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FUTURE LEGAL PRECEDENT:
A PREVIEW OF THE SUPREME COURT'S 2006-2007 TERM

MICHAEL E. HAMMOND

PREFACE

For many years, the National Legal Center has published a preview of cases to come before the Supreme Court each Term. The press, corporate counsel, academics, and interested citizens have come to rely on this publication as an important source of information.

This *Briefly* . . . by Michael Hammond offers readers interesting insights into the Roberts' Court with the addition of Justice Alito and the cases that make up the 2006-2007 docket.

Like all other publications of the National Legal Center, this book is presented to encourage greater understanding of legal issues, legal procedures, and the law. The views expressed in this monograph are those of the author and do not necessarily reflect the opinions or positions of the advisers, officers, or directors of the National Legal Center. This publication is presented purely as an educational public service.

Richard A. Hauser
President
National Legal Center

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NATIONAL LEGAL CENTER
FOR THE PUBLIC INTEREST
1776 K Street, N.W., 8th Floor
Washington, D.C. 20006
Tel: (202) 466-9360
Fax: (202) 466-9366
E-mail: info@nlcpi.org
Please visit our Web site at: www.nlcpi.org

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FUTURE LEGAL PRECEDENT:

A PREVIEW OF THE SUPREME COURT'S 2006-2007 TERM

MICHAEL E. HAMMOND

INTRODUCTION

Herein, we offer this preview of the U.S. Supreme Court's 2006-2007 Term—with an earlier cut-off date than previous years and, hence, somewhat fewer cases to look at.

Again this year, we are choosing to tell you what may happen—rather than what did happen. We do this under the assumption that it's more important to see the train barreling toward you than to watch it moving away.

And, intellectually—as anyone who has ever watched television reality shows (*American Idol*, *America's Got Talent* [sic], etc., etc.) knows—the selection process is infinitely more interesting (and more revealing) than who the winners are.

Since *Engel v. Vitale* outlawed prayer in the public schools, outrage and resentment toward the Supreme Court has been a "brooding omnipresence" in American life. The difference is that the class of people who love the courts—and the class of people who hate them—are currently in the process of switching seats.

In adjudicating the thirty cases that follow, the Warren Court would have started by at least giving a nod to the potential policy implications of the Court's options. Less so, this Court.

Rather, the Rehnquist Court—and now the Roberts Court— hones in on specific statutory words—analyzing them lovingly and then using frequently unspoken policy considerations to define them in counterintuitive ways.

Ah, progress!

So—prefacing our preview with just a little background—what did we learn from the Roberts Court last Term? We learned, in the Supreme Court's love for resolving cases by lexicography:

- that "may" may or may not mean "may";
- that "sale or exchange" definitely doesn't mean "sale or exchange"; and
- that nobody knows what the heck "adjacent" means.

What does all this say about the Court?

Like any topic with no ascertainable answer—and probably no answer at all—there are no shortages of opinions.

Richard A. Epstein, writing on situational constitutionalism in the *Wall Street Journal*, posits that "[t]he court's two wings share one trait: They defer only to the government officials they trust."

If this were true, it would mean that Scalia, Thomas, Roberts, and Alito defer to the big, nasty government bureaucrats they like—and no others. Ginsburg, Breyer, Souter, and Stevens defer to the big, nasty government bureaucrats they like—and no others. And Kennedy, presumably, has never met a big, nasty government bureaucrat he doesn't like. Hence, bureaucracy reigns.

And right in the center of this clash of competing deferences is John Roberts, whose self-professed mission—at least as he explained it to the Senate—is to create "tranquility" and consensus in the Court by reducing each case to legal esoterica.

But the problem is that, on the road to Tranquility, Roberts turned right at the *Rumsfeld v. Forum for Academic and Institutional Rights* case, when he should have gone straight.

And, as much as the gullible Senate was awed by the proposition that legal obscurity would produce consensus, this is hardly a new idea—and hardly one that has worked particularly well in the past.

William Rehnquist was king of the legal cul de sac, which he navigated with proficiency—although often without the other eight justices onboard. Whether Roberts will show more or less ability in pursuing the same avowed mission remains to be seen.

THE BIG PICTURE

STATISTICAL OVERVIEW

Number of Cases Broken Down by Lower Court

Total Number of Cases (2006-2007)	30
Total Federal Circuit Courts of Appeals Cases	27

	2006-2007 Term by Aug. 11	2005-2006 Term by Oct. 17
Original Jurisdiction	0	0
First Circuit (Me., Mass., N.H., Puerto Rico, R.I.)	1	2
Second Circuit (Conn., N.Y., Vt.)	1	6
Third Circuit (Del., N.J., Pa., Virgin Islands)	0	2
Fourth Circuit (Md., N.C., S.C., Va., W. Va.)	1	3
Fifth Circuit (La., Miss., Tex.)	1	1
Sixth Circuit (Ky., Mich., Ohio, Tenn.)	4	6
Seventh Circuit (Ill., Ind., Wis.)	1	2
Eighth Circuit (Ark., Iowa, Minn., Mo., Neb., N.D., S.D.)	2	2
Ninth Circuit (Alaska, Ariz., Cal., Haw., Idaho, Mont., Nev., Or., Wash.)	9	15
Tenth Circuit (Colo., Kan., N.M., Okla., Utah, Wyo.)	0	3
Eleventh Circuit (Ala., Fla., Ga.)	3	4
D.C. Circuit	2	1
Federal Circuit	2	2
Federal District Courts	0	1
State Courts	3	10
Total	30	60

Cases Broken Down by Subject Matter

The categories in cases dealing with multiple issues represent an attempt to identify the dominant issue.

	2006-2007 Term by Aug. 11	2005-2006 Term by Oct. 17
Abortion	2	1
Administrative Law	2	1
Antitrust	2	4
Arbitration		1
Bankruptcy	1	0
Civil Rights	3	3
Criminal Law (incl. immigration and civil RICO)	11	19
Due Process/Punitive Damages	1	1
Elections	0	0
Environmental Law	2	3
Federal Preemption	1	1
Fifth Amendment	0	0
First Amendment	0	6
Health (ERISA, Medicaid, Social Security)	0	2
Indian Affairs	0	1
Intellectual Property	2	0
Interstate and International Commerce	0	0
Jurisdiction of the Federal Courts	0	5
Labor Law	0	2
Securities Law	0	1
Sovereign Immunity (and the Eleventh Amendment)	0	7
Taxation	0	2
Telecommunications	2	0
Torts	1	0
Water Rights	0	0
Total	30	60

CASES CURRENTLY SLATED TO BE HEARD IN THE 2006-2007 TERM (in alphabetical order)

Ayers v. Belmontes
No. 05-493
from the Ninth Circuit Court of Appeals

In connection with California's "unadorned factor (k)"—a catch-all provision allowing the jury to consider a broad range of mitigating evidence in deciding whether to impose the death penalty—did the trial court in this case err in refusing to emphasize in its instructions the breadth of mitigating evidence that could be considered?

Bell Atlantic Corp. v. Twombly
No. 05-1126
from the Second Circuit Court of Appeals

Did the large telecommunications companies violate, *inter alia*, the Clayton and Sherman Antitrust Acts by conspiring not to compete against one another in their respective markets for local telephone and high-speed Internet services—and to prevent competitors from entering those markets?

BP America Production Company v. Burton
No. 05-669
from the D.C. Circuit Court of Appeals

Does the federal six-year statute of limitations for actions for monetary damages founded upon a contract apply to administrative orders?

Burton v. Waddington
No. 05-9222
from the Ninth Circuit Court of Appeals

Is the Court's holding in *Blakely v. Washington*, 124 S. Ct. 2531 (2004)—that factors resulting in enhanced statutory sentencing must be proven beyond a reasonable doubt—retroactive?

Carey v. Musladin
No. 05-785
from the Ninth Circuit Court of Appeals

Did the Ninth Circuit exceed its authority in overturning a murder conviction on the grounds that three family members wore buttons to court depicting the deceased?

Cunningham v. California
No. 05-6551
from the California Court of Appeal, 1st Appellate District

Does California's Determinate Sentencing Law violate the Sixth and Fourteenth Amendments because it allows judges to impose enhanced sentences based on facts not found by a jury or conceded by the defendant?

Environmental Defense v. Duke Energy Corp.
No. 05-848
from the Fourth Circuit Court of Appeals

Does section 307(b) of the Clean Air Act divest the courts of jurisdiction over "enforcement actions" regarding EPA regulations implementing the act—requiring, instead, that aggrieved parties file petitions for review—and, assuming the courts have jurisdiction, does the act require the EPA to interpret the term "modification" more consistently than it did?

Global Crossing Telecommunications, Inc. v.
Metrophones Telecommunications, Inc.
No. 05-705
from the Ninth Circuit Court of Appeals

Does section 201(b) of the Communications Act of 1934 create a private cause of action allowing pay phone operators to sue long-distance carriers for violation of federal rules dealing with compensation for coinless pay phone calls?

Gonzales v. Carhart
No. 05-380
from the Eighth Circuit Court of Appeals

Is the federal ban on partial birth abortions unconstitutional because, *inter alia*, it lacks a "health of the mother" exception?

Gonzales v. Planned Parenthood Federation of America
No. 05-1382
from the Ninth Circuit Court of Appeals

Is the federal ban on partial birth abortions unconstitutional because, *inter alia*, it lacks a "health of the mother" exception?

James v. United States
No. 05-9264
from the Eleventh Circuit Court of Appeals

For purposes of the severely enhanced sentences under the federal Armed Career Criminal Act, do all convictions for attempted burglary in Florida qualify as "violent felonies"—thereby invoking the act's sanctions?

Jones v. Bock/Williams v. Overton
No. 05-7058/05-7142
from the Sixth Circuit Court of Appeals

Under the 1995 Prisoner Litigation Reform Act—designed to limit frivolous prisoner civil rights suits—(1) must the prisoner allege in his claim how he has exhausted all other remedies (or attach proof), (2) is the prisoner's civil rights suit barred by a single unexhausted claim, even though the prisoner has exhausted his remedies on other claims, and (3) is the right to bring a civil rights suit against a particular defendant precluded if the prisoner failed to name that defendant in the grievance he used to exhaust his remedies?

KSR International Co. v. Teleflex, Inc.
No. 04-1350
from the Court of Appeals for the Federal Circuit

Can an invention be held to be "obvious" and therefore unpatentable in the absence of a "teaching, suggestion, or motivation" that would have led a person with skill in that area to come up with the invention—or is "teaching, suggestion, or motivation" only one of a series of considerations for determining whether an invention is "obvious" and therefore unpatentable?

Lawrence v. Florida
No. 05-8820
from the Eleventh Circuit Court of Appeals

Under what circumstances is the one-year statute of limitations for postconviction and collateral relief for a death row inmate tolled?

Ledbetter v. Goodyear Tire & Rubber Co.
No. 05-1074
from the Eleventh Circuit Court of Appeals

In a "disparate pay" Title VII sex discrimination case challenging the legality of a facially neutral compensation system, may the plaintiff challenge pay decisions made prior to the last decision immediately preceding the start of the statutory limitations period?

Lopez v. Gonzales/Toledo-Flores v. United States
Nos. 05-547/05-7664
from the Eighth Circuit Court of Appeals/from the Fifth Circuit Court of Appeals

When an immigrant commits a drug offense that is classified as a felony under state law—and that in fact resulted in a prison term in excess of a year—is the offense an "aggravated felony," even though federal law would normally regard it as a misdemeanor?

Marrama v. Citizens Bank of Massachusetts
No. 05-996
from the First Circuit Court of Appeals

Can the right to convert a Chapter 7 bankruptcy proceeding to another chapter of the bankruptcy code be denied on the basis of the debtor's bad faith?

Massachusetts v. Environmental Protection Agency
No. 05-1120
from the D.C. Circuit Court of Appeals

(1) Does the Environmental Protection Agency (EPA) have the statutory authority to regulate "greenhouse gases"—in particular, carbon dioxide—and (2) if so, do the states have the standing to force it to do so, and (3) if so, was the EPA wrong to reject the states' petition for it to do so?

MedImmune, Inc. v. Genentech, Inc.
No. 05-608
from the Court of Appeals for the Federal Circuit

Under the Constitution's "case or controversy" requirement, is a patent licensee required to materially breach the license agreement before the courts have jurisdiction to hear his claim that the patent is invalid, unenforceable, or not infringed?

Meredith v. Jefferson County Board of Education
No. 05-915
from the Sixth Circuit Court of Appeals

To what extent may a school district use race-conscious remedies in assigning students to specific public schools for the purpose of achieving racial diversity?

Norfolk Southern Railway Co. v. Sorrell
No. 05-746
from the Missouri Court of Appeals for the Eastern District

Under the Federal Employers Liability Act, in a comparable negligence situation, what causation standard for the employer's negligence applies?

Osborn v. Haley
No. 05-593
from the Sixth Circuit Court of Appeals

When the Attorney General certifies that a federal employee named as a defendant in a suit was "acting within the scope of his employment"—thereby substituting the government as the defendant and removing the case to federal court—(1) must the case go back to state court if the federal district court rejects the AG's scope-of-employment decision, and (2) does a federal court of appeals have jurisdiction to review the district court's remand to state court?

Parents Involved in Community Schools v.
Seattle School District No. 1
No. 05-908
from the Ninth Circuit Court of Appeals

To what extent may a school district use race-conscious remedies in assigning students to specific public schools for the purpose of achieving racial diversity?

Philip Morris USA v. Williams
No. 05-1256
from the Oregon Supreme Court

(1) Can an appellate court use punitive damages to punish a "reprehensible" defendant above and beyond what would otherwise be an acceptable ratio vis-à-vis the actual damages—or are punitive damages required to be reasonably related to the harm done to

plaintiffs, irrespective of the reprehensibility of the defendant—and (2) does due process prohibit punitive damages based on the harm done by the defendant to nonparties?

United States v. Resendiz-Ponce
No. 05-998
from the Ninth Circuit Court of Appeals

Can the omission of an element of a criminal offense from a federal indictment constitute harmless error?

Wallace v. Chicago Police Officers
No. 05-1240
from the Seventh Circuit Court of Appeals

When does a claim for false arrest and unconstitutional search arise—given that the fruits of the search were introduced in the plaintiff/criminal defendant's criminal trial and he was convicted?

Watters v. Wachovia Bank
No. 05-1342
from the Sixth Circuit Court of Appeals

Can the Comptroller of the Currency treat a state-chartered nonbank operating subsidiary of a national bank like a national bank itself —thereby preempting state regulation—consistently with the Tenth Amendment and with doctrines requiring judicial deference to agency interpretations?

Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.
No. 05-381
from the Ninth Circuit Court of Appeals

Must a plaintiff alleging "predatory bidding" in violation of the Sherman Act—in this case, artificially paying too much for wood in order to drive up the price of wood and force competitors out of business—prove that the defendant suffered a short-term loss (as a

result of paying too much for the wood) and that it had a dangerous probability of recouping its loss in the long term (once competitors had been forced to close)?

Whorton v. Bockting
No. 05-595
from the Ninth Circuit Court of Appeals

Is the Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004)—that hearsay evidence may be admitted in criminal trials only if the witness is unavailable and the defense has had an opportunity to cross-examine the witness—retroactive?

SUMMARIES AND ANALYSES OF MAJOR CASES AFFECTING BUSINESS

Punitive Damages

Philip Morris USA v. Williams
No. 05-1256
from the Oregon Supreme Court

Background:

Philip Morris is the most anti-smoking of the major American tobacco companies. In fact, the company is so remorseful that it has recently crafted an expensive advertising campaign around an only slightly disguised variant of the theme "Our product (which we continue to manufacture) is ***really*** bad for you!" So it must be a particularly bitter pill that juries still find it necessary to "send a message" to the already-contrite tobacco giant.

But such was the case when a jury in a state court in Oregon handed down, *inter alia*, an award of $79.5 million in punitive damages against the cigarette company—which was upheld by a state appellate court based, in part, on a determination that Philip Morris was "reprehensible" and, in part, on the damages the company's business did to nonparties.

This compared to a $521,485.80 compensatory damage award that the court finally gave to the actual plaintiff—a chain smoker who spent half of his waking hours smoking. But smoker Williams' personal damages were limited by the fact that he obstinately continued to smoke up to three packs a day in the face of arguments and articles forced on him by his nagging wife and meddling son concerning the dangers of tobacco.

In fact, even though he had called cigarettes "cancer sticks," it was only when Williams learned he had inoperable lung cancer that—six months before his death—he concluded that "those darn cigarette people . . . were lying all the time." (!)

Well, shucks!

So—with Williams' own culpability limiting the amount of the compensatory award—the question is: Is it consistent with the

Supreme Court's recent Due Process limitations on excessive punitive damages to award punitive damages that are 152 times the amount of actual damages, based on the "reprehensible" nature of the defendant and on injury to persons not actually parties to the litigation?

The trial court capped the jury's compensatory damages at $521,485.80, and reduced the jury's $79.5 punitive damage award to $32 million. But the state appeals court reinstated the $79.5 million figure. And, after the Oregon Supreme Court denied review, the U.S. Supreme Court granted cert, vacated, and remanded to the state intermediate appellate court, raising questions as to whether the punitive damage award was so excessive that it violated the Constitution's Due Process protections.

Upon remand, the intermediate court upheld the $79.5 million award. And the Oregon Supreme Court, in language that looks suspiciously like a stump speech, concluded:

> . . . Philip Morris, with others, engaged in a massive, continuous, near-half-century scheme to defraud the plaintiff and many others, even when Philip Morris . . . knew . . . that the scheme was damaging the health of a very large group of Oregonians—the smoking public . . .

Suffice it to say that the court upheld the $79.5 million punitive damage award as well.

Analysis:

On the surface this looks remarkably like Oregon's answer to *Scheidler v. NOW*, No. 04-1244 (2006)—a case that keeps bouncing back to the Supreme Court so that the justices can yell at an obstinate lower court for not implementing what we all thought was settled law.

Representing Philip Morris is Andrew Frey (formerly of the Solicitor General's office) who will argue on the basis of the Supreme Court's actions in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), and, conveniently, *Philip Morris v. Williams*, 540 U.S. 801 (2003), itself.

BMW established a three-part "guidepost" test that looks to the reprehensibility of the misconduct, the ratio of punitive to compensatory damages, and the level of penalties contained in legislative analogs.

But Frey will suggest that, if courts can get around the "ratio" component of constitutional limits on excessive punitive damage awards by finding the defendant "reprehensible," any limits are effectively meaningless. He will also suggest that the Oregon Supreme Court's liberal approach conflicts with the conservative jurisprudence on this issue of, ironically, the Ninth Circuit, [e.g., *Zhang v. Am. Gem Seafoods, Inc*., 339 F.3d 1020 (2003)].

Respondent will argue that previous Supreme Court limitations on punitive damage awards for harm to nonparties limit only punitive damage awards for dissimilar conduct and dissimilar claims. And she will certainly cite the fact that reprehensibility is explicitly made a criterion for punitive damages by *BMW*.

But when the question presented for certiorari is "Whether . . . an appellate court's conclusion that a defendant's conduct was highly reprehensible and analogous to a crime can "override" the constitutional requirement that punitive damages be reasonably related to the plaintiffs harm" you have to assume that the party seeking the "override" has an uphill battle.

In addition, if these plaintiffs are allowed to recover nearly $80 million in an individual suit which is effectively being turned into a "de facto class action"—but without the class—the other potential plaintiffs whose suffering triggered this award may find that the pot has dried up before they ever reach the courthouse door.

Finally, particularly on the issue of what is an acceptable "ratio," the Supreme Court may feel that to position itself to the left of the Ninth Circuit—on this or any other issue—could make it the permanent object of derision.

CIVIL RIGHTS

Ledbetter v. Goodyear Tire & Rubber Co.
No. 05-1074
from the Eleventh Circuit Court of Appeals

Background:

After years of substandard performance reviews by a variety of supervisors, Lilly Ledbetter brought a Title VII employment sex discrimination suit alleging that she received a lower salary than her more highly rated male competitors.

The Goodyear plant in Gadsden, Alabama—where Ledbetter worked—operated under a system of regular (generally annual) employment reviews that determined who would or would not receive merit raises—and how much.

The threshold question was how many of Ledbetter's annual reviews were cognizable by the courts and the Equal Employment Opportunity Commission (EEOC)—in view of the requirement that the charge against the company must be filed within 180 days "after the alleged unlawful employment practice occurred."

Given that the Supreme Court has held that there is an absolute bar to complaints about *conduct* more than 180 days old, the two obvious ways of dealing with this problem would be:

- to consider only those annual evaluations made within 180 days of the complaint; or

- to risk reversal by admitting them all as evidence of an ongoing discriminatory course of conduct continuing to the present—the so-called "repudiated Ninth Circuit 'serial violations' approach."

The district court tried to sneak in the "repudiated Ninth Circuit 'serial violations' approach" by the back door—allowing the jury to consider Ledbetter's aggregate salary at the end of her employment, compared to the salaries of her male counterparts. This effectively

permitted her entire two-decade employment history to be taken into consideration.

Instead of taking either of these routes, however, the Eleventh Circuit held that the action could be based on any annual review within the 180-day period, plus MAYBE the annual review immediately before the commencement of the 180-day period—but maybe not.

Having reached this "interesting" conclusion, the court went on to say, in effect, that the whole convoluted exercise was unnecessary because no reasonable jury could have concluded Goodyear discriminated against Ledbetter in the period it examined—a period that differed in no discernible way for the totality of Ledbetter's employment.

Ledbetter petitioned for certiorari, which was granted.

Analysis:

The Supreme Court grappled with this issue in 2002, and appeared to reach the conclusion that, with respect to "disparate treatment" claims challenging "discrete discriminatory or retaliatory acts," it was never permissible to hear claims falling outside the 180-day period. [*National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002).] Acts of discrimination more than 180 days old can, at most, be used as evidence to support nonbarred claims.

In so ruling, the Court did distinguish between "hostile work environment" claims—claims that would seem to be a stretch for Ledbetter.

But the bottom line is that, after a slight tweaking, the Eleventh Circuit's approach is a lot closer to the Supreme Court's precedents than is the district court's.

ANTITRUST

Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.
No. 05-381
from the Ninth Circuit Court of Appeals

Background:

Weyerhaeuser allegedly hatched a scheme to put its lumber-industry competitors out of business by artificially bidding up the cost of saw

wood. Thus, it would pay more than necessary for raw materials—with the only real benefit being that competitors who were not able to match Weyerhaeuser's high bids for limited wood supplies would soon go out of business.

At some point, predatory bidding presumably becomes a violation of section 2 of the Sherman Act. But how much do you have to prove?

There is little Supreme Court case law dealing with "predatory bidding," but much more concerning "predatory selling" (aka "sell-side predatory pricing")—the practice of selling goods to consumers below cost in the hope of bankrupting competitors.

The pivotal case in the "predatory selling" area—*Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993)—required that a successful plaintiff demonstrate that (1) defendant suffered a loss in the short-term (as a result of selling below cost), and (2) that he had a "dangerous probability" of recouping his loss in the long-term (once competitors had gone out of business). Because, *inter alia*, Weyerhaeuser never actually sold below cost, the case would have been thrown out under these standards.

Enter the always-reliable Ninth Circuit Court of Appeals, which proceeded to hold that the *Brooke Group* requirements were inapplicable to "predatory bidding" because, unlike price-slashing, "predatory bidding" had no direct benefits for the consumer. Thus, Weyerhaeuser becomes much easier to sue, and the rationale for its motion for judgment as a matter of law and for a new trial crumbles.

In particular, the court set up a three-part test to establish a violation of section 2 of the Sherman Act: (1) predatory or anticompetitive conduct; (2) specific intent to monopolize; and (3) a dangerous probability of achieving monopoly power in the relevant market.

Weyerhaeuser petitioned for and was granted cert.

Analysis:

At its core, the Ninth Circuit has reduced Sherman Act requirements to: intentional predatory bidding that is likely to succeed (with, incidentally, no requirement that it be so "predatory" that the bidder actually loses money).

Whether or not the Supreme Court stands by placidly as the Ninth Circuit throws out its landmark case, you have to wonder whether the court is not going to set the standard at something more than this.

Bell Atlantic Corp. v. Twombly
No. 05-1126
from the Second Circuit Court of Appeals

Background:

This is a class action for, *inter alia*, treble damages and injunctive relief under the Clayton and Sherman Acts. The thrust of the complaint is that the telecommunications giants conspired not to compete with one another in—and to exclude other competitors from—their respective geographic markets in connection with telephone, high-speed Internet, and other communications services.

The Telecommunications Act required that the remnants of AT&T—the so-called Baby Bells—allow other carriers access to their facilities at "just, reasonable, and nondiscriminatory" rates. But the small carriers complained that the Baby Bells dragged their feet on allowing access—and that the strange gerrymandered map of national telephone service was implicit proof that the Baby Bells had an explicit (but secret) agreement not to compete with one another.

Substantively, the issue was whether these actions constituted a "conspiracy, in restraint of trade or commerce . . . ."

Procedurally, the question was whether the federal District Court for the Southern District of New York erred in dismissing the complaint for failure to state a cause of action.

The Second Circuit held that—while the plaintiffs will have to back up their conspiracy allegations in order to avoid a motion for summary judgment—their assertions were enough to avoid dismissal at the pleading stage, even in a section 1 Sherman Act case.

Analysis:

The outcome of this case will probably revolve around the question of whether antitrust cases—with their complexity, expense, amorphous nature, and vacuum-like capacity for sucking judicial resources—will be held to a higher pleading standard than other cases.

The Second Circuit—which hears a lot of antitrust cases—has traditionally held that they do not, [e.g., *George C. Frey Ready-Mixed Concrete, Inc. v. Pine Hill Concrete Mix Corp.*, 554 F.2d 551 (1977)]. Rather, the Second Circuit's antitrust "gatekeeper" is a requirement that, in order to avoid summary judgment later in the proceedings, an antitrust plaintiff must show "at least one 'plus factor' that tends to exclude independent self-interested conduct as an explanation for defendants' parallel behavior."

The Supreme Court has yet to slap it down on this issue, and, in fact, early- to mid-twentieth century jurisprudence in the High Court suggested that it agreed with the Second Circuit. [*United States v. Employing Plasterers' Ass'n,* 347 U.S. 186 (1954).]

So the question may be whether Twombly's conclusions from looking at a map of national telephone service are "plausible"—or merely a conspiracy theory masquerading as a complaint.

BANKING/FEDERAL PREEMPTION

Watters v. Wachovia Bank
No. 05-1342
from the Sixth Circuit Court of Appeals

Background:

Michigan's state banking laws require state-chartered nonbank operating subsidiaries of national banks (such as Wachovia Mortgage) to register and file an annual report with the state—although they are not required to obtain a license. In addition, Michigan is authorized to investigate specific consumer complaints not being pursued at the federal level by the Comptroller of the Currency.

The question is whether the 1864 National Bank Act preempts Michigan's admittedly sparse regulatory scheme.

The Second and Ninth Circuits had just decided similar questions, and, relying on "those courts's [sic] decisions" (seriously!), the Sixth Circuit affirmed the district court's grant of summary judgment against Michigan's statute.

Analysis:

12 U.S.C. § 484(a) provides that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal Law . . . ." Pursuant to that statute, the Comptroller of the Currency has issued 12 C.F.R. § 7.4000—giving him exclusive visitorial powers over national banks, subject to narrow exceptions. And 12 C.F.R. § 7.4006 states that "unless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank."

The Second, Sixth, and Ninth Circuits have now all considered the issue of federal preemption of state banking laws in cases like this, and all have reached the same conclusion: that federal law preempts state regulation.

So all of this has raised more than idle curiosity about why the Supreme Court has chosen to resolve this "circuit non-split."

The first issue will be the standard for determining whether state law is preempted. Michigan will argue that preemption lies only when "Congress has expressly and clearly manifested its intent to preempt state laws . . . ." And, given that the 38th Congress—in 1864—probably wasn't thinking about state-chartered nonbank operating subsidiaries, the choice of this standard would probably defeat preemption.

What the Sixth Circuit, on the other hand, decided was that this was an example of "conflict preemption," in which "state law stands as an obstacle to [a federal purpose]." Thus, the only question for the appeals court was whether the Comptroller had "exceeded [his] statutory authority or acted arbitrarily."

If this is the standard, it is certainly significant that, in the past, the Supreme Court has given broad deference indeed to financial regulators like the Federal Reserve and the Comptroller of the Currency. [*See, e.g.*, *Household Credit Services, Inc. & MBNA America Bank v. Pfennig,* No. 02-857.]

And, although the second question certified for argument is whether the Comptroller's actions are precluded by "the incredible shrinking Tenth Amendment" (my words, not the court's), this would certainly be a strange context to suddenly decide to pump nourishment into the anorexic Bill of Rights.

So why did the Court take this case? Is it about to shunt aside "*Chevron* deference" and make a distinction between national banks and nonbank subsidiaries? Or, perhaps more likely, a distinction between "visitation" and "reporting"—by deciding that the addition of an unobtrusive layer of reporting does not interfere with the federal scheme?

Both of these would have seemed unlikely, had not the Court agreed to hear the case.

INTELLECTUAL PROPERTY/PATENTS

MedImmune, Inc. v. Genentech, Inc.
No. 05-608
from the Court of Appeals for the Federal Circuit

Background:

No good deed goes unpunished. And this case will presumably resolve the question of whether a patent licensee has to refuse to pay royalties in order to challenge the validity of the patent in federal court.

Under Article III, a patent infringement case—or any other type of case, for that matter—can be brought only when there is a justiciable controversy. And, in two recent cases, the U.S. Court of Appeals for the Federal Circuit has held that, in order for that to happen, either (1) the licensee must stop paying royalties, or (2) the licensor must breach the agreement in some way [*see, e.g. Gen-Probe, Inc. v. Vysis, Inc.*].

In 1998, MedImmune developed Synagis to treat childhood respiratory illnesses—and Synagis now accounts for roughly 80% of MedImmune's revenues. The same process that was used to develop Synagis was patented in 2001 by San Francisco-based Genentech following protracted litigation with the British-based Celltech.

Pursuant to this litigation, Genentech secured the right to receive royalties from MedImmune and other companies that had had licensing agreements with Celltech.

While continuing to pay Genentech—for fear of losing the means to produce the product responsible for 80% of its income—

MedImmune proceeded to challenge Genentech's patent and business practices.

Citing its own precedents, the U.S. Court of Appeals for the Federal Circuit held that MedImmune's insistence on complying with a potentially invalid agreement denied the court a justiciable controversy.

MedImmune appealed.

Analysis:

This Supreme Court has never been particularly fond of stringent limits on justiciability—particularly when those limits reward bad conduct [*see, e.g.*, *Kontrick v. Ryan*, 540 US 443 (2004)]. In addition, the Federal Circuit's rule goes pretty far toward establishing a system under which judicial access is awarded only for petulant, nonmeritorious conduct—while dutiful forbearance is punished.

This would certainly not be the first instance in which this happened in the federal courts. But you have to wonder whether the High Court didn't agree to hear this case for the purpose of modifying or even eliminating the Federal Circuit's harsh rule.

SR International Co. v. Teleflex, Inc.
No. 04-1350
from the Court of Appeals for the Federal Circuit

Background:

Since its creation, the Court of Appeals for the Federal Circuit has been on a very long leash in connection with the esoteric and arcane issues frequently governing patent litigation—an area over which it has exclusive appellate jurisdiction.

And it has used its very broad discretion to develop doctrines that—to put it mildly—haven't always pleased everyone.

This case examines the Federal Circuit's stewardship over section 103 of the Patent Act.

Section 103—dating from 1952—prohibits patents for innovations that would be "obvious" to a "person having ordinary skill" in a field. Similarly, the combination of two inventions is not patentable if each retains its original functions.

Over the last two decades, however, the Federal Circuit has eased the difficulty of obtaining a patent by holding that an innovation is only "obvious" if there is some "'suggestion, teaching, or motivation' that would have led a person of ordinary skill in the art to combine the relevant prior art teachings in the manner claimed."

The Supreme Court has now agreed to decide whether the "suggestion, teaching, or motivation" standard is permissible.

The case involves an adjustable gas pedal attached to an electronic sensor that activates the fuel system of an automobile. It starts with the proposition that gas pedals that adjust to the height and position of the driver are a well-established technology that has been in use since the 1970s—and that, since the mid-1990s, increasing numbers of new cars have had "electronic throttle controls" that fuel the engine without using a cable.

So is the "Adjustable Pedal Assembly With Electronic Throttle Control" (Patent No. 6,237,565) a new invention—or just a knockoff of two preexisting devices?

Under the Federal Circuit's "suggestion, teaching, or motivation" test, it became a lot more difficult to establish that the combination was "obvious" and therefore not patentable.

In fact, the Federal Circuit not only reversed the district court's grant of summary judgment against the patent holder, it stated that the company challenging the patent had failed to even make a prima facie case that the combination was "obvious" and therefore not patentable.

KSR—claiming that there was a circuit split with at least seven other circuits—appealed and was granted certiorari.

Analysis:

The Solicitor General—siding with KSR—argued, in his memorandum in support of the petition for certiorari, that the Federal Circuit has taken one of a variety of tests for "obviousness" laid out by the Supreme Court in *Graham v. John Deere Co.* 383 U.S. 1 (1966), and turned in into an inflexible single-issue standard.

The Justice Department goes on to argue that section 103's "central factors" relevant to an invention's "obviousness" include the scope and content of the prior art, the differences between the prior art and the claims at issue, and the level of ordinary skill in the pertinent art.

And this may well be closer to the High Court's disposition on this issue than the position of the Federal Circuit.

TELECOMMUNICATIONS

Global Crossing Telecommunications, Inc. v. Metrophones
No. 05-705
from the Ninth Circuit Court of Appeals

Background:

Who can forget that endearing commercial in which a comedian called "Carrot Top" (seriously!) clung to a gigantic phone and urged Americans to dial 1-800-CALL-ATT?

But coin-phone operator Metrophones wasn't laughing.

Originally, coin phone companies like Metrophones were prohibited from blocking these AT&T-type long-distance calls, but received little or no revenue from them.

And even after the 1996 Telecommunications Act required a "per call compensation plan [for] each and every completed . . . call using [a] payphone" [section 276], Metrophones complained that Global Crossing had stiffed it for part of the $30,000 in charges from long-distance calls using the company's pay phones.

So Metrophones sued.

But, in what can only have been, for Metrophones, a bitter irony—comparable in improbability to being struck by a meteor—the Ninth Circuit, in a moment of conservative activism, had just held that section 276 does NOT give rise to an implicit private cause of action.

So Metrophones amended its complaint to charge "unjust and unreasonable" practices under section 201(b) of the Communications Act of 1934. Both the district court and the Ninth Circuit, deferring to the Federal Communications Commission's reading of this section, held that section 201 gave rise to a cause of action.

This put the Ninth Circuit at odds with a decision just handed down by the D.C. Circuit, thus creating a circuit split [*APCC Servs., Inc. v. Sprint Communications Co.*]. Global Crossing petitioned for and was granted cert.

Analysis:

Along with *Environmental Defense v. Duke Energy Corp.*, No. 05-848 (discussed in the next section), this is one of two major cases before the Court this Term where a regional federal appeals court is squared off against the D.C. Circuit because the regional court gave "*Chevron* deference" to an agency regulation expansively interpreting the right to sue under its jurisdiction, whereas the D.C. court did not.

And, in a legal milieu in which "conservatism" is increasingly defined as deference to expansive agency interpretations of federal jurisdiction, this case will, once again, invite the Court to employ "conservative jurisprudence" in order to produce liberal results. No one is assuming that invitation will be declined.

THE ENVIRONMENT

Massachusetts v. Environmental Protection Agency
No. 05-1120
from the D.C. Circuit Court of Appeals

Background:

In the waning days of the Clinton administration, several environmental groups filed a rulemaking petition that was intended to "force" a malleable Environmental Protection Agency (EPA) to regulate emissions of "greenhouse gases" and, in particular, carbon dioxide. There was certainly a chance that the EPA would go along—particularly after 50,000 remarkably similar communications flooded into the rulemaking agency. And, if not, there were those—ultimately, 12 states and a variety of environmental organizations—who were poised to initiate litigation that, in its conception, bears an uncanny resemblance to a "sweetheart suit."

Unfortunately for the litigants, something else had happened in the Supreme Court in December 2000. And that "something" was *Bush v. Gore*.

Had that case gone differently, a rotund and embittered George W. Bush presumably would now be on the speaking circuit—decrying the dangerous expansion of the polar ice caps and the looming prospects of "global winter." But, instead, Bush won—and (after a flirtation

with environmentally liberal EPA administrator Christine Todd Whitman) a less-than-wholly-environmentally-enthusiastic Bush administration ultimately, to say the least, "lost interest" in the prospect of expanding CO_2 regulation, particularly at the point the states asked the Supreme Court to grant certiorari.

As a result, there is at least some thinking that the states are stuck on the "Titanic" of lawsuits—a costly, almost-sure-loser in which the largest question may be how firmly the justices will shut the courthouse door to future efforts of this sort.

Analysis:

The first—and perhaps last—issue will be whether the states and environmental groups have "standing."

The second question will be whether the Clean Air Act (CAA) even allows the EPA to regulate carbon dioxide.

And, if the plaintiffs get past that hurdle, they will have to show the Court that they can use the CAA to require the EPA, through litigation, to do so. This, against a backdrop of decades in which congressional Democrats have tried to amend the CAA to regulate carbon dioxide—without success.

Environmental Defense v. Duke Energy Corp.
No. 05-848
from the Fourth Circuit Court of Appeals

Background:

The Clean Air Act was amended, in 1970, to include New Source Performance Standards for new pollution sources and existing sources that are significantly modified.

Later, in 1977, the act was further amended with provisions to "prevent significant deterioration" of the atmosphere in the case of new or "modified" facilities by, *inter alia*, allowing monitoring and stringent EPA oversight.

"Modification" was, in turn, defined for purposes of the 1970 amendment to mean a "physical change in . . . a . . . source" that "results in the emission of any air pollutant not previously emitted." And Congress seemed to reference the same definition into the 1977

amendment, although this fact didn't prevent considerable sturm und drang in the lower courts over whether the standards under the 1970 and 1977 amendments were the same—and exactly what they were.

All of this is now before the courts because, in 1988, Duke Energy Corporation—without obtaining prior approval from the EPA—began a "modernization" or "life-extension" program for more than a dozen of its preexisting coal-fired energy generating plants.

In some cases, the cost of the "modification" actually ran to several times the cost of the original plant—shutting down some of the generators for years.

But, although the changes resulted in "a significant net emissions increase," in the sense that the plants could be operated for more hours during the day and for more years into the future, Duke ensured that the hourly emissions—traditionally regarded as the determining factor—would remain constant.

There is one final irony: Despite the fact that the case was originally filed in December 2000 by the Clinton administration's Justice Department, the Solicitor General, by 2005, was arguing that the Supreme Court should deny certiorari on an appeal of a Fourth Circuit decision rejecting his own department's original position. The Supreme Court ignored him and granted cert.

Analysis:

Probably the second most-pronounced characteristic of the Roberts/Rehnquist Court is its devotion to what has come to be known as "*Chevron* deference."

Under this doctrine, if Congress has not directly spoken on the precise question at issue, the Court will then determine whether the regulation is a permissible construction of the underlying statute and, if so, it will defer to it.

The district court had granted summary judgment to Duke.

And, although the Fourth Circuit, tragically, turned, instead, to "common sense"—always a bad idea—it reached the same result: a judgment for Duke. In particular, the appeals court deferred to the EPA's specific exclusion of increased pollution due solely to an increase in the number of hours of operation in connection with the 1970 amendment. And, since the 1977 "Prevention of Significant

Deterioration" statute was statutorily bootstrapped onto the 1970 New Source Performance Standards' definition of the term "modification," the court felt this was the end of the issue.

This put it at odds with the D.C. Circuit Court of Appeals, which had opined that the 1970 and the 1977 modifications rested on two separate standards concerning what was a significant modification [*New York v. Environmental Protection Agency*, 413 F.3d 3 (2005)]. Aside from creating an enticing "circuit split," Environmental Defense claimed that the Clean Air Act vested the D.C. Circuit, rather than the Fourth Circuit, with jurisdiction over its appeal.

So—why is this case before the Supreme Court?

The chief obstacle that Environmental Defense will have to surmount is the multipronged question of jurisdiction. This is only the third time in more than 30 years that the Supreme Court has granted cert. to a case brought on behalf of an environmental group. And, aside from the question of whether a "petition for review," rather than an enforcement action, was the appropriate vehicle for challenging the regulations (under section 307(b) of the Clean Air Act)—there is always the remote possibility that the Court will get "off message" and begin to question whether Environmental Defense had a right to bring suit.

Not since 1971 has the Supreme Court approved an environmental interest group's petition for cert. opposed by the executive branch. And not since—well, ever—has the Supreme Court consisted of a group of justices so willing to combat litigative activism through the invocation of discretionary doctrines of judicial abstention.

The other bad news for environmentalists is that, in the 10 major environmental cases to come before the Supreme Court in the last three years –

- in five (50%), environmentalists lost;
- in two (20%), environmentalists won; and
- in three (30%), no one has any idea who won and who lost.

The good news for environmentalists is that, notwithstanding the addition of Alito and Roberts, the Court is, in the last two years, trending away from environmental defeats and toward confusion.

BANKRUPTCY

Marrama v. Citizens Bank of Massachusetts
No. 05-996
from the First Circuit Court of Appeals

Background:

For the second time in two years, the Supreme Court will grapple with the knotty issue of whether the word "may" may not mean "may."

This case arose when the bottom fell out of Robert Marrama's flooring business, causing him to file for bankruptcy under the Chapter 7 provisions requiring liquidation of his assets.

Several months later—when Marrama tried to convert his bankruptcy into a Chapter 13 procedure whereby he would keep his assets and pay off his debts—his creditors noticed that $96,000 worth of Marrama property had somehow failed to appear on his original Chapter 7 list of assets.

This included $85,000 worth of Maine real estate, which had been transferred seven months earlier under really suspicious circumstances and which, in the words of Marrama's attorney, "somehow . . . didn't get onto the form"—and an $11,000 tax refund.

Sensing "bad faith," the bankruptcy court denied Marrama's petition to switch to a Chapter 13 procedure, and the Bankruptcy Appellate Panel and the First Circuit affirmed.

The Supreme Court granted cert.

Analysis:

11 U.S.C. § 706(a) states: "The debtor may convert a case under [chapter 7] to a case under chapter 11, 12, or 13 of this title at any time . . . ."

So both the statute and the legislative history seem to be fairly clear and unequivocal on their face. And, in fairness, Marrama's business did represent the center and culmination of his life's journey.

Balanced against this is the fact that all three lower courts seemed to regard Marrama as—to use nonlegal parlance—a bit of a weasel. And this resulted in a reluctance to approve a five-year court-supervised process that, on a month-by-month basis, would require the courts to rely on the veracity of Marrama's representations concerning his business.

The case, therefore, boils down to this:

- Will the Roberts Court be willing to ignore the clear language of the statute in order to thwart dishonesty in the judicial system?

and

- Does "may," in fact, mean something other than "may"?

On the first point, the Court, three years ago, resoundingly rejected the argument of a man who claimed—like Marrama—that the bankruptcy courts were jurisdictionally barred from doing anything about his attempts to conceal his assets.

To be fair, the earlier plaintiff—Kontrick—was considerably more open about his intention to defraud his creditors, justifying his actions on the proposition that ". . . there are just thousands and thousands of thieves out there that are ready to come after you on any pretense and rob you of whatever belongings you might have . . . ." Kontrick went on to admit—probably not on the advice of counsel—that "I felt that to have any sort of assets that could possibly be taken away from me would be foolish."

Well, perhaps "foolish" is a relative term. But the point is that the courts have demonstrated, with some uniformity, that they will find a way to assert jurisdiction when they feel that justiciability issues are being used to defraud them.

On the second question, the High Court dealt, within the last few months, with the issue of whether "may" may or may not mean "may."

And, while its reasoning was not particularly critical to its outcome, the Court found that the applicability of a statutory provision holding that the Court "may" award legal fees could hinge on whether or not an appeal was, effectively, in bad faith. [*Martin v. Franklin Capital Corp.*, No. 04-1140 (2006)].

Hence, the Court has, just recently, shown considerable malleability on the "may" issue.

TORTS/RAILROAD LIABILITY

Norfolk Southern Railway Co. v. Sorrell
No. 05-746
from the Missouri Court of Appeals for the Eastern District

Background:

The respondent was injured when—in an effort to avoid another Norfolk Southern truck chugging down a narrow road—he drove his own truck into a ditch, causing it to tip over.

Under these circumstances, the Federal Employers Liability Act (FELA) imposes a comparative negligence system that examines the relative culpability of plaintiff-respondent Sorrell and of his employer, Norfolk Southern. But the question is how to measure Sorrell's degree of guilt.

The Missouri state trial court held that the defendant would be liable for the totality of culpability, reduced only by the amount of plaintiff's negligence that directly caused the injury. The intermediate state court affirmed, the Missouri Supreme Court declined to hear the case, and the U.S. Supreme Court granted cert.

Analysis:

Certainly, the assumption is that the Supreme Court has descended from *Valhalla* to excoriate this little county court for ignoring its precedents.

In particular, Norfolk Southern will argue that "multiple" Supreme Court and U.S. Court of Appeals decisions handle these cases by (1) measuring the totality of the plaintiff's liability, then (2) measuring

the totality of the defendant's liability in the same way, and then (3) balancing the two off against one another.

Given that the Missouri Supreme Court didn't think this case warranted its time, more than one observer would be shocked if the High Court determined that the Missouri decision was "okey-doke."

STATUTE OF LIMITATIONS

BP America Production Company v. Burton
No. 05-669
from the D.C. Circuit Court of Appeals

Background:

Like *Massachusetts v. EPA*, this case arises from an excess of that pesky, nettlesome chemical—carbon dioxide. In particular, the government argues that certain oil and gas companies leasing federal lands for oil or gas extraction failed to include in the "gross proceeds" —used to calculate how much they owed the government—the cost of removing excess carbon dioxide from the extracted gas.

Reduced to its simplest terms, this case boils down to this:

28 U.S.C. 2415(a) creates a six-year statute of limitations for any "complaint . . . [in an] action for monetary damages . . . founded upon . .. contract . . . ."

Because the government uses the "honor system" where the company itself determines how much it owes the government, it took longer than six years, in some instances, for the government to figure out what was going on.

So—if the government determines that it was underpaid by a company extracting oil or gas from federal lands—is it bound by the six-year statute of limitations?

The Assistant Secretary of the Interior said "no." The District Court for the District of Columbia said "no." The Court of Appeals for the District of Columbia said "no." BP America appealed.

Analysis:

What submarined BP America in the Court of Appeals were these words: "Section 2415(a) . . . must be strictly construed in favor of the government. . . ."

And it certainly wouldn't be out-of-character if the Supreme Court rested its opinion on the same proposition.

Nevertheless, it is interesting that Congress, in 1996, found it necessary to amend the underlying mineral leasing statute to create a new seven-year statute-of-limitations in some cases prospectively —and to make it clear that 28 U.S.C. 2415(a) wouldn't apply to administrative orders.

APPENDIX A

THE SUPREME COURT OF THE UNITED STATES
SCHEDULE OF THE 2006–2007 TERM

2006	**M**	**T**	**W**	
October	2			(No Argument)
		3	4	(Argument)
	H	10	11	(Argument)
	16			(No Argument)
	30	31		(Argument)

RECESS – October 17 to October 26

November			1	(Argument)
	6	7	8	(Argument)
	13			(No Argument)
	27	28	29	(Argument)

RECESS – November 14 to November 21

December	4	5	6	(Argument)
	11			(No Argument)

RECESS – December 11, 2005 to January 4, 2006

2007

January	8	9	10	(Argument)
	H	16	17	(Argument)
	22			(No Argument)

RECESS – January 23 to February 15

February	H	20	21	(Argument)
	26	27	28	(Argument)

2007 (cont'd)	**M**	**T**	**W**	
March	5			(No Argument)
	19	20	21	(Argument)
	26	27	28	(Argument)
RECESS – March 6 to March 15				
April	2			(No Argument)
RECESS – April 3 to April 12				
April (cont'd)	16	17	18	(Argument)
	23	24	25	(Argument)
	30			(No Argument)
RECESS – May 1 to May 9				
May	14			(No Argument)
	21			(No Argument)
	H	29		(No Argument)
June	4			(No Argument)
	11			(No Argument)
	18			(No Argument)
	25			(No Argument)

From the Web site of the Supreme Court of the United States, <http://www.supremecourt.gov>.

APPENDIX B

The Justices of the Supreme Court

John G. Roberts, Jr., Chief Justice of the United States, was born in Buffalo, New York, January 27, 1955. He married Jane Marie Sullivan in 1996; they have two children—Josephine and John. He received an A.B. from Harvard College in 1976 and a J.D. from Harvard Law School in 1979. He served as a law clerk for Henry J. Friendly of the United States Court of Appeals for the Second Circuit from 1979-1980 and as a law clerk for then-Associate Justice William H. Rehnquist of the Supreme Court of the United States during the 1980 Term. He was Special Assistant to the Attorney General, U.S. Department of Justice, from 1981–1982, Associate Counsel to President Ronald Reagan, White House Counsel's Office, from 1982–1986, and Principal Deputy Solicitor General, U.S. Department of Justice, from 1989–1993. From 1986–1989 and 1993–2003, he practiced law in Washington, D.C. He was appointed to the United States Court of Appeals for the District of Columbia Circuit in 2003. President George W. Bush nominated him as Chief Justice of the United States, and he took his seat on September 29, 2005.

John Paul Stevens, Associate Justice, was born in Chicago, Illinois, April 20, 1920. He married Maryan Mulholland, and has four children—John Joseph (deceased), Kathryn, Elizabeth Jane, and Susan Roberta. He received an A.B. from the University of Chicago and a J.D. from Northwestern University School of Law. He served in the U.S. Navy from 1942 to 1945, and was a law clerk to Justice Wiley Rutledge of the Supreme Court of the United States during the 1947 Term. He was admitted to law practice in Illinois in 1949. He was Associate Counsel to the Subcommittee on the Study of Monopoly Power of the Judiciary Committee of the U.S. House of Representatives, 1951 to 1952, and a member of the Attorney General's National Committee to Study Antitrust Law, 1953 to 1955. He was Second Vice President of the Chicago Bar Association in 1970. From 1970 to 1975, he served as a Judge of the United States Court of Appeals for the Seventh Circuit. President Ford nominated him as an Associate Justice of the Supreme Court, and he took his seat on December 19, 1975.

Anthony M. Kennedy, Associate Justice, was born in Sacramento, California, July 23, 1936. He married Mary Davis and has three children. He received his B.A. from Stanford University and the London School of Economics, and his LL.B. from Harvard Law School. He was in private practice in San Francisco, California, from 1961 to 1963, as well as in Sacramento, California, from 1963 to 1975. From 1965 to 1988, he was a Professor of Constitutional Law at the McGeorge School of Law, University of the Pacific. He has served in numerous positions during his career, including a member of the California Army National Guard in 1961, the Board of the Federal Judicial Center from 1987 to 1988, and two committees of the Judicial Conference of the United States: the Advisory Panel on Financial Disclosure Reports and Judicial Activities, subsequently renamed the Advisory Committee on Codes of Conduct, from 1979 to 1987, and the Committee on Pacific Territories from 1979 to 1990, which he chaired from 1982 to 1990. He was appointed to the United States Court of Appeals for the Ninth Circuit in 1975. President Reagan nominated him as an Associate Justice of the Supreme Court, and he took his seat on February 18, 1988.

David Hackett Souter, Associate Justice, was born in Melrose, Massachusetts, September 17, 1939. He was graduated from Harvard College, from which he received his A.B. After two years as a Rhodes Scholar at Magdalen College, Oxford, he received an A.B. in Jurisprudence from Oxford University and an M.A. in 1989. After receiving an LL.B. from Harvard Law School, he was an associate at Orr and Reno in Concord, New Hampshire, from 1966 to 1968, when he became an Assistant Attorney General of New Hampshire. In 1971, he became Deputy Attorney General and in 1976, Attorney General of New Hampshire. In 1978, he was named an Associate Justice of the Superior Court of New Hampshire and was appointed to the Supreme Court of New Hampshire as an Associate Justice in 1983. He became a Judge of the United States Court of Appeals for the First Circuit on May 25, 1990. President George H.W. Bush nominated him as an Associate Justice of the Supreme Court, and he took his seat on October 9, 1990.

Clarence Thomas, Associate Justice, was born in the Pin Point community of Georgia near Savannah, June 23, 1948. He married

Virginia Lamp in 1987 and has one child, Jamal Adeen, by a previous marriage. He attended Conception Seminary and received an A.B., cum laude, from Holy Cross College and a J.D. from Yale Law School in 1974. He was admitted to law practice in Missouri in 1974, and served as an Assistant Attorney General of Missouri from 1974 to 1977, an attorney with the Monsanto Company from 1977 to 1979, and Legislative Assistant to Senator John Danforth from 1979 to 1981. From 1981 to 1982, he served as Assistant Secretary for Civil Rights, U.S. Department of Education, and as Chairman of the U.S. Equal Employment Opportunity Commission from 1982 to 1990. He became a Judge of the United States Court of Appeals for the District of Columbia Circuit in 1990. President George H.W. Bush nominated him as an Associate Justice of the Supreme Court, and he took his seat on October 23, 1991.

Ruth Bader Ginsburg, Associate Justice, was born in Brooklyn, New York, March 15, 1933. She married Martin D. Ginsburg in 1954, and has a daughter, Jane, and a son, James. She received her B.A. from Cornell University, attended Harvard Law School, and received her LL.B. from Columbia Law School. She served as a law clerk to the Honorable Edmund L. Palmieri, Judge of the United States District Court for the Southern District of New York, from 1959 to 1961. From 1961 to 1963, she was a research associate and then associate director of the Columbia Law School Project on International Procedure. She was a Professor of Law at Rutgers University School of Law from 1963 to 1972, and Columbia Law School from 1972 to 1980, and a fellow at the Center for Advanced Study in the Behavioral Sciences in Stanford, California, from 1977 to 1978. In 1971, she was instrumental in launching the Women's Rights Project of the American Civil Liberties Union, and served as the ACLU's General Counsel from 1973 to 1980, and on the National Board of Directors from 1974 to 1980. She was appointed a Judge of the United States Court of Appeals for the District of Columbia Circuit in 1980. President Clinton nominated her as an Associate Justice of the Supreme Court, and she took her seat on August 10, 1993.

Stephen G. Breyer, Associate Justice, was born in San Francisco, California, August 15, 1938. He married Joanna Hare in 1967, and has three children—Chloe, Nell, and Michael. He received an A.B. from

Stanford University, a B.A. from Magdalen College, Oxford, and an LL.B. from Harvard Law School. He served as a law clerk to Justice Arthur Goldberg of the Supreme Court of the United States during the 1964 Term, as a Special Assistant to the Assistant U.S. Attorney General for Antitrust, 1965 to 1967, as an Assistant Special Prosecutor of the Watergate Special Prosecution Force, 1973, as Special Counsel of the U.S. Senate Judiciary Committee, 1974 to 1975, and as Chief Counsel of the committee, 1979 to 1980. He was an Assistant Professor, Professor of Law, and Lecturer at Harvard Law School, 1967 to 1994, a Professor at the Harvard University Kennedy School of Government, 1977 to 1980, and a Visiting Professor at the College of Law, Sydney, Australia, and at the University of Rome. From 1980 to 1990, he served as a Judge of the United States Court of Appeals for the First Circuit, and as its Chief Judge, 1990 to 1994, and of the United States Sentencing Commission, 1985 to 1989. President Clinton nominated him as an Associate Justice of the Supreme Court, and he took his seat on August 3, 1994.

Samuel Anthony Alito, Jr., Associate Justice, was born in Trenton, New Jersey, April 1, 1950. He married Martha-Ann Bomgardner in 1985, and has two children—Philip and Laura. He received an A.B. from Princeton University in 1972 and a J.D. from Yale Law School in 1975. He served as a law clerk for Leonard I. Garth of the United States Court of Appeals for the Third Circuit from 1976–1977. He was Assistant U.S. Attorney, District of New Jersey, 1977–1981, Assistant to the Solicitor General, U.S. Department of Justice, 1981–1985, Deputy Assistant Attorney General, U.S. Department of Justice, 1985–1987, and U.S. Attorney, District of New Jersey, 1987–1990. He was appointed to the United States Court of Appeals for the Third Circuit in 1990. President George W. Bush nominated him as an Associate Justice of the Supreme Court, and he took his seat on January 31, 2006.

From the Web site of the Supreme Court of the United States, <http://www.supremecourt.gov>.

ABOUT THE AUTHOR

Michael E. Hammond has spent the better part of his career in government service. He has been a Legislative Counsel to Senators Bob Smith (R-N.H.), Gordon Humphrey (R-N.H.), Jesse Helms (R-N.C.), and Steve Symms (R-Idaho). He has served as Special Assistant and Legislative Assistant to Senator Harry Byrd (I-Va.) and Senator James Buckley (R-N.Y.), respectively. In 1980, Mr. Hammond was a member of the Department of Education Transition Team and the Department of Justice Transition Team. From 1977 to 1989, he served as General Counsel to the U.S. Senate Steering Committee. Mr. Hammond received his B.A. magna cum laude from Washington University and his J.D. from the New York University School of Law. He presently serves as a political consultant and writer.