WHAT WERE THEY THINKING

THE SUPREME COURT IN REVUE, OCTOBER TERM 2011

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"No one man should have all that power."

Kanye O. West[1]

One-hundred years ago, the RMS Titanic sideswiped a block of ice, sending to a chilly Atlantic grave hundreds of men, women, children, and Leonardo DiCaprio's charcoal portrait of a nude Kate Winslet—which, but for the absence of surrounding Van Halen logos, looked remarkably like something found in a Trapper Keeper under a study hall desk circa 1981. Ever since, armchair historians have speculated about what could have been done differently to allow the ship to sail on into nautical obscurity—overlooking the fact that its now-surviving occupants' extended life expectancy would have doomed them to years of crippling medical bills and hardship from the health care they would inevitably have consumed.

One school of thought maintains that a timely turn to port would have averted disaster. If news accounts are to be believed – and when have they ever been? – there are those on the Supreme Court who took that lesson to heart in a much-watched recent case, casting an important vote to minimize damage and with an eye to

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[1] *Power*, on *My Beautiful Dark Twisted Fantasy* (Roc-a-Fella 2010). Mr. West was apparently referring to Chief Justice Roberts, possibly based on a pre-cert.-petition Court leak.

history. Much of the chattering class has responded by hailing the Court for a disaster averted, providing a brief respite from portrayals of the Court as the Blue Meanies of the federal judiciary, intent on stealing your love of song and giving it to large corporations. But before we accept that version of events uncritically, it is worth pausing to consider that there are those who maintain that it would have been better for all involved if the *Titanic* had just run headlong into the blasted iceberg.[2]

On reflection, it ruins the narrative flow to start this Term's wrap up discussing *Salazar v. Ramah Navajo Chapter* like this – we probably should have started with the health care cases instead. Let's go there now.

1, 2, 3.
The Health Care Trifecta

There is a word for people who accurately predicted the Court would uphold the Affordable Care Act's "Individual Mandate" by a 5-4 vote with the Chief Justice providing the decisive vote and Justice Kennedy in dissent: liars. Most people who predicted a win for the Individual Mandate thought the Chief would be a "bonus" who came along for the ride only if Justice Kennedy were already going that way, thus furthering the Chief's goal of reducing 5-4 decisions and engaging in damage limitation by assigning the opinion to himself, *see Dickerson v. United States*, 530 U.S. 428 (2000). There's also a word for those who additionally predicted that the Mandate would be upheld as an exercise of the taxing power: damned liars. Having sat through the full 3,428 hours of oral argument, it is only a slight exaggeration to say that anyone momentarily enraptured by Justice Ginsburg's jabot might have missed the entirety of the questioning on Congress's taxing authority.

There's even a word for those who also predicted that the Court would nonetheless hold that the individual mandate was invalid as an exercise of the commerce power, and (by a 7-2 vote!) hold that the Medicaid expansion was impermissibly coercive under the Spending Clause: well, all we have left at this point is "statisticians." The majority – the first ever to conclude a spending condition was

[2] *See, e.g.*, *Titanic Disaster: If Ship Had Hit Iceberg Head-On?*, http://boards.straightdope.com/sdmb/showthread.php?t=406606.

unconstitutionally coercive – somehow managed to attract the votes of the two Democratic appointees who were the challengers' most hostile questioners during the Medicaid argument, Justices Breyer and Kagan. In short, *NFIB v. Sebelius* and its two companion cases plainly were part of an elaborate ploy to dampen enthusiasm for installing cameras in the Courtroom by making clear that watching argument actually *diminishes* one's understanding of the case.

Although many (including the authors) predicted the basic outcome, the contours of the decision were such a curious amalgamation of improbabilities that some thought *NFIB* had the "forced" feel of a case that was decided based on something other than the merits. But it wasn't the first time the Chief gave a statute an unusual reading in order to uphold it. Indeed, the analysis in *NFIB* had the clarity of the instructions on an electric hand drier – press button, receive bacon – compared to the twistification of OT2008's *Northwest Austin Municipal Utility District No. 1 v. Holder*, the only major municipal-utility-district-Voting-Rights-Act case to be compared unfavorably with *Lady in the Water*.[3] The cases were alike in one other respect: in *NAMUDNO* (as the case has come to be known among Puerto Rican boy-band fans and hangover sufferers), the Chief managed to get eight votes for the proposition that "preclearance requirements … raise serious constitutional questions," and in the likewise acronymed *NFIB,* he got seven votes for finding a Spending Clause violation, and managed to have the Commerce Clause and Spending Clause conclusions denominated "holding[s]" though they relied on dissenting votes.[4] While both conservatives and liberals have taken note of the promising/threatening language squirreled away in those opinions, the question is whether the Court will ever make use of it.

No serious discussion of the health care cases would be complete without addressing the supposed leaks from the Court about Chief Justice Roberts's alleged last-minute switch from striking down the ACA to upholding it. The early post-mortems commented so

[3] John P. Elwood, *What Were They Thinking: The Supreme Court in Revue, October Term 2008*, 12 Green Bag 2d 429, 433 (2009).

[4] John P. Elwood, *What Did the Court "Hold" About the Commerce Clause and Medicaid?*, Volokh Conspiracy, July 2, 2012, http://www.volokh.com/2012/07/02/what-did-the-court-hold-about-the-commerce-clause-and-medicaid/.

favorably on the Court's ability to maintain confidences that the bedrock scientific principle that Nature Appreciates Irony pretty much dictated that leaks, counter-leaks, anticipatory anti-counter-leaks, and cock-a-leekie were just a matter of time. It typically takes *weeks* for enterprising *E!* reporters to ferret out the inside scoop about judicial deliberation . . . on America's Got Talent (which, after all, requires waiting for the judges' publicist to prepare a press release). But the Domino's guy had barely arrived at the Court's we-decided-the-most-important-case-in-a-decade-without-leaks party when the torrent began, and it didn't let up until the public's interest in Supreme Court scuttlebutt was sated twelve and a half minutes later. The lapse at the Court raises questions about how much longer confidences can be maintained about even more important matters, such as the identity of the *other* ten ingredients that make KFC so finger-lickin' good. (Everyone knows the Colonel's #1 ingredient was love.)

4.
Arizona v. United States

In another Term, *Arizona v. United States* might have been a blockbuster. Arizona is, after all, a state that inspires strong emotions, a place of great natural beauty that gave us the Grand Canyon, the Painted Desert, the saguaro cactus, and the Sonoran hot dog. (OK, maybe that is not technically "natural.") It is likewise a place of universally beloved public figures who are not controversial in the slightest, such as Geronimo, César Chávez, Janet Napolitano, (briefly) Bristol Palin, and Sheriff Joe Arpaio – recently crowned America's most huggable law-enforcement officer. On the other hand, it is the state that gave us, well, Arizona. The climate, and the politics, can be a little harsh; *Mad Max* failed when test-screened there because people thought it was a documentary. Add in the politics of a presidential election year and a hot-button issue that Congress has ~~deliberately avoided~~ been too busy to address for the past few decades – immigration – and you would have expected the case to garner tremendous attention.

But while the 47 amicus briefs filed in the case is impressive in an absolute sense, it shrank into insignificance compared to the health care cases, where amicus support was measured in megatons, and

whose effect on the Earth's tree-canopy area ranks second only to the Chicxulub Meteor. Although the headlines after the *Arizona* argument and after the decision shared some of the same themes present in coverage of the health care cases ("SG screws up argument!"/"SG didn't screw up argument!"), the duration of the stories and the level of engagement were at an entirely different level. *Arizona* spawned a half-day of stories when it appeared from the Justices' comments at argument that the law might be upheld; perhaps another day and a half resulted from the release of Justice Kennedy's 5-3 opinion invalidating the law's employment ban and provisions making it a state-law offense to be in violation of federal immigration law and authorizing the arrest of persons suspected of committing deportable offenses. (The Court declined to invalidate the "show me your papers" provision at this stage.) But at least a third of that was spent discussing whether Justice Scalia crossed the line by using frowny-face emoticons in his dissent. And coverage in *Arizona* lacked the kind of serious intellectual discussion of the legal issues that the health care cases got: There was, after all, *no* serious coverage of the Solicitor General's use of beverages at argument.

5.
Criminal Law

1. Chances are when you were in law school – *if* you went to law school, and this journal wasn't just placed in your cell as part of some particularly depraved "enhanced interrogation technique" – you were taught that the Fourth Amendment "protects people, not places." And you nodded appreciatively and thought, all those student loans were definitely worth it. Because protecting people, not places is a very worthwhile thing to do, and plus you can noodle your *own* expectations of privacy (which surely are reasonable) while enjoying a $4 latte, and just like that understand Search and Seizure Law. That was the *Katz* test, and it was good. Your prof may have even told you that *Katz* killed off the older Fourth Amendment analysis that looked to property and trespass notions, perhaps triggering condescending chuckles at the idea of basing modern privacy protections on archaic property law.

Fast forward a number of years that may be depressing even to contemplate. In *United States* v. *Jones*, investigators attached a GPS

device to a suspected drug-dealer's car and tracked his movements for a long time. They initially got a warrant because they were careful, but a deadline slipped and some important evidence wasn't covered by it, so the Courts had to decide whether attaching the GPS device was a "search." This is one of the most high-tech search and seizure cases the Court has ever heard. So whether the activity was a Fourth Amendment Search naturally is governed by … did you just say "*18th-century property law*?"

It turns out that approach was not dead, just taking a really long nap. But now it's roused and ready to take its rightful place alongside *Katz*. Justice Scalia, joined by the Chief and Justices Kennedy, Thomas, and fellow Tea Party Express acolyte Sonia Sotomayor, held that attaching the GPS device to the car was an impermissible search because it invaded the owner's traditional property interest in the same way that – we are not making this up – placing a "very tiny constable" in his coach would. The time has come for random drug testing of Supreme Court Justices. A deeply surprised Justice Alito, joined by his peeps Justices Ginsburg, Breyer, and Kagan, concurred only in the judgment, saying that the majority erred by resorting to "18th-century tort law" to decide the legality of a "21st-century surveillance technique." They're on to something there: According to one well-placed leak, the majority would resolve a retinal-scanning case by dunking a witch to see if she floats.

But the real action was in Justice Sotomayor's concurring opinion, which examined reasonable expectations of privacy in the countless types of transactions that reveal information to third-party service providers. Under traditional post-*Katz* analysis, people have no expectation of privacy in information revealed to third parties. Justice Sotomayor argued that "it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties," which she thought was "ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks." That opinion may loom large in future Fourth Amendment cases.

2. There was a time when being in jail was about the worst thing you could imagine – think "Midnight Express," or "Scared Straight." Turns out there is something worse: getting there. That's what

Albert Florence learned the hard way when authorities neglected to remove an old warrant from the system, resulting in his arrest while out driving with his wife. During booking procedures, officials wished to ensure that Mr. Florence was not smuggling contraband into the Essex County Correctional Facility. We need not get into all the details here, as this is a family Entertaining Journal of Law, but the search procedure involved inspecting what the Court delicately termed "other body openings" and would probably be unlawful in most states if engaged in by consenting adults.

By a 5-4 vote along ideological lines, the Court held in *Florence v. Board of Chosen Freeholders* that jailhouse strip searches do not require reasonable suspicion, at least so long as the arrestee is being admitted into the general jail population. Justice Kennedy, joined by the Court's conservatives, reasoned that the procedure was constitutional because it was unlikely to be used on aging jurists with any frequency. That and something about such searches being reasonably necessary to prevent introduction of contraband and weapons into jails. The Court did not address, however, whether suspicionless searches would be reasonable for detainees held outside the general jail population and "without substantial contact with other detainees." Nor did it address what exactly a "Chosen Freeholder" is, or whether it is anything like a "Chosen *Cup*holder." For their part, the Chief and Justice Alito filed concurrences suggesting that using such procedures against detainees outside the general population might go too far, which may cause the *New York Times* editorial board to consider using a marginally less scathing tone when discussing their next act of extremism.

3. Like a pimply-faced tween-turned-bombshell who goes on *Maury* to rub it in her former classmates' faces, the Confrontation Clause has gone from relative obscurity to being on the cutting edge of criminal procedure and a favorite topic of the Court. Judging from the hash of opinions *Williams v. Illinois* produced, which was about as dysfunctional as, well, the guests on *Maury*, its time in the spotlight is far from over.

Justice Alito announced the judgment of the Court (which pretty much spoils the surprise about whether the defendant prevailed) and delivered an opinion for a plurality consisting of himself, the Chief, Justice Kennedy, and – fresh off his own confrontation with a

criminal[5] – Justice Breyer. The plurality largely concluded that the trial testimony of a technician that she had matched Williams's DNA to a semen sample from the victim but did not otherwise identify the DNA sample or establish how the lab handled or tested it did not violate his confrontation rights because the statements were not admitted for the truth of the matters asserted; rather, they were simply a premise for the questions asked of the technician. But the plurality also concluded that, even if it were offered for the truth of the matter asserted, it wouldn't violate the Confrontation Clause because the lab report's primary purpose was not to accuse a specific individual of criminal conduct nor was it a formalized statement such as an affidavit or deposition; rather, its primary purpose was to help police catch an at-large offender. Still with us?

As hard as it is to believe, Justice Thomas has a somewhat idiosyncratic view of this issue, and filed a solo opinion concurring in part and dissenting in part that the lab's out-of-court statements did not offend the Confrontation Clause because they lacked the requisite "formality and solemnity" to be testimonial. But he "share[d] the dissent's view of the plurality's flawed analysis." Justice Kagan, dissenting on behalf of herself and Justices Scalia, Ginsburg, and Sotomayor, would have found a Confrontation Clause violation, and observed that "[f]ive Justices specifically reject every aspect of [the plurality's] reasoning and every paragraph of its explication," making the plurality opinion itself a kind of "dissent."

The following week, the Court granted, vacated, and remanded in nine cases "for further consideration in light of *Williams*." The reaction of the recipient judges as their eyes moved from the GVR order to the Court's still-smoldering 91-page pile of guidance has not been reported, but we're willing to bet it's a good thing the event wasn't televised. *See infra FCC v. Fox.*.

4. In *Missouri v. Frye* and *Lafler v. Cooper*, Justice Kennedy, for a 5-4 Court, extended the Sixth Amendment's right to effective assistance of counsel to plea bargaining because "criminal justice today is for the most part a system of pleas, not a system of trials." The duo served as further illustration of the principle, if any were

[5] Robert Barnes, *Justice Breyer robbed by machete-wielding man*, Washington Post, Feb. 13, 2012.

needed, that There Are A Lot of Ways For Lawyers to Screw Up. Frye's lawyer had failed to tell him of a plea bargain offered by the prosecution; Frye then pleaded guilty without a deal and got a much harsher sentence. Cooper's lawyer, meanwhile, gave him what everyone agreed was bad advice to reject a plea; he went to trial and was found guilty. In *Frye*, the Court applied the usual *Strickland* ineffective-assistance standard and found the lawyer's conduct deficient and prejudicial. In *Lafler*, the Court fashioned a, well, *somewhat open-textured* remedy designed to "neutralize the taint" of the constitutional violation without granting the defendant a "windfall," which on balance provides about as much guidance as a grandparent telling you to "do the right thing." But what it lacks in concrete guidance about what courts should do, it makes up by affording them broad discretion to choose how (or indeed, whether) to remedy the ineffective assistance; district judges in effect have been given wide latitude to grant whatever Mulligan they think will make up for the lawyer's screwup. As you can imagine, this tour de force of nebulosity did not sit well with the bright-line-loving Justice Scalia. With his neighbors on the bench leaning slightly to avoid the jets of steam emerging from his ears, Justice Scalia read dissenting statements from the bench forecasting doom for our system of criminal justice. Sure, that's what he usually says when he dissents in a criminal case. But this time, he may be right.

5. The Court also handed down some cases of great practical significance, but which surprised nobody in particular. In short:

- The Court held in *Southern Union Co. v. United States* that *Apprendi v. New Jersey*, aka the Case That Ate Tokyo, applies to facts that increase fines, as yet another case joins the increasingly not-very-exclusive club known as "*Apprendi* and its progeny."
- It seems like only yesterday that Society was being pulled in a its cute little Radio Flyer wagon and writing letters backwards; now it grunts getting out of chairs and can never remember where it left its keys. With the progress of a maturing society, the Court has once again ruled previously permissible penalties out of bounds. After consulting her pocket Living Constitution, Justice Kagan ruled for a 5-4 majority in *Jackson v. Hobbs* and

Miller v. Alabama that the Eighth Amendment prohibits states from imposing mandatory life sentences for convicted juvenile murderers. If present trends continue, soon the only permissible punishment for underage killers will be a weeklong cedar, acai-berry and Tahitian-black-pearl cleanse at the Juvenile Detention and Restoration Center.

6.
Administrative Law

Researchers investigating a more-debilitating alternative to the Taser have discovered a combination of sounds that immediately induces paralyzing feelings of fear, nausea, and dread that will stop even the most determined attacker in his tracks: əd-ˈmi-nə- strā-tiv ˈlô. At least researchers have found it works on lawyers. Next they plan to test it on human subjects.

1. The Fair Labor Standards Act requires payment of "overtime" wages, but that provision does not apply to "outside salesmen." The implementing regulations define "sale" to "include the transfer of title to tangible property," or, with specific reference to elementary school fundraising products, "leaving it at grandma's back door and running away." SmithKline Beecham, like other pharmaceutical companies, employs sales representatives or "detailers" who meet with doctors and encourage them to prescribe its products when indicated. Petitioners, detailers employed by the firm, claimed they were not "outside salesm[e]n" and thus were entitled to additional pay when they worked 50-60 hours per week, *i.e.*, about two-thirds the schedule of the average part-time associate. Beginning in 2009, the Department of Labor supported that position, arguing in the court of appeals that a "sale" requires a consummated transaction directly involving the employee, revising its position before the Court to require actual "transfer of title." Executives at pharmaceutical companies, which were potentially on the hook for millions in overtime pay, reached for the fast-acting relief of Tagamet® – and their Romney bundler's phone number.

By a 5-4 vote in an opinion by Justice Alito, the Court in *Christopher v. SmithKline Beecham Corp.* rejected the Department's position and held that detailers fall within the outside salesman exemption. That outcome is not only of enormous practical importance – it also has great administrative-law significance: *both the majority and dissenting opinions concluded that an agency's interpretation of its own regulations was entitled to no deference*. Even Justice Breyer, who would have married a federal administrative agency if their parents hadn't disapproved, agreed deference wasn't warranted. It is unclear how much impact this ruling will have on agency practice outside the narrow circumstance present here – an agency, after a period of "conspicuous inaction," took a new position that increased liability on a matter about which regulated parties lacked "fair notice" – but it serves notice that there are limits to even *Auer* deference. The majority opinion even made approving reference to Justice Scalia's concurring opinion in last Term's *Talk America* case that questioned the entire enterprise of *Auer* deference, albeit for the more limited proposition that blind deference to agency interpretations can frustrate the "notice and predictability purposes of rulemaking." Agency officials reached for their moderately fast-acting Taga*meh*, the off-brand substitute approved by their HMO.

2. Three things in life are certain: death, taxes, and tedious coworkers who think it's witty to repeat the old saw about death and taxes. This year's big tax case was *United States v. Home Concrete & Supply*, which offered up one of life's fundamental questions: Does a provision extending the period for deficiency actions against a taxpayer from three years to six when a taxpayer "omits from gross income an amount properly includable therein" apply when the taxpayer overstates his basis in property, thereby understating the gain he received from its sale? Paramount and Fox are reportedly in heated battle over screenplay rights.

But there is a reason why *Home Concrete* appears in the AdLaw section and not in the (nonexistent) tax section or, let's be honest, the who-gives-a-rat's section: it's a sleeper AdLaw case. You see, back in 1958, the Court held in *Colony, Inc. v. Commissioner* that an identically worded predecessor provision did not apply to overstatement of basis. The *Colony* Court said (pre-*Chevron*) that the

agency's interpretation applying the provision to overstatement of basis was "not unreasonable," but still rejected it. Now, the agency wanted to apply *Chevron* and *Brand X* to apply the provision to an overstatement of basis. Justice Breyer delivered the opinion of the Court, joined by the Chief and Justices Thomas, Alito, and (for the most part) Scalia. To Breyer, there was no room for agency deference: "*Colony* has already interpreted the statute, and there is no longer any different construction that is … available for adoption by the agency." Losing Justice Scalia's vote, a plurality concluded that the *Colony* Court had determined that its construction of the statute was best and there was no gap left to fill. The *Home Concrete* plurality thus suggests that *Chevron*'s gap-filling principle does not apply to cases decided before that watershed case.

Although concurring in the result and in much of the opinion, Justice Scalia jumped ship on the regulatory-process part and duked it out with Breyer over when to defer to agencies. Scalia favored a more categorical approach: "Post-*Chevron* cases do not 'conclude that Congress wanted a particularly ambiguity resolved by the agency; that is simply the *legal effect* of ambiguity—a legal effect that should obtain whenever the language is in fact … ambiguous." After all, the statute at issue in *Chevron* was written pre-*Chevron*, so its rationale should apply here. Justice Kennedy, joined by Justices Ginsburg, Sotomayor, and Kagan, would have deferred to the agency. In a totally out-of-character move, Scalia took time out of his beef with Breyer to mock "the peroration of the dissent" for advocating a long-outmoded view of administrative law.

7.
First Amendment

The fact that most Americans can't name the five rights protected by the First Amendment[6] does not get in the way of their devotion to

[6] *Americans' Awareness of First Amendment Freedoms*, McCormick Tribune Freedom Museum (Mar. 1, 2006), http://www.forumforeducation.org/node/147 ("Remarkably, only one person of the 1,000 interviewed was a ble to correctly name all five freedoms.").

the thing.[7] Come to think of it, ignorance may facilitate their devotion. After all, the rights to assemble or petition the government for redress are a lot less appealing when it's 8AM on a Saturday and you live along the march route. And the right to free speech is less appealing when you realize it applies even to speech that the most enlightened citizens (i.e., you) disagree with.[8] But the Justices, who if anything might think five rights sounds like a low estimate, seem truly committed to it, and this is as speech-protective a Court as we've had in some time.

1. O Hosanna! See the long-awaited King, come to set his people free … Free from having to comply with the Americans with Disabilities Act, that is. In the blockbuster religious-liberty case *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, a unanimous Court sayeth that a "ministerial exception" grounded in the Establishment and Free Exercise Clauses precludes applying employment discrimination laws to disputes between a religious institution and its ministers. Requiring a church to accept or retain a certain minister, or penalizing it for not doing so, interferes with church governance and deprives it of control over deciding who will personify its beliefs.

If you are thinking that only the Court's Obi-Wan, Chief Jedi Master John G. Roberts, Jr., could produce unanimity in such a divisive case, you're right. He managed to persuade all nine Justices that the SG's position, which would have afforded the most devout clergy no more protection than a middle-school chess club, was not the droid they were looking for. Justice Thomas concurred, saying that he would be even more deferential to religious employers' understanding of who qualifies as a minister. Justice Alito, joined by Justice Kagan in an apparent effort to befuddle everyone who voted for either of them, filed a concurring opinion to remind a Court whose last protestant departed two years ago that "minister" is a term

[7] *See, e.g.*, http://www.northernsun.com/I-Heart-The-First-Amendment-Sticker-(5089).html.

[8] Hal Dardick, *Alderman to Chick-Fil-A: No Deal*, Chicago Trib., July 25, 2012, http://www.chicagotribune.com/business/breaking/ct-met-chicago-chick-fil-a-20120725,0,929023.story.

unknown to most religions, and that the person's functions rather than title should control.

2. The biggest case of the Term was *United States v. Alvarez*, which had Americans glued to their TVs for days as cable-news commentators parsed every syllable of the opinion. OK, so that's a lie. But what can we say? "Lying [is] [our] habit." *Alvarez*, slip op. 1. In truth, *Alvarez* garnered grudging attention for precisely six minutes while the country was waiting for something better: *Alvarez* was released at 10:01 EDT on June 28, 2012, and the false (how's that for irony?) claims that the ACA had been invalidated started going out at 10:07. As with so much in life, timing is everything: If the health-care cases hadn't been looming, *Alvarez* probably would have gotten serious play.

By a 6-3 vote, the Court invalidated the Stolen Valor Act, which made it a federal crime to lie about having received a military decoration. If OT2011 shows anything, it's that an opinion that garners the votes of an actual majority is unforgivably passé. Justice Kennedy announced the Court's judgment but delivered an opinion only for himself, Justices Ginsburg and Sotomayor, and – in a move that should score him a hemp beer refill at the American Constitution Society's annual Burn-a-Flag Barbecue – the Chief. The plurality concluded that the appropriate test for a content-based restriction was strict scrutiny; and, because the government could not show the statute was necessary to preserve the integrity of military honors, the law was invalid. The ever-pragmatic Justice Breyer, joined by Justice Kagan, believed the government should have some ability to regulate false statements of fact and so would have applied intermediate scrutiny. The relatively regulation-friendly Justice Alito, joined by the relatively regulation-hostile Justices Scalia and Thomas, found common ground in the position that the Act was fine as it was. If Congress enacts a new 'n' improved Stolen Valor Act, the concurrence and dissent may preserve the statute for the handful of prosecutions the government undertakes, which is not quite the same as saving it from oblivion.

7½.
Citizens United Jr.

Little of note traditionally happens during the seventh-inning stretch, which typically is spent warbling a shopworn song, grabbing another malted beverage, concluding the rental of the last one, or purchasing one last tubular meat-like product. During this Term's equivalent, the Court finally confronted the Montana Supreme Court's much-ballyhooed, er, application of the *Citizens United v. FEC* decision. In *American Tradition Partnership v. Bullock*, the Montana Supreme Court sought to apply the heretofore-unknown "Montana exception" to *Citizens United* for states that *really needed* restrictions on corporate and union spending, as opposed to the other states and the federal government that imposed them just for laffs. While there were those who earnestly believed the Court might take the opportunity to revisit its error in *Citizens United* (some of whom filed rare bottom-side cert-stage amicus briefs), that was not to be. Instead, the Court issued a *per curiam* opinion that reaffirmed *Citizens United* and brushed aside Montana's attempt to distinguish it. Justice Breyer, for the four *Citizens United* dissenters or their successors (*i.e.*, Justice Kagan for Stevens) bemoaned the futility of seeking to revisit the Court's holding. That would have been the end of the matter, except that Justice Alito attended the Phillies-Nats game a month later and ordered a hot dog. As he tucked into the "100% all-beef frank," Alito shook his head and silently mouthed, "not true."

8.
Patent Law

Having the Supreme Court review Federal Circuit decisions is a little like a university putting a Medieval Studies Ph.D. specializing in 14th Century thimble cozies in charge of the Molecular Biology Department. Add to that the fact a couple of the mol bio profs are also Medieval Studies academics who just impressed the university president, and you have some idea how American patent law became the envy of the world.

This Term's leading patent case was *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, in which the Federal Circuit held that Prometheus could patent its method for determining whether it was

necessary to adjust a patient's thiopurine dose, which was helpful in the treatment of autoimmune diseases and chronic consumption of one's internal organs by birds of prey. Justice Breyer, who had taken an interest in a similar issue when it was before the Court (in the later dismissed-as-improvidently-granted *Laboratory Corp. of America v. Metabolite Labs.*), delivered the decision of the unanimous Court. The Court concluded that Prometheus's method, which tested metabolite levels and gauged whether they were low or high, did not "add enough" to its statement of naturally occurring phenomena to qualify as a patent-eligible process that applies natural laws. Along with OT2009's *Bilski v. Kappos,* which held that the Federal Circuit's "machine or transformation" test is not the definitive test of patent eligibility, this case goes a long way in clarifying what is eligible for patent. This is a big win for medical practitioners, who can now stop worrying about whether administering certain treatments would violate someone's patent, and go back to wondering whether their 10,000-square-foot house in the Outer Banks is big enough.

9.
Overperformers

If there's anything Americans love, it's an improbable success story – be it an Olympic swimmer who comes back from not making the team in 2008 to set a world record in 2012, a man rising up from the hardscrabble world of Hawai'i's best private school all the way to the White House, or getting Word 2010 to actually do something you want it to. Whether or not the results strike your fancy, there is no question these two cases beat expectations:

1. First up is *Sackett v. EPA*. The Sacketts own a small lot near Priest Lake, Idaho. Preferring to live in structures, the Sacketts put down dirt and rocks as fill in preparation to build a house. Soon afterward, the Sacketts received a care package from the EPA. Along with an assortment of fruits and cheeses, the Sacketts found an Administrative Compliance Order saying their property was a wetland and they had violated the Clean Water Act by applying fill. The ACO threatened civil penalties of up to $32,500 per day, and even with all the gouda, that would put them pretty far in the hole. The Ninth Circuit held that the Clean Water Act impliedly preempts

pre-enforcement judicial review of ACOs under the Administrative Procedure Act.

Following an oral argument characterized by mild outrage over the EPA's treatment of the Sacketts, it seemed the couple would prevail, but the outcome was better than even their most ardent supporters expected. Justice Scalia delivered an opinion holding that the Sacketts could bring a civil action under the APA to challenge the issuance of the EPA's order. Justice Scalia would have beat expectations in a Clean Water Act case just by getting a fifth vote, *see Rapanos v. United States*, 547 U.S. 715 (2006) (plurality opinion), but here he got all nine. What's more, the language of the opinions suggests parties can seek APA review not simply of ACOs, but also "jurisdictional determinations" – the government orders asserting that a property contains wetlands subject to CWA jurisdiction. The sympathetic Sacketts thus proved to be the perfect plaintiffs for those wanting to give a boost to property rights. And, yes, they got to keep the basket.

2. Knox v. SEIU involved a First-Amendment challenge to public-sector unions' use of compelled union dues for political advocacy. Writing for the Court's five conservatives (although Justices Sotomayor and Ginsburg concurred in the judgment), Justice Alito concluded that a public-sector union must give employees fresh notice of union expenditures before imposing a special assessment, and may not exact funds from nonmembers without their affirmative consent. Even more significantly, the opinion went on to express skepticism of using compelled assessments even *to finance collective bargaining*. The majority said that compulsory fees for collective bargaining "constitute a form of compelled speech and association that imposes a 'significant impingement on First Amendment rights,'" and the Court's past "tolera[nce]" of the practice was an "anomaly." The majority all but invited requests to revisit that line of cases, which could set the stage for a *Citizens United*-style reconsideration in the area of union dues. No word yet whether this will reduce the population of giant inflatable rats on city streets.

10.

Underperformers

If Americans love a Michael Phelps (2008), we're a lot more familiar with a Michael Phelps (2012): a promising contender who doesn't work out quite as expected. Given the penchant of the Roberts Court for deciding cases narrowly, this is a category we will be seeing more of.

1. FCC v. Fox was a big win for broadcasters as the Court held 8-0 that because the FCC's new indecency policy did not provide fair notice that fleeting expletives and momentary nudity could be found actionably indecent, the agency's standards were unconstitutionally vague as applied to the broadcasts in question. But following the lead of the Second Circuit's opinion in the case, many questioned the continuing validity of *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), which approved a less rigorous standard of scrutiny for broadcast regulations, in light of changes to the television medium that undermined the assumptions on which it was based. For the Court to duck the First Amendment question and resolve the case on narrow notice grounds was a little like opening a big box Christmas morning and discovering it contained socks from Great Aunt Millie. For now, *Pacifica* (the opinion) will continue to be as much of an obstacle as a Pacifica (the minivan), doubtless festooned with "my child is an honor student" stickers, is on the roads of Northern Virginia.

Justice Ginsburg appeared to share in the disappointment, filing a two-sentence concurrence following Justice Thomas's lead during the last installment of *FCC v. Fox* in saying that *Pacifica* was wrong when it was decided and "[t]ime, technological advances, and the Commission's untenable rulings in th[is] case … show why *Pacifica* bears reconsideration." With a new awards season approaching and no reduction in celebrities' prodigious output of expletives, it won't be f—in' long until the next test case is here.

2. The petitioner in *Zivotofsky v. Clinton* asked whether the "political question doctrine" prevents a federal court from enforcing a 2002 statute that directs the Secretary of State to honor Jerusalem-born passport applicants' request to have their place of birth recorded as "Jerusalem, *Israel*." When the Court granted cert, it ordered briefing on whether the law "impermissibly infringes the President's

power to recognize foreign sovereigns," because of the Executive Branch's longstanding opposition to identifying the country where Jerusalem was situated, causing some to believe the Court would confirm that the political question doctrine did not prevent courts from reaching the question, but then promptly invalidate the statute. But they weren't counting on the Roberts Court's minimalist impulses. Having ordered briefing on the constitutional question, the Court promptly punted, narrowly deciding that the political question doctrine was no obstacle but leaving the harder question for the D.C. Circuit in the first instance.

3. Last but not least – well, actually, it is kind of is – *American Financial Corporation v. Edwards,* the *ne plus ultra* of underperformers. The Court was supposed to decide whether Congress could create statutory rights enforceable through a private right of action irrespective of whether the enforcer suffered a concrete injury. By late June, it had long been the oldest undecided case and the Court still had not come down with a decision. It appears from the resolution of the other November cases that the opinion was originally assigned to Justice Thomas but something happened along the way. We can only speculate, but it seems reasonable to think the Court was either (1) hopelessly deadlocked, (2) the separate writings were too difficult to decipher for even the Court that put out *Williams* and *NFIB*, or (3) a dog ate it. Whatever the reason, the Justices dismissed the case as improvidently granted. But at least American Financial got a coupon worth 10% off its next cert. petition.

That ribbon thingy means it is time to switch gears from OT2011 to OT2012. Thank you for reading this far; on a totally unrelated note, we remind you that the Eighth Amendment's prohibition of cruel and unusual punishment requires state action.

This is also the time where, whether true or not, all Court-watchers say that the next Term is looking like it will be a good one. This time it might actually be. For one thing, after letting the case percolate a little longer to give it that rich mountain-grown aroma, the Justices will turn again to *Kiobel v. Royal Dutch Petroleum* for reargument to permit the Court to address the additional question on

which the Court requested briefing – "whether and under what circumstances the Alien Tort Statute allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States." The last time the Court held a case over for reargument the following Term on an additional question presented we got *Citizens United*. Meanwhile, in *Kirtsaeng v. John Wiley & Sons, Inc.*, the Court will revisit the question that divided it 4-4 in OT2010's *Costco v. Omega*, in which Justice Kagan was recused. Justice Kagan has been seen around town stocking up on SPF100 in preparation for her moment in the sun. Sure to get excellent reception at least in some markets is *Comcast v. Behrend*, the follow-on to OT2010's pro-class-action-defendant stunner *Wal-Mart v. Dukes*, which asks if a district court may certify a class action without first resolving "merits arguments" that bear on Rule 23's prerequisites for certification. Then there's *Fisher v. University of Texas at Austin*, asking the Court to revisit affirmative action in higher education a cool fifteen years before *Grutter v. Bollinger*'s sell-by date. And there are already three petitions seeking review of the constitutionality of the Defense of Marriage Act; it seems likely at least one will be granted.

Sure, none of those cases is a showstopper like OT2011's *Taniguchi v. Kan Pacific Saipan, Ltd.*, where the Court once again took sides in the *kulturkampf* by holding that document translators are not "interpreters." But after that much excitement, we could stand some peace and quiet.

Until next time, that's today's baseball!