

# Supreme Court Review

Charles F. Williams

By the end of the 2008-2009 term, Justice David Souter's decision to return to New Hampshire and President Obama's nomination of Sonia Sotomayor to replace him on the bench had taken over the Supreme Court news cycle. "What now?" commentators asked.

In the end, the consensus has been that, with the possible exception of criminal justice issues, swapping out Souter for Sotomayor is unlikely to have much effect on the Court's current 4-1-4 balance.<sup>1</sup> The "1" in the middle of the Court's line up represents Justice Anthony Kennedy who, in perennial swing vote fashion, was with the majority in 73 of last term's 79 cases, once again more than anyone else.<sup>2</sup>

This is not to say that Justice Sotomayor's confirmation on August 8 was insignificant, however. The Court's first Hispanic justice will be a fresh voice with time to develop her own judicial philosophy (she is 55, relatively young by Supreme Court standards). And there is something else. Speaking at a panel hosted by the American Bar Association's *Preview of United States Supreme Court Cases*, John Payton, NAACP Legal Defense and Educational Fund director, noted that Justice Ruth Bader Ginsburg, for one, is likely to appreciate an end to her recent status as the lone woman on the bench. "Numbers matter," Payton said. When it comes to bringing to bear one's life experiences, "there's a tremendous difference between one and two." Thus Ginsburg may feel that reinforcements have finally arrived, and it is quite possible that on women's issues, at least, the two may have each other's back.

Meanwhile, one early, tangible effect of Sotomayor's nomination was to help

push a previously little remarked Second Circuit decision into the spotlight of the Court's docket.

## Employment Discrimination

In *Ricci v. DeStefano*, a 5-4 Court declared that the city of New Haven, Connecticut, violated Title VII of the Civil Rights Act when it threw out the results of an exam that was part of a merit-based promotions system used by the city's fire department.<sup>3</sup>

The case began in 2003 when, much to the city's dismay, it became apparent that none of the African American candidates who took the test had scored well enough to be promoted. The city (which is nearly 40 percent African American) found itself between a rock and a hard place. Some of the disappointed minority firefighters threatened to sue if the city ratified test scores they considered racially discriminatory. Some of the firefighters who did well on the exam declared that it was a fair exam for which they had studied long and hard; and they in turn threatened their own discrimination lawsuit if the city changed the rules after the fact, threw out their high scores, and refused to promote them. As is so often the case in litigation that reaches the Supreme Court, both sides had a point.

On the one hand, Title VII, the federal law at the center of this storm, clearly prohibits *intentional* acts of employment discrimination based on race.<sup>4</sup> And this is

exactly what some of the firefighters who did well on the exam claimed the city was doing—throwing out their grades, and thus denying them promotions, solely because they were white. On the other hand, however, Title VII also clearly prohibits policies or practices that, while not *intended* to discriminate, nevertheless *in fact* have "a disproportionately adverse effect on minorities." And this is what the unsuccessful minority test takers claimed would be the obvious consequence of certifying the results of a promotion test that ensured no African Americans could be considered for promotion.

"In the end," Justice Kennedy later summarized for the Supreme Court, "the City took the side of those who protested the test results. It threw out the examinations."

True to their word, 17 white candidates and one Hispanic candidate (Frank Ricci) who had done well on the exam filed a federal lawsuit, alleging that discarding the test results discriminated against them based on their race in violation of Title VII.

The district court granted summary judgment for the defendants and the Second Circuit summarily affirmed that decision in a brief and unsigned *per curiam* ruling. Among the three judges on the Second Circuit panel who essentially adopted the district court's ruling without adding their own analysis was ... Second Circuit Judge Sonia Sotomayor.<sup>5</sup>

In the Supreme Court, the usual suspects lined up on either end of the vote, with Kennedy swinging to the right and



In this March 25, 2009 photo, Joseph B. Muhammed, president of the International Association of Black Professional Fire Fighters, makes a statement in front of the Greater New Haven Chapter of the NAACP headquarters, in Connecticut, supporting the city of New Haven in a reverse-discrimination lawsuit brought by white firefighters. (AP Photo/New Haven Register, Peter Hvizdak)

penning the majority opinion for himself, Chief Justice Roberts, and Justices Scalia, Thomas, and Alito. Under Title VII, the Court reasoned, an employer is not permitted to engage in intentional discrimination against non-minorities “for the asserted purpose of avoiding or remedying an unintentional, disparate impact” on minorities unless the employer has “a strong basis in evidence” to believe it will be subject to disparate-impact liability if it doesn’t take this “race-conscious, discriminatory action.”

The majority conceded that the test results’ adverse impact on African Americans was “significant.” But it nevertheless concluded that the city did not have the required “strong basis in evidence” for believing a court would hold it liable for disparate impact discrimination if it went ahead and certified those results anyway. This was because

New Haven could only be held liable for disparate impact discrimination if the exams were either not “job related and consistent with business necessity,” or if there existed “an equally valid, less discriminatory alternative” to the exams that would have served the city’s needs but that the city nevertheless refused to adopt. Writing for the majority, Kennedy concluded that neither condition existed in this case.

Justice Ginsburg’s dissent (which was joined by Justices Souter, Stevens, and Breyer) passionately disagreed on both counts, and sought to place the dispute in the historical context of a fire department in which African Americans had been, and continued to be, underrepresented. But the majority was not persuaded, and Sotomayor’s ascension to the high Court would not, in theory, affect the *Ricci* 5-4 alignment.

## Voting Rights

One of the other most closely watched cases last term also had racial overtones. The “NAMUDNO case,” aka *Northwest Austin Municipal Utility District No. One v. Holder*, challenged the constitutionality of Congress’s 25-year extension of the Voting Rights Act.<sup>6</sup> The Act is a 1965 civil rights statute that outlawed the state laws and voting procedures that disenfranchised African Americans in much of the South after the Civil War. Section 5 of the Act goes on to require “covered jurisdictions” to seek “pre-clearance” with the U.S. Department of Justice before changing “any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting.” Covered jurisdictions include primarily a large swathe of the old Confederacy, plus Alaska and assorted towns and counties elsewhere.

# SEARCH ME: Understanding the Fourth Amendment

Catherine Hawke

**Estimated Time:** 70 Minutes

**Handouts available for download from**  
[www.abanet.org/publiced/lookingatthelaw.shtml](http://www.abanet.org/publiced/lookingatthelaw.shtml)

Handout 1:	Fourth Amendment and Terms
Handout 2.1:	Search Me at School
Handout 2.2:	Search Me at Home
Handout 2.3:	Search Me in Cars
Handout 2.4:	Search Me in Public Places
Handout 3:	Fact Patterns

## **Introduction: Walk The Line** (7 minutes)

1. Ask students to stand at the front of the room in a single horizontal line, all facing forward, side by side.
2. Explain to students that they will be presented with a variety of searches/seizures scenarios. If a student thinks that the search/seizure should be permitted under the law/any evidence can be used, they should step forward. If they think the search/seizure should be illegal/evidence cannot be used, they should step backwards.
3. Scenarios:
  - a. School officials conduct random searches of student lockers. No notice is given of the searches, although they are mentioned in a student handbook distributed at the start of each school year.
  - b. The police stop a car for running a red light. Besides the driver, there are two passengers in the car. The police make the driver and the passengers get out of the car and search them. The police find a stolen gun in the purse of one of the passengers.
  - c. A police officer sees a man walking down the street. The man keeps walking back and forth in front of a jewelry store, looking over his shoulder. The man is wearing a bulky coat, even though it is 82 degrees and sunny. The officer searches the man and finds a gun and a knife on him.
  - d. After a robbery at a local bank, a bulletin is sent out to police with the description of the getaway car. Two officers see a car matching this description, pull the car over and arrest the occupants. The police then search the car and find bags of money and two guns.
  - e. The police have a warrant to arrest Tom for mail fraud. Tom is currently staying at his mother's. When the police arrive at Tom's mom's house, Tom gives himself up without any problems. The police then search the mother's house, even though she tells them not to. They find evidence that Tom's mother has been growing marijuana in the home.
  - f. At the local high school, there recently have been problems with students using prescription strength ibuprofen and students selling it amongst themselves. The principal gets one report about a freshman girl selling some pills. The principal and another school official call the girl to the office and ask her to undress down to her underwear, looking for some ibuprofen.
  - g. The police have been keeping tabs on a local man alleged to be a drug dealer. One afternoon after he takes out his trash, leaving it in a dumpster in an alley, the police go through it, finding records of the drug dealing and drug paraphernalia.

- h. There have been no drug problems at Smithville High School. However, at the school in the town just south of Smithville, in the last five months, there has been an explosion of drug use. Officials at Smithville have decided to start randomly drug testing students.
- i. The police get a tip that Susan has been selling drugs. The police go to Susan's home, which is an RV parked at her mom's house. The police peak in the window and see drug paraphernalia. They then arrest Susan for selling drugs.
- j. A bank is robbed. The police get a description of the robber—and two officers see him driving down the street. They pull the robber over and arrest him. After they arrest him, they see a gun sitting on the front seat. The police go in and search the rest of the car and find evidence indicating that the robber has committed other bank robberies over the last 20 years. The police charge the robber for these historic robberies.

## **Jigsaw: Basic 4th Amendment Situations** (30 minutes)

1. Divide students into four groups.
2. Each of the groups will be assigned one of the following topics, and asked to read the corresponding handouts.
  - a. Handout 2.1: Search Me at School
  - b. Handout 2.2: Search Me at Home
  - c. Handout 2.3: Search Me in Cars
  - d. Handout 2.4: Search Me in Public
3. Students from each group should answer the following questions:
  - a. *How does the 4th Amendment regulate searches and seizures [in assigned location]?*
  - b. *What types of searches and seizures are allowed?*
  - c. *Did any of the cases surprise you? Why or why not?*
4. Groups will have 14 minutes to work together to answer the questions. Then the workshop will come back together—each group will offer a 4-minute presentation to the class to share what it has learned.

## **Debriefing/Follow Up** (30 minutes)

1. Ask students to list the circumstances that the courts look to when deciding whether a search is permissible. These should be listed on the board, including:
  - a. Reasonableness of the search
  - b. Seriousness of the crime
  - c. Age/sensitivity of the person to be searched
  - d. Where the search is occurring
2. Important take aways:
  - a. Different standards in different locations
  - b. Balancing act between keeping community/police safe and protecting constitutional rights
3. Distribute the Fact Patterns Handout to all students for review. They will examine the earlier scenarios with their new information about searches and seizures, and note legal and illegal searches. This may serve as an assessment.

*CATHERINE HAWKE is a program manager and editor with the American Bar Association's Division for Public Education. She holds a J.D. from Loyola University Chicago School of Law and a B.A. from the University of Michigan.*



While many of us expected the same 5-4 conservative majority to strike down the Act's extension on the grounds that the federal oversight of selected states was no longer justified given the achievements in civil rights over the past 40 years, in the end only Justice Thomas forthrightly took that view. The remaining justices joined an opinion by Chief Justice Roberts that put the constitutional issue off for another day and instead decided the case by interpreting the Act as permitting all political subdivisions to seek, on a case-by-case basis, to "bail out" from the preclearance requirements if certain conditions are met.

### Campaign Finance

But the award for the term's biggest surprise probably goes to the Court's decision to schedule a rare re-argument (in an even rarer special September 9 session) in *Citizens United v. Federal Election Commission*, a campaign finance case featuring an anti-Hillary Clinton documentary.<sup>7</sup>

McCain-Feingold (officially "the Bipartisan Campaign Reform Act of 2002") bars corporate-funded broadcasts that mention a federal candidate from airing shortly before an election.<sup>8</sup> This case asked whether that law could be constitutionally applied to bar a corporate-funded broadcast of a political "documentary" offered by a cable television video-on-demand service and to television advertisements for the "documentary."

The Court heard arguments on March 24, 2009, but instead of issuing a decision in June, the Court ordered the parties to brief whether it should overrule two precedents in which it had upheld limits on corporate spending during candidate elections. By early August the betting was that there would be five votes to overturn the current restrictions on how much corporations—and labor unions—can spend on campaigns.

### Environmental Law

Environmentalists, too, have noted the Roberts Court's conservative tendencies—this past term, they lost all five



## Presidents & the Constitution, Volume I

Your students will explore how various presidents understood and exercised their constitutional powers through

- 15 ready-to-use, interactive lesson plans
- Strong focus on primary source activities
- Solid content including historical narratives in each lesson
- Contemporary application highlighted with an "Issues Endure" portal in each unit
- Explore an interactive version of Article II as well as short thematic documentaries at [www.ArticleII.org/NCSS3](http://www.ArticleII.org/NCSS3)



For more information about presidents studied and the Online component visit [www.BillofRightsInstitute.org/NCSS3](http://www.BillofRightsInstitute.org/NCSS3)

## 2010 National Online Youth Summit

### It's Nothing to LOL About

#### How the First Amendment Affects You in the 21st Century

Have our rights to the **freedom of speech**, the **right to assemble**, and **free exercise of religion** changed in the classroom and in the virtual world as we've settled into the 21st century? You and your students can join in this highly relevant discussion during the **free**, 12-week interdisciplinary program, the 2010 National Online Youth Summit (NOYS).



During the course of the 2010 Summit, students will engage in a guided and civil discourse online with students around the country, and explore First Amendment freedoms through study of

- historical context;
- Supreme Court decisions and public policy;
- digital mediums of communication;
- student rights versus adult rights.

Visit [www.abanet.org/publiced/noys](http://www.abanet.org/publiced/noys) to apply and for more information.

Register by December 9, 2009 to ensure your spot in this exciting program.



environment cases heard by the Court.

The Court ruled:

- a party who sells a hazardous material that is later spilled in transport cannot be held liable for costs associated with the cleanup;<sup>9</sup>
- the Clean Water Act authorizes the U.S. Army Corps of Engineers—and not the EPA—to issue permits for the discharge of mineral waste;<sup>10</sup>
- the EPA can use cost-benefit analysis in formulating regulations under portions of the Clean Water Act that require companies to use “the best technology available” to minimize the environmental impact of withdrawing water from rivers to cool power-plant turbines;<sup>11</sup>
- [most federal land management projects must go through a process allowing the public to provide input on the project before it begins. The U.S. Forest Service had exempted small salvage sales of timber from this public input, and the Court held] that environmental groups don’t have standing (meaning, can’t bring the issue up in the court) to challenge this exemption;<sup>12</sup> and
- a federal district court abused its discretion when it granted a preliminary injunction restricting the Navy’s use of active sonar during training sessions.<sup>13</sup>

## Criminal Procedure

One bright spot for liberals: criminal law remained one area where the right and left wings most often got along by forming unusual alignments—and often to the benefit of criminal defendants’ rights. In an important Confrontation Clause case, *Melendez-Diaz v. Massachusetts*, the Court ruled that defendants have the right to question the technicians who analyze and handle evidence tested in laboratories. (This case featured a rare dissent by Kennedy, joined by Roberts, Alito, and Breyer.)<sup>14</sup>

Further, the term’s two search and seizure cases both went against the government. *Arizona v. Gant* limited the “search incident to arrest” exception to the Fourth Amendment’s warrant requirement.<sup>15</sup> And in *Safford Unified School District #1 et al. v. Redding*, the Court held that school officials violated the Fourth Amendment rights of a 13-year-old student when they searched her bra and underpants for prescription and over-the-counter pain medications.<sup>16</sup>

Prosecutors scored one victory, however: *District Attorney’s Office v. Osborne* held there is no constitutional right to obtain post-conviction access to the prosecution’s evidence for purposes of DNA testing.<sup>17</sup>

## The October 2009 Term

Among the highlights awaiting Justice Sotomayor and the rest of the Court in the new term are two high-profile First Amendment cases.

*United States v. Stevens* asks whether the right to free speech protects the commercial sale of videos depicting cruelty to animals. The specific tapes at issue in this case consist of staged dogfights.<sup>18</sup>

*Salazar v. Buono* challenges lower court decisions that require the federal government to remove a cross erected more than 70 years ago by the Veterans of Foreign Wars (VFW) as a memorial to fallen service members. When the trial court initially determined that the presence of the cross on federal land violated the Establishment Clause, Congress sought to have the acre with the cross transferred to the VFW in exchange for another acre of equal value, but the district court said Congress couldn’t do that either.<sup>19</sup>

Finally, we should take note of an important property rights case. *Stop Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection* asks whether the Florida Supreme Court committed a “judicial taking” when it upheld a Florida law creating a state-owned public beach between private waterfront land and the Gulf of Mexico as part of a plan to combat beach erosion.<sup>20</sup> The Fifth

Amendment’s Takings Clause provides that the government cannot take private property for public use “without just compensation.”<sup>21</sup>

## Notes

1. When introducing then-Judge Sotomayor to the Senate Judiciary Committee, Sen. Charles E. Schumer, D-N.Y., noted that she had “ruled for the government in 92 percent of criminal cases.” Jennifer A. Dlouhy, “Schumer Pitches for Sotomayor,” *TimesUnion.com* (July 13, 2009).
2. Thomas C. Goldstein, “End of Term Statistical Analysis,” 34 *Preview of United States Supreme Court Cases* 455 (August 10, 2009).
3. *Ricci v. DeStefano*, No. 07-142 (June 29, 2009). Please note that copies of all cited Supreme Court opinions are available at no charge on the web at [www.supremecourtus.gov](http://www.supremecourtus.gov). Copies of all the briefs (written arguments to the Court) are available at no charge at [www.supremecourtpreview.org](http://www.supremecourtpreview.org).
4. Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e *et seq.*
5. *Ricci v. DeStefano*, 530 F.3d 87 (2<sup>nd</sup> Cir. 2008).
6. *Northwest Austin Municipal Utility District No. One v. Holder*, 129 S.Ct. 2504 (2009); Voting Rights Act of 1965, 42 U.S.C. § 1973.
7. *Citizens United v. Federal Election Commission*, No. 08-205.
8. The Bipartisan Campaign Reform Act of 2002, Public Law No. 107-155.
9. *Burlington Northern & Santa Fe Railway Co. v. United States*, No. 07-1601 (May 4, 2009).
10. *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, No. 07-984 (June 22, 2009).
11. *Entergy Corp. v. Riverkeeper, Inc.*, Docket No. 07-588 (April 1, 2009).
12. *Summers v. Earth Island Institute*, Docket No. 07-463 (March 3, 2009).
13. *Winter v. Natural Resources Defense Council*, Docket No. 07-1239 (November 12, 2008).
14. *Melendez-Diaz v. Massachusetts*, No. 07-591 (June 25, 2009).
15. *Arizona v. Gant*, No. 07-542 (April 21, 2009).
16. *Safford Unified School District #1 v. Redding*, No. 08-479 (June 25, 2009).
17. *District Attorney’s Office v. Osborne*, No. 08-6 (June 18, 2009).
18. *United States v. Stevens*, No. 08-769.
19. *Salazar v. Buono*, No. 08-472.
20. *Stop Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection*, No. 08-1151.



The views expressed in this article are those of the authors and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association, and, accordingly, should not be construed as representing the policy of the American Bar Association.

**CHUCK WILLIAMS** is an associate director of the ABA’s Division for Public Education in Chicago and the editor of *Preview of United States Supreme Court Cases*.