. According to the Court, the rule in *Crawford* was a new rule (because *Crawford* was not dictated by, but inconsistent with, existing precedent), and the Court explained that, although new rules apply retroactively on direct review, new rules only apply retroactively in a collateral proceeding if the rule is substantive or a "watershed rule of criminal procedure." 127 S.Ct. at 1180 (citation omitted). After acknowledging that there was no dispute that the

Crawford rule was a procedural -- not substantive -- rule, and that Bockting's conviction was final on direct appeal a decade before *Crawford* was decided, the Court stated that the only issue was whether the new rule was a "watershed rule of criminal procedure," and held that it was not. According to the Court, the *Crawford* rule did not have a profound effect on the criminal process nor did it have a strong enough connection to the "accuracy of the factfinding process." 127 S.Ct. at 1176. Moreover, the *Crawford* rule, although important, did not effect a profound change that altered the understanding of bedrock procedural elements essential to the fairness of a proceeding.

- ***Wilkie v. Robbins,*** No. 06-219, 2007 U.S. LEXIS 8513 (2007)

In this case, the Court held that Harvey Robbins, who alleged that officials of the federal Bureau of Land Management (BLM) had relentlessly harassed and intimidated him over seven years because he refused to grant the government an easement over his land without just compensation, could not bring a civil claim against officials of the BLR for harassment and intimidation pursuant to *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), for violations of his constitutional rights, or pursuant to the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§1961-68, for extortion.

The Court unanimously rejected Robbins's RICO claim because the federal government was the intended beneficiary of the alleged racketeering activity, in this case extortion. According to the Court, the Hobbs Act (which criminalizes extortion) and RICO do not encompass federal employees who "stretch in trying to enforce Government property claims." 2007 U.S. LEXIS 8513, at *52.

In a 7-2 opinion written by Justice Souter and joined by Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, Breyer and Alito, the Court also dismissed Robbins's Fourth Amendment claim for malicious prosecution and Fifth Amendment due process claim brought pursuant to *Bivens*, holding that *Bivens* did not give him a cause of action. In *Bivens*, the Court allowed an individual whose constitutional rights had been violated to recover damages in federal court from individual federal employees because no other adequate federal remedy existed. Here, the majority held that the case could be distinguished from *Bivens* because other administrative and judicial remedies were available to Robbins for each alleged incident of harassment and intimidation by government officials at the time of their occurrence, although the majority acknowledged that these remedies would only have allowed Robbins to address each incident one-by-one. In rejecting a *Bivens* action here, the majority expressed the fear that "a general provision for tortlike liability when Government employees are unduly zealous in pressing a governmental interest affecting property would invite an onslaught of *Bivens* actions." 2007 U.S. LEXIS 8513, at *44.

Justices Thomas and Scalia joined Justice Souter's opinion in full, but Justice Thomas wrote a separate concurrence, joined by Justice Scalia, to state that they would not have extended *Bivens* here "even if its reasoning logically applied to this case." 2007 U.S. LEXIS 8513, at *54. They reiterated their belief, expressed in earlier dissenting opinions, that "*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action," and

would have restricted the application of *Bivens* and "its progeny" "to the precise circumstances that they involved." *Id.* at *54.

Justice Ginsburg wrote a dissent, joined by Justice Stevens, in which they would have held that Robbins could have brought a *Bivens* action. The dissent criticized the majority for rejecting Robbins's lawsuit despite its awareness and recognition that he did not have an effective alternative remedy for seeking redress for the ongoing alleged harassment and intimidation as a whole. According to the dissent, the issue should have been whether Robbins had a Fifth Amendment claim, which they assert he did, and then whether there was an alternative remedy for the harassment he had alleged. The dissent stated that the core holding of *Bivens* was to give a victim of a constitutional violation by a federal agent the right to recover damages from the official despite the absence of a statute conferring such right. The dissent also rejected the majority's "floodgates" argument as "veer[ing] away" from established precedent rejecting such an argument. 2007 U.S. LEXIS 8513, at *70.

- ***Winkelman v. Parma City School District***, 127 S.Ct. 1994 (2007)

In an opinion by Justice Kennedy, the Court unanimously held that parents of children with disabilities have the right under the Individuals with Disabilities Education Act (IDEA) to file an action *pro se* in federal district court (that is, acting as their own attorneys) to challenge the procedures of administrative hearings held to review their child's allegedly deficient individualized education program. The Court also unanimously held that such parents have standing to seek reimbursement from their public school district for the cost of private school enrollment and related expenditures. All of the members of the Court, except Justices Scalia and Thomas, further agreed that such parents have the right to challenge the determination of whether their child's "free appropriate public education" was inadequate. 127 S.Ct. at 2005.

In a portion of the Court's opinion from which Justices Scalia and Thomas dissented, the Court held that the IDEA grants parents all of the same independent, enforceable rights granted to their children, including the substantive right to a "free appropriate public education" for their children. The majority explained that the IDEA contemplates that parents would bring claims to assert these rights, and that its stated purpose is "to ensure that the rights of children with disabilities and parents of such children are protected." 127 S.Ct. at 2002. The majority held that the Act's reference to parents' rights had the purpose of conveying to parents the same rights that were conveyed to their children under the Act.

Justice Scalia, joined by Justice Thomas, wrote an opinion concurring in part and dissenting in part. While Justice Scalia agreed that the IDEA granted parents rights in connection with procedural and reimbursement-related matters, such as the due process and cost issues raised by the parents in this case, he did not agree that parents could proceed *pro se* when seeking a judicial determination that their child's "free appropriate public education" was inadequate. He argued that the statute granted "discrete types of rights upon parents and children" and "does not by accident confer the parent-designated rights upon children, or the child-designated rights upon parents." 127 S.Ct. at 2009. In his opinion, Justice Scalia wrote that although parents may have an interest in seeing their child receive a proper education, "there is a

difference between an *interest* and a statutory *right*." *Id.* at 2008 (emphasis in original). Only children, not their parents, possess the right to a "free appropriate public education." *Id.*

Consumer and Worker Protection

The Court's decisions this term in the area of consumer protections included a 5-4 ruling overturning a nearly 100-year-old antitrust rule and another 5-4 ruling restricting punitive damages awards.

- ***Leegin Creative Leather Products v. PSKS, Inc.,*** 2007 U.S. LEXIS 8668 (2007)

In a 5-4 decision in which Justice Kennedy wrote the Court's opinion and was joined by Chief Justice Roberts and Justices Scalia, Alito, and Thomas, the Court held that vertical price-fixing is not *per se* illegal under § 1 of the Sherman Act. In so holding, the Court overturned the 96-year-old antitrust rule set forth in *Dr. Miles Medical Co. v. John D. Park & Sons*, 220 U.S. 373 (1911), which held that agreements between manufacturers and retailers to set minimum resale prices were *per se* illegal.

In the instant case, PSKS (which operated a discount retailer store called Kay's Kloset) sued Leegin (a company that designs, manufactures and distributes leather goods and accessories) for refusing to sell to its retail stores that sold Leegin's products for amounts lower than the prices suggested by Leegin. Instead of applying the *per se* rule of *Dr. Miles*, the Court held that manufacturers are no longer *per se* barred from establishing agreements that require distributors to sell at or above a certain minimum price. According to the Court, some restraints can have pro-competitive effects and so should be judged individually "in light of the real market forces at work," while unreasonable restraints are of the type that should be prohibited. 2007 U.S. LEXIS 8668, at *17. The Court held that the *Dr. Miles* rule was "a flawed antitrust doctrine that serves the interests of lawyers . . . more than the interests of consumers -- by requiring manufacturers to choose second-best options to achieve sound business objectives." *Id.* at *49. According to the majority, *stare decisis* did not restrain it from overturning a 96-year-old decision because relevant circumstances, *i.e.*, present economic conditions, have changed.

In a dissent written by Justice Breyer and joined by Justices Stevens, Souter, and Ginsburg, the four justices criticized the majority's willingness to overturn such a longstanding precedent. The dissent rejected the majority's adoption of a "circumstance-specific 'rule of reason'" test to determine the lawfulness of a minimum resale price in place of the bright-line *per se* rule. According to Justice Breyer, "[t]he Court justifies its departure from ordinary considerations of *stare decisis* by pointing to a set of arguments well known in the antitrust literature for close to half a century. Congress has repeatedly found in these arguments insufficient grounds for overturning the *per se* rule. And in my view, they do not warrant the Court's now overturning so well-established a legal precedent." 2007 U.S. LEXIS 8668, at *56. The dissent contended that courts will have difficulty determining when the practice is harmful and helpful, and "[w]ithout such a [bright-line] rule, it is often unfair and consequently impractical, for enforcement officials to bring criminal proceedings," which "may tempt some producers or dealers to enter into agreements that are, on balance, anticompetitive." *Id.* at *71. The dissenting justices argued that "[t]he only safe predictions to make about today's decision

are that it will likely raise the price of goods at retail and that it will create considerable legal turbulence," transferring the consequences to consumers. *Id.* at *92.

- ***Long Island Care At Home, Ltd. v. Coke***, 127 S.Ct. 2339 (2007)

The Fair Labor Standards Act (FLSA) exempts from the law's minimum wage and maximum hours (overtime) rules domestic service workers who provide "companionship services" for the elderly or infirm. 29 U.S.C. § 213(a)(15). In the instant case, the Court unanimously upheld a regulation of the Department of Labor interpreting this statutory exemption to include caregivers who are "employed by an employer or agency other than the family or household using the services." 127 S.Ct. at 2344.

In an opinion by Justice Breyer, the Court held that Congress had given the Department the authority to fill in gaps in the FLSA through rules and regulations, that the Department had reasonably done so here, and that its regulation was therefore legally binding. According to the Court, the subject matter of the regulation "concerns a matter in respect to which the agency is an expert," and concerns "an interstitial matter, *i.e.*, a portion of a broader definition, the details of which . . . Congress entrusted the agency to work out." 127 S.Ct. at 2346. In upholding the regulation, the Court rejected arguments that the regulation was invalid because it conflicted with another Department regulation, that it fell outside the scope of Congress's delegation of authority, and that it had not been properly promulgated.

- ***Philip Morris USA v. Williams***, 127 S.Ct. 1057 (2007)

In this 5-4 decision, the Supreme Court held that when assessing punitive damages, a jury can consider the extent of harm suffered by nonparties to measure the "reprehensibility" of a defendant's action, and the need to punish the improper conduct and to deter its repetition. However, the Court also held that the Constitution's Due Process Clause precludes a jury from punishing a defendant for injuries or harm suffered by nonparties who could possibly, but have not yet, filed suit against the defendant, and thus prohibits an award of punitive damages that considers the harm to the greater public.

The widow of Jesse Williams brought suit in state court against Philip Morris for negligence and deceit. A jury found that Mr. Williams's death was caused by smoking, that Mr. Williams had smoked in large measure because he thought it was safe, and that Philip Morris had knowingly and falsely led him to believe this. With respect to Philip Morris's deceit, the jury awarded approximately $821,000 in compensatory damages and $79.5 million in punitive damages. The trial judge found the punitive damages award to be excessive, reducing it to $32 million, but the Oregon Court of Appeals later reinstated the larger award.

In a majority opinion authored by Justice Breyer and joined by Chief Justice Roberts and Justices Kennedy, Souter, and Alito, the Court held that punishing Philip Morris for injuries it inflicted upon nonparties or strangers to the litigation who the company had no opportunity to present a defense against violated the company's due process rights. Moreover, the Court determined that the fundamental due process concerns of risks of arbitrariness in issuing punitive damages awards -- uncertainty and lack of notice -- would be magnified by allowing a jury to

issue a punitive damages award for the uncertain injuries suffered by an unclear number of strangers to the litigation. For these reasons, the Court held that the jury award violated Philip Morris's due process rights because it punished the company for harm caused to nonparties. The Court held, however, that because conduct that risks harm to many is likely more reprehensible than conduct that only poses risks to a few, the jury may consider such harm in assessing reprehensibility. The majority stated that its holding established new precedent.

In a dissent written by Justice Ginsburg that was joined by Justices Scalia and Thomas, the three justices explained that the purpose of punitive damages awards was to punish a wrongdoer, not simply to compensate a victim. The dissent contended that the jury had done nothing more than punish Philip Morris for its conduct that was more reprehensible because it posed risks of harm to many; it had not punished the company for the actual injuries in fact sustained by nonparties. The dissent contended that because the Oregon state courts only considered the harm done to others to determine reprehensibility, the larger damages award was appropriately reinstated. Justice Thomas wrote his own dissent to reiterate his view that the Constitution does not limit the size of punitive damages awards.

Justice Stevens also disagreed with the majority and would have held that a wrongdoer could be punished for harming persons who were not before the court. He wrote in his own dissent that "punitive damages are a sanction for the public harm the defendant's conduct has caused or threatened . . . [and] harm to third parties would surely be a relevant factor to consider in evaluating the reprehensibility of the defendant's wrongdoing." 127 S.Ct. at 1066. He further stated that the Court "should be 'reluctant to expand the concept of substantive due process'" as it had in this case by announcing a new rule of substantive law. *Id.* at 1067.

- ***Safeco Ins. Co. of America v. Burr***, 127 S. Ct. 2201 (2007)

In a case involving the Fair Credit Reporting Act ("FCRA"), the Court overturned the Ninth Circuit's decision that insurance companies must notify a consumer whenever deciding not to provide the consumer the best possible insurance premium after having reviewed his or her credit report. The case involved claims brought against two insurance companies for alleged violations of FCRA's requirement that notice be given to consumers who are subjected to "adverse action" based in whole or in part on information in their credit reports. Specifically, it involved two companies who relied in part on credit scores to set insurance premiums for certain applicants at rates exceeding the best rates offered by the companies, but who did not give the applicants notice that their credit reports were factors in the companies' decisions not to offer the better rates.

All members of the Court agreed that companies are liable to consumers under FCRA for a "willful failure" to notify consumers if their failure was committed in "reckless disregard" of FCRA's notice requirement. The Court was splintered, however, as to what constituted an "adverse action" for purposes of triggering the notice requirement.

Under FCRA, an "adverse action" includes "a denial or cancellation of, an *increase* in any charge for, or a reduction . . . in the terms of coverage or amount of, any insurance, existing or applied for." 15 U.S.C. § 1681a(k)(1)(B)(i) (emphasis added). Accordingly, at issue in this

case was whether "quoting or charging a first-time premium could be considered 'an increase in any charge for . . . any insurance, existing or applied for.'" 127 S.Ct. at 1060. In an opinion written by Justice Souter, the Court held 7-2 (with Justices Thomas and Alito in the minority) that the "increase" required for an "adverse action" under FCRA should include disadvantageous initial rates for a new insurance policy given by an insurance company to a new applicant (even though there had been no prior dealing between the applicant and company), if, based on the applicant's credit report, he or she is given a policy with rates higher than the company's best initial insurance rates. In the same opinion, the Court held 7-2 (with Justices Stevens and Ginsburg in the minority) that consumers could only challenge a company's failure to notify them if the consumer would gain something if the challenge succeeded (*e.g.*, a lower insurance premium), and further held that the consideration of a consumer's credit report must be a "necessary condition" for the difference in rates for a consumer to challenge a company's notification failure. *Id.* at 2212. This same majority held that the base rate for determining whether a first-time rate is a disadvantageous increase should be the rate that a consumer without a credit report would receive, rejecting the plaintiffs' contention that the baseline should be the best possible rate available.

In an opinion concurring in part and concurring in the judgment, Justice Stevens, joined by Justice Ginsburg, expressed disagreement with the majority's decision that a company only need notify a consumer if a review of his or her credit report was a "necessary condition" for being issued a higher initial insurance rate. In their opinion, notification should be required as long as reviewing the report was a "sufficient condition" for the increase. They also disagreed with the majority's holding that the base rate for determining whether the issued rate was a disadvantageous increase should be the rate for a consumer without a credit report.

Justice Thomas, joined by Justice Alito, issued a concurring opinion stating that they agreed, for the most part, with the majority's decision but believed that the Court had improperly resolved "the merits of Safeco's interpretation," specifically, the issue of whether initial rates could be construed as an "increase" under the FCRA. 127 S.Ct. at 2218. The justices argued that the resolution of this issue was not necessary to the Court's conclusion and noted that this issue had not been briefed or argued by the parties.

Money, Politics, and Government Accountability

- ***Federal Election Commission v. Wisconsin Right to Life, Inc.,*** 2007 U.S. LEXIS 8515 (2007)

In this 5-4 campaign finance decision, the Court, divided in its reasoning, eased restrictions on issue-oriented ads broadcast within 60 days of a federal general election and 30 days of a federal primary election. Section 203 of the Bipartisan Campaign Reform Act (BCRA), 2 U.S.C. §441b(b)(2), makes it a federal crime for a corporation to use its general, non-campaign treasury funds to pay for any broadcast ad that names a federal candidate for elected office and is targeted to the electorate and aired within this time period.

The Court, in an opinion by Chief Justice Roberts that was joined by Justices Alito, Scalia, Kennedy, and Thomas, held that although *McConnell v. Federal Election Comm'n*, 540

U.S. 93 (2003), ruled that § 203 was not facially overbroad under the First Amendment, it did not purport to resolve future as-applied challenges to § 203. The Court also held that cases involving as-applied challenges to § 203, such as this case in which the anti-abortion organization Wisconsin Right to Life developed ads that urged state citizens to contact Senators Herb Kohl and Russell Feingold (who was up for re-election) and ask them to stop filibustering President Bush's judicial nominees, were within the established exception to mootness for disputes capable of repetition yet evading review. For this reason, the Court rejected the FEC's argument that the case was moot because the election had taken place and WRTL did not assert a continuing interest in running these particular ads.

Chief Justice Roberts, joined by Justice Alito, then considered whether § 203 could constitutionally be applied to WRTL's ads. In their opinion, the First Amendment's protection of free speech precludes Congress from regulating any ad unless "the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." 2007 U.S. LEXIS 8515, at *39. According to Chief Justice Roberts, the proper standard for evaluating whether § 203 can constitutionally be applied to a particular ad must be objective, focusing on the substance of the communication, not an intent-based test, and that every ad must be evaluated on a case-by-case basis. Chief Justice Roberts and Justice Alito would have held that § 203 allows the regulation of "express advocacy or its functional equivalent," but that other ads -- including issue-based ads -- can only be regulated by § 203 if application of the regulation is "narrowly tailored to further a compelling interest." *Id.* at *31, *49. According to Chief Justice Roberts's opinion, the Court "has never recognized a compelling interest in regulating ads, like WRTL's, that are neither express advocacy nor its functional equivalent." Therefore, § 203 could not constitutionally be applied to WRTL's ads, even though the Federal Election Commission had determined that the ads were a thinly veiled attack on Senator Feingold. *Id.* at *49. Chief Justice Roberts and Justice Alito took the position that WRTL's ads were consistent with genuine issue ads and not the functional equivalent of express advocacy because they concerned a legislative issue, took a position on that issue, and did not refer to any election, and the government had no compelling interest in regulating them.

Justice Scalia, joined by Justices Kennedy and Thomas, wrote an opinion concurring in part and concurring in the judgment. Although they agreed that as-applied challenges to § 203 were permissible and that WRTL's case was not moot, they contended that § 203 was unconstitutional on its face, not just as applied in this case. They also took the position that the Court should have overruled *McConnell*. In a separate concurrence, Justice Alito signaled the possibility of voting to overrule *McConnell* in the future if it "turns out that the implementation of the as-applied standard set out in the principal opinion impermissibly chills political speech." 2007 U.S. LEXIS 8515, at *59.

Justice Souter, joined by Justices Stevens, Ginsburg, and Breyer, wrote a dissenting opinion that strongly criticized the majority for departing from precedent and "effectively and, unjustifiably, overrul[ing]" *McConnell*'s holding that § 203 is facially constitutional. 2007 U.S. LEXIS 8515, at *97. According to Justice Souter, "[t]he court (and, I think, the country), loses when important precedent is overruled without good reason, and there is no justification for departure from our usual rule of *stare decisis* here." *Id.* at *144. The dissent explained that the Court in *McConnell* held that the distinction between issue advocacy and political advocacy was

meaningless, and rejected such a distinction based on an ad's use of "magic words," such as "vote" or "election." In the dissent's view, because the Court had established a new "reasonable interpretation" test that was contrary to *McConnell*'s holding and rejected an intent-effect test, it had effectively overruled *McConnell*. According to the dissent, "[a]fter today, the ban on contributions by corporations and unions and the limitation of their corrosive spending when they enter the political arena are open to easy circumvention, and the possibilities for regulating corporate and union campaign money are unclear." *Id.* at *146.

- ***Zuni Public School District No. 89 v. Department of Education***, 127 S. Ct. 1534 (2007)

The Federal Impact Aid Program provides financial assistance to local school districts whose ability to finance public education is adversely affected by a federal presence, *e.g.*, where federal land is exempt from local property taxes. The statute prohibits states from offsetting the federal aid by reducing its state aid to local districts unless the Secretary of Education finds that the state program "equalizes expenditures" among the local school districts. 20 U.S.C. § 7709. When calculating the disparity in per-pupil expenditures among the local districts, the Secretary is to "disregard" school districts "with per-pupil expenditures . . . above the 95th percentile or below the 5th percentile of such expenditures . . . in the State," in order to eliminate the outliers. § 7709(b)(2)(B)(i).

The issue in this case was whether the Secretary could identify the districts to be disregarded by looking at the number of a district's pupils in addition to the size of the district's expenditures per pupil. In a 5-4 decision written by Justice Breyer and joined by Justices Stevens, Kennedy, Ginsburg, and Alito, the Court held that the Secretary could factor in the number of students in each district in its calculation of the outliers. The Court held that the Secretary's interpretation of the statute and the applied method were reasonable in light of the statute's purpose and the plain meaning of "percentile." In a concurring opinion, Justice Kennedy, joined by Justice Alito, explained that because the plain language of the statute was ambiguous, *Chevron*'s rule of agency deference should have applied, and the Court's opinion should have been more faithful to a *Chevron* analysis.

Justice Scalia, in a dissenting opinion joined by Chief Justice Roberts and Justices Souter and Thomas, sharply criticized what he considered the majority's departure from the statutory text, contending that the Court's decision was the "elevation of judge-supposed legislative intent over clear statutory text." 127 S.Ct. at 1551. The dissent argued that the statute was clear and unambiguous and that the best indicator of congressional intent is the wording of the statute. Justice Stevens wrote a concurrence stating that "Justice Scalia's argument today rests on the incorrect premise that every policy-driven interpretation implements a judge's personal view of sound policy, rather than a faithful attempt to carry out the will of the legislature." *Id.* at 1549. Justice Stevens explained that a judicial decision may represent a policy-driven interpretation of statutory text if that interpretation faithfully corresponds to the intent of Congress.