

## Looking Ahead: October Term 2009

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When David Souter testified before the Senate Judiciary Committee in 1990, the White House lawyers who had prepped him for his confirmation hearings quickly began getting a collective sinking feeling. Instead of hearing the solid “strict constructionist” George H.W. Bush had portrayed him to be, they listened as Souter—their nominee, their unknown but presumably conservative nominee—talked an awful lot like a liberal.

On question after question, Souter surprised. He heaped praise on the iconic William Brennan, the justice he was replacing. He defended the rulings of the Warren Court. He even distanced himself from Antonin Scalia’s legal theories.

In the committee room, Senator Charles Grassley, the Iowa Republican, grew increasingly impatient. On Souter’s first day of testimony, Grassley had asked him the kind of friendly questions nominees tend to get from senators who support their president.

There was, for example, this softball: What does Souter think about the liberal view that “the courts, rather than the elected branches, should take the lead in creating a more just society?”<sup>1</sup>

Souter knocked it out to left field: “Courts must accept their own responsibility for making a just society. The courts are going to be forced to take on problems which, sometimes, in the first instance, might be better addressed by the political branches of government.” And if the other branches refuse to address a “profound social problem” raising a constitutional issue, Souter said, “ultimately it does and must land before the bench of the judiciary.”<sup>2</sup>

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<sup>1</sup> A Hearing on the Nomination of Judge David Souter to be an Associate Justice of the U.S. Supreme Court before the S. Comm. on the Judiciary, 101st Cong. 142 (2009) (Questioning of Souter by Sen. Grassley).

<sup>2</sup> *Id.*

“The law of nature and political responsibility, constitutional responsibility, abhor a vacuum,” Souter told Grassley.<sup>3</sup>

Pennsylvania Senator Arlen Specter, then a Republican, sounded amused by the entire exchange, telling reporters during a break: “I don’t think you’ll find a more liberal statement anywhere. It was out of Brennan’s left pocket.”<sup>4</sup>

Conservatives were baffled, and on Souter’s second day of testimony, Grassley wasn’t as friendly. Referring to their earlier exchange, Grassley told Souter his testimony “seems to me more the terminology likely to come from a judicial activist.”<sup>5</sup>

“If we are going to have a Supreme Court that thinks it can fill vacuums every time there is a perceived problem, then . . . you are going to be a very busy person,” Grassley continued, “because democratic self-government does not always move with the speed or the consensus or the wisdom of philosopher kings who might best fill those vacuums.”<sup>6</sup>

But Souter didn’t back off, leaving the Republicans to wonder just who the untested New Hampshire jurist really was. Surely, some thought, Souter was just playing along to get confirmed. Surely he didn’t really mean it.

And sure enough, in his first year on the Court, it appeared Souter, who sailed through to confirmation 90-9, hadn’t meant it after all. He eased those concerns with solid conservative votes, standing alongside Chief Justice William Rehnquist. The collective sinking feeling in the White House became a collective sigh of relief.

But a justice’s first term can be misleading, as conservatives would quickly learn.

By the end of his second year on the Court, Souter was voting more in line with his testimony, casting decisive votes on issues

<sup>3</sup> *Id.*

<sup>4</sup> Linda Greenhouse, *Filling in the Blanks*, *New York Times*, September 15, 1990, at 11.

<sup>5</sup> A Hearing on the Nomination of Judge David Souter to be an Associate Justice of the U.S. Supreme Court before the S. Comm. on the Judiciary, 101st Cong. 240 (2009) (Questioning of Souter by Senator Grassley).

<sup>6</sup> *Id.*

ranging from abortion to school prayer. He saw numerous “profound social problems” in his tenure on the Court, and he often stepped into fill the vacuum, whether on the death penalty or civil liberties or voting rights. He may not have been the “judicial activist” Grassley worried about, but he sure wasn’t the “strict constructionist” George H.W. Bush promised, either.

In fact, David Souter’s greatest legacy may be what he was not: a key fifth vote for conservatives.

Nineteen years after David Souter’s confirmation, his replacement will step into her first term on the bench, facing an array of difficult issues while also learning how to work with eight colleagues who aren’t exactly lacking in confidence about their respective jurisprudential approaches.

It’s too soon to say whether the 2009 term will end up as a blockbuster—like Anthony Kennedy’s first term, as well as the first terms of Clarence Thomas and Samuel Alito. Of the 46 cases granted thus far, there is one major showdown: a frontal assault on campaign finance laws. There also is a potentially divisive constitutional challenge to life sentences for juveniles, a widely accepted practice in the states, but one condemned internationally. And there are important cases that go to the heart of constitutional structure and power.

But the docket, which obviously will nearly double by the end of the year, has yet to reflect the kind of divisive issues that Kennedy, Thomas, and Alito had to grapple with in their first terms—cases on issues like abortion and race. The 2009 term is as notable, at this point, for the change in the membership of the Court as for the panoply of cases the justices will confront.

### **A New Justice Arrives**

Since we’ve all taken to heart the old saying that a new justice makes a new Court, all eyes will be on Sonia Sotomayor in her role as the new junior associate justice. Reporters will analyze her questions at argument for clues about her leanings. Professors will scour her opinions to discern her philosophical approach. Legal analysts will look for new coalitions and voting blocs, the kind that emerged when Justice Thomas joined the Court, again after Justice Stephen Breyer went on board and, most recently and vividly, after Justice Alito took Sandra Day O’Connor’s place.

Will Sotomayor find a comfortable home with the so-called liberal wing (something O'Connor never managed to do with the conservatives)? Will she help persuade swing justice Kennedy (as Breyer did with O'Connor)? Or will she help solidify the conservative majority by pushing Kennedy further to the right (as the famously charming William Brennan did with O'Connor in her first term, when he wrote "the bloom is off the rose" in a dissent to one of her first opinions for the Court)?

Questions, we all have questions, and the 2009 term will provide some hints. But if history is any guide, it's best to wait a year or two before making bold proclamations or answering with any degree of confidence.

Consider the confusing picture that has emerged thus far of Sotomayor—one that is, in some ways, as confusing as the images that emerged of David Souter at his confirmation.

When President Obama introduced Sotomayor as his first Supreme Court nominee, conservatives seized on her speeches and immediately painted her as a liberal activist who would rely on her heart and feelings when deciding cases, not the law. Souter got similar treatment from liberals when George H.W. Bush tapped him to replace William Brennan. (Abortion rights groups had issued flyers that proclaimed: "Stop Souter Now or Women Will Die.")

There are other parallels. Sotomayor's confirmation hearing—like Souter's—stirred concerns about her philosophy among those who had expected to extend full support. Even with friendly questions from Democrats, she refused to engage. This was a relatively new experience for liberals, who haven't suffered the kind of crushing disappointments that conservatives have endured with nominees who ended up surprising them. Ruth Bader Ginsburg, a women's rights advocate before joining the bench, was more direct in her testimony. Stephen Breyer gave a fascinating, accessible seminar on liberal jurisprudence.

Sotomayor was different. She didn't "pull a Souter" and paint herself in entirely different ideological stripes than expected, but she didn't embrace liberal jurisprudence either. She was an enigma.

At times she sounded as conservative as Chief Justice John Roberts, who clearly articulated a conservative judicial philosophy in his confirmation hearings (much as Breyer had done for liberals in the previous decade). Here's just one example of Sotomayor parroting boilerplate judicial conservatism: "The great beauty of this nation

is that we do leave . . . law-making to our elected branches and that we expect our courts to understand its limited role.”<sup>7</sup>

At times she sounded like a coy liberal nominee, hiding the ball on questions about, for example, international law. This was a particularly striking exchange with Republican Senator John Cornyn of Texas, which suggests she’s right there with Scalia, Thomas, Roberts, and Alito on disdaining the use of foreign law:

“Foreign law cannot be used as a holding or a precedent or to bind or to influence the outcome of a legal decision interpreting the Constitution or American law that doesn’t direct you to that law,” she told Cornyn.<sup>8</sup>

But let that answer settle in, and then process this subsequent response, which suggests she really stands with Ginsburg, Breyer, and Kennedy:

“In my experience, when I’ve seen other judges cite to foreign law, they’re not using it to drive the conclusion,” Sotomayor said. “They’re using it just to point something out about a comparison between American law and foreign law. But they’re not using it in the sense of compelling a result.”<sup>9</sup>

And at times she was, well, nonsensical. When asked by Senator Lindsey Graham of South Carolina whether the Constitution was a “living, breathing, evolving” document, she responded:

The Constitution is a document that is immutable to the sense that it’s lasted 200 years. The Constitution has not changed except by amendments. It is a process—an amendment process that is set forth in the document. It doesn’t live other than to be timeless by the expression of what it said. What changes is society. What changes is what facts a judge may get.<sup>10</sup>

That was a chance to put forth the case for liberal jurisprudence, with no risk to the nominee—a decisive Democratic majority in the

<sup>7</sup> A Hearing on the Nomination of Judge Sonia Sotomayor to be an Associate Justice of the U.S. Supreme Court before the S. Comm. on the Judiciary, 111th Cong. \_\_\_\_ (2009) (Statement of Judge Sonia Sotomayor).

<sup>8</sup> *Id.* (Questioning of Sotomayor by Sen. Cornyn).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* (Questioning of Sotomayor by Sen. Graham).

Senate meant that, as Graham remarked candidly, short of a “melt-down,” her confirmation was assured going in.<sup>11</sup> Instead, she inexplicably danced around an issue that a first-year law student who has skimmed Stephen Breyer’s book<sup>12</sup> could have slammed out of the park.

Contrast her answer to Breyer’s response, at his confirmation hearings, to a general question about whether the Constitution can change as society changes. (In 1994, we hadn’t seen the term “living Constitution” become a popular way of distinguishing between judicial liberals, who embrace it, and judicial conservatives, who prefer the “dead” version.) Here’s Breyer back in 1994:

I think that in applying the Constitution in general, one looks, of course, to the conditions of society. I think the Constitution is a set of incredibly important, incredible valuable principles, statements in simple language that have enabled the country to exist for 200 years, and I hope and we believe many hundreds of years more. That Constitution could not have done that if, in fact, it was not able to have words that drew their meaning in part from the conditions of the society that they govern. And, of course, the conditions and changed conditions are relevant to deciding what is and what is not rational in terms of the Constitution, as in the terms of a statute or in any other rule of law.<sup>13</sup>

Sotomayor also explicitly distanced herself from Obama’s approach to judging in an exchange with Arizona Senator Jon Kyl:

KYL: Let me ask you about what the President said. He used two different analogies. He talked once about the 25 miles—the first 25 miles of a 26-mile marathon. And then he also said, in 95 percent of the cases, the law will give you the answer, and the last 5 percent legal process will not lead you to the rule of decision. The critical ingredient in those cases is supplied by what is in the judge’s heart.

<sup>11</sup> *Id.* (Statement by Sen. Graham).

<sup>12</sup> Stephen Breyer, *Active Liberty: Interpreting our Democratic Constitution* (2005).

<sup>13</sup> A Hearing on the Nomination of Judge Stephen Breyer to be an Associate Justice of the U.S. Supreme Court before S. Comm. on the Judiciary, 103rd Cong. (1994) (Statement of Judge Stephen Breyer).

Do you agree with him that the law only takes you the first 25 miles of the marathon and that that last mile has to be decided by what's in the judge's heart?

SOTOMAYOR: No, sir. That's—I don't—I wouldn't approach the issue of judging in the way the President does. He has to explain what he meant by judging. I can only explain what I think judges should do, which is judges can't rely on what's in their heart. They don't determine the law. Congress makes the laws.<sup>14</sup>

Sotomayor's testimony was too much for some on the Left to take. Georgetown law professor Mike Seidman declared himself "completely disgusted" by her testimony. Seidman, who clerked for liberal icon Thurgood Marshall, wrote in an online debate:

If she was not perjuring herself, she is intellectually unqualified to be on the Supreme Court. If she was perjuring herself, she is morally unqualified. How could someone who has been on the bench for seventeen years possibly believe that judging in hard cases involves no more than applying the law to the facts?<sup>15</sup>

A clearer picture of Sotomayor will begin to emerge when she takes the bench this fall. Despite her testimony, she is unlikely to disappoint liberals as nominees like Souter (and Kennedy and O'Connor) have disappointed conservatives. But it's nonetheless a mistake, as Souter's case shows, to read too much into a justice's first term, even when the new justice is an experienced and presumably liberal federal judge like Sonia Sotomayor.

In Justice Kennedy's first full term, for example, he voted with Rehnquist 92 percent of the time, more than any other justice. He cast decisive conservative votes on discrimination, abortion, and the death penalty. His vote with Rehnquist, Scalia, and White in *Webster v. Reproductive Health Services*, a four-justice opinion that proposed a different way of analyzing abortion cases, convinced people on both sides he would eventually agree to overturn *Roe v. Wade*. The

<sup>14</sup> A Hearing on the Nomination of Judge Sonia Sotomayor to be an Associate Justice of the U.S. Supreme Court before , 111th Cong. (2009) (Questioning by Sen. Kyl).

<sup>15</sup> Mike Seidman, The Federalist Society Online Debate Series: The Sotomayor Nomination, Part II, available at <http://www.fed-soc.org/debates/dbtid.30/default.asp>.

*Washington Post* pronounced him “at least as conservative” as Robert Bork would have been.<sup>16</sup>

But those early votes were deceiving, and over the next few years, a more lasting image would emerge: Kennedy was a winnable vote for liberals. He would change his mind. He could be persuaded. He just couldn’t say “never,” especially on those “profound social problems” like abortion.

Even a justice’s demeanor can change after his or her first term on the Court. Sotomayor, for example, has a reputation as a fierce questioner. Perhaps she’ll step up and go head-to-head with Chief Justice Roberts and Justice Scalia. Perhaps she’ll assume Souter’s role of stepping in and assisting lawyers who struggled to answer withering questions from Scalia.

But if she shows reticence in her first year, it may not tell us much. When the experienced appeals court Judge Alito became Justice Alito, he made a conscious decision to ease into his new role. In his first term, he was deferential and reserved. He asked few questions, deliberately opting to first absorb the routines and rhythms of the Supreme Court bench at argument.

Alito has since emerged as one of the Court’s most effective questioners. He is probing and focused, often homing in on pragmatic consequences, but still grounded in law. He often gets the attention of key swing vote—Kennedy, who is not reluctant to jump in at argument and demand that lawyers answer Justice Alito’s questions.

Bottom line: it may take a while for us to understand the kind of justice Sonia Sotomayor will be.

### **Campaign Finance**

In any event, the new justice has hit the ground running, thanks to the Court’s decision to return to the bench nearly a month early, on Sept. 9, for re-arguments in a major campaign finance case, *Citizens United v. Federal Election Commission*.<sup>17</sup> At issue is whether *Hillary: The Movie*, a feature-length, relentlessly critical film of presidential candidate Hillary Clinton, was an “electioneering communication” and, as such, regulated under the 2002 Bipartisan Campaign

<sup>16</sup> Al Kamen, *Kennedy Moves Court to Right: Justice More Conservative than Expected*, *Washington Post*, April 11, 1989, at A1.

<sup>17</sup> *Citizens United v. FEC*, 129 S. Ct. 594, reargument scheduled, *Citizens United v. FEC*, 129 S. Ct. 2893 (2009).

Reform Act. (That law also is known as “McCain-Feingold,” after Senate sponsors John McCain, the Arizona Republican, and Russell Feingold, the Wisconsin Democrat.)

Before BCRA, campaign finance issues were governed by the Federal Election Campaign Act, which prohibited corporations and unions from spending their general treasury funds on “election-related activities.” In *Buckley v. Valeo* in 1976, the Supreme Court interpreted the FECA’s “election-related activities” to encompass only those activities that amounted to “express advocacy,” such as a direct call to “Vote for Me” or “Don’t Vote for Her.”<sup>18</sup>

After *Buckley*, however, corporations and unions started running so-called “issue ads” to get around the law’s restrictions on express advocacy. They weren’t a direct plea to “Vote for Me,” but instead typically criticized the opponents’ stands on the issues.

Part of BCRA was designed to close that loophole with restrictions on “electioneering communications.” Those communications are broadcast on radio or television 30 days before a primary election or 60 days before a general election, and feature candidates for federal office. According to BCRA’s Section 203, corporations and unions are prohibited from spending their general treasury funds on those advertisements. BCRA also contains disclosure requirements identifying the person or committee funding the advertisements.

A broad array of groups challenged BCRA, but the Court upheld key provisions, including a facial challenge to Section 203, in *McConnell v. FEC* in 2003.<sup>19</sup> *McConnell* also reaffirmed *Austin v. Michigan Chamber of Commerce*, where the Court upheld limits on corporate financing of “express advocacy” because of the “corrosive and distorting effects [that] immense aggregations of [corporate] wealth” could have on elections.<sup>20</sup> In *McConnell*, the Court said “issue ads” also could be limited because most were the “functional equivalent of express advocacy.”<sup>21</sup>

The Court again waded into campaign finance restrictions in *Wisconsin Right to Life v. Federal Election Commission*, which made two

<sup>18</sup> *Buckley v. Valeo*, 424 U.S. 1, 47 (1976).

<sup>19</sup> *McConnell v. FEC*, 540 U.S. 93 (2003).

<sup>20</sup> *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 660 (1990).

<sup>21</sup> *McConnell*, 540 U.S. at 206.

different appearances in the Court.<sup>22</sup> The case involved advertisements taking aim at Senators Feingold's and Herb Kohl's votes to filibuster judicial nominees. The group argued those ads were not the "functional equivalent of express advocacy," and the justices allowed the as-applied challenge to Section 203 to proceed in the lower court.<sup>23</sup> After the lower court found the ads were, in fact, the functional equivalent, the case headed back to the Supreme Court.

In the second go-round, the Court ruled that *McConnell* could not apply to those types of advertisements.<sup>24</sup> Three justices—Kennedy, Scalia, and Thomas—argued that Section 203 was unconstitutional and said *McConnell* and *Austin* should be overruled. Roberts and Alito joined in a more narrow controlling opinion, holding that BCRA barred only ads that were the "functional equivalent of express advocacy," which it defined as ads in which there "no reasonable interpretation" of anything other than an advertisement expressly supporting or opposing a candidate.<sup>25</sup> Because the ads targeting Feingold and Kohl didn't mention character or fitness for office, they could be interpreted as something other than an express ad against them. As a result, they were not covered by BCRA, the Court held.<sup>26</sup>

The case now before the Court came about after Citizens United tried to distribute *Hillary: The Movie* through a "video-on-demand" service, in which cable subscribers could get the movie for free.

The Federal Election Commission took the position that the movie, which was funded with corporate money, was an "election communication" and could not be paid for with corporate funds. Citizens United sued, and the Court heard arguments in the case in March.

The justices then upped the ante, deciding in the last week of the term to hold over the case and directing the parties to brief whether the Court should overturn *Austin* and a portion of *McConnell*. Overturning those decisions could pave the way for corporations to use

<sup>22</sup> *Wis. Right to Life v. FEC* ("WRTL I"), 546 U.S. 410 (2006), *FEC v. Wis. Right to Life* ("WRTL II"), 551 U.S. 449 (2007).

<sup>23</sup> WRTL II, 551 U.S. at 412.

<sup>24</sup> *Id.* at 481.

<sup>25</sup> *Id.* at 455–504.

<sup>26</sup> *Id.* at 456.

their general treasury funds to advocate the election or defeat of political candidates.

A recap: In *Austin*, the Court held that corporations may be prohibited from financing express electoral advocacy with funds from their business activities. In *McConnell*, the Court upheld BCRA's ban on corporate treasury funds being used for express advocacy or the functional equivalent of express advocacy. The Court in *McConnell* also upheld the law's definition of "electioneering communication," which had been attacked as facially overbroad.

The Obama administration is arguing the case is a "particularly unsuitable vehicle" for reexamining either *Austin* or *McConnell*, because Citizens United is a nonprofit corporation with an expressly ideological purpose—both of which make it a "distinctly atypical corporation."<sup>27</sup> The administration also argues the broad constitutional question was not properly raised in the case because Citizens United abandoned efforts to assert a facial challenge to BCRA's Section 2003 and did not argue that either *Austin* or *McConnell* should be overruled.

On the merits of the constitutional questions, the administration argues that a reversal of those decisions "would likely invalidate federal legislation that has restricted corporate electioneering for over 60 years, as well as similar legislation enacted by many states."<sup>28</sup>

"Overruling *Austin* and *McConnell* would fundamentally alter the legal rules governing participation of corporations—including the Nation's largest for-profit corporations—in electoral campaigns, and would make vast sums of corporate money available for overt electioneering," the administration argues.<sup>29</sup>

The argument marks Solicitor General Elena Kagan's first appearance before the justices. She squares off against former solicitor general Theodore Olson, who once defended the very laws he now asks the Court to overturn—as well as another former solicitor general, Seth Waxman, who will be arguing on behalf of BCRA's congressional sponsors, and famed First Amendment attorney, Floyd

<sup>27</sup> Supplemental Brief for the Appellee at 2, *Citizens United v. FEC*, No. 08-205 (July 24, 2009) 2009 WL 2219300.

<sup>28</sup> *Id.* at 1.

<sup>29</sup> *Id.* at 2.

Abrams, who represents Senator Mitch McConnell (who was BCRA's leading opponent and is now Senate minority leader).

In his supplemental brief, Olson homes in on the March argument of Deputy Solicitor General Malcolm Stewart, who was defending the FEC's position that *Hillary: The Movie* was an "election communication." The argument got away from Stewart when he asserted, under sharp questioning, that the law could also be interpreted to ban campaign-related books if funded with money from general corporate treasuries.<sup>30</sup>

"Enough is enough," says Olson in the *Citizens United* brief. "When the government of the United States of American claims the authority to ban books because of their political speech, something has gone terribly wrong and it is as sure a sign as any that a return to first principles is in order."<sup>31</sup>

"It would be anomalous, according to the government, if it did not have the power to prohibit all corporate and union communications that constitute the functional equivalent of express advocacy because the government already makes it a felony for corporations and unions to make any communication that includes express advocacy—even 'a newsletter,' 'a sign held up in Lafayette Park,' or a '500-page book' that includes 'vote for X' as its last three words," *Citizens United* argues in its brief.<sup>32</sup>

## Religion and Speech

After the *Citizens United* appetizer, the Court formally returns the first Monday in October to kick off a sitting that includes two other compelling First Amendment cases, both of which are likely to garner a significant amount of public interest and provide clues on how the Court's newest justices will approach critical issues of free speech and standing.

<sup>30</sup> See especially Transcript of Oral Argument at 27–30, *Citizens United v. FEC* (March 24, 2009) (No. 08-205), 2009 WL 760811 (series of questions by Justices Alito and Kennedy and Chief Justices Roberts, culminating in Stewart's admission that if the publisher didn't comply with campaign finance regulations, "we could prohibit the publication of the book").

<sup>31</sup> Supplemental Brief for Appellant at 2, *Citizens United v. FEC*, No. 08-205 (U.S. July 24, 2009), 2009 WL 2219301.

<sup>32</sup> *Id.*

In *Salazar v. Buono*, the justices will rule on a challenge to a religious cross that is displayed on the 1.6 million-acre Mojave National Preserve in southeastern California.<sup>33</sup> After a legal challenge, Congress passed legislation that transferred the speck of land where the cross was displayed to a private buyer. There are two issues in the case: Whether Frank Buono, a former employee at the preserve, has standing to challenge the cross, and whether Congress can avoid a constitutional challenge by transferring the land to a private entity.

The controversy over the cross has raged for more than a decade. It was erected in the preserve nearly 75 years ago as memorial to veterans who died in World War I, and has been replaced several times. It now is made of white metal pipes and is about five feet tall, making it visible to anyone who drives on by a remote road in the preserve.

The controversy began when a man asked the National Park Service for permission to erect a Buddhist shrine nearby. The Park Service rejected the request and indicated it was planning to remove the cross. Local officials protested and Congress eventually swapped the one-acre parcel of land where the cross is located with other land privately held in the preserve.

Buono argued in his suit that the government could not pick and choose among religious symbols—that if it allowed the cross, it must also allow other religious symbols.

The government argues that Buono has no standing to sue because he is not seeking “to redress a personal injury, but instead to vindicate a view of the Establishment Clause” that public lands where crosses are displayed should also include other symbols, if the public wishes.<sup>34</sup> It says Buono has only a “policy disagreement,” which is not grounds for the lawsuit against the government.<sup>35</sup> Buono replies that his objection is not an abstract one, but stems from his “direct and unwelcome contact with a government-sponsored religious display or practice.”<sup>36</sup>

<sup>33</sup> *Buono v. Kempthorne*, 527 F.3d 758 (9th Cir. 2008), cert. granted sub nom., *Salazar v. Buono*, 129 S. Ct. 1313 (2009).

<sup>34</sup> Brief for the Petitioners at 13, *Salazar v. Buono*, No. 08-472 (U.S. June 1, 2009), 2009 WL 1526915.

<sup>35</sup> *Id.*

<sup>36</sup> Respondent’s Brief at 19, *Kempthorne v. Buono*, No. 08-472 (U.S. July 27, 2009), 2009 WL 2365232.

If the Court recognizes that Buono has standing, it must then decide whether Congress could duck the constitutional challenge with the land swap.

Also in October, the justices will decide whether the government can ban videotapes of dog fighting, or whether those depictions of animal cruelty are protected speech under the First Amendment. At issue in *United States v. Stevens* is a 1999 federal law prohibiting animal cruelty, which prosecutors invoked to charge a Virginia man, Robert Stevens, with selling videotapes of pit bulls participating in dog fights.<sup>37</sup>

Stevens operated a business called “Dogs of Velvet and Steel” and a website called Pitbulllife.com, through which he sold videos of the dog fights. The videos include scenes of “savage and bloody dog fights and of pit bull viciously attacking other animals” and are narrated by Stevens. He was convicted and sentenced to 37 months in prison.

The U.S. Court of Appeals for the Third Circuit struck down the law, holding that it would not create a new exception to the First Amendment in order to prohibit depictions of animal cruelty.<sup>38</sup> The last time the Supreme Court said an entire class of speech could be prohibited was in 1982, when it ruled in *New York v. Ferber*<sup>39</sup> that child pornography was unprotected by the First Amendment, and the en banc appeals court said it would not create a new category of unprotected speech absent “express direction” from the Supreme Court.

The appeals court also rejected a proposed analogy to child pornography. Although it acknowledged that, as with child pornography, all 50 states have laws prohibiting animal cruelty, and that the offenses are difficult to prosecute, it held that the government interest was not as compelling. Animal cruelty is not “of the same magnitude as protecting children,” the appeals court wrote.<sup>40</sup> It applied strict scrutiny and invalidated the statute on its face.

<sup>37</sup> *United States v. Stevens*, 533 F.3d 218 (3d Cir. 2008), cert. granted, 129 S. Ct. 1984 (April 20, 2009) (No. 08-769).

<sup>38</sup> *Id.* at 220.

<sup>39</sup> *New York v. Ferber*, 458 U.S. 747 (1982).

<sup>40</sup> *Stevens*, 533 F.3d at 228.

Three judges dissented, arguing the law regulates only a “narrow subclass” of depictions of “depraved acts committed against an uniquely vulnerable and helpless class of victims.”<sup>41</sup> The dissenters said the First Amendment does not protect those depictions, because the government has a compelling interest in preventing animal cruelty, and the depictions are “no essential part of any exposition of ideas.”<sup>42</sup>

The Justice Department makes a similar argument, noting that the law applies only in rare cases, where the depictions are illegal, created solely for commercial gain, and lack “serious religious, political, scientific, educational, journalistic, historical or artistic value.”<sup>43</sup> “Like child pornography,” the government continues, “the material here depicts the horrific maltreatment of helpless victims, which society long has deemed reprehensible.”<sup>44</sup>

Stevens’s brief attacks the government’s relativism regarding constitutional speech protections. “If the First Amendment meant to permit such a balancing test, then the First Amendment would read more like the Fourth Amendment, proscribing only ‘unreasonable’ prohibitions on speech.”<sup>45</sup> The Cato Institute echoes this sentiment in its supporting brief, arguing that “[t]he ‘categorical balancing’ proposed by the Government for identifying categories of proscribable content is an open attempt to end-run—and even subvert—the Court’s traditionally rigorous scrutiny of content-based restrictions on speech.”<sup>46</sup>

### **Life Sentences for Juveniles and the Relevance of Foreign Law**

The justices also will grapple with a number of high-profile criminal cases, including a constitutional challenge to life sentences for juveniles that also could be a good barometer for measuring the

<sup>41</sup> *Id.* at 247.

<sup>42</sup> *Id.* at 236 (quoting *Chaplinsky v. N.H.*, 315 U.S. 568, 571 (1942)).

<sup>43</sup> Brief for the United States at 15, *United States v. Stevens*, No. 08-769 (U.S. June 8, 2009) 2009 WL 1615365.

<sup>44</sup> *Id.* at 36.

<sup>45</sup> Brief for the Respondent at 14, *United States v. Stevens*, No. 08-769 (U.S. July 20, 2009) 2009 WL 2191081.

<sup>46</sup> Brief for the Cato Institute as Amicus Curiae in Support of Respondent at 16, *United States v. Stevens*, No. 08-769 (U.S. July 27, 2009), 2009 WL 2331221.

newest justice and her approach to criminal law—as well as international law.

This question is a natural outgrowth of the Court's 2005 decision in *Roper v. Simmons*, in which it struck down the death penalty for juveniles.<sup>47</sup> The argument is essentially the same: that a life sentence for a juvenile crime is basically a death sentence, and therefore violates the Constitutional prohibition against cruel and unusual punishment.

The cases, *Graham v. Florida*<sup>48</sup> and *Sullivan v. Florida*,<sup>49</sup> both involve life sentences for juveniles who committed non-homicide crimes. Terrance Jamar Graham was 17 when he received life without parole for a series of robberies, which violated his probation for an earlier armed burglary. Joe Harris Sullivan was given life without parole for committing sexual battery when he was 13.

The cases raise slightly different questions, and the Court could resolve them differently. Graham directly confronts the specific question of whether the Eighth Amendment prohibits a life sentence for a juvenile. Sullivan's case also injects his young age of 13, suggesting he is entitled to greater Eighth Amendment protection than a 17-year-old like Graham. But Sullivan's case has a wrinkle: He was sentenced nearly 20 years ago.

Unlike in the juvenile death penalty context, when the court found growing societal opposition, life sentences for juveniles are more commonplace. More than 2,200 juveniles now are serving life sentences in the United States, and not a single state has a per se rule rejecting the use of life sentences for juveniles in every case.

The case also gives the justices another opportunity to wade into the issue of using foreign law to interpret the Constitution, which factored into the *Roper* decision as well—and, as discussed, in Justice Sotomayor's confirmation hearing. As with the juvenile death penalty, the international community frowns on life sentences for juveniles, the state court noted in *Graham*. The court observed that outside the United States, only a dozen juveniles are serving life sentences,

<sup>47</sup> *Roper v. Simmons*, 543 U.S. 551 (2005).

<sup>48</sup> *Graham v. State*, 982 So. 2d 43 (Fla. Dist. Ct. App. 1st Dist. 2008), cert. granted sub nom. *Graham v. Florida*, 129 S. Ct. 2157 (May 4, 2009) (No. 08-7412).

<sup>49</sup> *Sullivan v. State*, 987 So. 2d 83 (Fla. Dist. Ct. App. 1st Dist., 2008), cert. granted sub nom. *Sullivan v. Florida*, 129 S. Ct. 2157 (May 4, 2009) (No. 08-7621).

and the United Kingdom recently barred them. The state court concluded that while the weight given the international community was “persuasive,” it does not counter the “individual rights of the state to impose its chosen sentencing scheme if that scheme is not held to be otherwise unconstitutional.”<sup>50</sup>

### ***Miranda* Revisited?**

The criminal docket also will involve the justices in the familiar issue of *Miranda* warnings, which will raise broader questions about *stare decisis*. In *Florida v. Powell*, they will decide whether standard *Miranda* warnings that advise a defendant he has a right to “talk to a lawyer before answering any of our questions” are adequate.<sup>51</sup> The Florida Supreme Court ruled that those warnings were deficient, affirming a lower court decision that threw out the conviction of Kevin Dewayne Powell, who had confessed to owning a firearm after Tampa police read him the warnings off a standard form. Powell’s confession provided the basis for his conviction as a felon in possession of a firearm.

Ruled the Florida Supreme Court:

[T]o advise a suspect that he has the right “to talk to a lawyer before answering any of our questions” constitutes a narrower and less functional warning than that required by *Miranda*. Both *Miranda* and article 1, section 9 of the Florida Constitution require that a suspect be clearly informed of the right to have a lawyer present during questioning.<sup>52</sup>

The issue sharply divided the lower Florida courts, much as it had society. Although conservatives have long been critical of the *Miranda* as a blatant example of judicial lawmaking, the Supreme Court in *Dickerson v. United States*<sup>53</sup> seemed to put the issue to rest in 2000. Chief Justice William Rehnquist wrote the majority opinion rejecting a constitutional challenge to *Miranda*, saying, whatever the merits of the original holding may be, principles of *stare decisis*

<sup>50</sup> Graham, 982 So. 2d at 51.

<sup>51</sup> *State v. Powell*, 998 So. 2d 531, 532 (Fla. 2008) cert. granted sub nom. *Florida v. Powell*, 174 L. Ed. 2d 551 (U.S. June, 22 2009) (No. 08-1175).

<sup>52</sup> *State v. Powell*, 998 So. 2d 531, 542 (Fla. 2008).

<sup>53</sup> *Dickerson v. United States*, 530 U.S. 428 (2000).

counseled against overruling it. Justices Scalia and Thomas dissented.

### **Crime and Federalism**

Another criminal case before the Court this term raises pressing questions of federalism, giving the new justices a clear opportunity to embrace (or reject) the Rehnquist legacy, which put clear limits on congressional power.

At issue in *United States v. Comstock* is whether Congress had authority to pass a statute that allows the government to place in indefinite civil commitment “sexually dangerous” persons.<sup>54</sup> The issue has divided trial courts across the nation, and the U.S. Court of Appeals for the Fourth Circuit ruled the law exceeds the limits of congressional power and intrudes on the powers reserved to the states.

Congress enacted the civil commitment provision as part of the Adam Walsh Child Protection and Safety Act of 2006. It establishes a national Sex Offender Registry, increases penalties for federal crimes against children, and strengthens existing child pornography prohibitions. The only provision at issue authorizes the federal government to commit a “sexually dangerous” person to the custody of the Bureau of Prisons, even after the person has completed his prison sentence.

Graydon Comstock, who pleaded guilty to receiving child pornography, was certified as a sexually dangerous person six days before the end of his 37-month prison sentence. He remains incarcerated more than two years later. Several other men filed similar challenges after they, too, were certified as sexually dangerous and held in prison after their sentences expired. (The appeals court noted that the attorney general has certified more than 60 people as “sexually dangerous” in the Eastern District of North Carolina alone, all of whom remain in prison.)

The government argues that Congress had authority to pass the statute under the Necessary and Proper Clause (which the appeals court flatly dismissed) and under the Commerce Clause.<sup>55</sup>

<sup>54</sup> *United States v. Comstock*, 551 F.3d 274 (4th Cir.), cert. granted, 129 S. Ct. 2828 (2009).

<sup>55</sup> *Id.* at 281.

For decades, courts rarely questioned congressional authority, assuming everything was, in some way, connected to commerce. *United States v. Lopez* changed that. In that case, the Supreme Court held that federal laws prohibiting possession of a gun in a school zone exceeded Congress's Commerce Clause power, since it was not regulating either commercial or interstate activity.<sup>56</sup> Then, in *Morrison v. United States*, the Court struck down a provision in the federal Violence Against Women Act that had created a federal civil remedy for sexual assault, holding those crimes do not substantially affect interstate commerce.<sup>57</sup>

The appeals court said *Morrison's* rationale for rejecting Commerce Clause authority over civil sexual assault crimes applied with equal force to civil commitment statutes.

"Federal commitment of 'sexually dangerous persons' may well be—like the suppression of guns in schools or the redress of gender-motivated violence—a sound proposal as a matter of social policy," the appeals court wrote. "But policy justifications do not create congressional authority."<sup>58</sup>

The court concluded that the power claimed by the civil commitment statute, authorizing "forcible, indefinite civil commitment," is among "the most severe wielded by any government."<sup>59</sup> "The Framers, distrustful of such authority, reposed such broad powers in the states," the court wrote, "limiting the national government to specific and enumerated powers."<sup>60</sup>

### ***Sarbanes-Oxley and the Separation of Powers***

The Court also will take up another major constitutional powers case when it grapples with whether the Sarbanes-Oxley Act violates separation-of-powers principles. The case, *Free Enterprise Fund v. Public Company Accounting Oversight Board*,<sup>61</sup> is significant on a number of levels, and gives the justices an opportunity to establish key

<sup>56</sup> *United States v. Lopez*, 514 U.S. 549 (1995).

<sup>57</sup> *United States v. Morrison*, 529 U.S. 598 (2000).

<sup>58</sup> *Comstock*, 551 F.3d at 280.

<sup>59</sup> *Id.* at 284.

<sup>60</sup> *Id.*

<sup>61</sup> *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 537 F.3d 667 (D.C. Cir. 2008), cert. granted, 129 S. Ct. 2378 (2009).

guideposts on presidential power and separation of powers concerns.

At issue is a challenge to the constitutionality of the Public Company Accounting Oversight Board—whose acronym, PCAOB, is cutely pronounced “peek-a-boo”—which enforces the Sarbanes-Oxley regulatory scheme. Challengers contend the appointment of PCAOB’s officers violates the Constitution’s Appointments Clause.

The Appointments Clause gives the president exclusive power to appoint government officials, but the PCAOB’s officers are appointed by the SEC, which has limited power to remove or supervise them. That gives the PCAOB’s officers broad authority and puts them in a different league than other similar authorities, such as the IRS Commissioner and governors of the Federal Reserve—all of whom must be nominated by the president and confirmed by the Senate.

The U.S. Court of Appeals for the D.C. Circuit said PCAOB members were different, so Congress could dictate the “power of removal as it deems best for the public interest.”<sup>62</sup> The Free Enterprise Fund, along with other groups challenging the PCAOB—including the Cato Institute as *amicus curiae*—say that gives them too much power and insulates them from political accountability.

### The Erosion of Property Rights

Another sweeping and divisive constitutional question is at issue in *Stop the Beach Renourishment v. Florida Department of Environmental Protection*.<sup>63</sup> In that case, the justices will return to the question of property rights, in an appeal of a Florida Supreme Court decision that a beach erosion control statute did not unconstitutionally deprive landowners of their property.

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So the justices will take their seats with the table more than half set in terms of cases. They will continue adding cases throughout the fall, but the lineup already suggests the 2009 term will be an

<sup>62</sup> *Id.* at 683 (quoting *United States v. Perkins*, 116 U.S. 483 (1886)).

<sup>63</sup> *Walton County v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102 (Fla. 2008), cert. granted sub nom. *Stop the Beach Renourishment, Inc., v. Florida Dept. of Env'tl. Protection*, 129 S. Ct. 2792 (2009).

important one, with several difficult and important constitutional principles at stake. One pending cert petition could ratchet up the stakes. It would inject the court into a contentious issue that snagged Sotomayor in her confirmation hearing: Whether the Second Amendment is incorporated against the states—and if so whether that would be through so-called “substantive due process” or via the resurrection of the Fourteenth Amendment’s Privileges or Immunities Clause.

With its rich constitutional questions—even those that aren’t publicly explosive—October Term 2009 also will start the process of understanding new Justice Sotomayor. It should as well provide a greater understanding of Roberts and Alito, who will be grappling with issues they’ve not yet confronted at the High Court.

But keep in mind these principles as the Court goes through the 2009 term with its newest member: First impressions can be dead wrong. Speculation can be uninformed and off base. (Just ask Justice Thomas, the subject of ludicrous and grossly inaccurate news articles in his first term that he was somehow Justice Scalia’s “lackey.”) And justices can take a year or two to find their footing, as well as their philosophy.

