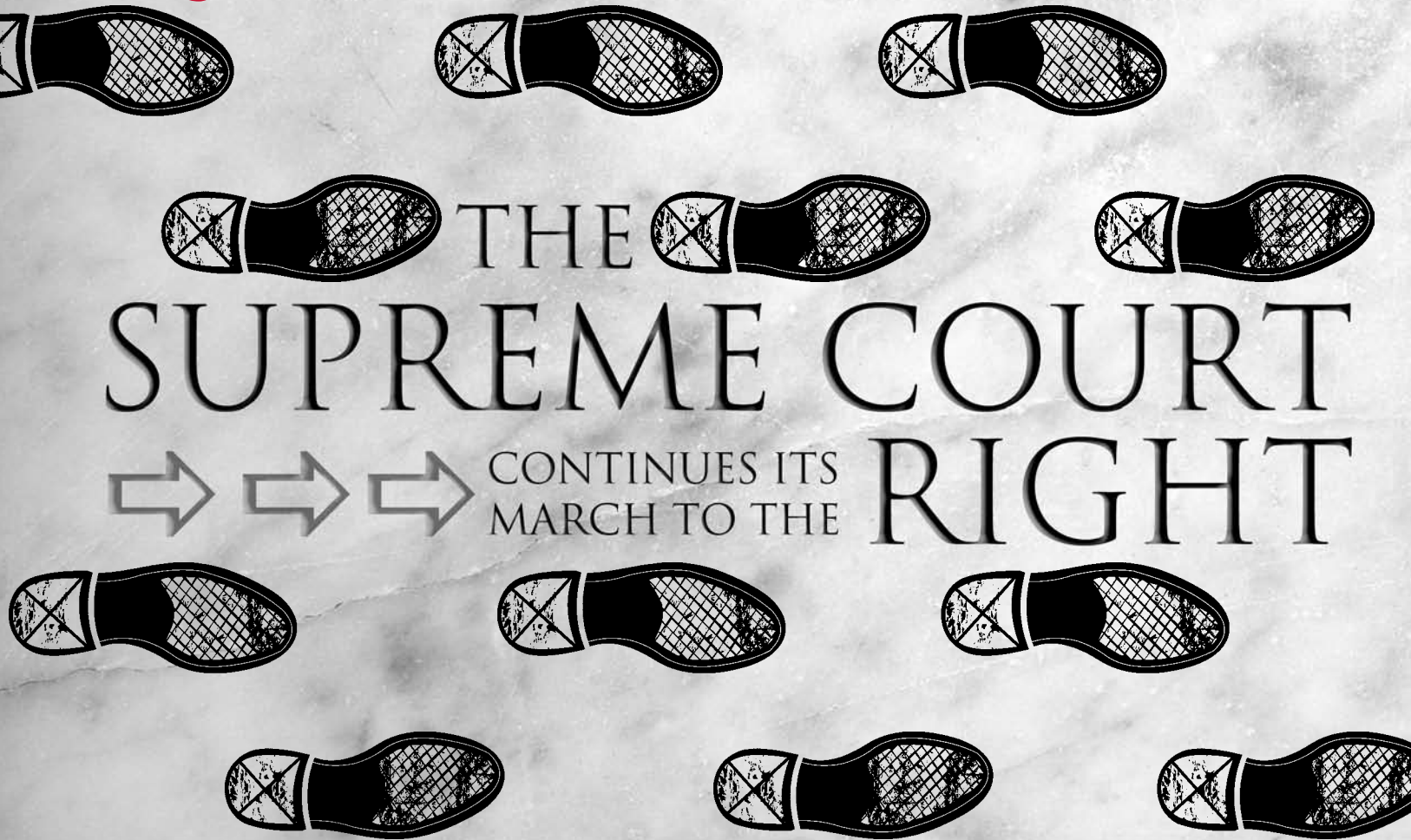


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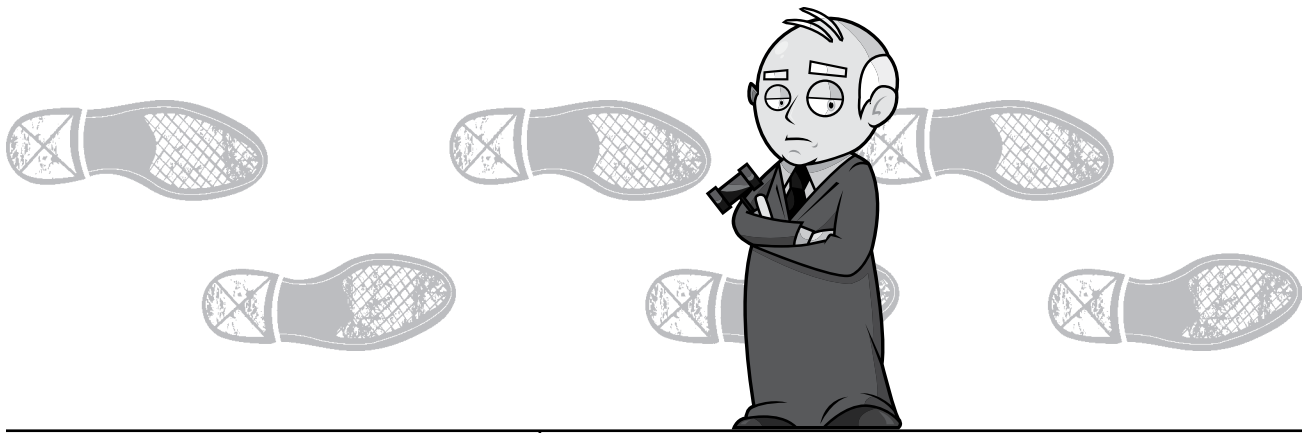
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The Supreme Court's 2008–2009 Decisions on Court Access

The March to the Right Continues

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In the fourth Term of the Roberts Era the U.S. Supreme Court resumed its steady conservative course by restricting a plaintiff's access to the federal courts. In general, the Court's decisions this Term implicating issues of access (including pleading requirements, deference, standards for preliminary injunctions, *stare decisis*, and postjudgment relief) also demonstrated its now well-established tendency to favor the government and business over the individual and the environment.

Rule 8(a) Notice Pleading

In *Ashcroft v. Iqbal* the Court, for the second time in three years, tightened the pleading standards set forth in Rule 8(a) of the Federal Rules of Civil Procedure, thus creating doubt as to whether the rule can still be said to embody a concept of "notice" pleading.¹ *Iqbal*, a case in which the plaintiff challenged some of the detention activities of the Federal Bureau of Investigation following the attacks of September 11, also contained a gratuitous discussion that could make it more difficult for plaintiffs to hold supervisory officials liable for civil rights violations.

Javaid Iqbal, a Pakistani Muslim, filed a *Bivens* action against federal prison guards and numerous federal officials, among them the Attorney General John Ashcroft and the Federal Bureau of Investigation (FBI) director Robert Mueller. Iqbal alleged that he was arrested in November 2001 and placed in a maximum-security prison, where he was beaten, subjected to unjustified strip searches, and prevented from engaging in prayer. The FBI "under the direction of Defendant Mueller," Iqbal alleged, "arrested and detained thousands of Arab Muslim men" as part of its post-September 11 investigations.² The complaint also alleged that defendants Ashcroft and Mueller approved a policy of detaining and holding these men in highly restrictive environments. Ashcroft and Mueller, the Court stated, "each knew of, condoned, and willfully and maliciously agreed to subject" [Iqbal] to harsh conditions of confinement "as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest."³ Ashcroft was named as the "principal architect" of the policy

¹*Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

²*Id.* at 1944 (quoting First Amended Complaint ¶ 47, *Elmaghraby v. Ashcroft*, No. 04 CV 1409, 2005 U.S. Dist. LEXIS 21434 (E.D.N.Y. Sept. 27, 2005); Appendix to Petition for Writ of Certiorari at 164a, *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) (07-1015)).

³*Id.* at 1944 (second alteration in original) (quoting Complaint, *supra* note 2, ¶ 96, Appendix, *supra* note 2, at 172a–173a).

and Mueller as “instrumental in [its] adoption, promulgation, and implementation.”⁴ These actions by Ashcroft and Mueller, *Iqbal* claimed, violated his rights under the First and Fifth Amendments. By a 5-to-4 majority the Court decided that the complaint did not meet pleading standards and therefore did not state a claim against Ashcroft and Mueller.

Rule 8 and the Plausibility Standard.

Rule 8(a)(2) states that a pleading must contain “a short and plain statement of the claim showing that the pleader is entitled to relief.”⁵ Until recently courts applied *Conley v. Gibson*, a fifty-year-old precedent, to determine whether a complaint met the requirements of Rule 8.⁶ *Conley* held that a complaint would not be dismissed for failure to state a claim unless it appeared “beyond doubt” that the plaintiff could “prove no set of facts in support of his claim which would entitle him to relief.”⁷ The district court in *Iqbal* applied this standard to deny the defendants’ motion to dismiss.⁸ The Second Circuit upheld the district court’s decision.⁹ But it did so by relying not on *Conley* but on *Bell Atlantic Corporation v. Twombly*, a 2007 decision.¹⁰ In *Twombly* the Court backed away from its decision in *Conley* and announced a “plausibility” standard. The *Twombly* Court decided that a complaint must allege facts that are sufficient to “state a claim to relief that is

plausible on its face” in order to survive a motion to dismiss under Rule 8.¹¹

Reversing the Second Circuit, the *Iqbal* Court further tightened *Twombly*’s analysis, highlighting two of its principles. First, conclusory factual allegations are not enough. While Rule 8 departs from the “hyper-technical, code-pleading regime of a prior era,” it does not, according to the Court, “unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.”¹² Writing for the majority, Justice Kennedy found that the plausibility standard “demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.”¹³ The “sheer possibility that a defendant has acted unlawfully” is not enough to meet the plausibility standard.¹⁴ And, Justice Kennedy added, “[w]here a complaint pleads facts that are ‘merely consistent with’ liability it ‘stops short of the line between possibility and plausibility of entitlement to relief.’”¹⁵ Winding the discussion back to Rule 8, the Court held that “where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not ‘show[n]’—that the pleader is entitled to relief.”¹⁶ The second *Twombly* principle cited in *Iqbal* concerns the demeanor of the reviewing judge. According to the Court, the review of the complaint for plausibility will be “context-specific,”

⁴*Id.* (alteration in original) (quoting Complaint, *supra* note 2, ¶¶ 10–11; Appendix, *supra* note 2 at 157a).

⁵Fed. R. Civ. P. 8(a)(2).

⁶*Conley v. Gibson*, 355 U.S. 41 (1957).

⁷*Id.* at 45–46.

⁸*Elmaghraby v. Ashcroft*, No. 04 CV 1409, 2005 U.S. Dist. LEXIS 21434 (E.D.N.Y. Sept. 27, 2005), *aff’d sub nom. Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007), *rev’d sub nom. Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

⁹*Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007).

¹⁰*Bell Atlantic Corporation v. Twombly*, 550 U.S. 544 (2007).

¹¹*Ashcroft v. Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 570).

¹²*Id.* at 1950.

¹³*Id.* at 1949 (citing *Twombly*, 550 U.S. at 555).

¹⁴*Id.* (citing *Twombly*, 550 U.S. at 556).

¹⁵*Id.* (quoting *Twombly*, 550 U.S. at 557).

¹⁶*Id.* at 1950 (alteration in original) (quoting Fed. R. Civ. P. 8(a)(2)).

requiring the court to “draw on its judicial experience and common sense.”¹⁷

Applying this newly created plausibility test to Iqbal's allegations, the Court first “identif[ied] the allegations in the complaint that are *not* entitled to the assumption of truth.”¹⁸ These included all the claims imputing bias based on the plaintiff's race, religion, or national origin to defendants Ashcroft and Mueller. According to the Court, these allegations were “bare assertions” that “amounted to nothing more than a ‘formulaic recitation of the elements’ of a constitutional discrimination claim.”¹⁹ The Court emphasized that “[it] is the conclusory nature of respondent's allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth.”²⁰

The Court next considered the remaining nonconclusory factual allegations to determine whether they “plausibly” suggested an entitlement to relief. The Court found that the complaint was insufficient because it did not “show, or even intimate,” that Ashcroft and Mueller “purposefully housed detainees” in the maximum-security setting “due to their race, religion, or national origin.”²¹ The most troubling aspect of this part of the decision is that the Court goes outside the pleadings to find an “obvious alternative explanation” and draws its own conclusions about each defendant's state of mind.²² The Court's concern was clearly tilted not toward the plaintiff who allegedly suffered torture but in favor of shielding government officials dealing with the difficult aftermath of September 11.

For its part, the dissent takes the majority to task for its supercharged application of *Twombly*:

Twombly does not require a court at the motion-to-dismiss stage to consider whether the factual allegations are probably true. We made it clear, on the contrary, that a court must take the allegations as true, no matter how skeptical the court may be. The sole exception to this rule lies with allegations that are sufficiently fantastic to defy reality as we know it: claims about little green men, or the plaintiff's recent trip to Pluto, or experiences in time travel. That is not what we have here.²³

The significance of this decision cannot be underplayed. While Iqbal did set forth allegations that were consistent with the defendants' liability, the Court found them to be conclusory. The Court required instead that the allegations in the complaint show the reviewing judge that the pleader is entitled to relief. How, absent discovery or a well-placed mole, Iqbal could have alleged more is not clear. Moreover, the Court injects an element of subjectivity into the review by allowing the trial judge to disregard allegations when his “common sense” tells him that they cannot be true.

Qualified Immunity. *Iqbal* also has a potentially significant discussion of the requirements for holding high-ranking officials liable for the acts of their subordinates. As noted, Iqbal filed a *Bivens* action against the government officials. The Court has long held that while government officials may not be held vicariously liable under a theory of *respondeat superior*, that immunity may be overcome under “a spectrum of possible tests for supervisory liability.”²⁴ Relying upon one of these

¹⁷*Id.* at 1950.

¹⁸*Id.* at 1951 (emphasis added).

¹⁹*Id.* (quoting *Twombly*, 550 U.S. at 555).

²⁰*Id.*; cf. *id.* at 1961 (Souter, J., dissenting) (the majority highlighted select allegations as conclusory, while ignoring other allegations that detailed the government policies).

²¹*Id.* at 1952 (majority opinion).

²²*Id.* at 1951–52 (“nondiscriminatory intent to detain aliens ... who had potential connections to those who committed terrorist attacks”).

²³*Id.* at 1959 (Souter, J., dissenting) (citations omitted).

²⁴*Id.* at 1958 (Justice Souter goes on to describe various supervisory liability tests).

tests, *Iqbal* alleged that the defendants were liable because of their “knowledge and acquiescence in [the unlawful conduct of] their subordinates.”²⁵ The Court rejected this theory and stated that *Iqbal*

must plead sufficient factual matter to show that petitioners adopted and implemented the detention policies at issue not for a neutral, investigative reason but for the purpose of discriminating on account of race, religion, or national origin.

... [E]ach Government official, his or her title notwithstanding, is only liable for his or her own misconduct.²⁶

Thus, the Court is saying, the federal officials in *Iqbal* needed to have more than knowledge of or do more than acquiesce in the Constitutional violation; they needed to have participated in it. This discussion seems gratuitous in light of the Court’s dismissal of the case on Rule 8(a) grounds. This portion of the opinion could, nonetheless, be particularly far-reaching because courts’ reasoning on supervisory responsibility typically applies both to *Bivens*-type actions involving federal officials and to Section 1983 actions involving state officials. Justice Souter’s stinging dissent blasts the majority’s discussion of supervisory liability as irrelevant to the resolution of the case and raises the possibility that future decisions may characterize that discussion as dicta.²⁷

Postjudgment Relief Under Rule 60(b)(5)

The Court decided *Horne v. Flores*, a case closely watched by governmental de-

fendants subject to ongoing remedial judgments, with the usual 5-to-4 majority.²⁸ The decision, authored by Justice Alito, will likely make it easier for governmental defendants to argue that “changed circumstances” should excuse their postjudgment obligations to comply with federal law. The *Flores* litigation began seventeen years ago. Public school students who were enrolled in the “English Language Learner” program in the Nogales, Arizona school district and their parents sued the state of Arizona and several state officials for violating the Equal Education Opportunities Act of 1974.²⁹ The plaintiffs sought a declaratory judgment that the defendants were in violation of the Act because of their failure to provide adequate English language learner instruction to plaintiff students.

The Equal Education Opportunities Act provides that no state shall deny equal educational opportunity to any person by “the failure of an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in instructional programs.”³⁰ After a bench trial and the issuance of detailed findings, the district court in 2000 entered a judgment—which the defendants did not appeal—concluding that the plaintiffs’ rights under the Act had been violated due to inadequate state funding for English language learner students.³¹ In the following years the district court entered a series of additional remedial and enforcement orders such as the extension (unopposed by the defendants) of the declaratory judgment to the entire state and the imposition of sanctions and fines for the defendants’ failure to fund the English language learner program adequately.³²

²⁵*Id.* at 1949 (majority opinion) (quoting Brief of Respondent at 45–46, *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) (No. 07-1015)).

²⁶*Id.* at 1948–49.

²⁷*Id.* at 1956–57 (Souter, J., dissenting).

²⁸*Horne v. Flores*, 129 S. Ct. 2579 (2009).

²⁹Equal Education Opportunities Act of 1974, 20 U.S.C. §§ 1701 *et seq.*

³⁰*Id.* § 1703(f).

³¹*Flores*, 129 S. Ct. at 2589–90.

³²*Id.* at 2590–91.

In 2006, in response to the district court's orders and sanctions, the Arizona legislature passed House Bill 2064. The bill increased state funding for the English language learner program and instituted several programmatic and structural changes in the program.³³ The governor, however, believed that H.B. 2064 was inadequate to bring the state into compliance with the district court's orders and (along with the plaintiffs) sought district court review of the adequacy of the statutory funding levels.³⁴ At this point, the leaders of the two state legislative houses were granted leave to intervene to (1) defend the adequacy of the funding levels in H.B. 2064, (2) move to dissolve the district court's contempt order, and (3), in the alternative, move for relief from judgment under Rule 60(b)(5) of the Federal Rules of Civil Procedure.³⁵ Rule 60(b)(5) "permits a party to obtain relief from a judgment or order if, among other things, 'applying the [judgment or order] prospectively is no longer equitable.'"³⁶ The district court found that H.B. 2064 was inadequate to remedy the Equal Education Opportunities Act violations that it had identified, imposed further fines and sanctions on the state, and denied the Rule 60(b)(5) motion.³⁷ The Ninth Circuit affirmed the district court's denial of the Rule 60(b)(5) motion.³⁸

Justice Alito began his opinion for the Court by noting that "Rule 60(b)(5) serves a particularly important function

in what we have termed 'institutional reform litigation.'"³⁹ The majority's discussion seems infused with skepticism for the propriety of "institutional reform injunctions," which "often raise sensitive federalism concerns" by potentially (1) "dictating state or local budget priorities," (2) "bind[ing] state and local officials to the policy preferences of their predecessors," and (3) "constrain[ing]" the ability of state and local politicians "to fulfill their duties as democratically-elected officials."⁴⁰ The Court acknowledged that "federal courts must vigilantly enforce federal law and must not hesitate in awarding necessary relief."⁴¹ Nevertheless, the Court stated, federal courts must take a "flexible approach" to Rule 60(b)(5) motions filed in "institutional reform" cases.⁴² Such an approach is necessary to "return control to state and local officials as soon as a violation of federal law has been remedied."⁴³

Having tilted the Rule 60(b)(5) playing field in favor of the defendants, the majority concluded that the lower courts used a too-strict standard in deciding whether to grant the motion. The lower courts had also focused too narrowly on the primary issue raised by the parties: the adequacy of the state's funding for English language learner programs.⁴⁴ The lower courts had erred, the Court found, by focusing upon whether the original judgment—that the deficiency in state

³³*Id.* at 2590 (H.B. 2064, 47th Leg., 2d Reg. Sess. (Ariz. 2006) (enacted)).

³⁴*Id.* at 2590–91.

³⁵*Id.* at 2591.

³⁶*Id.* at 2593 (quoting Fed. R. Civ. P. 60(b)(5)). The Court stated further that a party seeking relief under Rule 60(b)(5) had the burden of demonstrating that "a significant change either in factual conditions or law" rendered continued enforcement "detrimental to the public interest" (*id.* (quoting *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. at 384 (1992))).

³⁷*Id.* at 2591 (citing *Flores v. Arizona*, 480 F. Supp.2d 1157, 1167 (D. Ariz. 2007)).

³⁸*Id.* (citing *Flores v. Horne*, 516 F.3d 1140 (9th Cir. 2008)).

³⁹*Id.* at 2593 (quoting *Rufo*, 502 U.S. at 380).

⁴⁰*Id.* at 2593–94.

⁴¹*Id.* at 2594.

⁴²*Id.* at 2594–95 (quoting *Rufo*, 502 U.S. at 381).

⁴³*Id.* at 2595 (quoting *Rufo*, 502 U.S. at 380).

⁴⁴*Id.* at 2596.

English language learner funding violated plaintiffs' rights under the Equal Education Opportunities Act—had been “satisfied” under Rule 60(b)(5).⁴⁵ The district court instead should have considered whether “changed circumstances” warranted a “modification” of the original order on equitable grounds.⁴⁶ Repeatedly citing the “flexible” inquiry required for determining Rule 60(b)(5) motions in the “institutional reform” context, the Court identified “four important factual and legal changes that may warrant the granting of relief from the judgment: the State’s adoption of a new [English language learner] instructional methodology, Congress’s enactment of [the No Child Left Behind Act], structural and management reforms in Nogales, and increased overall [state] education funding.”⁴⁷ Furthermore, instructed the majority, the lower courts should have reconsidered whether the statewide scope of the district court’s injunctive relief (which had extended the injunction beyond the local school district) was even appropriate.⁴⁸ That under the “flexible approach” required by the Court’s Rule 60(b)(5) analysis courts may consider potential “changed circumstances” not raised by the parties themselves seems clear, although the majority does not say so directly.⁴⁹

Justice Breyer, whose dissent was joined by Justices Stevens, Souter, and Ginsberg, first took issue with the majority’s underlying premise—that this case is an example of “institutional reform litigation.”⁵⁰ Far from involving a “highly de-

tailed set of orders” or a “comprehensive judicial decree that governs the running of a major institution,” Justice Breyer stated, the *Flores* case presents a simple failure of a government defendant to meet a federal statutory requirement, which resulted in the imposition of a relatively straightforward remedy.⁵¹ As such, he argues, the majority never should have involved the “institutional reform litigation” standard of heightened “flexibility” for evaluating Rule 60(b)(5) relief.

Justice Breyer described six principles that apply when a court evaluates a Rule 60(b)(5) motion and argued that the majority either ignored or failed to apply each of them correctly.⁵² He directed his harshest assault on the Court’s repeated (and “outcome determinative”) examination of “issues or factors that the parties themselves [did] not raise.”⁵³ Such improper consideration, in his view, also caused the Court to violate a second key principle: the Court relieved the moving party of its Rule 60(b)(5) burden to demonstrate entitlement to relief. The Court’s analysis wrongly provided the defendants with the opportunity to use their Rule 60(b)(5) motion to relitigate the merits of the original judgment, a judgment they had chosen not to appeal.⁵⁴ And the dissent emphasized that the denial of a Rule 60(b) motion was reviewable under an abuse-of-discretion standard. Accordingly the district court’s order is entitled to a “high degree of deference.”⁵⁵ This is true “[p]articularly where, as here, entitlement to relief depends heavily upon fact-related determinations,” such that

⁴⁵*Id.* at 2597.

⁴⁶*Id.*

⁴⁷*Id.* at 2600; see No Child Left Behind Act § 301, 20 U.S.C. § 6842.

⁴⁸*Id.* at 2606 & n.23.

⁴⁹*Id.* at 2602 & n.12, 2606 & n.23.

⁵⁰*Id.* at 2608, 2621 (Breyer, J., dissenting).

⁵¹*Id.* at 2621.

⁵²*Id.* at 2617–20.

⁵³*Id.* at 2617.

⁵⁴*Id.* at 2618–19.

⁵⁵*Id.* at 2619 (quoting *Calderon v. Thompson*, 523 U.S. 538, 567–68 (1998) (Souter, J., dissenting)). We do not discuss Justice Breyer’s third and fourth principles.

the “power to review the district court’s decision ‘ought seldom be called into action,’ namely, only in the rare instance where the Rule 60(b) standard ‘appears to have been misapprehended or grossly misapplied.’”⁵⁶

Judicial Review of Agency Action

For the past twenty years, the Court has focused extensively on the standards for judicial review of agency interpretations of law. The *Chevron* doctrine has led to an endless series of refinements, revisions, and debates.⁵⁷ By contrast, the standard for judicial review of agency determinations of policy under the Administrative Procedure Act’s “arbitrary and capricious” standard had received little attention from the Court for more than twenty-five years.⁵⁸ The Court’s last decision on the subject was *Motor Vehicle Manufacturers Association of the United States Incorporated v. State Farm Mutual Automobile Insurance Company*.⁵⁹ This Term the Court returned to that standard in a big way in *Federal Communications Commission v. Fox Television Stations Incorporated*, in which the Court held that the Federal Communications Commission (FCC) had not acted arbitrarily and capriciously in revising its standard for determining whether language in a television broadcast was “indecent.”⁶⁰

Fox Television centered on comments made by performers at awards ceremonies. Until 2004 the FCC viewed “passing or fleeting” use of sexual or excretory references as generally not running afoul of the prohibition on indecent language.⁶¹

In 2004 the FCC eliminated this exception. The FCC decided that, “given the core meaning of the ‘F-word,’ any use of that word ... inherently has a sexual connotation” and is “patently offensive.”⁶² In its decision against Fox Television the FCC explicitly disavowed its pre-2004 rulings that had distinguished between the use of sexual terms as expletives and their use as descriptions of sexual functions. Instead the FCC applied its 2004 regulations and concluded that the sexual terms themselves were inherently offensive and that exempting “passing or fleeting” comments gave broadcasters a free pass to air such terms as long as they aired the terms in isolation. Fox appealed the FCC’s findings that the broadcast of these comments violated the decency requirement. The Second Circuit found that the FCC’s shift in policy was “arbitrary and capricious” because the FCC had not provided a sufficiently reasoned explanation for its change in position.⁶³ Accordingly the Second Circuit did not reach the First Amendment issues raised by the case.

Justice Scalia, writing for the Court in a 5-to-4 decision, reiterated that, to satisfy the “arbitrary and capricious” standard, an agency must “examine the relevant data and articulate a satisfactory explanation for its action.”⁶⁴ He rejected the Second Circuit’s statement that when agencies change policy, they must explain why the reasons for adopting the initial policy are no longer dispositive and why the new policy is superior.⁶⁵ Justice Scalia also rejected the use of any

⁵⁶*Id.*

⁵⁷*Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984). The most significant post-*Chevron* case on the subject is *United States v. Mead Corporation*, 533 U.S. 218 (2001).

⁵⁸Administrative Procedure Act, 5 U.S.C. § 706(2)(A).

⁵⁹*Motor Vehicle Manufacturers Association of the United States Incorporated v. State Farm Mutual Automobile Insurance Company*, 463 U.S. 29 (1983).

⁶⁰*Federal Communications Commission v. Fox Television Stations*, 129 S. Ct. 1800 (2009).

⁶¹*Id.* at 1806–7.

⁶²In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program, 19 F.C.C. Rcd. 4978 ¶ 8, 4979 ¶ 9 (2004) (quoted in *Fox Television Stations*, 129 S. Ct. at 1807–8).

⁶³*Fox Television Stations v. Federal Communications Commission*, 489 F.3d 444 (2d Cir. 2007), *rev’d*, 129 S. Ct. 1800 (2009).

⁶⁴*Fox Television*, 129 S. Ct. at 1810 (quoting *State Farm*, 463 U.S. at 43).

⁶⁵*Id.*

form of “heightened” judicial review for agency policy reversals.⁶⁶ The Administrative Procedure Act, he explained, makes no distinction between the standard of review for rescinding or revising a policy and that for the initial issuance of a policy. In the Court’s view, the “arbitrary and capricious” standard demands that an agency acknowledge that it is changing its policy and that the agency show that there are good reasons for the new policy. It does not require the agency to demonstrate that the new policy is superior to the initial policy.⁶⁷ Instead the agency need only explain why it believes that the new policy is better than the old policy—a standard that may be satisfied by no more detailed explanation than would be necessary “for a new policy created on a blank slate.”⁶⁸ Justice Scalia did concede that when an agency’s new policy rests on factual findings that are at odds with earlier findings used to justify its initial policy, or when the prior policy engendered substantial reliance interests, greater explanation is required.⁶⁹

Justice Scalia found that under this approach—that the agency need only explain why it believes the new policy is better than the old—the FCC’s explanation for its new policy passed muster. He found nothing irrational in the FCC’s rejection of its earlier distinction between literal and expletive uses of the terms at issue or in the FCC’s rejection of its previous repetition requirement. Nor was he troubled by the absence of data or studies indicating that the previous policy was producing suboptimal results: “One cannot demand a multiyear controlled study, in which some children are intention-

ally exposed to indecent broadcasts (and insulated from all other indecency), and others are shielded from all indecency.”⁷⁰ Instead, Justice Scalia concluded, “it suffices to know that children mimic the behavior they observe.”⁷¹ Justice Scalia found the FCC’s decision to treat different categories of indecent language differently to be reasonable. He noted that the FCC believed that the pre-2004 requirement that offensive language be repeated before its use could be banned would lead to a greater use of offensive language than would a complete ban on the use of such language. The FCC’s belief, he stated, need not be supported by data since that belief is an “exercise in logic rather than clairvoyance.”⁷²

A change in agency policy requires greater explanation than the issuance of a new policy on a clean slate, and an agency must rationally address the question of why it is not satisfied with the initial policy and why it has changed course. Justice Breyer, writing for four dissenters, argued.⁷³ In a concurrence that could prove vital given the 5-to-4 result in the case, Justice Kennedy agreed with the dissent that an agency must explain changes in positions that led it to adopt its initial policy. In his view, however, the extent of this obligation is highly context-specific:

The question in each case is whether the agency’s reasons for the change, when viewed in light of the data available to it, and when informed by the experience and expertise of the agency, suffice to demonstrate that the new policy rests upon principles that are rational, neutral, and in

⁶⁶*Id.* at 1810–11.

⁶⁷*Id.* at 1811.

⁶⁸*Id.*

⁶⁹*Id.* Justice Scalia also rejected the notion that the First Amendment concerns raised by the policy justified any heightened review under the Administrative Procedure Act’s “arbitrary and capricious” standard (*id.* at 1811–12).

⁷⁰*Id.* at 1813.

⁷¹*Id.*

⁷²*Id.* at 1814.

⁷³*Id.* at 1829–31 (Breyer, J., dissenting).

accord with the agency's proper understanding of its authority.⁷⁴

Applying this test, Justice Kennedy concluded that the FCC's explanation of its changed reading of an earlier decision was sufficient.

The *Fox Television* case will undoubtedly supplant *State Farm* as the Court's most thorough discussion of the "arbitrary and capricious" standard, particularly in the context of a reversal in policy. While Justice Scalia's opinion will tend to reduce the burden on agencies defending flip-flops in policy, Justice Kennedy's concurrence, coupled with the views of the four dissenters, may moderate its impact over the long run.

The Court issued several decisions that touched on issues of *Chevron* deference to agency interpretations of law. In the most important of these, *Coeur Alaska Incorporated v. Southeast Alaska Conservation Council*, the Court declined to apply *Chevron* deference to a memorandum issued by the Environmental Protection Agency because the memorandum lacked sufficient "formality."⁷⁵ The Court instead applied deference to the memorandum as a reasonable interpretation of the agency's own regulations. In a partial concurrence Justice Scalia accused the majority of bootstrapping tiers of deference—deferring to the memorandum as an interpretation of the agency's regulations and then deferring to the regulations, so understood, as an interpretation of the statute that warrants deference.⁷⁶ As Justice Scalia pointed out, this is functionally the same as according *Chevron* deference to the memo.⁷⁷

Federal Preemption of State Law

The 2007–2008 Term featured four major decisions on the question of preemption of state law.⁷⁸ These decisions appeared to establish a trend of accepting the use of federal law to invalidate state and local health and safety regulation. In 2008–2009 this trend came to a halt after the Court issued two major decisions concluding that state and local laws were not preempted.

In *Wyeth v. Levine* the Court held that a product liability case brought against a pharmaceutical company was not preempted by the federal Food and Drug Administration (FDA) approval of the drug's labeling.⁷⁹ The plaintiff, a musician, was injected with the drug promethazine hydrochloride (brand name "Phenergan") to control nausea. The drug made its way into an artery in her arm and caused gangrene, which led to the amputation of her arm. The plaintiff's tort suit claimed that Wyeth's label for the drug failed to warn that direct injection into the arm posed such a risk despite there having been twenty prior similar incidents leading to amputation. The Vermont state courts rejected Wyeth's argument that the FDA's approval of Wyeth's Phernegan label preempted state tort suits challenging the label's adequacy.⁸⁰

By a 6-to-3 margin the Supreme Court agreed with the Vermont courts. The Court concluded that the FDA's regulatory scheme did not prevent Wyeth from unilaterally changing its label. More fundamental, the Court found that Congress did not intend the FDA's role in labeling drugs to be the exclusive source of legal

⁷⁴*Id.* at 1823 (Kennedy, J., concurring in part and concurring in the judgment). Justice Kennedy did not join the portion of Justice Scalia's opinion that responds to Justice Breyer's arguments, thereby rendering that portion of Scalia's opinion only a plurality view.

⁷⁵*Coeur Alaska Incorporated v. Southeast Alaska Conservation Council*, 129 S. Ct. 2458 (2009).

⁷⁶*Id.* at 2479 (Scalia, J., concurring in part and dissenting in part).

⁷⁷See also *Entergy Corporation v. Riverkeeper Incorporated*, 129 S. Ct. 1498 (2009) (employing *Chevron* deference because the word "best" is ambiguous); *Negusie v. Holder*, 129 S. Ct. 1159 (2009) (rejecting *Chevron* deference because the agency believed that the challenged policy was mandated by a prior Supreme Court decision).

⁷⁸See *Preston v. Ferrer*, 128 S. Ct. 978 (2008); *Rowe v. New Hampshire Motor Transport Association*, 128 S. Ct. 989 (2008); *Riegel v. Medtronic*, 128 S. Ct. 999 (2008); *Chamber of Commerce of the United States v. Brown*, 128 S. Ct. 2408 (2008).

⁷⁹*Wyeth v. Levine*, 129 S. Ct. 1187 (2009).

⁸⁰*Id.* at 1191–93.

requirements governing warnings about drugs. The Court noted that Congress did not include an express provision on preemption in the Federal Food, Drug, and Cosmetic Act, notwithstanding that Congress was well aware of state-tort litigation regarding drug labeling.⁸¹ Most important, the Court declined to give controlling weight to the preamble to a 2006 FDA regulation stating, in part, that the Federal Food, Drug and Cosmetic Act provides both a floor and a ceiling to legal obligations as to drug labeling. While particular federal regulatory requirements may indeed preempt state law, a general statement in a regulatory document that state law is preempted is entitled to weight only insofar as it is persuasive, the Court explained.⁸² In this instance the Court found that the agency's conclusion was not persuasive because it conflicted with the agency's long-standing prior understanding and was at odds with congressional purposes.

In *Altria Group Incorporated v. Good* the Court, in yet another 5-to-4 decision, held that the plaintiffs' claim that Altria's advertising of "light" cigarettes was misleading and deceptive in violation of Maine law was not preempted by the Federal Cigarette Labeling and Advertising Act.⁸³ The Act specifies the warnings that cigarette manufacturers must place on both packaging and advertisements. It also preempts states from adopting their own warning and labeling requirements so that manufacturers are not confronted with diverse and confusing requirements.⁸⁴ Key here is that the federal law bars state requirements or prohibitions

based on "smoking and health" with respect to cigarette advertising or promotion as long as the cigarettes are labeled in conformity with federal requirements.⁸⁵ State prohibitions on deceptive advertising, such as the Maine law at issue, are not, the Court concluded, in conflict with this provision because they are not based on the link between smoking and health but rather seek to protect the public from deception.⁸⁶ The Court also rejected Altria's claim that the Federal Trade Commission has exclusive authority over the regulation of cigarette advertising.⁸⁷

Statutory Notice and Harmless Error

In *Shinseki v. Sanders* the Court considered a rule that the Federal Circuit imposed on the Department of Veterans Affairs (VA).⁸⁸ The rule applies when the agency's notice to an applicant regarding the applicant's claim for benefits fails to give information required by statute and regulation. In a decision by Justice Breyer for a 6-to-3 majority the Court held that the Federal Circuit's rule putting the burden on the VA to show that a defective notice to an applicant was harmless did not comport with the statutory scheme. The Court accepted the VA's approach of requiring the veteran to demonstrate that the error was harmful.

The Veterans Claims Assistance Act of 2000 requires that the VA assist veterans in making their claims for disability benefits.⁸⁹ At the time the plaintiff was making his claim, the VA required that its notices to applicants that their claims were inadequate include four elements:

⁸¹*Id.* at 1200.

⁸²*Id.* at 1200–1202. The Court applied the deference framework of *United States v. Mead Corporation*, 533 U.S. 218 (2001), and *Skidmore v. Swift and Company*, 323 U.S. 134 (1944).

⁸³*Altria Group Incorporated v. Good*, 129 S. Ct. 538 (2008); Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331 *et seq.*

⁸⁴15 U.S.C. § 1331.

⁸⁵*Id.* § 1334.

⁸⁶*Altria*, 129 S. Ct. at 546. The Court relied on the plurality decision in *Cipollone v. Liggett Group Incorporated*, 505 U.S. 504 (1992), for this narrow reading of the federal statute.

⁸⁷*Altria*, 129 S. Ct. at 549–51.

⁸⁸*Shinseki v. Sanders*, 129 S. Ct. 1696 (2009).

⁸⁹Veterans Claims Assistance Act of 2000, Pub. L. No. 106-475, 114 Stat. 2096 (codified as amended in scattered sections of 38 U.S.C. ch. 38).

the notice must state what further information is necessary to substantiate the claim, what portions of that information the VA will obtain, and what portions the claimant must obtain and must inform the claimant that the claimant may submit additional relevant information.⁹⁰ In a challenge to a decision on the ground that the VA's notice had not furnished some of the required information, the Court of Appeals for Veterans Claims (Veterans Court) concluded that the error was harmless and that the veteran had not demonstrated how proper notice would have caused him to act differently.⁹¹ On the veteran's appeal the Federal Circuit reversed the Veterans Court on the ground that any deficiency in a notice requires a presumption of prejudicial error "unless the VA can show that the error did not affect the essential fairness of the adjudication."⁹²

The Supreme Court analyzed the Federal Circuit's holding in light of the Veterans Court's statutory obligation to "take due account of the rule of prejudicial error."⁹³ Justice Breyer began by holding that the "prejudicial error" injunction required application of "the same kind of 'harmless-error' rule that courts ordinarily apply in civil cases."⁹⁴ The Federal Circuit's rule, he explained, deviated from this traditional harmless-error standard in three ways. First, the rule was "complex, rigid, and mandatory."⁹⁵ The rule instead should allow "case-

specific application of judgment, based upon examination of the record."⁹⁶ Second, the rule "impose[d] an unreasonable evidentiary burden upon the VA."⁹⁷ Third, it improperly placed the burden on the VA: "the burden of showing that an error is harmful normally falls upon the party attacking the agency's determination."⁹⁸ The majority clarified that it was not questioning the "use by the Veterans Court of what it called the 'natural effects' of certain kinds of notice errors."⁹⁹ "We have previously made clear," the Court went on to say, "that courts may sometimes make empirically based generalizations about what kinds of errors are likely, as a factual matter, to prove harmful."¹⁰⁰

Justice Souter in his dissent, in which Justices Stevens and Ginsburg joined, relied primarily on the VA having the unusual obligation of helping the claimant develop the claim: "Given Congress's understandable decision to place a thumb on the scale in the veteran's favor in the course of administrative and judicial review of VA decisions, I would not remove a comparable benefit in the Veteran's [sic] Court based on the ambiguous directive of [Section] 7261(b)(2)."¹⁰¹

Stare Decisis

The Court issued two decisions that evaluated the practice of overruling prior decisions as exceptions to the doctrine of

⁹⁰38 U.S.C. § 5103(a); 38 C.F.R. §§ 3.159(b), 3.159(b)(1) (2007) (under the 2009 regulations the notice need contain only the first three elements); *Sanders*, 129 S. Ct. at 1700–1701.

⁹¹*Sanders*, 129 S. Ct. at 1702.

⁹²*Id.* (quoting *Sanders v. Nicholson*, 487 F.3d 881, 889 (Fed. Cir. 2007)).

⁹³Veterans Benefits Act of 2002 § 401, 38 U.S.C. § 7261(b)(2).

⁹⁴*Sanders*, 129 S. Ct. at 1704. An analogous provision of the Administrative Procedure Act, 5 U.S.C. § 706, states that "a court shall review the whole record ... and due account shall be taken of the rule of prejudicial error," the Court noted (*id.*).

⁹⁵*Id.* at 1704.

⁹⁶*Id.* at 1705.

⁹⁷*Id.*

⁹⁸*Id.* at 1706.

⁹⁹*Id.* at 1707.

¹⁰⁰*Id.*

¹⁰¹*Id.* at 1709 (Souter, J., dissenting).

stare decisis. The first was *Pearson v. Callahan*, concerning a Fourth Amendment warrantless search.¹⁰² The second was *Montejo v. Louisiana*, concerning the Sixth Amendment invocation of the right to counsel.¹⁰³ In *Pearson v. Callahan* a unanimous Court repudiated *Saucier v. Katz*, a precedent that was only eight years old; four of the 2008 Term's Justices were on the bench when *Saucier* was decided.¹⁰⁴ The author of *Pearson*, Justice Alito, was one of the two members not on the Court when the offending decision (*Saucier*) came down in 2001.¹⁰⁵

The issue in *Pearson* and *Saucier* was what process lower courts should use in deciding whether government officials are entitled to qualified immunity. For purposes of *stare decisis* analysis, note that the process mandated in *Saucier*—the so-called *Saucier* procedure—did not find enthusiastic support among the lower courts, which found the process unworkable.¹⁰⁶ Justice Alito's explanation for the propriety of acceding to these complaints initially set out the black letter law on the importance of *stare decisis* but then provided three factors which laid explicit grounds for ignoring it: "Revisiting precedent is particularly appropriate where, as here, a departure would not upset expectations, the precedent consists of a judge-made rule that was recently adopted to improve the operation of the courts, and experience has pointed up the precedent's shortcomings."¹⁰⁷

Stare decisis is a more compelling doctrine when property and contract rights

are at issue than when procedural rules are at issue, Justice Alito pointed out in addressing the first factor. Property and contract rights create reliance interests, whereas procedural rules such as that in *Saucier* do not adversely affect expectations.¹⁰⁸ *Stare decisis*—explained Justice Alito, turning to the second factor—is deemed to be more important in the context of statutory construction where Congress can change the Court's interpretation than in the context of judge-made rules that are appropriately altered by the Court rather than Congress.¹⁰⁹

The most compelling factor, however, was the third. Rejecting the suggestion that only "badly reasoned" or "unworkable" procedures should be revisited—on the ground that such an approach is applicable only to constitutional or statutory precedent—the Court devoted most of its attention to its now "considerable body of new experience to consider regarding the consequences of requiring adherence to this inflexible procedure."¹¹⁰ A review of both lower-court decisions and observations from members of the Court itself in the post-*Saucier* years was sufficient to convince all nine members of the present Court that reevaluating *Saucier*'s qualified immunity inquiry was appropriate.¹¹¹ Crediting criticisms made by the lower courts, the Court modified the *Saucier* procedure to make it more workable for the lower courts.¹¹²

In *Montejo v. Louisiana* the court considered the issue of *stare decisis* in the context of whether a criminal defendant had

¹⁰²*Pearson v. Callahan*, 129 S. Ct. 808 (2009).

¹⁰³*Montejo v. Louisiana*, 129 S. Ct. 2079 (2009).

¹⁰⁴*Saucier v. Katz*, 533 U.S. 194 (2001).

¹⁰⁵The majority decision in *Saucier* was written by Justice Kennedy. Five justices agreed with his reasoning, while Justices Stevens, Ginsburg, and Breyer disagreed.

¹⁰⁶*Pearson*, 129 S. Ct. at 817.

¹⁰⁷*Id.* at 816.

¹⁰⁸*Id.*

¹⁰⁹*Id.* at 816–17.

¹¹⁰*Id.* at 817.

¹¹¹*Id.* at 817–18.

¹¹²*Id.* at 818–22.

invoked his right to counsel.¹¹³ Because the decision was viewed by several members of the Court as a significant change in Sixth Amendment law, the split was the now-traditional 5-to-4 division, with Justice Scalia writing the majority opinion. Although Justice Scalia cited *Pearson* for the considerations relevant to questions of *stare decisis*, he listed four factors, not three, and with a different emphasis. Justice Scalia's four factors are the workability of the precedent, its antiquity, the reliance interests, "and of course whether the decision was well reasoned."¹¹⁴ Summarily concluding that the first three factors favored abandoning the current rule, Justice Scalia lavished most of his firepower on the fourth consideration: "When this Court creates a prophylactic rule in order to protect a constitutional right, the relevant 'reasoning' is the weighing of the rule's benefits against its costs."¹¹⁵ Not surprisingly, the several printed pages that followed this description of the issue led inexorably to the conclusion that "when the marginal benefits of the *Jackson* rule are weighed against its substantial costs to the truth-seeking process and the criminal justice system ... the rule does not 'pay its way.'"¹¹⁶

Justice Stevens's opinion for the dissenters accused the majority of "[p]laying lip service to the rule of *stare decisis*," "exaggerat[ing] the considerations favoring reversal," and "giv[ing] short shrift to the valid considerations favoring retention of the *Jackson* rule."¹¹⁷ He noted, *inter alia*, that the majority's reliance on *Jackson*'s alleged lack of antiquity seemed at odds with reality: "I would have thought that the 23-year existence of a simple bright-line rule would be a factor that cuts in the other direction."¹¹⁸

Apparent from these opinions is that *stare decisis*, like many standards that the Court embraces and then develops exceptions to, has whatever presumptive force a majority of the Court decides to impart in a given case. The rule in *Jackson* was doomed not because the considerations relevant to *stare decisis* led necessarily to that result but because five members of the present Court disagreed with it. In *Pearson* that kind of straining was unnecessary—partly because the relevant factors did actually suggest that *stare decisis* should not be followed. More important to the *Pearson* decision, however, was that everyone on the Court—including four members who were in the majority of the offending precedent—and many lower court judges who were on the front lines concluded that *Saucier* had established a lousy policy. The latter reasoning—that everyone agrees that the precedent is bad policy—will, unfortunately, probably be used less often than the former, especially given the present makeup of the Court.

Preliminary Injunctions and Stays

In two decisions, *Winter v. Natural Resources Defense Council* and *Nken v. Holder*, the Court discussed at length a number of issues pertaining to preliminary injunctions and stays.¹¹⁹ We summarize those decisions and quote from them, but we caution that, because of the nature of these decisions, you must read these decisions thoroughly in the event that you are involved in litigation touching on an injunction or a stay. The decisions set out explicitly the standards for injunctions and stays and how those standards are applied. The Court in *Winter* changed the standard for preliminary injunctions

¹¹³*Montejo v. Louisiana*, 129 S. Ct. 2079 (2009). The specific issue was "the scope and continued viability of the rule announced ... in *Michigan v. Jackson*, 475 U.S. 625 (1986), forbidding police to initiate interrogation of a criminal defendant once he has requested counsel at an arraignment or similar proceeding" (*id.* at 2082).

¹¹⁴*Id.* at 2088–89.

¹¹⁵*Id.* at 2089.

¹¹⁶*Id.* at 2091 (quoting *United States v. Leon*, 468 U.S. 897, 907–8 n.6 (1984)).

¹¹⁷*Id.* at 2097 (Stevens, J., dissenting).

¹¹⁸*Id.* at 2098.

¹¹⁹*Winter v. Natural Resources Defense Council*, 129 S. Ct. 365 (2008); *Nken v. Holder*, 129 S. Ct. 1749 (2009).

from that used by some appellate courts. These decisions are now the building blocks for any briefs pertaining to preliminary injunctions and stays.

In *Winter* the Court torpedoed the whales, or, in legalese, the Court concluded that the Navy's need for its submarines to employ sonar in training exercises took precedence over the harm that the sonar allegedly caused marine mammals. The Court reversed the Ninth Circuit's decision, which had affirmed a preliminary injunction imposing restrictions on the Navy's sonar training.¹²⁰ In the course of that effort, the majority ranged far and wide over the seascape of preliminary injunction law and concluded that the potential harm to the public interest and the Navy was sufficient alone to deny the preliminary injunction—with an explicit recognition that it need not even consider the likelihood of success on the merits.¹²¹

Because *Winter* was dominated by national security concerns, the public interest and the Navy's need to conduct realistic training for its sailors were the majority's main considerations. Accordingly Chief Justice Roberts's opinion for the gang of five repeatedly emphasized the deference that is owed to the judgment of military authorities and the significance, largely ignored by the lower courts, of the declarations submitted on those points.¹²² In this respect the majority opinion and Justice Ginsburg's dissenting opinion (joined by Justice Souter) are truly like ships passing in the night. Justice Ginsburg's opinion focused almost exclusively on the merits, that is, the failure of the Navy to prepare an environmental impact statement before initiating the exercises.¹²³ The majority's preoccupation with

national security, and therefore with the public interest and balancing the equities, may suggest that the Court's analysis in this case is limited to cases involving national security. Even if that view has any traction, however, the language and holding of *Winter* demand that counsel seeking a preliminary injunction, in any context, engage in a careful review of the majority opinion.

After setting out the traditional four factors that a plaintiff must satisfy to be eligible for a preliminary injunction, the opinion emphatically rejected the revisionist standard employed by the Ninth Circuit (and other circuits). Under the Ninth Circuit's standard, a strong showing of the likelihood of success on the merits allowed a plaintiff to demonstrate only the "possibility" of irreparable harm in getting the sought-after preliminary injunction:

Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction. Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.¹²⁴

Chief Justice Roberts then clarified that a preliminary injunction should not be considered a common or easily obtained remedy: "In exercising their sound discretion, courts of equity should pay particular regard for the public conse-

¹²⁰*Natural Resources Defense Council v. Winter*, 518 F.3d 658 (9th Cir.), *rev'd*, 129 S.Ct. 365 (2008).

¹²¹*Winter*, 129 S. Ct. at 376, 381.

¹²²See, e.g., *id.* at 377–79; see also *id.* at 384 (Breyer, J., concurring in part and dissenting in part).

¹²³*Id.* at 387–91 (Ginsburg, J., dissenting).

¹²⁴*Id.* at 375–76 (majority opinion) (citations omitted). This reiteration of the standard is probably dictum because, as the Court itself noted, the Ninth Circuit's use of "the incorrect standard" may have been irrelevant; however, this aspect of the decision spells the end of a sliding-scale test for preliminary injunctions (see *id.* at 376). Justice Ginsburg's assertion that she did not believe the majority was rejecting the use of a sliding scale is certainly just wishful thinking (*id.* at 392 (Ginsburg, J., dissenting)). Indeed, the appellate courts have begun to "correct" their tests (see *American Trucking Associations Incorporated v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009); *Davis v. Pension Benefit Guaranty Corporation*, 571 F.3d 1288, 1296 (D.C. Cir. 2009) (Kavanaugh, J., concurring)).

quences in employing the extraordinary remedy of injunction.”¹²⁵ Although the opinion purported to take seriously the plaintiffs’ ecological and scientific interests, the Court based its decision solely on the overarching importance of security concerns. The resolution appears to have been a fairly easy one for the majority: “[T]he balance of equities and consideration of the overall public interest in this case tip strongly in favor of the Navy.”¹²⁶ Those factors, the balance of equities and overall public interest, so dominated the majority’s thinking that, even if the plaintiffs had been correct on the merits, the Court would still have determined that the issuance of the injunction was an abuse of discretion.¹²⁷

Furthermore, in dictum at the conclusion of the opinion the chief justice added that, for the same reasons, issuing a permanent injunction in this case would also be inappropriate:

[W]hat we have said makes clear that it would be an abuse of discretion to enter a permanent injunction, after final decision on the merits, along the same lines as the preliminary injunction. An injunction is a matter of equitable discretion; *it does not follow from success on the merits as a matter of course.*¹²⁸

This observation, while not representing new law, is noteworthy because, for the most part, neither the lower courts nor government defendants have required that plaintiffs satisfy the four factors in the permanent-injunction context. Rather, it has usually been the case that

when a plaintiff wins on the merits and requests a permanent injunction, it is granted without further consideration; courts rarely exercise their discretion to deny a permanent injunction once the plaintiff has prevailed. This final salvo in *Winter*, however, may revive the notion that permanent injunctions are no more automatic than preliminary ones when the nonmerit factors favor the government.

Following *Winter*, Chief Justice Roberts authored a decision for a 7-to-2 majority in *Nken v. Holder* providing a road map for understanding when courts should issue stays pending appeal.¹²⁹ The plaintiff, an immigrant from Cameroon, appealed an order of removal to the Fourth Circuit and asked for a stay of the removal order pending the court’s decision. The issue was whether the traditional test for a stay should apply in this instance or whether language in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 that severely restricts the circumstances in which a federal appellate court may “enjoin the removal of any alien pursuant to a final order” applies in the stay context as well.¹³⁰

The Court began its analysis by noting that an appellate court’s power to stay an order is “inherent.”¹³¹ Granting a stay, however, “is not a matter of right, even if irreparable injury might otherwise result to the appellant,” stated the Court citing a 1926 case.¹³² Then the majority explained the difference between an injunction and a stay. An injunction “is a means by which a court tells someone what to do or not to do.”¹³³ This remains true “whether

¹²⁵ *Winter*, 129 S. Ct. at 376–77 (majority opinion) (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982)).

¹²⁶ *Id.* at 378.

¹²⁷ *Id.* at 381 n.5.

¹²⁸ *Id.* at 381 (emphasis added).

¹²⁹ *Nken v. Holder*, 129 S. Ct. 1749 (2009).

¹³⁰ *Nken*, 129 S. Ct. at 1754 (2009); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1252(f)(2).

¹³¹ *Nken*, 129 S. Ct. at 1756.

¹³² *Id.* at 1757 (quoting *Virginian Railway Company v. United States*, 272 U.S. 658, 672 (1926)); see also *id.* at 1760 and *Indiana State Police Pension Trust v. Chrysler LLC*, 129 S. Ct. 2275, 2276 (2009).

¹³³ *Nken*, 129 S. Ct. at 1757.

the injunction is preliminary or final; in both contexts the order is directed at someone, and governs that party's conduct."¹³⁴ By contrast, a stay "instead of directing the conduct of a particular actor ... operates upon the judicial proceeding itself."¹³⁵ A stay "does so either by halting or postponing some portion of the proceeding[] or by temporarily divesting an order of enforceability."¹³⁶

With that clarification of the difference between an injunction and a stay, the chief justice explained that the restrictive statutory language could not reasonably encompass the traditional notion of a stay: "Whether such a stay might technically be called an injunction is beside the point; that is not the label by which it is generally known. The sun may be a star, but 'starry sky' does not refer to a bright summer day."¹³⁷

Since the statutory language did not apply in the stay context, the Court had to consider the standard that would apply when a court exercised its discretion in granting a stay. The same four factors that apply in considering a preliminary injunction apply in the consideration of a stay, the Court noted. The first two factors, the likelihood of success and the likelihood of irreparable harm in the absence of the stay, the chief justice stated, "are the most critical."¹³⁸ Regarding the first factor, "[i]t is not enough that the chance of success on the merits be 'better than negligible.'"¹³⁹ As to the second factor, the chief justice stated: "By the same token, simply showing some 'possibility of irreparable injury' fails to satisfy the second factor."¹⁴⁰ If the stay applicant is successful on the first two factors, the next

leg of the inquiry requires "assessing the harm to the opposing party and weighing the public interest. These factors merge when the Government is the opposing party."¹⁴¹

In his concurring opinion Justice Kennedy, joined by Justice Scalia, emphasized the point made in *Winter* about the preliminary injunction standard: "When considering success on the merits and irreparable harm, courts cannot dispense with the required showing of one simply because there is a strong likelihood of the other."¹⁴²

Standing

Standing reared its ugly head again this Term, and it took a particularly grotesque form. The Court issued one very important standing decision, *Summers v. Earth Island Institute*, which will undoubtedly be deployed by government attorneys in a number of ways.¹⁴³ In *Earth Island* the U.S. Forest Service had approved the salvage sale of 238 acres of timberland damaged in a forest fire (the Burnt Ridge Project) without providing an opportunity for public notice, comment, or appeal. U.S. Forest Service regulations exempt salvage timber sales of less than 250 acres from the notice, comment, and appeal requirements that apply to larger management decisions. Several environmental organizations sued, seeking to enjoin the Forest Service from applying the exemption regulations to the Burnt Ridge Project. The district court issued a preliminary injunction stopping the sale, and the parties settled their dispute regarding the Burnt Ridge Project. But the district court, in a decision affirmed

¹³⁴*Id.*

¹³⁵*Id.* at 1758.

¹³⁶*Id.*

¹³⁷*Id.* at 1758–59.

¹³⁸*Id.* at 1761.

¹³⁹*Id.* (quoting *Sofinet v. Immigration and Naturalization Service*, 188 F.3d 703, 707 (7th Cir. 1999)).

¹⁴⁰*Id.* (quoting *Abbassi v. Immigration and Naturalization Service*, 143 F.3d 513, 514 (9th Cir. 1998)). The Court added: "[T]he 'possibility' standard is too lenient" (*id.*) (quoting *Winter v. Natural Resources Defense Council*, 129 S. Ct. at 375).

¹⁴¹*Id.* at 1762.

¹⁴²*Id.* at 1763 (Kennedy, J., concurring).

¹⁴³*Summers v. Earth Island Institute*, 129 S. Ct. 1142 (2009).

by the Ninth Circuit, also enjoined the regulations that exempted the sales of salvage timber of less than 250 acres from notice, comment, and appeal.¹⁴⁴

Justice Scalia writing for the Court, the usual 5-to-4 majority, focused exclusively on standing and on the injury-in-fact requirement. Justice Scalia first noted that the challenged regulations had no direct effect on the plaintiffs but instead governed only the actions of Forest Service officials.¹⁴⁵ This made establishing the plaintiffs' standing a more difficult task than would normally be the case.¹⁴⁶ Environmental organizations have the right to represent their members if the harm to the environment "affects the recreational or even the mere esthetic interests" of the members, the Court did recognize.¹⁴⁷ But, the majority held, once the dispute is settled, there is "no other application of the invalidated regulations that threatens imminent and concrete harm to the interests of their members."¹⁴⁸ The affidavits filed by the organizations' members required the assumption of too many events occurring to satisfy the requirement of showing concrete injury.¹⁴⁹

In his dissenting opinion Justice Breyer was particularly displeased with the majority's imposition of the "imminent" standard and noted that in prior cases, "where ... a plaintiff has *already* been subject to the injury it wishes to challenge, the Court has asked whether there is a *realistic likelihood* that the challenged future conduct will, in fact, recur and harm the plaintiff."¹⁵⁰ Justice Breyer

complained that, since the Forest Service had admitted to taking wrongful action "thousands" of times before the suit was filed and stated that it would "conduct thousands of exempted projects in the future," and since the plaintiff organizations had hundreds of thousands of members who used the forests, to believe that at least some members would not suffer harm was "unreasonable."¹⁵¹

Justice Scalia vigorously responded to this "statistical probability" argument: "This novel approach to the law of organizational standing would make a mockery of our prior cases, which have required plaintiff-organizations to make specific allegations establishing that at least one identified member had suffered or would suffer harm."¹⁵² Furthermore, the "requirement of naming the affected members has never been dispensed with in light of statistical probabilities, but only where *all* the members of the organization are affected by the challenged activity."¹⁵³ The majority thus eviscerated the assumption that statistical analyses could demonstrate the likelihood of injury-in-fact to members of organizations and that accordingly naming individual members who had suffered harm was unnecessary.¹⁵⁴

The majority also rejected the plaintiffs' claims that plaintiffs had suffered a "procedural injury" in the deprivation of their right to file comments. While acknowledging that the plaintiffs had properly alleged such an injury with respect to the Burnt Ridge Project, Justice Scalia observed that the Burnt Ridge Project was

¹⁴⁴*Earth Island Institute v. Ruthenbeck*, No. CIV F-03-6386 JKS, 2005 WL 5280466, at *2 (E.D. Cal. Sept. 20, 2005), *aff'd* on this point, 490 F.3d 687, 696–99 (9th Cir. 2007), *rev'd*, 129 S. Ct. 1142 (2009).

¹⁴⁵*Id.* at 1149.

¹⁴⁶*Id.*

¹⁴⁷*Id.*

¹⁴⁸*Id.* at 1150.

¹⁴⁹*Id.* at 1150–51.

¹⁵⁰*Id.* at 1155–56 (Breyer, J., dissenting).

¹⁵¹*Id.* at 1156, 1157.

¹⁵²*Id.* at 1151 (majority opinion).

¹⁵³*Id.* at 1152.

¹⁵⁴See, e.g., *Natural Resources Defense Council v. Environmental Protection Agency*, 464 F.3d 1, 7 (D.C. Cir. 2006).

no longer at issue.¹⁵⁵ The Court offered this standard:

[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing. “Only a person who has been accorded a procedural right to protect *his concrete interests* can assert that right without meeting all the normal standards for redressability and immediacy.”¹⁵⁶

42 U.S.C. § 1983

In *Fitzgerald v. Barnstable School Committee*, the Court held, Title IX of the Education Amendments of 1972 does not preclude a Section 1983 action alleging unconstitutional gender discrimination in school.¹⁵⁷ The Fitzgeralds had complained repeatedly to school officials that their daughter, a kindergartener, was being sexually harassed by an older student. The principal found insufficient evidence to warrant discipline. The Fitzgeralds filed suit in federal court under Title IX and Section 1983; they alleged that the school system's response to their allegations was inadequate and violated Title IX and the equal protection clause of the Fourteenth Amendment.¹⁵⁸ The First Circuit dismissed the Section 1983 claim because, the First Circuit found, Title IX's implied cause of action provides a “sufficiently comprehensive” remedy that precludes resort to Section 1983.¹⁵⁹ The Supreme Court unanimously reversed the First Circuit.

The Court's opinion relies heavily on three prior decisions: *Middlesex County Sewerage Authority v. National Sea Clammers Association*, *Smith v. Robinson*, and *City of Rancho Palos Verdes v. Abrams*.¹⁶⁰ Under these cases the “crucial consideration” when deciding whether an individual may proceed under Section 1983 “is what Congress intended.”¹⁶¹ In all three cases the Court found that the statutes at issue required plaintiffs to comply with detailed, particularized procedures prior to and while asserting judicial remedies. Allowing plaintiffs a direct route to court via Section 1983 therefore would have circumvented the carefully tailored remedial scheme that Congress intended them to use. The *Fitzgerald* Court noted that, even were plaintiffs to assert an independent constitutional right, the proper focus was on the statute's remedial scheme.¹⁶²

The Court, “[m]indful that we should ‘not lightly conclude that Congress intended to preclude reliance on [Section] 1983 as a remedy for a substantial equal protection claim,’” ruled for the plaintiffs.¹⁶³ The Court first found insufficient evidence that Congress intended to preclude an individual action under Section 1983 for violations of Title IX. The Court found that the two limited enforcement mechanisms available under Title IX—an administrative complaint resulting potentially in funding withdrawal and a potential implied private right of action—“stand in stark contrast to the ‘unusually elaborate,’ ‘carefully tailored,’ and ‘restrictive’ enforcement schemes of the statutes at issue in *Sea Clammers*, *Smith*, and *Rancho Palos Verdes*.”¹⁶⁴

¹⁵⁵*Earth Island Institute*, 129 S. Ct. at 1151.

¹⁵⁶*Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992)).

¹⁵⁷*Fitzgerald v. Barnstable School Committee*, 129 S. Ct. 788 (2009); Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.*; 42 U.S.C. § 1983.

¹⁵⁸*Fitzgerald*, 129 S. Ct. at 792; U.S. CONST. amend. XIV, § 1.

¹⁵⁹*Fitzgerald v. Barnstable School Committee*, 504 F.3d 165, 179 (1st Cir. 2007), *rev'd*, 129 S. Ct. 788 (2009).

¹⁶⁰*Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 131–34 (1981); *Smith v. Robinson*, 468 U.S. 992, 1011 (1984); *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 124 (2005).

¹⁶¹*Fitzgerald*, 129 S. Ct. at 793–94 (quoting *Smith*, 468 U.S. at 1012).

¹⁶²*Id.* at 794.

¹⁶³*Id.* at 796 (quoting *Smith*, 468 U.S. at 1012).

¹⁶⁴*Id.* at 795.

The Court next compared the rights and protections guaranteed under Title IX with those of the equal protection clause. The Court found the Title IX and constitutional protections to diverge, with Title IX reaching only federally funded institutions and programs and the equal protection clause reaching only state actors. Moreover, the Court found, a Title IX plaintiff may establish liability by focusing on the actions of a single administrator, but a plaintiff suing under Section 1983 must establish a school custom or practice in order to make a claim for an equal-protection violation. This divergent coverage, as well as the absence of a comprehensive remedial scheme, led the Court to conclude that “Title IX was not meant to be an exclusive mechanism for addressing gender discrimination in schools, or a substitute for [Section] 1983 suits as a means for enforcing constitutional rights.”¹⁶⁵

Haywood v. Drown also involved Section 1983.¹⁶⁶ Until recently New York’s courts of general jurisdiction heard prisoners’ Section 1983 damages claims against state correctional officials. Believing that these suits were largely frivolous, New York had enacted a statute that divested these courts of jurisdiction over Section 1983 suits in which money damages were sought from correctional officials (but not over Section 1983 suits against other state officials). Prisoners were allowed to pursue damages claims only against the state in the court of claims, a court of limited jurisdiction that does not grant jury trials or award punitive damages or attorney fees.

The plaintiff in *Haywood* challenged the state statute on the grounds that it ran afoul of the supremacy clause of the U.S. Constitution.¹⁶⁷ The five-member major-

ity observed that “federal law is as much the law of the several States as are the laws passed by their legislatures.”¹⁶⁸ State and federal courts are not “foreign” to each other but rather have “jurisdiction partly different and partly concurrent,” the Court explained, citing a *Federalist* paper and long-standing precedent.¹⁶⁹ Federal and state courts have concurrent jurisdiction over Section 1983 actions, and this presumption of concurrent jurisdiction is so strong that it can be overcome “only in two narrowly defined circumstances: first, when Congress expressly ousts state courts of jurisdiction, and second, ‘[w]hen a state court refuses jurisdiction because of a neutral state rule regarding the administration of the courts.’”¹⁷⁰ State actions to the contrary violate the supremacy clause because,

although States retain substantial leeway to establish the contours of their judicial systems, they lack authority to nullify a federal right or cause of action they believe is inconsistent with their local policies. “The suggestion that an act of Congress is not in harmony with the policy of the State, and therefore that the courts of the State are free to decline jurisdiction, is quite inadmissible, because it presupposes what in legal contemplation does not exist.”¹⁷¹

Although New York had decided that correction officials would not be burdened by damages suits arising from their employment, Congress decided that “all persons who violate federal rights while acting under color of state law shall be held liable for damages” through Section 1983.¹⁷² The federal law is the supreme law of the land, the Court held. For the

¹⁶⁵*Id.* at 797.

¹⁶⁶*Haywood v. Drown*, 129 S. Ct. 2108 (2009).

¹⁶⁷U.S. CONST. art. VI, cl. 2.

¹⁶⁸*Haywood*, 129 S. Ct. at 2114.

¹⁶⁹*Id.* (quoting *Clafin v. Houseman*, 93 U.S. 130, 136–37 (1876)) (citing THE FEDERALIST No. 82, at 132 (Alexander Hamilton) (Edward Bourne ed., 1947)).

¹⁷⁰*Id.* (quoting *Howlett v. Rose*, 496 U.S. 356, 372 (1990)) (internal citations omitted).

¹⁷¹*Id.* (quoting *Second Employers’ Liability Cases*, 223 U.S. 1, 57 (1912)).

¹⁷²*Id.* at 2115.

four dissenting justices, Justice Thomas writes an in-depth analysis of original intent for the supremacy clause.¹⁷³

Judicial Recusal

In a widely publicized case involving issues of judicial electoral politics, the Court staked out some constitutional limitations for tolerating perceptions of judicial bias. The saga of *Caperton v. A.T. Massey Coal Company* began in 2002 with a \$50 million jury verdict in a West Virginia state court against A.T. Massey Coal Company and its affiliates.¹⁷⁴ The jury found that Massey, whose chief executive officer and president is Don Blankenship, had committed fraud and various business-related torts against Hugh Caperton and several development and mining corporations operated by Caperton.¹⁷⁵ After the verdict, but before any appeal, West Virginia held its 2004 judicial elections. Knowing that Massey and its affiliates would appeal to the West Virginia Supreme Court of Appeals, Blankenship supported a candidate, Brent Benjamin, who was running against an incumbent justice. Blankenship contributed—in support of Benjamin's judicial campaign—\$3 million, an amount that exceeded the total amount spent by all other supporters of Benjamin in the state.¹⁷⁶

Benjamin won. Not surprisingly, Caperton moved to disqualify now-Justice Benjamin from hearing Massey's appeal of the jury verdict. Justice Benjamin denied the motion and, by a 3-to-2 vote, the West Virginia Supreme Court of Appeals reversed the \$50 million verdict. The majority opinion was authored by then-Chief Justice Robin Davis and joined by Justices Benjamin and Elliot E. "Spike" Maynard, while Justices Larry Starcher

and Joseph P. Albright dissented. The decision triggered not only a petition for rehearing from Caperton but also a flurry of new recusal motions from both parties. Caperton renewed his motion to recuse Justice Benjamin and filed a motion to disqualify Justice Maynard, after photos surfaced of Justice Maynard vacationing on the French Riviera with Blankenship while the appeal was pending.

Massey, in turn, filed a motion to disqualify Justice Starcher because of remarks that Justice Starcher had made criticizing Blankenship's role in the judicial election. Justices Maynard and Starcher recused themselves, but Justice Benjamin denied Caperton's recusal motion. Two lower-court judges were selected to replace Justices Maynard and Starcher. The reconstituted court granted Caperton's petition for rehearing but in another 3-to-2 vote, with Justice Benjamin still in the majority, again reversed the jury verdict. In a final postscript, four months after the rehearing decision and after the petition for certiorari was filed in the U.S. Supreme Court, Justice Benjamin filed a "concurring opinion" in which he defended his decision not to recuse himself and in which he insisted that he had "no direct, personal, substantial, pecuniary interest" in the case.¹⁷⁷

In a 5-to-4 decision, with Justice Kennedy abandoning his usual four colleagues, the Court, citing prior cases, found that the "probability of actual bias" on the part of Justice Benjamin in this case was "too high to be constitutionally tolerable."¹⁷⁸ The Court held that "due process requires recusal."¹⁷⁹ The majority begins its analysis with a historical journey through the jurisprudence of judicial recusal, which makes for some entertaining reading.¹⁸⁰

¹⁷³*Id.* at 2118–38 (Thomas, J., dissenting).

¹⁷⁴*Caperton v. A.T. Massey Coal Company*, 129 S. Ct. 2252 (2009).

¹⁷⁵*Id.* at 2257.

¹⁷⁶*Id.* Almost \$2.5 million of the \$3 million contribution went to a political action organization formed to help elect Benjamin.

¹⁷⁷*Id.* at 2259.

¹⁷⁸*Id.* at 2259 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

¹⁷⁹*Id.*

¹⁸⁰*Id.* at 2259–61.

The early decisions on recusal focused on the common-law standard requiring evidence of a judge's "direct, personal, substantial, pecuniary interest" in the case's outcome.¹⁸¹ Over time, however, "the Court has identified additional instances which, as an objective matter, require recusal."¹⁸² Among these are "circumstances in which 'experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'"¹⁸³ Such circumstances involve, for instance, cases where fines assessed by a local mayor who also acted as a judge, while not personally benefiting the mayor, nevertheless were deposited in the town's general account.¹⁸⁴ The Court there focused not on the direct pecuniary interest of the mayor but on the "possible temptation" for the mayor to maximize the town's revenue.¹⁸⁵

According to the *Caperton* majority, the Court's 1986 decision in *Aetna Life Insurance Company v. Lavoie* marks the transition from a subjective to an "objective" analysis of bias.¹⁸⁶ In *Lavoie* a state supreme court judge sat on a case, the decision of which would have had implications for another case in which he had a personal stake. The Court in *Lavoie* held that the possibility that a state supreme court justice's decision might be influenced by his personal stake in the other litigation was a sufficient "objective" basis upon which to disqualify the justice.¹⁸⁷

Summarizing its precedents, the *Caperton* majority concluded that the recusal "inquiry is an objective one," which "asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'"¹⁸⁸

Acknowledging the novelty of the bias issue in the context of judicial-election contributions, the majority hastened to caution that "[n]ot every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal...."¹⁸⁹ The Court stated that "there is a serious risk of actual bias—based on objective and reasonable perceptions—when," as here, "a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent."¹⁹⁰ In this case, the majority concluded, "Blankenship's campaign efforts had a significant and disproportionate influence in placing Justice Benjamin on the case."¹⁹¹ The Court stated that it was not questioning Justice Benjamin's "subjective findings of impartiality and propriety" and emphasized that it was not "determin[ing] whether there was actual bias" on Benjamin's part.¹⁹² Nevertheless, the Court concluded, given the "extraordinary situation" and "extreme

¹⁸¹*Id.* at 2259 (quoting *Tumey v. Ohio*, 273 U.S. 510, 523 (1927)).

¹⁸²*Id.*

¹⁸³*Id.* (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

¹⁸⁴*Id.* at 2260 (citing *Ward v. Monroeville*, 409 U.S. 57 (1972)).

¹⁸⁵*Id.* (quoting *Ward*, 409 U.S. at 60).

¹⁸⁶*Id.* at 2261; *Aetna Life Insurance Company v. Lavoie*, 475 U.S. 813 (1986).

¹⁸⁷*Caperton*, 129 S. Ct. at 2261 (citing *Lavoie*, 475 U.S. at 825).

¹⁸⁸*Id.* at 2262.

¹⁸⁹*Id.* at 2263.

¹⁹⁰*Id.* at 2263–64.

¹⁹¹*Id.* at 2264.

¹⁹²*Id.* at 2263.

facts” presented by the case, due process concerns required the appellate judge to recuse himself.¹⁹³

Chief Justice Roberts, in a dissent joined by Justices Scalia, Thomas, and Alito, took issue with the “objective” standard for bias that the majority articulated and that he fears would unleash a torrent of judicial-election-contributions-related recusal motions, at least in the thirty-

nine states that hold judicial elections.¹⁹⁴ Justice Scalia filed a brief dissent of his own, stating: “The Court today continues its quixotic quest to right all wrongs and repair all imperfections through the Constitution. Alas, the quest cannot succeed—which is why some wrongs and imperfections have been called nonjusticiable.”¹⁹⁵

COMMENTS?

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—The Editors

¹⁹³*Id.* at 2265.

¹⁹⁴*Id.* at 2267 (Roberts, C.J., dissenting). Justice Roberts acknowledged, at least implicitly, the rather “extreme” appearance of partiality raised by the facts of this case, but responds that “[e]xtreme cases often test the bounds of established legal principle” (*id.* at 2272).

¹⁹⁵*Id.* at 2275 (Scalia, J., dissenting).

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