

# **TRENDS IN THE UNITED STATES SUPREME COURT**

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**CHAPTER 13**

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## I. First Amendment.

### (A) *Pleasant Grove City v. Summum*, 555 U.S. \_\_\_\_ (2009).

**Holding:** The placement of a monument in a public park is a form of government speech and therefore not subject to scrutiny under the Free Speech Clause of the First Amendment.

Summum, a religious organization, asked the mayor of Pleasant Grove, Utah if it could place a monument in one of the city's parks. Although the park already housed a monument to the Ten Commandments, the request was denied because the monument did not "directly relate to the history of Pleasant Grove." Summum filed suit against the city in federal court citing, among other things, a violation of its First Amendment free speech rights. The U.S. District Court for the District of Utah denied Summum's request for a preliminary injunction.

The Tenth Circuit reversed the district court and granted Summum's injunction request holding that the park was in fact a "public" forum, not a non-public forum as the district court had held; that Summum demonstrated that it would suffer irreparable harm if the injunction were to be denied; that the interests of the city did not outweigh this potential harm; and that the injunction was not against the public interest.

The Supreme Court reversed, holding that the placement of a monument in a public park is a form of government speech and therefore not subject to scrutiny under the Free Speech Clause of the First Amendment. With Justice Alito writing for the majority and joined by Chief Justice Roberts and Justices Stevens, Scalia, Kennedy, Thomas, Ginsburg, and Breyer, the Court reasoned that the First Amendment clause protecting free speech only limits government regulation of *private* speech, and does not curb what the government can say, and, therefore – since the city had retained final authority over which monuments were displayed and the monuments represented an expression of the city's viewpoints and thus government speech – the placement of the monuments was not subject to First Amendment scrutiny.

Justice Stevens, joined by Justice Ginsburg, wrote a separate concurring opinion that largely embraced the majority's reasoning. Justice Scalia, joined by Justice Thomas, also wrote a separate concurring opinion noting that there were likely no violations of the Establishment Clause of the First Amendment on the part of Pleasant Grove City. He argued that displays of the Ten Commandments had been construed by the Court as "having an undeniable historical meaning" and thus did not attempt to

establish a religion. Justice Breyer also wrote a separate concurring opinion in which he noted that "government speech" should be considered a rule of thumb and not a rigid category. He stated that sometimes the Court should ask "whether a government's actions burdens speech disproportionately in light of the action's tendency to further a legitimate government objective." Justice Souter also wrote separately, concurring in the judgment, but warning that public monuments should not be considered government speech categorically.

### (B) *Ysursa, Secretary of State of Idaho, et. Al. v. Pocatello Educ. Assoc.*, 555 U.S. \_\_\_\_ (2009).

**Holding:** State statute banning political payroll deductions, as applied to local governmental units does not infringe on the unions' First Amendment rights.

Idaho's Right to Work Act permits public employees to authorize payroll deductions for general union dues, but prohibits such deductions for union political activities. A group of Idaho public employee unions sued alleging that the ban on payroll deductions for political activities violated the First and Fourteenth Amendments.

The District Court upheld the ban at the state level, but struck it down at the local level and the Ninth Circuit affirmed, holding that, while Idaho has the ultimate control over local governmental units, it did not actually operate or control their payroll deduction systems. The Ninth Circuit applied strict scrutiny and held that the statute was unconstitutional as applied at the local level.

The Supreme Court reversed the Ninth Circuit holding that Idaho's Voluntary Contributions Act did not violate the free speech rights of local government employees. With Chief Justice Roberts writing for the majority and joined by Justices Scalia, Kennedy, Thomas, and Alito, and Justice Ginsburg in part, the Court reasoned that Idaho's law did not restrict political speech, but merely declined to promote speech by prohibiting public employees from directly contributing to partisan activities from their government-issued paycheck. Using a rational-basis review, it recognized that the state had a reasonable interest in avoiding the appearance of impropriety by banning the funding of partisan political activity from the state's payroll. The Court also held that this governmental interest applied equally to governments at the state and local level.

Justice Ginsburg wrote a separate concurring opinion. Justice Breyer also wrote separately, concurring in part and dissenting in part. Breyer argued that rather than reverse the court of appeals, the case should have been remanded and that rather than apply a

rational-basis review as the Court did here, he would utilize an “intermediate scrutiny inquiry” where the statute would be considered in light of whether it imposed a burden upon speech that was disproportionate to other interests the government sought to achieve. Justice Stevens dissented, arguing that the Idaho statute was clearly intended to make it more difficult for government employees to finance speech and therefore was unconstitutional. Justice Breyer also dissented, arguing that this case was a poor vehicle for refining the analysis of the First Amendment and therefore should have been denied review.

## II. Fourth Amendment.

### (A) *Herring v. United States*, 555 U.S. \_\_\_\_ (2009).

**Holding:** A criminal defendant’s Fourth Amendment rights are not violated when police mistakes that lead to unlawful searches are merely the result of “isolated negligence attenuated from the arrest” and not “systematic error or reckless disregard of constitutional requirements.”

While arresting Herring based on a warrant issued in a neighboring county, officers found drugs and a gun. They then discovered that the arrest warrant had been recalled months earlier, but had not been removed from the computer system. Herring filed a motion to suppress the allegedly “illegally obtained” evidence. The federal district court denied the motion and sentenced him to 27 months in prison.

The Eleventh Circuit affirmed the conviction, stating that illegally obtained evidence should only be suppressed when doing so could “result in appreciable deterrence” of future police misconduct.

In a 5-4 decision with Chief Justice Roberts writing for the majority and joined by Justices Scalia, Kennedy, Thomas and Alito, the Court affirmed, holding that a criminal defendant’s Fourth Amendment rights are not violated when police mistakes that lead to unlawful searches are merely the result of “isolated negligence attenuated from the arrest” and not “systematic error or reckless disregard of constitutional requirements.” Evidence obtained under these circumstances is admissible and not subject to the exclusionary rule.

Justice Ginsburg dissented and was joined by Justices Stevens, Souter, and Breyer. Justice Ginsburg argued that an intact exclusionary rule provides a strong incentive for police compliance with respect to the Fourth Amendment and its erosion in this case was not warranted. Justice Breyer also filed a separate dissenting opinion and was joined by Justice

Souter. He argued that the Court should move away from its reliance on analyzing the degree of police culpability when determining whether the exclusionary rule applies and instead draw a bright line between errors made by record keepers and those made by police officers.

### (B) *Arizona v. Johnson*, 555 U.S. \_\_\_\_ (2009).

**Holding:** The encounter between police and the passenger of a car that was pulled over for a suspended license was not consensual and therefore did not violate his Fourth Amendment protection against unreasonable search and seizure.

Johnson was riding in a car that was pulled over because of a suspended license. Although the stop was solely predicated on the suspended license, the officers began to question the car’s occupants, including Johnson, about gang activity in the area. Based on circumstantial evidence, the officers asked Johnson to exit the car so that they could question him further. He voluntarily exited the car and the officers found a handgun and a small amount of marijuana on his person. Based on this evidence, Johnson was convicted in Arizona state court of (1) the unlawful possession of a weapon as a prohibited possessor and (2) possession of marijuana. Johnson appealed, arguing that the evidence recovered from the search should have been suppressed because the officers did not have probable cause to search him at the time of his arrest and therefore did so in violation of his rights under the Fourth Amendment.

The Court of Appeals of Arizona reversed Johnson’s conviction, finding that the officers had no reason to believe that he was involved in any criminal activity when he was searched. The officers requested that Johnson step out of the car to discuss gang activity, not because the officers feared that their safety was threatened, thus it was part of a consensual encounter between the officers and Johnson and the officers’ subsequent search of Johnson was illegal and unconstitutional.

In a unanimous opinion written by Justice Ginsburg, the Supreme Court reversed, holding that Johnson’s encounter with police officers was not consensual and therefore the search did not violate his Fourth Amendment protection against unreasonable search and seizure. The Court reasoned that lawful traffic stops entail the “temporary seizure of driver and passengers” that continues for the duration of the stop. Officer inquiries into matters unrelated to the stop do not transform the event into a “consensual” encounter whereby the driver or passenger is free to go as he or she pleases. Therefore, the police officers who frisked Johnson were not constitutionally required to depart the

scene without first ensuring that he was not armed and dangerous, so long as they reasonably suspected he was armed and dangerous.

(C) *Arizona v. Gant*, 556 U.S. \_\_\_\_ (2009).

**Holding:** Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe that the vehicle contains evidence of the offense of arrest.

After *Gant* was arrested for driving with a suspended license, handcuffed, and locked in the back of a patrol car, police officers searched his car and discovered cocaine in the pocket of a jacket on the backseat. *Gant* was convicted on two counts of cocaine possession after the judge refused to suppress the evidence found in *Gant*'s vehicle, stating that the search was a direct result of *Gant*'s lawful arrest and therefore an exception to the general Fourth Amendment warrant requirement.

The Arizona Court of Appeals reversed, holding the search unconstitutional, and the Arizona Supreme Court agreed, stating that exceptions to the Fourth Amendment warrant requirement must be justified by concerns for officer safety or evidence preservation and that, because *Gant* could not have accessed his car to retrieve weapons or evidence at the time of the search, the search-incident-to-arrest exception did not apply.

In a majority opinion authored by Justice Stevens and joined by Justices Scalia, Souter, Thomas, and Ginsburg, the Court held that police may search a vehicle after arresting its driver only if it is reasonable to believe that the arrestee might access the vehicle at the time of the search or that the vehicle contains evidence of the offense of the arrest. The Court reasoned that "warrantless searches are per se unreasonable" and subject only to a few, very narrow exceptions and that an arrest for a suspended license did not fall within the exceptions.

Justice Scalia filed a separate concurrence. Justice Alito dissented and was joined by Chief Justice Roberts, and Justices Kennedy and Breyer. He argued that the majority improperly overruled its precedent in *New York v. Belton* which held that "when a policeman has made a lawful arrest... he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." Justice Breyer also wrote a separate dissenting opinion arguing that the Court could not create a new governing rule.

### III. Sixth Amendment.

(A) *Kansas v. Ventris*, 556 U.S. \_\_\_\_ (2009).

**Holding:** Statements elicited in violation of the Sixth Amendment were admissible to impeach inconsistent testimony at trial.

*Ventris* was convicted of aggravated robbery and aggravated battery based in part on testimony of his former cell mate used to counter *Ventris* testimony. The government recruited his cellmate to listen for incriminating statements made by *Ventris*.

On appeal, *Ventris* claimed the cellmate's testimony violated his Sixth Amendment right to counsel. The Court of Appeals affirmed, but the Supreme Court of Kansas reversed, holding that "[w]ithout a knowing and voluntary waiver of the right to counsel, the admission of the defendant's uncounseled statements to an undercover informant who is secretly acting as a State agent violates the defendant's Sixth Amendment rights."

In an opinion by Justice Scalia and joined by Chief Justice Roberts, and Justices Kennedy, Souter, Thomas, Breyer, and Alito, the Court held that statements elicited in violation of the Sixth Amendment were admissible to impeach inconsistent testimony at trial, reasoning that the interests protected by excluding "tainted evidence" are outweighed by the need to assure "integrity of the trial process."

Justice Stevens, joined by Justice Ginsburg, dissented and sharply criticized the majority for allowing the State to cut corners in criminal proceedings at the expense of criminal defendants' constitutional guarantees.

### IV. Section 1983.

(A) *Fitzgerald v. Barnstable School Committee*, 555 U.S. \_\_\_\_ (2009).

**Holding:** A claim filed under Title IX for violation of the Equal Protection Clause of the Fourteenth Amendment does not preclude the use of 42 U.S.C. Section 1983 to further constitutional claims.

A kindergarten student's parents reported allegations of bullying and mistreatment of the student to the school. The school's immediate investigation into the matter did not provide any further proof of the sexual harassment. After the student told her parents about further instances of mistreatment, the local police department began its own investigation but was unable to find sufficient evidence to bring criminal proceedings against the alleged harasser. The student reported other

incidents throughout the year, and each was addressed by the school's principal as it occurred.

The student's family brought suit against the school district in federal court alleging violations of both Title IX of the Education Act Amendments of 1972 and 42 U.S.C. § 1983. Title IX prohibits discrimination by any educational entity receiving federal funding, while Section 1983 protects against the deprivation of any rights guaranteed by the Constitution and federal laws. The district court granted the school district's motion to dismiss both counts and the girl's family appealed.

The First Circuit affirmed the district court's dismissal of both claims. First, discussing the Title IX claim, the court stated that five conditions must be met for a plaintiff to succeed: the student must prove that (1) the institution is a recipient of federal funding, (2) severe, pervasive, and objectively offensive harassment occurred, (3) the harassment denied the student of educational opportunities or benefits, (4) the institution had actual knowledge of the harassment, and (5) the institution's deliberate indifference caused the student to be subjected to the harassment. The First Circuit held that even if the first four factors were met in this case, the school's "prompt" and "diligent" investigation was not clearly unreasonable and therefore did not amount to deliberate indifference because the school looked into each allegation quickly and thoroughly. The court also affirmed the dismissal of the Fitzgeralds' Section 1983 claim, applying the "remedial" exception prohibiting such claims when the allegedly violated federal law is itself specific enough to demonstrate Congress' intention to allow only those remedies referred to in the statute itself. According to the First Circuit, Title IX is one of these remedial statutes and therefore any alleged violations of the statute cannot be litigated under Section 1983.

In a unanimous decision authored by Justice Alito, the Supreme Court reversed, holding that a claim filed under Title IX for violation of the Equal Protection Clause of the Fourteenth Amendment does not preclude the use of 42 U.S.C. Section 1983 to further constitutional claims. The Court reasoned that Title IX was not meant to be the exclusive tool for addressing gender discrimination in schools, or a substitute for actions filed under Section 1983 to enforce constitutional rights.

**(B) *Haywood v. Drown*, 556 U.S. \_\_\_\_ (2009).**

**Holding:** A state statute barring state courts from hearing damages actions against corrections officers violates the Supremacy Clause.

New York courts lack jurisdiction under state or federal law to entertain civil actions seeking money damages against corrections officers, which means that New York courts cannot entertain causes of action under Section 1983 against corrections officials.

In an opinion by Justice Stevens and joined by Justices Kennedy, Souter, Ginsburg, and Breyer, the Court held that the New York statute barring state courts from hearing damages actions against corrections officers violates the Supremacy Clause. There is a presumption that state and federal courts have jurisdiction over Section 1983 suits that is defeated only when Congress expressly ousts state courts of jurisdiction and states lack authority to nullify a federal right or cause of action.

Justice Thomas filed a dissenting opinion joined by Chief Justice Roberts and Justice Scalia and in part by Justice Alito. Thomas argued that the Court stretched the Supremacy Clause too far by imposing on state courts a duty to accept subject-matter jurisdiction over Section 1983 actions.

**V. Employment.**

**(A) *Crawford v. Metropolitan Government of Nashville & Davidson County, TN*.**

**Holding:** Title VII's antiretaliation provision's protection extends to an employee who speaks out about discrimination when answering questions during an employer's investigation.

In response to questions from a local government official during an internal investigation into rumors of sexual harassment by the Metro School District employee relations director, Crawford reported that the director had sexually harassed her. Metro took no action against the director, but fired Crawford for alleged embezzlement.

Crawford sued Metro under Title VII of the Civil Rights Act of 1964, claiming that Metro was retaliating for her report of the director's behavior. The court granted Metro summary judgment and the Sixth Circuit affirmed, holding that the opposition clause demanded "active, consistent activities" and Crawford had not initiated any complaint prior to the investigation.

In a unanimous decision authored by Justice Souter writing for the majority, the Supreme Court reversed, and held that the anti-retaliation provision of Title VII extends to people who speak out, not just on their own initiative, but when prompted by an employer's internal investigation. The Court reasoned that the plain meaning of the statute includes people who oppose sexually obnoxious behavior by merely disclosing the violation and need not initiate the disclosure.

Justice Alito filed a separate concurrence and was joined by Justice Thomas. Justice Alito noted that, while not addressed in the majority opinion, the plain meaning of “oppose” should not include “silent opposition.” He argued it would open the door to plaintiffs who never expressed opposition to their employers, thus raising difficult factual determinations at trial.

## VI. Prosecutorial immunity.

- (A) *Van De Kamp v. Goldstein*, 555 U.S. \_\_\_\_ (2009).

**Holding:** The Supreme Court reaffirmed its holding in *Imbler* that officers of the court are immune from liability “for actions intimately associated with the judicial phase of the criminal process.”

Goldstein was released on habeas corpus from a California prison in 2004 after serving twenty-four years of a murder sentence. He then sued the prosecutor and chief deputy from his trial alleging that he had been wrongly convicted. Goldstein argued that he had been prejudiced by the testimony of a jailhouse informant claiming to have heard Goldstein confess to the murder, claiming that the prosecutor and deputy had failed to fulfill their obligation to ensure that information regarding jailhouse informants was adequately shared among prosecutors. The informant had stated that he had never, either before or during the trial, received benefits for cooperating with the government; in fact, the informant had worked with the government in the past and was getting reduced sentences in exchange for his testimony. In response, the prosecutors argued that their actions during the trial were immune from suit.

The district court held that the actions were administrative rather than prosecutorial and were therefore not subject to immunity. The Ninth Circuit agreed, finding that the prosecutor had failed to show the necessary close association with the judicial phase of the trial in order to invoke immunity.

In a unanimous opinion authored by Justice Breyer, the Supreme Court reversed. It reaffirmed its holding in *Imbler* that officers of the court are immune from liability “for actions intimately associated with the judicial phase of the criminal process.” Acknowledging that immunity does not apply when officers of the court engage in administrative tasks, the Court reasoned that in this case, the prosecutors’ decision not to share information regarding the testimony of a jailhouse informant was intimately connected to their roles as officers of the court and therefore they were not subject to prosecution.

## VII. Qualified immunity.

- (A) *Pearson, et al. v. Callahan*, 555 U.S. \_\_\_\_ (2009).

**Holding:** The Supreme Court discarded the rigid two-step process for evaluating qualified immunity claims that it outlined in *Saucier v. Katz*, which required that federal courts first determine if a constitutional violation occurred and then decide whether the right infringed was clearly established.

After the Utah Court of Appeals vacated Callahan’s conviction for possession and distribution of drugs, which he sold to an undercover informant who he voluntarily admitted into his home, Callahan brought a 42 U.S.C. § 1983 action alleging that the officers who supervised and conducted the warrantless search of his home violated the Fourth Amendment.

The district court granted the officers’ motion for summary judgment and dismissed his claim holding in part that the officers were entitled to qualified immunity because they could have reasonably believed that the consent once removed doctrine – which permits a warrantless police entry into a home when consent has already been granted to an undercover officer who has observed contraband in plain view – applied to the search.

The Tenth Circuit reversed, concluding that qualified immunity did not bar Callahan’s claim. It first found that the consent once removed doctrine does not apply when the officers are summoned by a police informant and that the defendant had established a violation of his Fourth Amendment protection against unreasonable searches and seizures. Then it found that the officers’ conduct violated Callahan’s clearly established right “to be free in one’s home from unreasonable searches and seizures.”

In a unanimous decision written by Justice Alito, the Supreme Court reversed and discarded the two-step process for evaluating qualified immunity claims that it outlined in *Saucier v. Katz*, which required that federal courts first determine if a constitutional violation occurred and then decide whether the right infringed was clearly established. The Court gave federal courts the discretion to decide which question they would answer first, reasoning that substantial judicial resources were often expended in determining difficult constitutional claims that ultimately had little to do with the outcome of the case.

The Court also noted that “[w]hen the entry at issue here occurred in 2002, the ‘consent-once-removed’ doctrine had gained acceptance in the lower courts” and that the officers “were entitled to rely on these cases, even though their own Federal Circuit had not yet ruled on ‘consent-once-removed entries.’”

The Court did not address the Fourth Amendment merits of Callahan's claim.

### VIII. Sovereign immunity.

(A) *Ministry of Defense of Iran v. Elahi*, 556 U.S. \_\_\_ (2009).

**Holding:** Assets that were not "blocked" at the time of the circuit court's opinion could not be attached to satisfy judgment against Iran.

Dariush Elahi sued Iran, claiming that Iran unlawfully participated in the assassination of his brother, and obtained a default judgment of \$312 million. Seeking to collect, he attempted to attach a \$2.8 million judgment that Iran obtained against an American defense contractor.

The U.S. District Court for the Southern District of California held that Iran had waived its immunity from attachment by submitting to the jurisdiction of the International Court of Arbitration and the district court in its prior contract dispute.

The Ninth Circuit affirmed, but on different grounds. The court held that Elahi could attach the Iranian judgment under Section 201(a) of the Terrorism Risk Insurance Act of 2002, which allows creditors such as Elahi to attach "the blocked assets of [a] terrorist party."

In a majority opinion authored by Justice Breyer and joined by Chief Justice Roberts, and Justices Stevens, Scalia, Thomas, and Alito, the Court held that the assets in question in Elahi's case were not "blocked" under the Terrorism Risk Insurance Act of 2002 because the Treasury Department had issued an order unblocking transactions involving property in which Iran's interest arose after January 19, 1981. The Court also held that Elahi waived his right to attach the judgment when he accepted a \$2.3 million payment under Section 2002 of the Victims of Trafficking and Violence Protection Act of 2000 (VPA) which offers compensation to individuals holding terrorism-related judgments against Iran. As a condition of receiving the VPA funds Elahi signed a waiver form relinquishing "all rights to ...attach property that is at issue in claims against the United States before an international tribunal." The judgment fell within this waiver because it is "at issue" in a claim against the United States before the Iran-U.S. Claims Tribunal. Given this finding of waiver, the Court declined to reach whether the judgment was "blocked" by new Executive Branch actions following the Ninth Circuit's decision.

Justice Kennedy concurred in part and dissented in part, and was joined by Justices Souter and Ginsburg. He agreed that the assets in question were not "blocked" at the time of the Ninth Circuit's

decision. However, he disagreed that Elahi had waived his right to attach those assets. He reasoned that the majority departed from the plain meaning and purpose of the federal statute that awarded compensation to Elahi when it inhibited his ability to collect the award granted him against Iran for the murder of his brother.

### IX. Voting Rights Act.

(A) *Bartlett v. Strickland*, 556 U.S. \_\_\_ (2009).

**Holding:** The Voting Rights Act of 1965 (VRA) does not require the creation of a new legislative district when the new district would include a racial minority group that has less than 50% of the population.

Despite the North Carolina Constitution's "While County Provision" prohibiting the General Assembly from dividing counties when drawing its own legislative districts, in 1991 the legislature drew a district to include portions of four counties, for the asserted purpose of satisfying §2 of the VRA. The VRA allows minority voters to pursue claims in court that the political strength they could wield has been diluted by some law or election regulation. By the time the district was to be redrawn in 2003, the African-American voting-age population had fallen below 50%. Rather than redrawing the district to keep counties whole, the legislature split portions of it and another county.

Several county commissioners in one of the "split" counties brought this suit against state officials alleging that their redistricting plan was in violation of the North Carolina Constitution. The state officials argued that the redistricting plan was required by the VRA, stating that the minority group in question was sufficiently large and geographically compact to constitute a majority under the terms of the VRA. The North Carolina Superior Court agreed with the state officials and entered summary judgment in their favor.

The North Carolina Supreme Court reversed on appeal, holding that the minority group did not comprise a numerical majority of citizens and, therefore, redistricting was not required by the VRA. Because the redistricting plan did not meet the conditions of the VRA, the court said, it had to comply with certain terms of North Carolina's Constitution setting a minimum county population for redistricting. The court found that the county did not meet this requirement, and declared the plan unlawful.

The Supreme Court affirmed the North Carolina Supreme Court holding that the VRA does not require the creation of a new legislative district when that would include a racial minority group that has less than 50% of the population. With Justice Kennedy writing for the plurality and joined by Chief Justice Roberts and Justice Alito, the Court stated that the VRA allows

redistricting only when a geographically compact group of minority voters could form a majority in the redrawn election district. The Court reasoned that this requirement was not satisfied here as the minority group in the redrawn district comprised a mere 39 percent of the voting population.

Justice Thomas, joined by Justice Scalia, concurred only in the judgment. He disagreed with the framework used by the Court for analyzing vote dilution claims arguing it had no basis in the language of the VRA. Justice Souter dissented and was joined by Justices Stevens, Ginsburg, and Breyer. He argued that a district may be redrawn so long as a cohesive minority population is large enough to elect its chosen candidate when combined with crossover voters. Justice Ginsburg also wrote a separate dissenting opinion, encouraging Congress to remedy what she viewed as the Court's misinterpretation of the VRA. Justice Breyer also wrote a separate dissenting opinion, criticizing the plurality's reliance on a 50% threshold as too simplistic because it fails to account for the realities of how people actually vote.

## X. Criminal.

### (A) *Puckett v. United States*, 556 U.S. \_\_\_\_ (2009).

**Holding:** The plain error standard governs claims that are forfeited because they were not raised at trial in determining whether they may be raised at the appellate level.

In September 2003, Puckett agreed to a plea bargain with the United States. In exchange for his guilty plea, the government agreed to recommend a reduced sentence. However, at sentencing, the government reneged, arguing that because Puckett admittedly aided a fellow inmate in another crime while awaiting sentencing, he was no longer eligible for the reduction. The district court agreed. On appeal, Puckett argued that the government's breach of agreement disqualified his guilty plea.

The Fifth Circuit held that Puckett's guilty plea was not disqualified. It recognized that the government breached its plea agreement at sentencing but it reasoned that Puckett failed to prove his substantial rights were affected when the district court was unlikely to have imposed a different sentence, even if the government had recommended a reduction.

With Justice Scalia writing for the majority and joined by Chief Justice Roberts and Justices Kennedy, Thomas, Ginsburg, Breyer, and Alito, the Supreme Court held that the plain error standard governs claims that are forfeited because they were not raised at trial in determining whether they may be raised at the

appellate level. The Court then reaffirmed the four-pronged plain-error standard of review: "1) there must be an error or defect that the appellant has not affirmatively waived, 2) it must be clear and obvious, 3) it must have affected the appellant's substantial rights, 4) if the three other prongs are satisfied, the court of appeals has the discretion to remedy the error if it seriously affects the fairness, integrity or public reputation of judicial proceedings." The Court rejected Mr. Puckett's arguments that he should not be subject to the plain-error standard after he failed to raise his claims at the trial level. Moreover, it affirmed his conviction and sentencing, agreeing with the Fifth Circuit's reasoning that Mr. Puckett's "substantial rights" had not been affected.

Justice Souter, joined by Justice Stevens, wrote a separate dissenting opinion. He agreed that the plain-error standard was appropriate in this case but criticized the majority for interpreting the plain-error standard's third prong requirement of affecting the appellant's "substantial rights" to only include his "length of incarceration." Rather, Justice Souter argued that Puckett's substantial rights were affected when he was convicted without trial and by a plea agreement that was not honored by the government and that he was thus entitled to relief.

### (B) *Rivera v. Illinois*, 556 U.S. \_\_\_\_ (2009).

**Holding:** A criminal conviction need not always be overturned if a juror was wrongly seated after being opposed by a defense lawyer's peremptory challenge.

During jury selection in Rivera's state-court murder trial, his counsel sought to use a peremptory challenge to dismiss a female potential juror. The judge did not allow it deeming the motion discriminatory towards the juror (he had already exercised two peremptory challenges against women). The potential juror not only was seated; she was chosen as foreperson. On appeal after his conviction, Rivera argued that the trial court erred in dismissing the pre-trial motion and thus his conviction should be reversed.

The Illinois Supreme Court remanded the case with instructions for the trial court to specify how the motion was discriminatory. After the trial court found that gender discrimination was at issue, the Illinois Supreme Court continued its review and held that Rivera was improperly denied his pre-trial motion to dismiss the juror. It reasoned that there was no evidence Rivera's attorney aimed to dismiss the juror because of her gender. However, it also found that this was harmless error explaining that there was no evidence that indicated Rivera was tried before a biased jury because of the improperly dismissed motion.

In an opinion authored by Justice Ginsburg, a unanimous Supreme Court held that a criminal conviction need not always be overturned if a juror was wrongly seated after being opposed by a defense lawyer's peremptory challenge. Such an erroneous seating is not such a serious trial error that it cannot be excused as harmless and states are free to decide what consequences follow such an error in assembling a juror.

(C) *Harbison v. Bell*, 556 U.S. \_\_\_\_ (2009).

**Holdings:** (1) A certificate of appealability (COA) is not required to appeal an order denying a request for federally appointed counsel. (2) Federally appointed counsel may represent their clients in state clemency proceedings and are entitled to compensation for such representation.

After the Tennessee state courts rejected Edward Jerome Harbison's conviction and death sentence challenges, a federal district court appointed Harbison a federal public defender to represent him in filing a federal habeas corpus petition. That petition was denied by both the federal district court and the Sixth Circuit. Because Tennessee law does not authorize the appointment of state public defenders as counsel in state clemency proceedings, Harbison's federal public defender requested to represent him in his state clemency proceedings. Both the district court and Sixth Circuit denied the request, holding that federal law does not authorize federal compensation for legal representation in state matters.

First, the Supreme Court held that a certificate of appealability (COA) is not required to appeal an order denying a request for federally appointed counsel. With Justice Stevens writing for the majority, and joined by Justices Kennedy, Souter, Ginsburg, and Breyer, the Court reasoned that a COA is only required to appeal final orders in habeas corpus petitions and was not required in this case because Harbison merely appealed an order denying his request to expand the authority of his federally appointed counsel.

Second, the Supreme Court held that federally appointed counsel may represent their clients in state clemency proceedings and are entitled to compensation for such representation. The Court stated that the plain language of 18 U.S.C. Section 3599 authorized federally appointed counsel to represent their clients in those proceedings "as may become available to the defendant," reasoning that state clemency proceedings met this description.

Chief Justice Roberts and Justice Thomas each wrote separately concurring in the judgment. Justice Scalia, joined by Justice Alito, concurred in part and dissented in part. He agreed that a COA was not required to appeal an order denying the expansion of a federally appointed counsel's authority. However, he disagreed that 18 U.S.C. Section 3599 authorizes state prisoners' federally funded counsel to pursue state clemency on their clients' behalf.

**TRENDS IN THE UNITED STATES SUPREME COURT  
Supplement**

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**CHAPTER 13**

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## I. Fourth Amendment/Qualified Immunity

### (A) *Safford Unified School Dist. # 1 v. Redding*, 556 U.S. \_\_\_\_ (2009).

**Holding:** 13-year old girl's Fourth Amendment rights were violated when school employees searched her underwear for pills. But the school employees were entitled to qualified immunity because lower court decisions were disparate enough to have warranted doubt about the scope of the girl's Fourth Amendment right.

After a 13-year old female student was accused of giving pills to fellow students, the assistant principal searched her backpack and found nothing. Then two female school employees made the student remove her outer clothing, pull her bra and shake it, and pull out the elastic on her underpants. No pills were found. The girl's mother sued the school district and its employees alleging that the strip search violated the girl's Fourth Amendment rights. The employees claimed qualified immunity and moved for summary judgment, which the District Court granted.

The en banc Ninth Circuit reversed, holding that the strip search was unjustified under the Fourth Amendment test for searches of children by school officials set out in *New Jersey v. T.L.O.* It then applied the test for qualified immunity and found that the girl's right was clearly established at the time of the search. The Court thus held that the assistant principal was not entitled to qualified immunity. However, it affirmed the summary judgment as to the other two employees because it decided that they were not independent decision makers.

In an opinion by Justice Souter, the Court held that the search of the girl's underwear violated the Fourth Amendment because the assistant principal did not have sufficient suspicion to warrant extending the search to the point of making the girl pull out her underwear. The Court reasoned that this part of the search necessarily exposed the girl's breasts and pelvic area to some degree, and both subjective and reasonable societal expectations of personal privacy supported the treatment of such a search as categorically distinct, requiring distinct elements of justification on the part of school authorities for going beyond a search of outer clothing and belongings. However, the Court held that all of the school employees were protected from liability by qualified immunity because "clearly established law [did] not show that the search violated the Fourth Amendment" where there were enough lower court cases viewing school searches differently, with well-reasoned majority and dissenting opinions, to make it unclear whether the search violated the Fourth Amendment.

Justice Stevens concurred in part and dissented in part and was joined by Justice Ginsburg. He agreed that the strip search was unconstitutional, but disagreed that the employees were entitled to immunity. Justice Thomas concurred in the judgment in part and dissented in part. He agreed that the employees were entitled to immunity, but argued that the Court should not meddle with decisions school administrators make in the interest of keeping schools safe.

## II. Employment

### (A) *Gross v. FBL Financial Services, Inc.*, 557 U.S. \_\_\_\_ (2009).

**Holding:** A plaintiff bringing an Age Discrimination in Employment Act (ADEA) disparate-treatment claim must prove, by a preponderance of the evidence, that age was the "but-for" cause of the challenged adverse employment action. The burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision.

Gross sued his employer alleging that he was demoted because of his age. The jury returned a verdict for the employee, but the Eighth Circuit reversed and awarded a new trial, holding that the jury had been improperly instructed. It reasoned that since Gross never submitted direct evidence that age was a motivating factor in his demotion, he was not entitled to a jury instruction that put the burden of persuasion on the employer to show that it would have demoted him regardless of age.

In a majority opinion authored by Justice Thomas, the Court held that the burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision. The Court held that it was the plaintiff's burden to prove by a preponderance of the evidence that age was the "but-for" cause of the challenged adverse employment action.

Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, dissented, arguing that the Court and Congress had previously rejected the "but-for" standard of causation in ADEA claims. Justice Breyer also wrote a separate dissenting opinion criticizing the majority for adopting a standard that was inappropriate for determining motive, a necessary element in a ADEA discrimination claim.

**(B) *Ricci v. DeStefano*, 557 U.S. \_\_\_\_ (2009)**

**Holding:** City’s race-based rejection of test results violated Title VII.

The City of New Haven uses objective examinations to identify firefighters best qualified for promotion. When the City administered the exam to fill vacant lieutenant and captain positions, the results showed that white candidates had outperformed minority candidates. The City threw out the results based on statistical racial disparity. White and Hispanic firefighters, who passed the exams but were denied a chance at promotions when the City refused to certify the test results, sued the City alleging that discarding the test results discriminated against them on the basis of race in violation of Title VII of the Civil Rights Act of 1964. The City responded that, had they certified the test results, they could have faced Title VII liability for adopting a practice having a disparate impact on minority firefighters. The District Court granted summary judgment for the City.

The Second Circuit initially affirmed summarily, but then issued a per curiam opinion that praised the district court for a “thorough, thoughtful, and well-reasoned opinion” and concluded that the City could not be held liable for its failure to certify because it “was simply trying to fulfill its obligations under Title VII.” The court then voted 7-6 to deny rehearing en banc, with all six dissenters signing an opinion that questioned the panel’s judgment and highlighted the issue for the Supreme Court.

In an opinion by Justice Kennedy, the Court held that the City’s action in throwing out the tests violated Title VII, which prohibits intentional acts of discrimination based on race, color, religion, sex, and national origin, as well as policies or practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities. The Court held that, under Title VII, before an employer can engage in intentional discrimination for the purpose of avoiding or remedying an unintentional, disparate impact, the employer must have a “strong basis in evidence” to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action. It then applied this test and held that the City’s race-based rejection of the test results did not satisfy the strong-basis-in-evidence standard because, while a threshold showing of a significant statistical disparity, without more, is not a “strong basis in evidence” that the City could be liable under Title VII if it certified the test results. There was no evidence that the exams were not job related and consistent with business necessity. And there was not a strong basis in evidence showing an equally valid, less discriminatory testing alternative, that the

City, by certifying the test results, would necessarily have refused to adopt.

Justices Scalia and Alito filed concurring opinions. And Justice Ginsburg filed a dissenting opinion, in which Justices Stevens, Souter and Breyer joined.

**III. Individuals with Disabilities Act****(A) *Forest Grove School Dist. v. T.A.*, 557 U.S. \_\_\_\_ (2009).**

**Holding:** The Individual with Disabilities Education Act (IDEA) authorizes reimbursement for private special education services when a public school fails to provide “free appropriate public education” (FAPE), regardless of whether a child had previously received special education services through the public school.

A former student of the Forest Grove School District was evaluated and determined to be disabled and eligible for special education under the IDEA and Section 504 of the Rehabilitation Act of 1973, and the school district was ordered by the Office of Administrative Hearings for the State of Oregon to reimburse the student for private school tuition.

The school district appealed the order in District Court, arguing that reimbursement was not appropriate because the student did not receive special education services while enrolled in public school. The District Court invalidated the order. The Ninth Circuit reversed and upheld the order, reasoning that the IDEA provided the courts broad discretion to achieve “equitable relief” for disabled students, including reimbursement for private school tuition.

In an opinion by Justice Stevens, the Court held that the IDEA authorizes reimbursement for private special education services when a public school fails to provide FAPE, regardless of whether the child received special education services through the school.

The Court relied heavily on its previous decisions in *School Committee of Burlington v. Department of Education of Massachusetts* and *Florence County School Dist. Four v. Carter*, which held that courts had the power to reimburse parents for private school tuition when a school district fails to provide FAPE.

Justice Souter’s dissent, joined by Justices Scalia and Thomas, argued that the 1997 amendments to IDEA limited reimbursement to children who had previously received special education services from a public school.

#### IV. Procedure

(A) *Horne, Superintendent, Arizona Public Instruction v. Flores*, 557 U.S. \_\_\_\_ (2009).

**Holding:** Rule 60(b)(5) provides the appropriate vehicle for a court to reconsider, in light of a new bill, its ruling that the state was not in compliance with the Equal Educational Opportunities Act (EEOA).

A group of English Language-Learner (ELL) students and their parents filed a class action against Arizona, its State Board of Education, and the Superintendent of Public Instruction alleging that the defendants were providing inadequate ELL instruction in the Nogales Unified School District, in violation of the EEOA. The EEOA requires States to take “appropriate action to overcome language barriers” in schools. The District Court entered a declaratory judgment, finding an EEOA violation because the amount of funding the State allocated for the special needs of ELL students was arbitrary and not related to the actual costs of ELL instruction in Nogales. The District Court subsequently extended relief statewide and, in the following years, entered a series of additional orders and injunctions. The District Court ultimately held the state in contempt for failing to “appropriately and constitutionally fun[d] the State’s ELL programs taking into account the previous orders.” Then the state legislature passed a bill designed to implement a permanent funding solution by increasing ELL incremental funding and creating new funds to cover additional costs of ELL programming. The Governor did not approve of the bill’s funding provisions, but allowed it to become law without her signature. She then requested the attorney general to move for accelerated consideration of the bill by the District Court. After the Speaker of the State House and President of the State Senate intervened, they and the superintendent moved to purge the District Court’s contempt order in light of the bill. Alternatively, they moved for relief under Federal Rule of Civil Procedure 60(b)(5) based on changed circumstances.

The Supreme Court granted cert after the Ninth Circuit affirmed the denial of petitioners’ motion for relief under Federal Rule of Civil Procedure 60(b)(5).

In an opinion by Justice Alito, the Court held that Rule 60(b)(5) provides the appropriate vehicle for petitioners to argue that Arizona’s new bill fulfills its statutory obligation by “new means that reflect new policy insights and other changed circumstances.” The Court found that the Rule 60(b)(5) standard applied by the Ninth Circuit was too strict and that its inquiry was too narrow. Rule 60(b)(5) permits a party

to seek relief from a judgment or order if “a significant change either in factual conditions or in law” renders continued enforcement “detrimental to the public interest.” Because institutional reform injunctions bind both state and local officials to their predecessors’ policy preferences and may thereby “improperly deprive future officials of their designated legislative and executive powers,” federal courts must take a “flexible approach” to Rule 60(b)(5) motions brought in this context. The Court remanded for the lower courts to consider whether the District Court erred in entering statewide relief because the record contained no factual findings or evidence that any school district other than Nogales failed to provide equal educational opportunities to ELL students.

Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg, filed a dissent and argued that the review standards enunciated by the Court were incomplete and distorted Rule 60(b)(5)’s objectives. He also argued that, applying the Court’s standard, the lower courts did “fairly consider” every change in circumstances that the parties called to their attention.

(B) *U.S. ex rel. Eisenstein v. City of New York*, 556 U.S. \_\_\_\_ (2009).

**Holding:** The 60-day time limit for filing a notice of appeal in Rule 4(a)(1)(B) of the Federal Rules of Appellate Procedure only applies when the United States has formally intervened in an action.

New York City required government employees not living in the City to pay a fee equivalent to the municipal income taxes paid by employees living in the city. Employees sued the city alleging that the policy violated the federal False Claims Act, which imposes civil liability on any person who “knowingly presents, or causes to be presented, to an officer of employee of the United States Government ... a false or fraudulent claim for payment or approval” and provides that a private plaintiff may sue *qui tam* (on the government’s behalf). The government has a right to intervene if it can show a good cause for doing so, but it did not seek to intervene in this case.

The District Court dismissed the employees’ claims and they appealed 54 days later. Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure gives a party 30 days to appeal a civil case, but Rule 4(a)(1)(B) gives “any party” 60 days to appeal when the United States is a party to the action. The Second Circuit held that the 30 day limit applied because the United States was not a “party” to the action.

In a unanimous opinion by Justice Thomas, the Supreme Court affirmed, holding that, when the United States has declined to intervene in a privately initiated Federal Claims Act action, it is not a “party” to the

litigation for purposes of Rule 4 and the notice of appeal filed after 30 days was untimely.

## V. Voting Rights Act.

- (A) *Northwest Austin Municipal Utility Dist. No. One v. Holder*, 557 U.S. \_\_\_\_ (2009).

**Holding:** The Voting Rights Act (VRA) permits all political subdivisions, including municipal utility districts, to seek bailout from the preclearance requirements of the VRA.

Section 5 of the VRA prohibits states and political subdivisions with histories of racial discrimination in voting from changing their voting procedures without permission from either the Attorney General or a three-judge panel of the U.S. District Court for the District of Columbia. A municipal utility district (MUD) sought a declaratory judgment exempting it from Section 5 of the VRA and alternatively argued that Section 5 was unconstitutional.

The trial court held that the bailout was unavailable to a political subdivision like the MUD that did not register its own voters. The MUD appealed to the United States Supreme Court, arguing that the Act does not limit the bailout to political subdivisions that register its own voters, and that if it does, the preclearance requirements are unconstitutional.

In an opinion by Chief Justice Roberts, the Court held that the VRA permits all political subdivisions, including the MUD, to seek exemption from the preclearance requirements of the VRA, noting that the language of the VRA did not constrict the availability of a bailout for political subunits like the MUD.

Justice Thomas wrote separately, concurring in the judgment in part and dissenting in part to criticize the Court for not addressing the constitutionality of Section 5 of the VRA. He thought Section 5 was unconstitutional because it exceeded Congress' power to enforce the 15th Amendment.