Supreme Court Review

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It's such a pleasure to get to present a Supreme Court review with you again. Yesterday, I had the opportunity to be opinionated on topics I care a great deal about. Today as is my custom, I want to be more neutral in describing what the Supreme Court has done and what it is likely to mean to you as judges and lawyers. The only opinion that I'll express, and strongly, is I think the Supreme Court would have done better this year if they had followed the Tenth Circuit more. [Laughter and applause]

As always I want to give a statistical overview of the term. This year the Supreme Court decided seventy-five cases. That's about the same as the seventy-eight last year or the seventy-three that I had the opportunity to talk with you about when we were together two years ago. It's somewhat less than the ninety-one cases that I had to discuss with you four years ago over in Keystone and less than the ninety-three when we were together six years ago in Aspen. Much less than the 150 or even 160 in a term that was common a little more than a decade ago.

Again this term, Justices O'Connor and Kennedy were the most likely to be the swing votes on the Court. This year, of seventy-five decisions twenty-one were resolved by a five-to-four margin. In ten of those twenty-one decisions, the five Justices of the majority were Rehnquist, O'Connor, Scalia, Kennedy, and Thomas. In four of those five-to-four decisions, the Justices in the majority were Stevens, Souter, Ginsburg, Breyer, and O'Connor. Of the twenty-one five-to-four decisions, Justice O'Connor was in dissent only twice, the smallest number among any of the nine Justices and, in fact, in all but one of those cases Justice Kennedy was the majority. That means in all but one five-to-four decision, either Justice O'Connor and/or Justice Kennedy was in the majority.

This is also reflected with regard to dissents. Of the seventy-five cases, Justice Kennedy dissented just eight times, the fewest among any of the Justices. Justice O'Connor dissented nine times. To put this in some context, Justice Breyer dissented fifteen times. Justice Souter dis-

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sented seventeen times and Justice Scalia dissented twenty-one times; Justice Stevens dissented twenty-three times.

In terms of reversal rates, there were four cases from the Tenth Circuit. In three of the four, the Tenth Circuit was reversed. In *Chickasaw Nation v. United States* the Tenth Circuit was affirmed in an opinion by Justice Breyer upholding the application of federal excise taxes to Native American casinos. The Tenth Circuit was reversed in *Owesso School District v. Faldo* where the Supreme Court said that having students grade each other’s papers does not violate the Family Educational Records Privacy Act. In a case I’ll talk about in much more detail in a few moments, the *Board of Education of Independent School District No. 92 of Pottowatomie County v. Earls*, the Supreme Court reversed the Tenth Circuit and allowed random drug testing of the students as a condition for participating in extracurricular activities. In another case I’ll discuss in detail, *McKune v. Lile*, the Supreme Court reversed the Tenth Circuit and said that the state of Kansas can require that individuals admit to past sex crimes as a condition for participating in sex-offender rehabilitation, with the punishment for refusing being loss of privileges within prisons.

With that as my overview, I want to look at specific decisions in five areas. There is a handout that you should have that lists the cases in the order in which I’ll discuss them.

The first area of decisions that I want to talk about concerns criminal procedure. The interesting overall theme this year is, except for two significant death penalty cases, that law enforcement, police, and prosecutors won virtually every criminal case before the Supreme Court this term. Maybe this is a reflection of a post-9/11 consciousness in greater deference to law enforcement. Maybe it’s just a conservative Court that generally tends to side with law enforcement.

The first sub-area that I’ve listed concerns the Fourth Amendment and there are three Fourth Amendment cases listed. The first is *United States v. Arvizu*. The issue here is what’s sufficient for reasonable suspicion to exist for a police officer to stop a motorist. The facts are important to understanding the case. A car was driving on a public road in Arizona not far from the Mexico border. It was a road often used by smugglers, both drug and immigration smugglers. The officer saw the
driver and noticed that the driver did not wave to the officer. The officer noticed [Laughter] that children were in the backseat, and the children looked uncomfortable and the children were rhythmically waving. [Laughter] It was a minivan, a kind of car often used by drug smugglers. [Laughter] Based on these facts, and I’ve left out nothing significant, [Laughter] the officer decided there was reasonable suspicion and did a stop. Indeed, marijuana was found in some trunks in the backseat. The United States Court of Appeals for the Ninth Circuit said that the suppression motion should have been granted.7 The Ninth Circuit said all of these facts were innocuous and they don’t add up to reasonable suspicion.8 The Supreme Court unanimously reversed the Ninth Circuit. Chief Justice Rehnquist wrote the opinion for the Court. Chief Justice Rehnquist said that the test is reasonableness under the totality of the circumstances. Chief Justice Rehnquist said that even though these are innocuous factors, a trained police officer could add them altogether for reasonable suspicion.9

Now what’s troubling to me is these kinds of factors exist for almost any motorist just about any time. Think again of the factors. The driver didn’t wave to the police officer. [Laughter] Now I will confess to you when I am driving in Los Angeles and I see Los Angeles police officers I don’t wave at them. [Laughter] The children looked uncomfortable in the backseat. [Laughter] My kids look uncomfortable by the time we get out of the driveway. [Laughter] The kids were waving at the officer. I’ve always thought one benefit of being a parent and driving is that we don’t get to see what our kids are doing in the backseat to the cars behind us. [Laughter] It was a minivan. I don’t drive a minivan but a lot of my friends do. It was a road often used by smugglers. That’s true with every highway in Los Angeles. [Laughter] So what’s left here? Well, it was near the border, but can that really be enough? Now some have said this case does reflect the post-9/11 greater deference to law enforcement by the Supreme Court. I don’t think so. I think this is part of a trend in recent years of the Court giving law enforcement great latitude when it comes to motorists. In Whren v. United States, in 1996, the Supreme Court said pretextual stops of motorists were permissible.10 In Maryland v. Wilson that year the Court said it’s okay for officers to order passengers out of the car.11 Last year in Atwater v. City of Lago Vista the Su-

8. Id.
Supreme Court said police officers can arrest motorists even for traffic violations with no possibility of a prison sentence.\textsuperscript{12} I think this case continues that trend.

The next case involves a different medium of transportation—buses. The issue is: what’s sufficient for consent to search with regard to a bus? The case is \textit{United States v. Drayton},\textsuperscript{13} and again the facts are important. Three officers got on a bus. One sat in the bus driver’s seat. The other two went and questioned individual passengers. The officers got right in the face of the passengers. According to the lower court, the officer gets within twelve-to-eighteen inches of the faces of the passengers.\textsuperscript{14} The officers asked for consent to search. A passenger gave consent; a pat down was done and drugs were found taped to his thighs.

The question is: was this sufficient for consent? The United States Court of Appeals for the Eleventh Circuit said no. The Eleventh Circuit said that the test for consent is whether the reasonable person under the circumstances would feel free to refuse.\textsuperscript{15} The Supreme Court reversed the Eleventh Circuit. It was a six-to-three decision. Justice Kennedy wrote the opinion for the Court. Justice Stevens, Souter, and Ginsburg dissented. Justice Kennedy’s majority opinion began by saying there was no seizure here.\textsuperscript{16} The passenger was legally free to leave the bus. In fact, Justice Kennedy said other passengers in similar circumstances had chosen to leave the bus.\textsuperscript{17} Moreover, Justice Kennedy said the consent was valid.\textsuperscript{18} Following a long line of Supreme Court cases, the Supreme Court said there’s no duty on the part of police officers to inform an individual of his or her rights before asking for consent.\textsuperscript{19} The fact that somebody might feel some coercion under the circumstances doesn’t in any way vitiate the consent. Because the person was legally free to refuse that was sufficient for consent.

I think the difference here between the majority and the dissent is the difference between a formalist and a functional approach to consent. The majority says from a formal legal perspective that the person was legally free to get off the bus, legally free to refuse, but the dissent would put much more emphasis on the functional circumstances in the coercion that was present.

\textsuperscript{12} 532 U.S. 318, 354 (2001).
\textsuperscript{13} 122 S. Ct. 2105 (2002).
\textsuperscript{14} United States v. Drayton, 231 F.3d 787, 790 (11th Cir. 2000).
\textsuperscript{15} \textit{Id}. at 791.
\textsuperscript{16} \textit{Drayton}, 122 S. Ct. at 2110–13.
\textsuperscript{17} \textit{Id}. at 2113.
\textsuperscript{18} \textit{Id}. at 2113–14.
\textsuperscript{19} \textit{Id}.
The third Fourth Amendment case isn’t really a criminal case. It was decided yesterday. It was the Board of Education of Independent School District No. 92 of Pottowatomie County v. Earls.\textsuperscript{20} It involves a school district in Oklahoma that required the students who wanted to participate in extracurricular activities to submit to random drug tests.

In 1995, in Vernonia School District v. Acton,\textsuperscript{21} the Supreme Court upheld random drug testing for student athletes. There the Supreme Court emphasized the diminished expectation of privacy in the locker room.\textsuperscript{22} The Court stressed the danger of students becoming injured in athletic events.\textsuperscript{23} The Court said that the school had documented a drug problem. The Tenth Circuit declared this Pottowatomie school district drug-testing program unconstitutional, distinguishing Vernonia.\textsuperscript{24} The plaintiff here was a girl who wanted to sing in the school choir, a much less dangerous activity. [Laughter] Also there is not the same diminished expectation of privacy, and the district court had found there was not a drug problem in the school.\textsuperscript{25} So the Tenth Circuit found this unconstitutional.\textsuperscript{26}

In a five-to-four decision, the Supreme Court reversed the Tenth Circuit yesterday in a somewhat unusual split among the Justices. Justice Thomas wrote the opinion for the Court, joined by Chief Justice Rehnquist, Justice Kennedy, Justice Scalia, and Justice Breyer. Justice Thomas’s majority opinion emphasized the school’s strong interest in preventing drug use among its students.\textsuperscript{27} Justice Thomas’s opinion stressed the minimal invasion of privacy that attended such drug-testing programs.\textsuperscript{28} Justice Thomas emphasized the benefit of random drug testing rather than identifying particular students.\textsuperscript{29} Justice Thomas said when particular students are identified there’s the danger that they might be selected because they are different in some way, where random testing avoids that.\textsuperscript{30}

Justice Breyer wrote a concurring opinion. He, too, stressed the important school interest in preventing drug use. Justice Breyer’s concur-

\begin{itemize}
\item \textsuperscript{20} 122 S. Ct. 2559 (2002).
\item \textsuperscript{21} 515 U.S. 646 (1995).
\item \textsuperscript{22} Id. at 657.
\item \textsuperscript{23} Id. at 662.
\item \textsuperscript{24} Earls v. Bd. of Ed. of Tecumseh Pub. Sch. Dist., 242 F.3d 1264, 1275 (10th Cir. 2001).
\item \textsuperscript{25} Id. at 1272–73.
\item \textsuperscript{26} Id. at 1278.
\item \textsuperscript{27} Bd. of Educ. of Independent Sch. Dist. No. 92 of Pottowatomie County v. Earls, 122 S. Ct. 2559, 2567–68 (2002).
\item \textsuperscript{28} Id. at 2565–66.
\item \textsuperscript{29} Id. at 2568–69.
\item \textsuperscript{30} Id.
\end{itemize}
ring opinion, unlike Justice Thomas’s majority opinion, put great weight on the fact that students could opt out of such drug testing simply by not participating in extracurricular activities. 31 Obviously the issue after this case is: what about a drug-testing program that’s applied as a requirement to all students in the school? I see the four Justices likely to uphold that, but seemingly not Justice Breyer, the key fifth vote.

The next area that I listed concerns important decisions with regard to the death penalty. In *Atkins v. Virginia,* 32 the Supreme Court held that the execution of the mentally retarded is cruel and unusual punishment in violation of the Eighth Amendment. It was a six-to-three decision; Justice Stevens writing for the Court, with Rehnquist, Scalia, and Thomas dissenting. Justice Stevens’s majority opinion for the Court emphasized the trend against execution of the mentally retarded. When the Supreme Court first addressed the issue in the *Penry* 33 case in 1989 only two states prohibited execution of the mentally retarded. Now thirty-eight states and the federal government do not allow the execution of the mentally retarded. Justice Stevens, writing for the Court, said that this is indicative of evolving standards of decency through important Eighth Amendment analysis. 34 Justice Stevens’s majority opinion also emphasized the greater danger of executing an innocent person when there’s the death penalty for the mentally retarded. Justice Stevens pointed out that a mentally retarded individual is less able to work with counsel and more likely to make a false incriminating statement. 35

I think this latter aspect of the majority opinion has importance beyond just the holding of this case. In the last ten years, many studies have shown that innocent individuals are convicted and sentenced to death. This is the first Supreme Court case that has paid a great deal of attention to the need to administer the death penalty in a manner that minimizes the likelihood of executing an innocent person.

The next subcategory I listed concerns *Apprendi* issues. I think one of the most important criminal procedure cases in recent years was *Apprendi v. New Jersey,* 36 in 2000, where the Supreme Court held that any factor, other than a prior conviction, that leads to a sentence greater than the statutory maximum must be proven to the jury beyond a reasonable doubt. 37

31. Id. at 2571 (Breyer, J., concurring).
34. *Atkins*, 122 S. Ct. at 2252.
35. Id. at 2251–52.
37. Id. at 490.
I remember when I was with you two years ago. The first person I saw was Judge Lucero and the first thing he said to me was, "Well, does *Apprendi* apply retroactively?" And I shrugged then and the Supreme Court still hasn't definitively answered that question. Most lower courts have said that it doesn't apply retroactively. This term, though, there were three *Apprendi* cases before the Supreme Court. I've listed two of them. The one that I didn't list was *United States v. Cotton*,\(^{38}\) where the Supreme Court said an *Apprendi* challenge to an indictment for failure to state the quantity of drugs cannot be raised on appeal if it wasn't raised in the federal district court.\(^{39}\) The Supreme Court said this isn't one of the narrow category of cases where the challenge can be raised on appeal if it wasn't raised at trial.\(^{40}\)

The two *Apprendi* cases that I did list are quite significant. The first is *United States v. Harris*.\(^{41}\) The federal drug trafficking statute, 18 U.S.C. section 924(c)(1)(a), says that if a person has a firearm when engaged in drug trafficking, there's a mandatory minimum sentence of five years. If the person brandishes the weapon, there's a mandatory minimum sentence of seven years. And if the weapon is discharged, then there's a mandatory minimum sentence of ten years. In this case the federal district court judge found, as a sentencing factor, that there was brandishing of the weapon and imposed the mandatory minimum sentence of seven years. The issue before the Supreme Court was: is brandishing to be regarded as an element to the offense under *Apprendi*, so as to be proven to the jury beyond reasonable doubt, or is it a sentencing factor that can be found by the judge by a preponderance of the evidence? The Supreme Court in a five-to-four decision ruled that it is a sentencing factor that can be found by the judge. Justice Kennedy wrote the opinion for the Court. The split among the Justices is important here. He was joined by Chief Justice Rehnquist, Justice O'Connor, Justice Breyer, and Justice Scalia. Justice Kennedy's majority opinion looked at the statute and said under the statute, the way it is constructed, brandishing should be regarded as a sentencing factor, not as an element to the offense.\(^{42}\) Moreover, Justice Kennedy said that when it comes to mandatory minimum sentences, the factors that trigger mandatory minimum sentences are not ones that have to be proven beyond a reasonable doubt.

\(^{38}\) 122 S. Ct. 1781 (2002).

\(^{39}\) *Id.* at 1784–85.

\(^{40}\) *Id.* at 1785–87.

\(^{41}\) 122 S. Ct. 2406 (2002).

\(^{42}\) *Id.* at 2414.
to the jury. It’s different than factors that lead to a sentence greater than the statutory maximum under Apprendi.

Now what I think is significant about the split of Justices here is that the Justices in the majority were the four who dissented in Apprendi—Kennedy, Rehnquist, O’Connor, and Breyer—joined by Justice Scalia who had been in the majority in Apprendi. To me this suggests that Apprendi issues are likely to be closely divided, and each case is likely to depend very much on the facts and circumstances. Justice Breyer concurred here and said that he wasn’t persuaded by the majority’s distinction of Apprendi, but he thought for practical reasons it was better to leave this as a sentencing factor. He said he generally doesn’t think that mandatory minimum schemes are desirable, but he doesn’t believe that applying Apprendi would make them less likely to exist.

The other Apprendi case is Ring v. Arizona, where the Supreme Court held that the aggravating factors in a death penalty case must be proven to the jury. This was a seven-to-two decision. Justice Ginsburg wrote the opinion for the Court here. Chief Justice Rehnquist and Justice O’Connor were the dissenters. The Supreme Court unequivocally said that according to Arizona law the finding of aggravating factors is something that the jury must do. It’s not simply sentencing factors that can be done by the judge. It’s important in the handful of states that have death penalty determinations made by the judge rather than the jury.

Now the question that I struggled with in reading these opinions—and I reread them last night and still struggle with this—what’s the difference between Ring where the Supreme Court applies Apprendi and Harris where the Court distinguishes Apprendi?

I interpret Ring as saying that the requirement for the finding of aggravating factors in essence makes it a different crime from the crime where the aggravating factors are not present. That’s why the Court applies Apprendi to the death penalty. That’s why the Court overruled Walton v. Arizona. Yet, when one applies that to Harris, the Supreme Court is saying it’s the same crime whether there’s brandishing or not. And, yet, isn’t the fact that the penalty is automatically greater where there’s brandishing so it makes it really a different crime here? And I

43. Id. at 2420.
44. Id. at 2421 (Breyer, J., concurring).
45. Id (Breyer, J., concurring).
46. 122 S. Ct. 2428, 2443 (2002).
47. Id.
think lower courts are going to have to struggle with how to reconcile these two cases and the countless Apprendi issues sure to arise.

The final criminal procedure case that I listed in the Tenth Circuit is *McKune v. Lile*. The case involves a prisoner in Kansas who has been convicted of a sex offense. He was relatively close to the time for release from incarceration, and he had been moved from a maximum to a medium security prison. He was told by the prison officials that he needed to then participate in a sex-offender treatment program. He was told that in order to participate in the program, he had to admit to his prior sex offenses even though what he said could be used against him in a criminal prosecution. He was told if he refused to make those admissions he would then be transferred back to the maximum-security facility, which would mean a loss of privileges, such as family visitation and also the ability to earn greater income.

The issue: Was requiring him to make these disclosures that could be criminally used against him a violation of the Fifth Amendment, when the punishment was the loss of these privileges? The Tenth Circuit found that it was a violation of the Fifth Amendment. The Supreme Court with a five-to-four decision reversed the Tenth Circuit. Justice Kennedy wrote for a plurality of four. He was joined by Rehnquist, Scalia, and Thomas. Justice Kennedy emphasized that the state has an interest in the rehabilitation of the prisoner before release, and thus the prisoner participating in the sex-offender treatment program did not violate the Fifth Amendment. Justice Kennedy said that the test for liberty for prisoners was articulated in *Sandin v. Conner*, in 1995, whether there's a loss of a significant freedom for the prisoner, atypical to the usual conditions of confinement. Justice Kennedy said that prisoners can be transferred from medium- to maximum-security facilities even though it means a loss of privileges without that being a loss of liberty for due process purposes; therefore, it doesn't violate the Fifth Amendment here. Justice O'Connor concurred in the judgment. She emphasized that her agreement was limited to the facts of this program in this case. She said she disagreed with the plurality's use of due process analysis. She said for her the test of the Fifth Amendment is whether or not there was undue coercion put on the individual to force the person to

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50. Id. at 2026.
52. *McKune*, 122 S. Ct. at 2027.
53. Id. at 2021.
answer questions. Justice O'Connor said that the loss of privileges here, the transfer from a medium- to a maximum-security facility, wasn't sufficiently coercive to violate the Fifth Amendment. Justice Stevens wrote an angry dissent joined by the other Justices. He labeled this "a watershed ruling." Although he conceded the rehabilitative interest of the state, he said that the state was punishing people for exercising their Fifth Amendment rights. Judge Stevens said that if the state's goal was really rehabilitation, then they could require the person to answer the questions, but give the individual use-immunity so the answers couldn't be used against the person.

I think the one future issue in here is: what if a state decides that at the time of sentencing a person has two choices: admit to past drug offenses or sex offenses and go to drug-offender rehabilitation or sex-offender rehabilitation, or refuse to answer those questions and then go to prison. Is that a violation of the Fifth Amendment? I don't think you can read this case, not the plurality, not the opinion concurring the judgment, as providing any answer to that question.

The second major area that I listed concerns the takings clause and for those of you who do represent local governments or developers or do environmental work, the case is very important. It's the Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, and the issue here is: when is a moratorium on development a taking that requires just compensation?

Twenty years ago Lake Tahoe imposed a moratorium on certain development because it discovered that the development was causing algae growth and through a process called eutrophication causing the pristine clear waters to become cloudy. What was before the Supreme Court, though, was just thirty-two months of that moratorium. The Supreme Court was dealing with a landowner who for a period of thirty-two months was unable to develop the property and the issue here is: is the thirty-two month delay in development a taking that requires compensation? The federal district court found that it was not a regulatory taking because the government had acted reasonably under the circumstances. The Ninth Circuit reversed, but the Ninth Circuit en banc in a six-to-five decision reversed the panel and said it was not a regulatory taking.

54. Id. at 2033 (O'Connor, J., concurring).
55. Id. at 2033–34 (O'Connor, J., concurring).
56. Id. at 2036 (Stevens, J., dissenting).
57. Id. at 2043 (Stevens, J., dissenting).
58. Id. at 2043–45 (Stevens, J., dissenting).
Here the Supreme Court affirmed the Ninth Circuit. It was a six-to-three decision. Justice Stevens wrote the opinion for the Court; Rehnquist, Scalia, and Thomas dissented. Justice Stevens said that moratoria on development are not possessory or per se takings. He said that those require that the government confiscate or physically occupy the property and that hasn’t occurred here. As to regulatory takings, the Supreme Court said it was not holding that moratoria are always regulatory takings; nor was the Supreme Court saying that moratoria are never regulatory takings. The Court said the test is one of reasonableness; so long as the government acts reasonably then the moratorium is not a regulatory taking. Here the Supreme Court said that the government had acted reasonably. The Court pointed to a number of factors. The government had an important interest in preserving Lake Tahoe. Justice Stevens’s majority opinion stressed the need for delays in development for environmental studies, permit reviews and the like. Justice Stevens said that there also has to be consideration of the burden that’s placed on the landowner with regard to investment-based expectations. Justice Stevens said that the length of the moratorium is relevant, especially relative to the overall lifespan of the property.

I think this is a tremendous victory for local governments and environmentalists. The petitioner before the Supreme Court had said that a delay of even one day should require just compensation. Obviously, if that had been adopted by the Supreme Court it would tremendously inhibit local governments doing environmental studies and permit reviews.

The third area of cases that are listed concerns federalism. There were no decisions this term with regard to the scope of Congress’s commerce power or its authority under Section 5 of the Fourteenth Amendment, but there were four cases concerning sovereign immunity. The first is Raygor v. Regents of University of Minnesota. The issue here is: if there’s a suit against a state government in federal court and there are supplemental state law claims, is the statute of limitations tolled as to those state law claims while the matter is pending in federal court? Here are the facts. Some individuals who worked for the University of Minnesota sued it in federal court under the Federal Age Discrimination Employment Act. They also brought supplemental state law claims. While

60. Id. at 1470–73.
61. Id. at 1479–80.
62. Id. at 1489.
63. Id. at 1474–78.
64. Id. at 1483–89.
the case was pending, the Supreme Court, two years ago, decided *Kimble v. Florida Board of Regents* and held that state governments can’t be sued under the Federal Age Discrimination Employment Act. So in *Raygor*, all that remained were the supplemental state law claims. The federal district court then said using its discretion that it would dismiss them. The plaintiff re-filed the state law claims in state court. The state defendant said, but the statute of limitations is now expired under state law claims. You’re time barred. However, the federal supplemental jurisdiction statute, 28 U.S.C. section 1367(d), said that the statute of limitations is tolled on supplemental state law claims while they are pending in state law court.

The Minnesota Supreme Court found that 28 U.S.C. section 1367(d) was unconstitutional. It is not often that state courts find federal statutes unconstitutional. The Supreme Court, in a six-to-three decision, affirmed. Justice O’Connor wrote for the Court; Stevens, Souter, and Breyer dissented. Justice O’Connor said that if section 1367(d) were interpreted to apply to supplemental state law claims against state governments, it would raise serious constitutional questions. The Court has to interpret statutes to avoid constitutional doubts. So the Court said it would interpret section 1367(d) to not apply to supplemental claims against state governments.

For those of you who are lawyers, if you bring claims against state governments in federal court, this decision is likely to mean that you face difficult choices. Imagine that the statute of limitations is about to expire under state law claims. What do you do? Do you take your chances that the federal court will hear them? Do you file a simultaneous suit in state court with your state law claims knowing whichever court decides first has claim preclusion against the other? Do you give up the federal forum and just file in state court?

For those of you who are federal district court judges, this case is going to present for you some difficult choices. Imagine that you dismissed the federal claims so all that remain are supplemental state law claims, and you know that they are now time barred and can’t be filed in state court. Should that effect your discretion under section 1367 as to whether you hear or dismiss this claim?

The second case, with regard to sovereign immunity, is *Federal Maritime Commission v. South Carolina State Ports Authority*. The

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68. Id. at 542–43.
issue here is: does a state have sovereign immunity that protects it from being sued in federal administrative agency proceedings? The Eleventh Amendment to the Constitution only bars suits against state governments in federal court. In *Alden v. Maine*, in 1999, the Supreme Court said that sovereign immunity is broader than the Eleventh Amendment, and state governments cannot be sued in state court, even on federal claims, without their consent. This case involves a shipping company that wanted to use berths in ports in South Carolina. It claimed that its denial of use of the facilities was discriminatory and it initiated proceedings before the Federal Maritime Commission. The South Carolina State Ports Authority said it had sovereign immunity and couldn’t be sued there.

The Supreme Court in a five-to-four decision agreed with the South Carolina State Ports Authority and held that sovereign immunity bars suits against states and federal agencies. Justice Thomas wrote the opinion for the Court here. As in all the recent sovereign immunity cases, the other Justices in the majority were Rehnquist, O’Connor, Scalia, and Kennedy. Justice Thomas said that sovereign immunity is about protecting the dignity of state governments. He said that it would be an affront to the dignity of the states to allow them to be sued in federal agencies without their consent. Justice Breyer wrote a lengthy dissent. He said agencies are exercising administrative power, executive authority. He said even if he agreed with all of the sovereign immunity decisions, and he didn’t, still here the executive power should be able to be used against the state.

The third sovereign immunity case was *Lapides v. Board of Regents of University System of Georgia*. Broadly stated the issue here is: if a state chooses to remove a case from state to federal court, is that a waiver of sovereign immunity? The Tenth Circuit in *Sutton v. Utah State School for Deaf and Blind* has said yes. Now the actual holding by the Supreme Court here is narrower than that. What was involved was a section 1983 suit against the University of Georgia with supplemental state law claims against state officials. It was removed by the Attorney General of Georgia to federal court. The section 1983 suit got dismissed because state governments can’t be sued under section 1983. So all that remained were state law claims. It turns out that Georgia had consented

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70. 119 S. Ct. 2240, 2246 (1999).
71. *Id.* at 2262.
73. *Id.* at 1882 (Breyer, J., dissenting).
74. *Id.* at 1881–82 (Breyer, J., dissenting).
75. 122 S. Ct. 1640 (2002).
76. 173 F.3d 1226 (10th Cir. 1999).
to be sued on these state law claims in state court. The Supreme Court unanimously ruled in an opinion by Justice Breyer that when it comes to state law claims against a state, where a state has waived sovereign immunity, then removal from state to federal court is a waiver.\textsuperscript{77} I think, though, this case has a broader significance than that. I think what the Supreme Court is saying here—and saying unanimously—is if it's the state government that chooses to invoke the federal forum, then it's a waiver of sovereign immunity. I know there are bankruptcy judges and bankruptcy lawyers here. One place where this will arise is with section 106(b) of the bankruptcy code, which says that the filing of proof of claim by the state is a waiver of sovereign immunity. I think this case clearly indicates that section 106(b) because it's the state that's invoking federal jurisdiction.

The final federalism case that I've listed here is \textit{Verizon Maryland, Inc. v. Public Service Commission of Maryland}.\textsuperscript{78} As the case was presented to the Supreme Court it was about the issue of whether or not a state's choice to participate in a federal regulatory program is a waiver of sovereign immunity. Specifically, the question is whether a state's protection under the Telecommunications Act is a waiver of its sovereign immunity. The Tenth Circuit has said yes with regard to that very statute. But as the Supreme Court decided the case, it focused on a different issue. The Supreme Court in an opinion by Justice Scalia said that the state officers here could be sued for injunctive relief for violating the federal law, so there was no need to reach the other questions.\textsuperscript{79} The Supreme Court strongly reaffirmed that under \textit{Ex Parte Young},\textsuperscript{80} state officers may be sued for injunctive relief when it's alleged that they've violated a federal statute.\textsuperscript{81}

The fourth major area of cases concerns the First Amendment. Initially, as to speech cases, the first sub-grouping concerns sexual speech. The first case is \textit{Ashcroft v. Free Speech Coalition}.\textsuperscript{82} Congress amended the Child Pornography Prevention Act to include within the definition of child pornography material that uses adults who are child-like in appearance and also to include computer-generated images of children. And the question here is: can the government prohibit non-obscene child pornography that doesn't use children in its production? The Supreme

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\item \textsuperscript{77} \textit{Lapides}, 122 S. Ct. at 1646.
\item \textsuperscript{78} 122 S. Ct. 1753 (2002).
\item \textsuperscript{79} \textit{Id. at} 1760--61.
\item \textsuperscript{80} 209 U.S. 123 (1908).
\item \textsuperscript{81} \textit{Verizon Maryland}, 122 S. Ct. at 1761.
\item \textsuperscript{82} 122 S. Ct. 1389 (2002).
\end{itemize}
Court in a six-to-three decision declared this unconstitutional. Justice Kennedy wrote the opinion for the Court; Chief Justice Rehnquist, Justice Scalia, and Justice O'Connor dissented. Justice Kennedy said that when it comes to non-obscene child pornography the government's interest is preventing children from being used in its production. If there are no children, then the government doesn't have a sufficient interest to justify prohibiting the material. Justice Kennedy said that this law could be used against many movies that explore issues of teenage sexuality, even against productions of Romeo and Juliet.

The next freedom of speech case was one of the more closely watched decisions of the term but it didn't decide very much. The case is Ashcroft v. ACLU. In 1996 Congress enacted the Communication Decency Act, which made it a federal crime to knowingly transmit indecent material over the Internet in a manner accessible to a minor. In 1997, in Reno v. ACLU, the Supreme Court declared this unconstitutional. Congress then passed the Child Online Protection Act. It applies only to commercial web sites. It requires age verification. It applies if the material would appeal to the interest of a minor as defined by contemporary community standards and requires that the material be offensive. The federal district court found this law unconstitutional on many grounds. The Third Circuit affirmed on one ground. The Third Circuit said that the phrase "contemporary community standards" was unduly vague. The Supreme Court reversed the Third Circuit. Justice Thomas wrote the opinion for the Court. Justice Thomas said that the phrase "contemporary community standards," is a longstanding part of the Supreme Court's obscenity jurisprudence. Miller v. California, in 1973, uses that language. But the Court kept in place the injunction against enforcement of the Child Online Protection Act and remanded the case back to the Third Circuit for consideration of other issues.

There were a number of other opinions in the case debating a fascinating issue that wasn't resolved. How is the phrase "contemporary community standards" to be applied for a national medium like the Internet? Justice Breyer said we have to look to the community being the

83. Id. at 1401.
84. Id. at 1400.
86. 117 S. Ct. 2339 (1997).
89. Reno, 122 S. Ct. at 1707.
entire nation, not just local.91 Other Justices said it should be a local, not a national standard.92 That’s obviously left to be litigated and resolved in the future.

The third sexual speech case, which also doesn’t resolve a lot, is City of Los Angeles v. Alameda Books, Inc.93 Local governments have long had zoning ordinances regulating the location of adult bookstores and movie theaters. You might remember the case in the 1970s, Young v. American Mini Theaters, Inc., where the Supreme Court upheld the Detroit zoning ordinance limiting the number of adult bookstores and movie theaters that can be on any city block, based on the city’s interest in preserving the character of the neighborhoods.94 You might remember the more recent case, City of Renton v. Playtime Theaters, Inc. where the Court upheld a zoning ordinance that required that all the adult bookstores and movie theaters be in a small area of the city, occupying less than five percent of the city.95 The Supreme Court upheld these again based on the city’s interest in stopping the undesirable secondary effect of adult-entertainment establishments.

The City of Los Angeles adopted a zoning ordinance that limited the number of adult businesses that could be on a city block. Then Los Angeles amended the ordinance to say there could not be two adult businesses in the same building structure. For example, there could not be an arcade and an adult bookstore in the same building structure. The United States Court of Appeals for the Ninth Circuit declared this unconstitutional. The Ninth Circuit said that the city’s justification for the law is preventing undesirable secondary effects, but there’s no evidence that two adult businesses in one building cause more undesirable secondary effects than one adult business in the building.96

The Supreme Court reversed the Ninth Circuit, but without a majority opinion. Justice O’Connor wrote for a plurality of four. She was joined by Rehnquist, Scalia, and Thomas. Justice O’Connor’s plurality opinion said that there’s a 1977 study in Los Angeles that shows that adult businesses cause undesirable secondary effects like prostitution crimes, drug crimes, and that’s all that Los Angeles needs to point to for this ordinance.97 Justice Kennedy concurred in the judgment. He said that he believed that the study was enough to get the city past summary

91. Reno, 122 S. Ct. at 1715 (Breyer, J., concurring).
92. Id. at 1719 (Kennedy, J., concurring).
95. 475 U.S. 41 (1986).
judgment, but now there has to be a trial where the city has to prove that
two adult businesses in the same structure cause more undesirable second-
dary effects than one.98 So it’s somewhat of a victory for local govern-
ments. It says they get past summary judgment without needing specific
proof, but since Justice Kennedy wouldn’t go along it still means there
has to be a trial in order for the city to prevail.

The second sub-area with regard to speech that I listed concerns
door-to-door solicitation. The case is *Watchtower Bible and Tract Soci-
ety of New York, Inc. v. Village of Stratton.*99 A city in Ohio said that in
order for a person to do door-to-door solicitation, the individual needed
to get a permit from the mayor. The Sixth Circuit upheld this based on
the city’s interest in preventing crime. The Supreme Court, in an eight-
to-one decision, declared this unconstitutional. Justice Stevens wrote for
the Court. Chief Justice Rehnquist was the sole dissenter. Justice Ste-
vens said there’s a long line of cases, mostly involving Jehovah’s Wit-
nesses, that protect the ability to do door-to-door solicitation.100 Justice
Stevens said that solicitation is speech protected by the First Amend-
ment.101 Justice Stevens said to require a permit from the mayor violates
the First Amendment under these circumstances.102 The city has an in-
terest in preventing crime, but it can do so in much more narrowly tai-
lored fashions.103 For example, individuals can post on their doors “no
solicitation,” and the city can enforce that. The police can monitor the
neighborhoods for crime, but a city can’t require a permit for door-to-
door solicitation.

The final speech case, decided yesterday, was *Republican Party of
Minnesota v. White.*104 There are provisions in the Code of Judicial Con-
duct that bar candidates from judicial office from saying certain things.
What was involved here was the provision of the Code of Judicial Con-
duct, which says candidates for judicial office can’t make statements
about disputed legal or political issues. This is one of the hardest cases
of the time. On the one hand, this is a content-based restriction of politi-
cal speech. Something the Court never allows. On the other hand, it’s
obvious the government has an interest in preserving judicial independ-
ence and the appearance of impartiality. Can you imagine the commer-
cials that there are going to be?

98. *Id.* at 1743–44 (Kennedy, J., concurring).
100. *Id.* at 2086.
101. *Id.* at 2088.
102. *Id.*
103. *Id.* at 2090–91.
In a five-to-four decision, the Supreme Court yesterday declared this restriction on speech unconstitutional. In an unusual split among the Justices, Justice Scalia wrote the opinion for the Court, joined by Rehnquist, O'Connor, Kennedy, and Thomas. Justice Scalia stressed that this is a content-based restriction on political speech.\footnote{Id. at 2534.} Justice Scalia conceded that the government has a compelling interest in preserving the impartiality of the judiciary, but said that the means here are not sufficiently narrowly tailored.\footnote{Id. at 2535.} He questioned whether limiting the statements about disputed issues preserves judicial independence in a meaningful way. Justice Scalia said, in essence, that the government by having judicial elections has chosen to make judges into politicians and by making this choice it can't keep politicians from informing voters of their views.\footnote{Id.} Now there's another provision in the Code of Judicial Conduct that says that candidates for judicial offices can't make pledges or promises for conduct in office. That was not ruled on by the Supreme Court yesterday.

I thought one of the more interesting aspects of the decision was Justice Ginsburg's dissent. She pointed out that when Justice Scalia faced confirmation, that he refused to talk to the Senate Judiciary Committee even about his views with regard to \textit{Marbury v. Madison}.\footnote{Id. at 2558 n.4 (Ginsburg, J., dissenting).}

The final First Amendment case that I've listed is what I regard as the most important case of the term. It's \textit{Zelman v. Simmons-Harris}.\footnote{122 S. Ct. 2460 (2002).} It involves the constitutionality of the Ohio voucher program in the Cleveland Public Schools. The United States Court of Appeals for the Sixth Circuit declared this unconstitutional. The Sixth Circuit said that the way the program was structured; it gave parents an incentive to send their children to parochial schools.\footnote{Simmons-Harris v. Zelman, 234 F.3d 945, 948–50 (6th Cir. 2000).} The vouchers could not be used in the Cleveland Public Schools themselves. It could only be used outside of Cleveland Public Schools if those school districts consent to it, and none did. It turns out that eighty-three percent of all the schools participating were parochial schools and ninety-six percent of all the parents participating were using their vouchers in parochial schools. The Sixth Circuit said that it resulted in the impermissible effect of advancing religion.
The Supreme Court, in a five-to-four decision, reversed the Sixth Circuit and upheld the constitutionality of this voucher program. Chief Justice Rehnquist wrote the opinion for the Court. Chief Justice Rehnquist stressed that the government had the permissible secular purpose of improving education. Chief Justice Rehnquist said that the program was neutral, and that it was parents who chose where to use the vouchers.\textsuperscript{111} It was the parents’ choice to use them in parochial schools. The program was neutral because it allowed the parents a range of options. Indeed, Justice O’Connor wrote separately and stressed the range of options that were available to parents in the Cleveland schools.\textsuperscript{112} Justice Thomas, in a concurring opinion, lamented the quality of inner city schools and questioned the application of the Establishment Clause to the state.\textsuperscript{113} In a strong dissenting opinion, Justice Breyer said that this is in kind different from any aid to parochial schools that have previously been allowed.\textsuperscript{114} This is the government using its dollars to subsidize religious indoctrination.\textsuperscript{115} Justice Breyer lamented over the likelihood of social divisions over religion.\textsuperscript{116}

I think the Court’s willingness to uphold this voucher program, where ninety-six percent of the vouchers were used in parochial schools, is a strong indication that the vouchers are not likely to be litigated much in the future with regard to the Establishment Clause. Now it’s likely to be a political issue or one to be litigated under state constitutions.

The final area of cases that I’ve listed, and I’ll just talk about them briefly, concerns civil rights statutes. I did not include the Americans with Disabilities Act cases because there was a special panel about that yesterday. They are also cases that are easy to summarize: plaintiffs in ADA cases lose.

I did list four civil rights statutory cases that I’ll briefly mention. The first is \textit{Swierkiewicz v. Sorema.}\textsuperscript{117} It’s a case that didn’t make headlines, but is very important. It concerns the permissibility of heightened pleading requirements in civil rights cases. In the 1980s and even in the 1990s, many circuits required heightened pleading, in section 1983 cases, in environmental cases, securities cases and so on. In 1993, in \textit{Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit}, the Supreme Court said there was no heightened pleading requirement al-

\begin{footnotes}
\footnote{Zelman, 122 S. Ct. at 2467.}
\footnote{Zelman, 122 S. Ct. at 2477–80 (O’Connor, J., concurring).}
\footnote{Id. at 2482–84 (Thomas, J., concurring).}
\footnote{Id. at 2507 (Breyer, J., dissenting).}
\footnote{Id. at 2507–08 (Breyer, J., dissenting).}
\footnote{Id. at 2505 (Breyer, J., dissenting).}
\footnote{534 U.S. 506 (2002).}
\end{footnotes}
ollowed in section 1983 suits against local governments. But still many circuits required heightened pleading in suits against individual officers.

In *Sorema*, there was a Title 11 suit and the Second Circuit said that there needs to be facts pled that would show the prima facie case. The Supreme Court unanimously reversed the Second Circuit. Justice Thomas wrote the opinion for the Court. The Supreme Court emphatically said: No heightened pleading requirements except where the Federal Rules of Civil Procedure provide for them, which are cases underlying fraud or mistake, or if there's a federal statutory provision that requires it. I don't think that the Court could have been clearer.

The second civil rights statutory case concerns the Prison Litigation Reform Act. It's *Porter v. Nussle*. The Prison Litigation Reform Act said that prisoners must exhaust administrative remedies before bringing suit about prison conditions. This case involved an individual prisoner who claimed that he was subjected to excessive force by prison guards. The Second Circuit said that there is no need to exhaust here because a claim of individual mistreatment is not about prison conditions. The Supreme Court reversed the Second Circuit in an opinion by Justice Ginsburg. Justice Ginsburg said that there is no distinction to be drawn for exhaustion purposes between a claim by an individual prisoner for mistreatment and an overall claim with regard to how the prisoners are treated. I put this case together with *Booth v. Churner* from last year, where the Supreme Court held in an opinion by Justice Souter that prisoners seeking money damages must exhaust administrative remedies even if the administrative remedies can't provide money so long as they can supply something of value. I see these cases indicating that the Supreme Court is taking very seriously and enforcing very aggressively the exhaustion requirement of prison litigation reform.

The third case is *Gonzaga University v. Doe*. The specific issue decided by the Supreme Court is whether section 1983 can be used to enforce the Family Educational Records Privacy Act. This law limits the ability of schools to release personal information. The Court held that section 1983 could not be used to enforce this law. I think the larger significance of the case is that Chief Justice Rehnquist's majority opinion clearly seems to want to limit the ability to bring suits to enforce statutes

120. 534 U.S. 516 (2002).
121. *Nussle v. Willete*, 224 F.3d 95, 100 (2d Cir. 2000).
adopted by Congress under its spending power. The Court says that such statutes can be enforced under section 1983 only if there is an enforceable right under cases concerning whether there is an implied right of action. This could well jeopardize enforcement of the Social Security Act, Medicare and Medicaid law, and other spending statutes. The specific holding, though, is only about the Family Education Records Privacy Act.

The final case on the list, a very important decision from yesterday, is Hope v. Pelzer. It involves how qualified immunity is defined. In 1982, in Harlow v. Fitzgerald, the Supreme Court said that officers have qualified immunity unless they violate clearly established law that a reasonable officer should know. How is it determined if there is clearly established law that a reasonable officer should know? Does there need to be a case on point? This case involved prison guards who tied a prisoner to a hitching post. They left him in the sun for almost seven hours. They didn't provide him water, though in front of him they gave water to their dogs. They didn’t give him access to the bathroom. The United States Court of Appeals for the Eleventh Circuit said that the prison guards here violated the Constitution, but the Eleventh Circuit said that the prison guards had qualified immunity because there was no case on point that said that the hitching post was unconstitutional.

The Supreme Court in a six-to-three decision reversed. Justice Stevens wrote for the Court. Chief Justice Rehnquist, Justice Scalia, and Justice Thomas dissented. Justice Stevens said that the officers here did not have qualified immunity because they had fair notice that what they did was unconstitutional. That now seems to be the key for determining whether there is clearly established law that the reasonable officer knows. Did the officers have fair notice? Would the reasonable officers under the circumstances know that the conduct was impermissible? I think the case is crucial in saying there doesn’t have to be a case on point.

So that's the Supreme Court term in forty-five minutes. It was an important term, and next year promises to be even more superior.

[Applause.]