MOVING TO THE RIGHT, PERHAPS SHARPLY TO THE RIGHT

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OCTOBER TERM 2008 LACKED the blockbuster decisions of the prior Term, in which the Court ruled that the Second Amendment protects a right of individuals to possess firearms apart from militia service,[1] held a key portion of the Military Commissions Act of 2006 to be an unconstitutional suspension of the writ of habeas corpus,[2] and concluded that the death penalty for child rape is cruel and unusual punishment.[3] But the recently completed Term contained an exceptionally large number of decisions that changed the law in areas that affect lawyers and judges in their daily work. Strikingly, practically all of these rulings – in areas such as the federal-court pleading standards in civil cases, the scope of the exclusionary rule, and the protections from employment discrimination – moved the law in a more conservative direction.

There is an easy explanation for this: Justice Anthony Kennedy joined the four most conservative Justices to create 5-4 majorities in

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[1] District of Columbia v. Heller, 128 S. Ct. 2783 (2008).

[2] Boumediene v. Bush, 128 S. Ct. 2229 (2008).

[3] Kennedy v. Louisiana, 128 S. Ct. 2641 (2008).

each of these cases. This year, like in each of the four Terms in which John Roberts has been Chief Justice, it was the Anthony Kennedy Court. The Court decided 75 cases after briefing and oral argument this Term. In 23 of them, the Court split 5-4 – and Justice Kennedy was in the majority in 18 of these, more than any other Justice. Moreover, Justice Kennedy was in the majority in over 92% of all cases this Term, again far more than any other Justice.

Perhaps the most revealing statistic is that in 16 of the 5-4 cases, the Court split along ideological lines, with Chief Justice Roberts and Justices Scalia, Thomas, and Alito on one side and Justices Stevens, Souter, Ginsburg, and Breyer on the other. Justice Kennedy sided with the conservatives in 11 of these 16 cases. Indeed, in the most important cases concerning civil litigation, criminal procedure, employment discrimination and civil rights, Justice Kennedy voted with the conservatives, often to change the law.[4]

I. CIVIL LITIGATION

For those who handle civil litigation in federal court, no decision this Term was more important than *Ashcroft v. Iqbal*.[5] It concerned basic questions: what is the standard of pleading in federal court, and what should be the standard for granting a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6)?

Ever since the Federal Rules of Civil Procedure went into effect

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[4] Obviously, a 5,000 word essay cannot cover all of the significant cases of the Term. Some important cases not discussed in this essay include *District Attorney of the Third Judicial District v. Osborne*, 129 S. Ct. 2308 (2009) (convicted criminals have no constitutional right to access to DNA testing); *Caperton v. A.T. Massey Coal Co.,* 129 S. Ct. 2252 (2009) (due process is violated when a judge participates in a case after having received substantial campaign contributions from one of the litigants); and *Wyeth v. Levine,* 129 S. Ct. 1187 (2009) (the approval of a warning label on a prescription drug does not preempt state tort liability for failure to adequately warn of the risks of a prescription drug). In each of these Justice Kennedy was in the majority, in *Osborne* joining the conservatives and in *Caperton* and *Wyeth* joining the liberals.

[5] 129 S. Ct. 1937 (2009).

over 70 years ago, they have been interpreted to require only "notice pleading." This was embodied in the rule announced in *Conley v. Gibson*: a case should be dismissed for failure to state a claim only if it "appears beyond doubt" that there is no set of facts upon which the plaintiff can recover.[6]

Two years ago, in *Bell Atlantic Corp. v. Twombly*, the majority in essence abrogated *Conley*, at least with respect to antitrust cases.[7] The dissent referred to *Conley* as "interred."[8] But it was unclear whether *Twombly* applied only to antitrust cases, or what standard it was adopting. Tremendous confusion resulted. In fact, even though it is only two years old, *Twombly* is one of the five most frequently cited Supreme Court cases by lower federal courts in all of American history.

Iqbal involved a man of Pakistani descent who was detained after September 11. He claimed that his detention and treatment were illegal and sued, among others, then-Attorney General John Ashcroft. The defense filed a motion to dismiss for failure to state a claim, and, in a 5-4 decision, the Supreme Court held that the motion should have been granted.

Justice Anthony Kennedy, writing for an ideologically divided Court, held that plaintiffs in civil litigation must plead facts sufficient for the district court to conclude that it is "plausible" that the plaintiff is entitled to relief. For decades, the law has been that, in assessing a motion to dismiss, allegations in a plaintiff's complaint must be taken as true. The Court changed this standard, holding that conclusory allegations need not be accepted.

It is difficult to overstate the importance of this case since it sets the standard for pleading in almost every civil case in federal court. It is unclear how a district court is to decide whether allegations are "plausible." This standard would seem to give a great deal more discretion to district courts in deciding whether to dismiss cases. It is unclear how appellate courts will review such determinations.

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[6] 355 U.S. 41, 45 (1957).

[7] 550 U.S. 544 (2007).

[8] Id. at 577 (Stevens, J., dissenting).

The philosophy underlying notice pleading is to set a lenient standard for allowing plaintiffs into federal court, using summary judgment as the primary stage for rejecting meritless cases. The "plausibility" standard undoubtedly will mean more screening at the motion to dismiss stage, which will necessarily favor defendants over plaintiffs.

The Court's activism in this area is striking. There was no amendment to Federal Rule of Civil Procedure 8. Congress did not pass a statute changing pleading standards. No party asked the Court to make this change. Yet, on its own, the Court has altered the very essence of the notice pleading system created by the Federal Rules.

II. Criminal Procedure

One of the most important criminal cases of the year was *Herring v. United States*,[9] which effected the biggest change in the exclusionary rule since *Mapp v. Ohio* applied the rule to the states in 1961.[10] *Herring* addressed whether the exclusionary rule applies when police commit an illegal search based on good-faith reliance on erroneous information from another jurisdiction.

Chief Justice Roberts, writing for a 5-4 majority, held that the exclusionary rule does not apply. The Court held that the exclusionary rule is the last resort, and is to be used only where its application will have significant additional deterrent effect on police misconduct. According to the Court, the exclusionary rule applies only if there is an intentional or reckless violation of the Fourth Amendment, or if there are systemic police department violations with regard to searches and seizures. The Court concluded, for the first time ever, that the exclusionary rule does not apply if the Fourth Amendment is violated by good-faith – or even negligent – police actions.

The Court could have reached the same result in a far narrower, more minimalist opinion. In *Arizona v. Evans*,[11] the Court held that

[9] 129 S. Ct. 695 (2009).

[10] 368 U.S. 871 (1961).

[11] 514 U.S. 1 (1995).

the exclusionary rule does not apply if police rely in good faith on erroneous information about a warrant from a local court. The Court could have simply ruled that the same exception applies when the police rely on erroneous information about a warrant from another jurisdiction. Instead, the Court issued a sweeping rule that the exclusionary rule never applies if the police violate the Fourth Amendment in good faith or through negligence.

Another criminal case to significantly change the law was *Montejo v. Louisiana.*[12] The Court, in a 5-4 decision, expressly overruled *Michigan v. Jackson*[13] and held that police are not barred by the Sixth Amendment right to counsel from attempting to elicit incriminating statements from a criminal defendant who has been appointed an attorney.

Montejo was arraigned for murder in Louisiana, and an attorney was appointed for him at the arraignment. Subsequently, the police took him to the murder scene and asked him to write a letter of apology to the victim's widow. Prosecutors attempted to use incriminating statements from that letter at the trial. Defense counsel objected that the letter was obtained in violation of the Sixth Amendment because police had elicited it without counsel's presence.

Justice Scalia, writing for the conservative majority, held that there was no Sixth Amendment violation. The Court concluded that the appointment of counsel under the Sixth Amendment does not preclude subsequent efforts by the police to elicit incriminating statements. The Court emphasized that *Edwards v. Arizona*[14] remains the law, and that once a criminal suspect invokes the Fifth Amendment right to counsel pursuant to *Miranda v. Arizona,*[15] the police cannot attempt to elicit incriminating statements without counsel's presence. But for suspects who waive their right to counsel under *Miranda*, there is nothing to keep police from attempting to elicit

[12] 129 S. Ct. 2079 (2009).

[13] 475 U.S. 625 (1986).

[14] 451 U.S. 477 (1981).

[15] 384 U.S. 436 (1966).

incriminating statements even once the suspects have attorneys.

Not all of the major criminal procedure decisions were divided along ideological lines. In *Safford Unified School District No. One v. Redding*,[16] the Court held, 8-1, that the Fourth Amendment was violated when a school subjected a seventh grade girl to a strip search because she was suspected of possessing prescription-strength ibuprofen. The girl was required to remove all of her outer clothes and to pull out her bra and underpants so that school officials could look in them for the drugs. Nothing was found.

Justice Souter wrote for the Court and held that, although there was reasonable suspicion for a search, the intrusiveness violated the Fourth Amendment – especially given the relatively minor nature of the suspected offense and the lack of any reason to believe that the girl had hidden the drugs in her underwear. Notably, the Court also held, 7-2, that the school officials had qualified immunity because the law concerning strip searches was not clearly established at the time of their search. Still, the case is significant in holding that there are some limits to what schools can do in searching students, even when they claim to be seeking illegal drugs.

Finally, in *Melendez-Diaz v. Massachusetts*,[17] the Court ruled 5-4 that the Confrontation Clause of the Sixth Amendment requires laboratory analysts to testify in court. At Melendez-Diaz's criminal trial for distributing cocaine, the state introduced a lab analyst's report as to the type and quantity of drugs Melendez-Diaz was carrying at the time of his arrest. The Supreme Court held that this violated the Sixth Amendment because the report was "testimonial" in nature. There was an unusual split among the Justices, with Justice Scalia writing a majority opinion joined by Justices Stevens, Thomas, Souter, and Ginsburg. The majority and the dissent – written by Justice Kennedy – disagreed vehemently over whether this decision will impose a substantial burden on state and local governments or sometimes create insurmountable obstacles to successful prosecutions.

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[16] 129 S. Ct. 1695 (2009).

[17] 129 S. Ct. 2527 (2009).

III. EMPLOYMENT DISCRIMINATION

In the three most important employment discrimination cases of the Term, the Court ruled 5-4 in the conservative direction. Each of these cases represents a significant change in the law.

A. Burden of proof in age discrimination cases

Jack Gross worked for FBL Financial Group, Inc., and at age 54 was transferred from his administrative position to a less desirable job with fewer responsibilities. Gross filed suit, alleging that his reassignment violated the Age Discrimination in Employment Act (ADEA), which makes it unlawful for an employer to take adverse action against an employee "because of such individual's age."[18] At trial, the judge instructed the jury that it should find for the plaintiff if it found by a preponderance of the evidence that age was a motivating factor in the employer's decision to transfer Gross to a less desirable position. The judge also instructed the jury that it should find for the defendant if it concluded that the employer would have taken the same action regardless of the plaintiff's age. The jury ruled in favor of the plaintiff, Gross.

In *Gross v. FBL Financial Services, Inc.,* the Supreme Court ruled that the jury instructions were impermissible.[19] Although these are exactly the instructions that the Supreme Court has approved for race and gender discrimination claims under Title VII,[20] the Court held that claims under the ADEA must be treated differently. Justice Clarence Thomas wrote for the majority, and held that "a plaintiff bringing [an ADEA] disparate-treatment claim . . . must prove, by a preponderance of the evidence, that age was the 'but-for' cause of the challenged adverse employment action. The burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that de-

[18] 29 U.S.C. §623(a).

[19] 129 S. Ct. 2343 (2009).

[20] Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

cision."[21] To support this ruling, the Court pointed to differences in statutory language between Title VII and the ADEA, and also stated that the burden-shifting approach under Title VII had proven difficult to administer in practice.

As Justice Stevens noted in his dissent, this will make it harder for many victims of age discrimination to succeed in litigation. The dissent stressed that there is no reason why the statutory language requiring that the adverse action be "because of age" necessarily requires "but for" causation. Moreover, as Justice Stevens explained, "[t]he relevant language in the two statutes is identical, and we have long recognized that our interpretations of Title VII's language apply with equal force in the context of age discrimination, for the substantive provisions of the ADEA were derived *in haec verba* from Title VII."[22]

B. Arbitration of employment discrimination claims under union collective bargaining agreements

In *14 Penn Plaza LLC v. Pyett*, the Supreme Court significantly changed the law and held that union collective bargaining agreements (CBAs) requiring arbitration apply to federal employment discrimination claims, barring individual union members from bringing such claims in court.[23] Plaintiffs were members of the Service Employees International Union who wanted to sue for age discrimination. The Court noted that "the Union has exclusive authority to bargain on behalf of its members over their 'rates of pay, wages, hours of employment, or other conditions of employment. . . . The [CBA] requires union members to submit all claims of employment discrimination to binding arbitration under the CBA's grievance and dispute resolution procedures."[24]

In an opinion by Justice Thomas, the Court held that this provision means that federal age discrimination claims must go through

[21] Gross, 129 S. Ct. at 2352.

[22] Id. at 2354 (Stevens, J., dissenting) (internal quotation marks and citations omitted).

[23] 129 S. Ct. 1456 (2009).

[24] Id. at 1461.

this arbitration process, and that the CBA waives the ability of individual union members to sue in court. The Court rejected the notion that employment discrimination claims should be treated differently from other types of claims. According to Justice Thomas, "[a]s in any contractual negotiation, a union may agree to the inclusion of an arbitration provision in a collective-bargaining agreement in return for other concessions from the employer. Courts generally may not interfere in this bargained-for exchange."[25] The Court concluded "that a collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable as a matter of federal law."[26]

This decision is troubling on many levels. As the dissent pointed out, it seems impossible to reconcile with the Court's earlier decision in *Alexander v. Gardner-Denver Co.*,[27] which held that a clause in a collective-bargaining agreement requiring arbitration of discrimination claims could not waive an employee's right to a judicial forum for statutory claims. The Court did not decide whether its decision means that a union that controls the claims presented in arbitration may refuse to advance them altogether. But the case clearly holds that a CBA requiring arbitration precludes an individual employee from going to court to seek redress for discrimination.

C. Avoiding disparate impact liability

Ricci v. DeStefano, decided the last day of the Term, was one of the year's highest profile cases.[28] New Haven, Connecticut administered a civil service exam as part of its process for deciding which firefighters to promote. According to the results of the test, 10 individuals were eligible for promotion to lieutenant; all 10 were white. Similarly, nine individuals were eligible for promotion to captain, seven were white and two were Hispanic. No African-Americans were eligible for either promotion.

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[25] Id. at 1464.

[26] Id. at 1474.

[27] 415 U.S. 36 (1974).

[28] 129 S. Ct. 2658 (2009).

To avoid the possibility of being sued for an employment practice with a racially discriminatory impact – something prohibited by Title VII of the 1964 Civil Rights Act – New Haven chose not to rely on these results in making promotions. Seventeen white and one Hispanic firefighters filed suit, claiming that they were subjected to discriminatory treatment under Title VII and denied equal protection in violation of the Fourteenth Amendment. The District Court granted summary judgment for New Haven, and the Second Circuit, in a very brief opinion written by then-Judge Sonia Sotomayor, affirmed.[29]

The Supreme Court, in a 5-4 decision with Justice Kennedy writing for the Court, reversed and ruled that New Haven violated Title VII. The Court noted a tension between Title VII's prohibition of discriminatory treatment based on race (i.e., intentional discrimination) and Title VII's prohibition of employment practices with a discriminatory impact. The Court explained that an employer's failure to take into account disparate impact can lead to liability, but that acting to prevent a discriminatory impact may cause an employer to engage in racially discriminatory treatment.

To reconcile this conflict, the Court held that an employer may engage in discriminatory treatment based on race to avoid disparate-impact liability only if there is a strong basis in evidence to believe that there would be such liability. According to Justice Kennedy, the Court adopted this "strong-basis-in-evidence standard as a matter of statutory construction to resolve any conflict between the disparate-treatment and disparate-impact provisions of Title VII."[30] Rather than remand the case, the Court concluded that New Haven lacked the requisite evidence for believing that relying on the civil service exam would lead to disparate-impact liability, and therefore held that the city was liable.

Justice Scalia wrote a concurring opinion in which he called into question the constitutionality of disparate-impact liability under Title VII, observing that the Court's "resolution of this dispute

[29] 530 F.3d 87 (2d Cir. 2008).

[30] Ricci, 129 S. Ct. at 2676.

merely postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution's guarantee of equal protection?"[31] It is staggering to consider the implications of the Court holding that disparate-impact liability is not allowed under civil rights statutes. But at this stage, it is hard to imagine that there would be five votes for such a radical change in the law.

Justice Ginsburg in dissent emphasized the long history of race discrimination in fire departments.[32] The dissent also stressed the difficulty the decision creates for employers. If they see a discriminatory effect against minorities or women and do not act, they face Title VII liability. But if they do act, they also face liability unless they meet the requirement for showing a strong basis in evidence that they were acting to avoid liability. It is unclear what will be enough to meet this standard.

IV. CONSTITUTIONALITY OF THE EXTENSION OF THE VOTING RIGHTS ACT

One civil rights case, not concerning employment discrimination, was particularly important this Term. In *Northwest Austin Municipal Utility District No. 1 v. Holder*,[33] the Court considered whether Congress had the constitutional authority to extend Section Five of the Voting Rights Act of 1965 (VRA) for 25 years. This provision requires that jurisdictions with a history of race discrimination in voting obtain "preclearance" from the Attorney General before changing their electoral practices.

The case involved a small utility district in Texas that had no history of race discrimination in voting, but that was covered by Section Five because of the state's long legacy of such discrimination. The utility district argued that it should be allowed to bail out of the Act's requirements, or alternatively that the extension of the VRA

[31] Id. at 2681-82 (Scalia, J., concurring).

[32] Id. at 2689-90 (Ginsburg, J., dissenting).

[33] 129 S. Ct. 2504 (2009).

should be declared unconstitutional as exceeding the scope of Congress's powers.

The Court, in an 8-1 decision, avoided the constitutional question by interpreting the law to allow local governments to "bail out" of the Act's requirements by showing that they had not engaged in recent race discrimination. But Chief Justice Roberts' majority opinion expressed serious doubts about whether Section Five is constitutional. He opined that Section Five is a great intrusion on the prerogatives of state and local governments, and noted the tremendous gains with regard to race discrimination in voting since 1965. Strikingly, no Justice wrote a separate concurrence to justify the law. But the Court concluded that the utility district, and other local governments, could seek bailout, and thus there was no need to reach the constitutional question.

Local governments, including the petitioner in this case, are sure to seek bailouts. As soon as there is a denial, a challenge to the constitutionality of the extension of Section Five is sure to be brought. The Court thus simply postponed having to deal with this important constitutional issue.

V. Freedom of Speech

No principle of free speech law is more basic than that the government cannot regulate speech based on its content unless there is a compelling reason to do so. Nothing would be more anathema to the First Amendment than for the government to allow some viewpoints to be expressed in a public park while prohibiting opposing positions from being communicated. The Supreme Court has explained that "[g]overnment action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential [First Amendment] right."[34] Thus, the Court has declared that "[c]ontent-based regulations are presumptively invalid."[35]

Yet, the Court's ruling in *Pleasant Grove City v. Summum* opens

[34] Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994).

[35] R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992).

the door for the government to do exactly that.[36] Pioneer Park in Pleasant Grove, Utah, has 15 monuments, 11 of which were privately donated. One of these is a large Ten Commandments monument donated by the Fraternal Order of Eagles in 1971. The Fraternal Order of Eagles donated hundreds of Ten Commandments monuments all over the country. Many of these were paid for by Cecil B. DeMille in connection with his movie, The Ten Commandments.

Summum is a religious organization founded in 1975 and headquartered in Salt Lake City, Utah. On two separate occasions in 2003, Summum's president wrote a letter to Pleasant Grove's mayor requesting permission to erect a "stone monument," which would contain "the Seven Aphorisms of Summum" and be similar in size and nature to the Ten Commandments monument. The city refused the request, and Summum sued. Summum claimed that for the city to allow a monument from some religions but not others violated the First Amendment.

The Supreme Court unanimously ruled in favor of the city, with Justice Samuel Alito writing for the Court. The Court held that by allowing placement of donated permanent monuments in a public park, the city was exercising a form of government speech not subject to scrutiny under the free speech clause of the First Amendment.

Justice Alito began by declaring that "[t]he Free Speech Clause restricts government regulation of private speech; it does not regulate government speech."[37] The Court quoted a recent case declaring that "the Government's own speech . . . is exempt from First Amendment scrutiny."[38] Justice Alito also explained that "[a] government entity may exercise this same freedom to express its views when it receives assistance from private sources for the purpose of delivering a government-controlled message."[39]

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[36] 129 S. Ct. 1125 (2009).

[37] Id. at 1131.

[38] Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 553 (2005).

[39] Summum, 129 S. Ct. at 1131.

The fact that the Ten Commandments monument had been donated by a private group did not prevent the Court from concluding that the city had adopted it and made it government speech. According to Justice Alito, "[a]lthough many of the monuments were not designed or built by the City and were donated in completed form by private entities, the City decided to accept those donations and to display them in the Park."[40]

The Court also observed that governments have long used monuments to convey messages, and concluded that the private donation of the monument does not keep it from being government speech. Since the privately donated monuments were accepted and adopted by the government, they became government speech, and the free speech clause of the First Amendment did not apply at all.

At first glance, the decision does not seem particularly controversial. Government officials and government entities inevitably engage in speech and choose to express particular messages. The usual First Amendment rule requiring government content neutrality does not apply because when the government is the speaker it certainly can choose to express a particular viewpoint. The Court's decision simply extends this to private speech that the government chooses to adopt as its own.

But the implications of this are potentially enormous. The decision seemingly opens the door for the government to engage in viewpoint discrimination in any public forum just by adopting a private message as its own. Imagine that a city allowed pro-war demonstrators to use a public park, but refused access to anti-war demonstrators. This would be clearly unconstitutional viewpoint discrimination. Likewise, if a city allowed anti-abortion activists to use a park, but not pro-choice activists, this would be blatantly unconstitutional under the First Amendment.

After the *Summum* decision, though, there is nothing to keep the government from announcing that it was adopting the private pro-war demonstrators' message as its own speech. Once it did so, then the First Amendment would not apply and the requirement for con-

[40] Id. at 1134.

tent-neutrality would have no application. Justice Alito's opinion would in no way preclude the government from engaging in this blatantly unconstitutional form of viewpoint discrimination.

Justice Alito did acknowledge "the legitimate concern that the government speech doctrine not be used as a subterfuge for favoring certain private speakers over others based on viewpoint."[41] But nowhere does he explain how to keep it from being used in exactly this way. Nor does he explain how to keep the government from engaging in blatant viewpoint discrimination simply by adopting private speech as its own. Perhaps a distinction could be drawn between permanent monuments, as in *Summum*, and transitory speech, such as demonstrations. It is impossible to explain, though, why this is a distinction that would matter under the First Amendment.

The Court expressly left undecided the question whether the Ten Commandments monument violates the Establishment Clause of the First Amendment. The Establishment Clause limits the ability of the government to express a message endorsing religion. Whether the Ten Commandments monument in Pleasant Grove does this was left as an issue to be litigated on remand. Yet, even here the Court's ruling has troubling implications. If the Ten Commandments monument is government speech, then why is it not necessarily a government endorsement of religion that should have been held unconstitutional without further litigation?

CONCLUSION

The most dramatic development of the Term was the resignation of Justice David Souter. When the Court returns from its summer recess, there will be a new Justice, Sonia Sotomayor. She is only the third Justice appointed by a Democratic president since Thurgood Marshall was nominated by President Lyndon Johnson. She will be the third woman and the first Hispanic to serve on the high court.

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[41] Id.

Most expect that Justice Sotomayor will generally vote as Justice Souter did, especially in the most controversial cases, and thus will not change the overall ideological balance of the Court. But the Court is a small group, and perhaps there will be instances where by virtue of her life experiences and persuasiveness her presence will change the outcome and the direction of the law. Perhaps there will be instances where she will persuade Anthony Kennedy to join the more liberal Justices in situations where David Souter could not. Although her presence on the bench will be striking and visible, this, perhaps her most profound effect, will be invisible to the press and the public.