

Ninth Circuit Judicial Conference
July 20, 2009
Supreme Court Review: Highlights of the 2008-2009 Term
Kathleen M. Sullivan

I. Freedom of Speech

- a. *FCC v. Fox Television Stations*: FCC did not act arbitrarily or capriciously under the APA in determining that the broadcast of “fleeting expletives” may violate federal restrictions on the broadcast of “any obscene, indecent, or profane language,” despite prior enforcement only against deliberate and repeated use (5-4 per Justice Scalia)
- b. *Pleasant Grove City v. Summum*: the First Amendment does not require a city to include a monument to the “Seven Aphorisms of Summum” in a display of monuments in a public park that includes a monument to the Ten Commandments because the display of monuments in a public park constitutes “government speech” to which the requirements of the Free Speech Clause do not apply; reserving question whether, if government speech, Ten Commandments monument violates the Establishment Clause (unanimous, per Justice Alito)

II. Federalism

- a. *Wyeth v. Levine*:
 - i. held 6-3 per Justice Stevens that FDA prescription drug labeling approval under the Food, Drug and Cosmetic Act does not preempt Vermont product liability claims based on the theory that the warning label on the drug was inadequate because it did not prohibit the use of the technique used to administer the drug
 - ii. Justice Thomas concurred in the judgment only, expressing doubt about all implied preemption claims
 - iii. dissent by Justice Alito, joined by Chief Justice Roberts and Justice Scalia, would have found conflict preemption
- b. *Altria Group v. Good*: held that Federal Cigarette Labeling and Advertising Act, which provides that “no requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes,” does not preempt claim for misrepresentation under Maine Unfair Trade Practices Act for promotional statements that cigarettes were “light” and had “lowered tar and nicotine” (5-4 per Stevens)
- c. *Cuomo v. The Clearing House*: visitorial powers of the Office of the Comptroller of the Currency under the National Bank Act do not preempt judicial enforcement actions by New York Attorney General against national banks in New York for allegedly discriminatory lending practices (5-4, per Justice Scalia jointed by Justices Stevens, Souter, Ginsburg and Breyer)

III. Voting Rights

- a. *Northwest Austin Municipal Utility District No. 1 v. Holder*
 - i. held 8-1, per Chief Justice Roberts, that a municipal utility district qualifies as a “political subdivision” under §4(a) of the Voting Rights Act that is eligible to bail out of the preclearance requirements of VRA §5

- ii. this statutory construction avoided the constitutional question whether the 2006 extension of the §5 preclearance requirement exceeded Congress's remedial powers under the 14th and 15th Amendment
 - iii. only Justice Thomas dissented, arguing that §5 is no longer necessary to curb pervasive discrimination in voting practices
- b. *Bartlett v. Strickland*
- i. held 5-4 that "vote dilution" claim under §2 of the Voting Rights Act cannot arise if a racial minority group constitutes less than 50% of a proposed district's population
 - ii. Justice Kennedy wrote for a plurality with Chief Justice Roberts and Justice Alito affirming North Carolina's invalidation of North Carolina House District 18, which was created with a 39.36% black population; Justices Scalia and Thomas joined result but said §2 can never support vote dilution claims
 - iii. dissent by Justice Souter, joined by Justices Stevens, Ginsburg, and Breyer, argued that Section 2 requires the creation of a new district when the minority voting population is substantial even if less than 50%

IV. Civil Rights

- a. *Ricci v. DeStefano*
- i. held 5-4, in an opinion by Justice Kennedy joined by Chief Justice Roberts, and Justices Scalia, Thomas, and Alito, that the City of New Haven violated Title VII by throwing out results of a firefighter promotion exam that disproportionately failed black firefighters, in the absence of a "strong basis in evidence" to believe that certifying the test would make it liable under Title VII for disparate impact
 - 1. invalidation of test was race-conscious disparate treatment
 - 2. mere statistical disparity, fear of litigation, or prima facie case not enough to provide defense
 - 3. did not remand but found summary judgment appropriate for plaintiffs
 - ii. Justice Scalia in concurrence questioned whether disparate impact litigation is consistent with the Equal Protection Clause
 - iii. Justice Ginsburg's dissent, joined by Justices Stevens, Souter and Breyer, argued that the test was sufficiently flawed to give the city good cause to fear disparate impact liability and thus its jettison should not have been held to amount to disparate treatment
- b. Other decisions under federal antidiscrimination statutes
- i. *Crawford v. Nashville and Davidson County*: Title VII's anti-retaliation provision for "opposing" unlawful practices protects a worker from being dismissed for cooperating with her employer's internal investigation of sexual harassment even though she did not initiate that investigation (unanimous)
 - ii. *AT&T Corp. v. Hulteen*: 1977 pregnancy amendments to Title VII do not apply retroactively to require, for purpose of calculating pension benefits, restoration of service credit that female employees lost when they took pregnancy leaves under lawful pre-PDA leave policies (7-2, per Justice Souter, reversing CA9 en banc)

- iii. *Gross v. FBL Financial Services*: Title VII’s burden-shifting framework for mixed-motive cases does not apply to the ADEA, and thus burden of proof remains on employee to show that employer would not have demoted him absent age discrimination (5-4 decision, per Justice Thomas)
- iv. *Forest Grove School District v. T.A.*: IDEA permits a tuition reimbursement award against a school district for private school special education even though child had not “previously received special education and related services” from the school district (6-3, per Stevens, affirming CA9)
- v. *Fitzgerald v. Barnstable School Committee*: invocation of implied right of action under Title IX against federally funded educational institution for allowing student-on-student sexual harassment does not preclude constitutional claim for sex discrimination under §1983 based on same conduct (unanimous)

V. Due Process

- a. *District Attorney's Office for the 3d Judicial District v. Osborne*
 - i. held 5-4, per Chief Justice Roberts, joined by Justices Kennedy, Scalia, Thomas, and Alito, that an individual whose criminal conviction has become final does not have a constitutional due process right to access DNA evidence for testing in an effort to prove innocence (reversing CA9)
 - ii. in a concurrence, Justice Alito, joined by Justices Kennedy and Thomas, would have gone further in rejecting any such DNA access claim except through a habeas plea after state court remedies have been exhausted
 - iii. in dissent, Justice Stevens, joined by Justices Ginsburg and Breyer, and in part by Justice Souter, argued that the Due Process Clause requires access to evidence that may exonerate a defendant post-conviction, outweighing the state’s interest in ensuring the finality of its judgments
- b. *Caperton v. A.T. Massey Coal Co*
 - i. held 5-4, per Justice Kennedy, that the Due Process Clause of the Fourteenth Amendment requires recusal of a state supreme court justice where the CEO of a litigant before the court had donated \$3 million to that justice’s election campaign (60% of total expenditures); due process requires that there be no “probability of bias” based on “objective and reasonable perceptions,” a standard is met where “a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case”
 - ii. dissenters criticized the majority for failing to create a clear or workable standard, inviting increased recusal claims that will harm public confidence in the impartiality and integrity of the state courts

VI. Criminal Procedure

- a. *Herring v. United States*: Fourth Amendment does not require exclusion of evidence found during a search incident to an arrest based on a faulty arrest warrant where police mistakes that lead to the unlawful search were the result of isolated negligence and “not systematic error or reckless disregard of constitutional requirements” (5-4, per Chief Justice Roberts)

- b. *Arizona v. Gant*: Fourth Amendment permits police to conduct a warrantless vehicle search incident to an arrest only if the arrestee is within reaching distance of the vehicle or the officers have reasonable belief that “evidence of the offense of arrest might be found in the vehicle,” effectively overruling *New York v. Belton*, which held that, “when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident to that arrest, search the passenger compartment” (5-4 per Justice Stevens joined by Justices Scalia, Souter, Thomas, and Ginsburg, over dissent by Chief Justice Roberts, and Justices Alito, Breyer and Kennedy)
- c. *Van De Kamp v. Goldstein*: absolute prosecutorial immunity under *Imbler v. Pachtman* for “for actions intimately associated with the judicial phase of the criminal process” extends to decisions of a supervising prosecutor for overseeing subordinates’ compliance with *Brady v. Maryland* (unanimous, per Justice Breyer, reversing CA9)
- d. *Melendez Diaz v. Massachusetts*: state forensic analyst’s laboratory report prepared for use in a criminal prosecution is testimonial and triggers a right under the Sixth Amendment Confrontation Clause for the accused to confront the analyst in court (5-4, per Justice Scalia joined by Justices Stevens, Souter, Thomas, and Ginsburg, over dissent by Justice Kennedy joined by Chief Justice Roberts and Justices Breyer and Alito)
- e. *Safford United School District No. 1 v. Redding*: holding excessively intrusive in violation of the Fourth Amendment a strip search by public school officials to determine if a student was possessing and distributing a prescription drug on campus in violation of school policy, holding that strip-searches are “categorically distinct” under the Constitution and that school officials must have some evidence showing both that the illegal substance being hidden is dangerous and that the substance is concealed in the student’s underwear (8-1, per Justice Souter over dissent only by Justice Thomas on the Fourth Amendment question; but finding qualified immunity appropriate by a vote of 7-2; affirming CA9 on Fourth Amendment question and reversing on qualified immunity)
- f. *Pearson v. Callahan*: overruling the *Saucier* two-step and allowing qualified immunity to be granted at the district court’s discretion without a mandatory prior inquiry into the substance of a constitutional right

VII. Civil Litigation

- a. *Ashcroft v. Iqbal*:
 - i. upholding by vote of 5-4 (per Kennedy, J.) dismissal of complaint alleging discrimination on the basis of race, religion and national origin by Arab/Muslim detainees in high-security facilities in the wake of 9/11, reasoning that factual basis for allegations of personal knowledge by high-ranking officials was insufficiently particularized
 - ii. limits supervisory liability for discriminatory actions of subordinates
 - iii. extends *Bell Atlantic v. Twombly* to all civil pleading under Rule 8

VIII. Concluding Thoughts on the Transition from Justice Souter to Justice Sotomayor