

2008

2008-2009 Supreme Court Preview: Contents

Institute of Bill of Rights Law at the William & Mary Law School

Repository Citation

Institute of Bill of Rights Law at the William & Mary Law School, "2008-2009 Supreme Court Preview: Contents" (2008). *Supreme Court Preview*. 218.

<https://scholarship.law.wm.edu/preview/218>

Copyright c 2008 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/preview>

SUPREME COURT PREVIEW

What to Expect
From the New Term

September 26-27, 2008

2008-2009 Supreme Court Preview

Institute of Bills of Rights Law

THE INSTITUTE OF BILL OF RIGHTS LAW was established at William & Mary in 1982 to support research and education on the Constitution and the Bill of Rights. One of the principal missions of the Institute is to facilitate interaction between the professions of law and journalism. Through a discussion of key cases on the Supreme Court's docket at the start of each term, the annual SUPREME COURT PREVIEW provides in-depth education for journalists on the underlying issues in order to enhance press coverage of the decisions.

STAFF

NEAL DEVINS, Goodrich Professor of Law, Director of the Institute of Bill of Rights Law, and Professor of Government

LINDA QUIGLEY, Adjunct Professor of Law and Assistant Director of the Institute of Bill of Rights Law

MELODY S. NICHOLS, Assistant Director of the Institute of Bill of Rights Law

LEAD STUDENT EDITOR

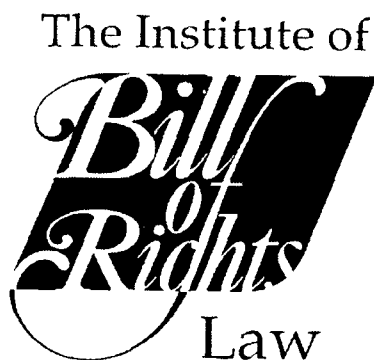
LINDSEY CRAVEN

ASSISTANT STUDENT EDITORS

EDWARD NUNES

RYAN MILLETT

AMY ROSE



WILLIAM & MARY SCHOOL OF LAW
WILLIAMSBURG, VIRGINIA 23187-8795
(757) 221-3810 ♦ FAX (757) 221-3775
E-MAIL: IBRL@wm.edu ♦ Web: IBRL.org

2008-2009 Supreme Court Preview

Table of Contents

Schedule of Events	p. i
Who's Who on the Panels	p. ii

I. MOOT COURT ARGUMENT: *FCC v. Fox Television Stations*

In This Section:

New Case: 07-582 *FCC v. Fox Television Stations*

Synopsis and Question Presented	p. 2
“Supreme Court to Rule on Broadcast Indecency” David Savage	p. 13
“Decency Ruling Thwarts FCC on Vulgarities” Stephen Labaton	p. 15
“Court Tosses FCC ‘Wardrobe Malfunction’ Fine” Joann Lovigold	p. 18
“Decency over the Airwaves Is a Public Good” Joe Pitts	p. 20
“A Federal Appeals Court Strikes down the FCC’s ‘Fleeting Expletives’ Policy on Administrative Law Grounds: Was it Right to Do so?” Julie Hilden	p. 22
“FCC Backtracks on 2 Charges of Indecency” Jim Puzanghera	p. 27
“The Price for On-Air Indecency Goes up” Frank Ahrens	p. 29
“Bush Taps FCC’s Martin as Chairman” Bloomberg News	p. 31
“FCC Rules Bono Remark Is Indecent” Jube Shiver Jr.	p. 33
“Nasty Language on Live TV Renews Old Debate” Frank Ahrens	p. 35

II. 2008 ELECTION AND THE SUPREME COURT

In This Section:

- “In the Balance” p. 41
Stuart Taylor
- “Some Legal Activists Have Hearts Set on ‘True Liberal’” p. 46
Robert Barnes and Kevin Merida
- “What Will the Outcome of the 2008 Election Mean for the Supreme Court?” p. 49
Edward Lazarus
- “Constitutional Drift: Obama Veers to the Right, but Does He Need to Take
the Constitution with Him?” p. 53
Doug Kendall and Dahlia Lithwick
- “McCain Newly Assertive on Judicial Views” p. 56
Avi Zenilman and Bed Adler
- “Over Guantanamo, Justices Come Under Election-Year Spotlight” p. 58
Linda Greenhouse
- “John McCain and Barack Obama: Two Visions of the Supreme Court” p. 60
David Savage
- “McCain Assures Conservatives of His Stance on Judges” p. 63
Elisabeth Bumiller
- “Obama’s Constitution” p. 66
Edward Whelan
- “Activists Mobilize over Shaping Supreme Court” p. 69
Richard Simon and David G. Savage
- “Dismissed in Boston: Why Won’t the Democrats Talk About Judges?” p. 71
Dahlia Lithwick
- “Fighting over the Court: It’s Tough to Make the Supreme Court into
an Election Issue” p. 73
William G. Ross

III. ELECTION LAW

In This Section:

New Case: 07-689 *Bartlett v. Strickland*

Synopsis and Questions Presented	p. 78
“Racial Makeup of ‘Influence’ Districts to Be Basis of Case” Associated Press	p. 91
“Pender Districts Voided” Dan Kane and Ryan Teague Beckwith	p. 93
“Pender County Will Sue over New House Districts” Sam Scott	p. 95
“Voting Act Overshadows Race Debate” Joseph Williams	p. 96
“Supreme Court Upholds Texas Redistricting” David Savage	p. 99
“The Supreme Court: Voting Rights” Adam Clymer	p. 101

LOOKING BACK: CRAWFORD V. MARION COUNTY ELECTIONS BOARD

“In a 6-to-3 Vote, Justices Uphold a Voter ID Law” Linda Greenhouse	p. 103
“Initial Thoughts on the Supreme Court’s Opinion in <i>Crawford</i> ” Rick Hansen	p. 106
“ID Law Keeps Nuns, Students from Polls” Scott Martelle	p. 108
“Voter ID Battle Shifts to Proof of Citizenship” Ian Urbina	p. 109
“Voter ID Law’s Opponents Focused on a Non-issue” Bradley A. Smith	p. 112
“Voter Fraud” Erwin Chemerinsky	p. 114
“Voter ID Law Sequels?” Michael W. Hoskins	p. 116

VOTING RIGHTS ACT REAUTHORIZATION

“Vote Law Appeal Likely by Early Fall” Lyle Denniston	p. 119
“Court Upholds Key Provisions of the Voting Rights Act” Neil A. Lewis	p. 121
“Congressional Power to Extend Preclearance Under the Voting Rights Act” Pamela S. Karlan	p. 122
“Tiny Water District Is Challenging Voting Rights Act” Janet Elliot	p. 130
“Voting Rights Act Extension Passes in Senate, 98 to 0” Charles Babington	p. 132
“Some Officials, Scholars Say Voting Rights Act Needs Update” Frank James	p. 134
“An Insulting Provision” Edward Blum	p. 136
“Extension of Voting Rights Act Is Likely Despite Criticism” Rick Lyman	p. 138

IV. BUSINESS

In This Section:

New Case: 07-1216 *Philip Morris USA v. Williams*

Synopsis and Questions Presented	p. 144
“Justices to See Philip Morris Case a Third Time” Linda Greenhouse	p. 154
“Justices Uphold Cigarette Damages” Ashbel Green	p. 155
“Justices Overturn Tobacco Award” Robert Barnes	p. 157
“Oregon Supreme Court Backs \$79.5 Million Tobacco Award” Ashbel Green	p. 159

“High Court Sends back Tobacco Case Award” David Savage	p. 160
“Jury Awards \$81 Million to Oregon Smoker’s Family” Barry Meier	p. 162
“A New Day on Punitive Damages Law” Lyle Denniston	p. 164

New Case: 07-562 *Altria Group v. Good*

Synopsis and Questions Presented	p. 166
“Altria Gets U.S. High Court Hearing on ‘Lights’ Suit” Greg Stohr	p. 177
“Light Cigarette Case not Preempted, First Circuit Says” Allison Torres Burtka	p. 179
“Bid to Shift Tobacco Cases to U.S. Courts Denied” John Donnelly	p. 182

New Case: 06-1249 *Wyeth v. Levine*

Synopsis and Questions Presented	p. 184
“Justices to Hear Cases on Products Liability” Linda Greenhouse	p. 197
“Court Considers Protecting Drug Makers from Lawsuits” Gardier Harris	p. 198
“Patients’ Ability to Sue at Risk” Daniel Costello	p. 200
“The State of Medical Device Tort Litigation in the Wake of <i>Riegel</i> ” Eric J. Parker and Richard S. Cabelus	p. 202
“No Special Treatment” Sol Weiss	p. 206

New Case: 07-512 *Pacific Bell v. linkLine*

Synopsis and Questions Presented	p. 208
“High Court Agrees to Hear AT&T ISP Dispute” EWeek.com	p. 218

“Ninth Circuit Case Alleging DSL ‘Price Squeeze’ Can Proceed” <i>Telecommunications Reports</i>	p. 219
“Ninth Circuit Prequels and Sequels” Neal R. Stoll and Shepard Goldfein	p. 221
“ISPs File Antitrust Lawsuit Against SBC in California” <i>Telecommunications Reports</i>	p. 224
“U.S. High Court Rules in Favor of Verizon” James S. Granelli	p. 225

New Case: 07-1059 *United States v. Eurodif*

Synopsis and Questions Presented	p. 227
“High Court to Hear Uranium Case” Robert Barnes	p. 231
“ITC Rules in Favor of USEC Position on French Uranium Imports” <i>Business Wire</i>	p. 233
“Sole U.S. Company that Enriches Uranium Is Struggling to Stay in Business” Matthew L. Wald	p. 234

New Case: 07-1239 *Winter v. Natural Resources Defense Council*

Synopsis and Questions Presented	p. 237
“Justices Take Case on Navy Use of Sonar” Linda Greenhouse	p. 248
“Court Upholds Whale Protection in Navy Exercises” Bob Egelko	p. 250
“White House Went too Far in Sonar Case, Judge Rules” Marc Kaufman	p. 252
“Navy Wins Exemption from Bush to Continue Sonar Exercises in California” Mark Kaufman	p. 254
“Judge Imposes Stricter Rules on Navy to Protect Marine Life” Carolyn Marshall	p. 256
“Navy Given Choice: New Safeguards or No Sonar” Kenneth Weiss	p. 257

“Judge Curbs Navy Sonar” Kenneth Weiss	p. 259
---	--------

V. CIVIL RIGHTS

In This Section:

New Case: 07-665 *Pleasant Grove v. Summum*

Synopsis and Questions Presented	p. 266
<i>Summum v. Pleasant Grove</i>	p. 274
“With the Commandments, Must City Make Room?” Robert Barnes	p. 282
“No Rehearing in Summum Case” Geoffrey Fattah	p. 283
“Summum May Display Aphorisms” Amy Choat-Nielsen	p. 284
“Justice Denies a Motion on Summum Display: Religious Group’s Battle Likely to Face a Bench Trial” Geoffrey Fattah	p. 286
“‘Aphorisms’ in Pleasant Grove?” Leigh Dethman	p. 288
“Monuments in Cross Hairs: Attorney Aims to Rid Public Lands of the Markers” Laura Sanderson	p. 290

New Case: 06-1595 *Crawford v. Metro. Gov’t of Nashville and Davidson County, Tennessee*

Synopsis and Questions Presented	p. 292
“Supreme Court to Hear Key Anti-Discrimination Case” David Savage	p. 296
“High Court Hasn’t Closed the Book on Retaliation” Marcia Coyle	p. 298
“Court Expands Right to Sue over Retaliation on the Job” Charles Lane	p. 302

New Case: 07-1125 *Fitzgerald v. Barnstable School Committee*

Synopsis and Questions Presented	p. 304
“Court Rejects ‘Class of One’ Argument” Linda Greenhouse	p. 312
“Fist Circuit Says School May Be Liable for Student-on-Student Sexual Harassment” Lawyers USA	p. 313
“1st U.S. Civil Court of Appeals Rules Civil Rights Claim over Alleged Student Harassment Precluded” Eric T. Berkman	p. 314

New Case: 07-543 *AT&T v. Hulteen*

Synopsis and Questions Presented	p. 317
“High Court to Take up Pregnancy Leave Case” Christopher Twarowski	p. 328
“AT&T Pregnancy Suit Ruling Is Overturned” Bob Egelko	p. 330
“Court Won’t Hear Case” Jack Thompson	p. 332
“\$25 Million Settlement by Pac Bell” Harriet Chiang	p. 333
“Working Mothers Score a Major Victory in Court” Seth Rosenfeld	p. 335

New Case: 07-869 *Ysura v. Pocatello Education Association*

Synopsis and Questions Presented	p. 337
“Court to Weigh Deduction for Union PACs” Mark Walsh	p. 345
“Nonunion Educators Organization Applauds U.S. Supreme Court Decision to Review Idaho Voluntary Contributions Act” PR Newswire	p. 347
“Union Leaders Welcome Ruling” Dean Ferguson	p. 348

New Case: 07-610 *Locke v. Karass*

Synopsis and Questions Presented	p. 350
“Court Will Hear Labor Union Fee Dispute” Associated Press	p. 359
“First U.S. Circuit Court of Appeals Rules Nonmembers Can Be Charged for National Union’s Litigation Costs” Eric Berkman	p. 360
“Justices Curb Unions’ Use of Fees for Politics” David Savage	p. 363
“Court Ruling Stipulates Kinds of Fees Public Unions Can Assess Nonmembers” Ruth Marcus	p. 365

New Case: 07-581 *14 Penn Plaza v. Pyett*

Synopsis and Questions Presented	p. 367
“Arbitration of Bias Claims” Michael Starr and Christine M. Wilson	p. 372
“Mandatory Arbitration Is Raising Challenges” T. Shawn Taylor	p. 375
“High Court Upholds Forced Arbitration” Sarah Schafer and Charles Lane	p. 378
“High Court Backs Workers’ Right to Sue” David Savage	p. 380

New Case: 07-1015 *Ashcroft v. Iqbal*

Synopsis and Questions Presented	p. 382
“Court to Hear Challenge from Muslims Held After 9/11” Linda Greenhouse	p. 398
“U.S. Officials Fail to Win Release from 9/11 Suit” Mark Hamblett	p. 400
“Top Officials Told to Testify in Muslims’ Suit” Nina Bernstein	p. 404

“Prison Tapes Show Abuse of Terrorism Suspects” p. 406
Dan Eggen

New Case: 07-499 *Negusie v. Mukasey*

Synopsis and Questions Presented p. 407

“Fresno Couple in Limbo After Court Withdraws Eligibility for Asylum” p. 409
Bob Egelko

“Supreme Court Accepts African Prison Guard’s Asylum Appeal” p. 410
Debra Cassens Weiss

“Courts Criticize Judges’ Handling of Asylum Cases” p. 411
Adam Liptak

VI. THEORIES OF INTERPRETATION

In This Section:

LOOKING BACK: DISTRICT OF COLUMBIA V. HELLER

“In Defense of Looseness” p. 417
Richard A. Posner

“History’s Lessons on Gun Rights” p. 424
Lyle Denniston

“Justices, Ruling 5-4, Endorse Personal Right to Own Gun” p. 427
Linda Greenhouse

“Supreme Court Finds History Is a Matter of Opinions” p. 430
David Savage

“What Did the Framers Have in Mind?” p. 433
Stanley Fish

“News Flash: The Constitution Means What It Says” p. 435
Randy E. Barnett

“A Liberal Case for the Individual Right to Own Guns Helps Sway the Federal
Judiciary” p. 437
Adam Liptak

JUSTICE SCALIA'S A MATTER OF INTERPRETATION

“Judge Dread” p. 440
David Franklin

“Courtroom Arguments” p. 443
John O. McGinnis

JUSTICE BREYER'S ACTIVE LIBERTY

“Consent of the Governed” p. 445
Kathleen Sullivan

“Active Liberty: A Progressive Alternative to Textualism and Originalism?” p. 448
Michael W. McConnell

“How Should Judges Judge?” p. 452
Bernard G. Prusak

“The Philosopher-Justice” p. 458
Cass R. Sunstein

COMMENTARY ON THEORIES OF INTERPRETATION

“Justice Grover Versus Justice Oscar: Scalia and Breyer Sell Very
Different Constitutional Worldviews” p. 464
Dahlia Lithwick

“Alive and Kicking: Why No One Truly Believes in a Dead Constitution” p. 467
Jack Balkin

“Rethinking Originalism: Original Intent for Liberals (and for
Conservatives and Moderates, too)” p. 471
Akhil Reed Amar

“In Praise of Judicial Modesty” p. 474
Stuart Taylor

VII. CRIMINAL

In This Section:

New Case: 07-542 *Arizona v. Gant*

Synopsis and Questions Presented p. 480

“High Court to Rule on Warrantless Search of Vehicle” David Savage	p. 489
“Court: Search Warrant Required for Traffic Stops” Jill Redhage	p. 490
“Warrant Ruling Not a Concern to Pima Officers” David Teibel	p. 491
“High Court to Weigh Arizona Case on Car Searches” Billy House	p. 493
“High Court Sidesteps Key Arizona Drug Case” Billy House	p. 495

New Case: 07-854 *Van de Kamp v. Goldstein*

Synopsis and Questions Presented	p. 497
“Justices Accept Question of Prosecutors as Lawyers or Managers” Linda Greenhouse	p. 503
“A Fight 24 Years in the Making” Henry Weinstein	p. 505
“Free at Last: Long Beach Man Released After 25 Years in Prison for Murder” Tracy Manzer	p. 507
“Judges Want a Convicted Killer Freed” Henry Weinstein	p. 509
“Grand Jury Criticizes D.A. on Informants” Ted Rohrlich	p. 513
“Justices Rule Prosecutors May Be Sued for Non-Court Acts” Joan Biskupic	p. 517

New Case: 07-751 *Pearson v. Callahan*

Synopsis and Questions Presented	p. 519
“Justices to Weigh Search and Consent” Linda Greenhouse	p. 529
“6 th Circuit Rules Warrantless Entry Did Not Violate Fourth Amendment” <i>Lawyers Weekly USA</i>	p. 531

“Justices Give Police Latitude” Glen Elasser	p. 532
“Ruling Exposes Misuse of Search Consent” David W. Gleischer	p. 534
“When Should Courts Address Qualified Immunity?” Ilann Margalit Maazel	p. 536

New Case: 07-901 *Oregon v. Ice*

Synopsis and Questions Presented	p. 540
“Court to Take a Look at Oregon’s Consecutive Sentencing Law” Onthedocket.org	p. 550
“Court Ruling Cuts Prison Sentence” Nick Budnick	p. 551
“Sentencing Tsunami” Laurie L. Levenson	p. 553
“Sentence Enhancements Curbed” David Savage	p. 557

New Case: 07-513 *Herring v. United States*

Synopsis and Questions Presented	p. 559
“Evidence Rule to Be Reviewed” David Savage	p. 565
“In Alabama Drug Case, a Question of Timing” Tom Goldstein	p. 566
“Federal Appeals Court Rules on Case Involving Coffee, Dale Counties” Lance Griffin	p. 568
“Justices Validate Seizure Based on Error on Warrant” Linda Greenhouse	p. 570

New Case: 07-591 *Melendez-Diaz v. Massachusetts*

Synopsis and Questions Presented	p. 572
“A ‘Sleeper’ Mass. Case Takes an Unlikely Path to the Supreme Court” David Frank	p. 576

“Not so Perfect Together: Municipal Courts and Hearsay” p. 579
Ken Vercammen

“Supreme Court Roundup: Court Alters Rule on Statements of Unavailable Witnesses” p. 583
Linda Greenhouse

VIII. BUSH’S LEGAL LEGACY

In This Section:

HOW THE BUSH ADMINISTRATION PURSUED ITS AGENDA IN THE COURTS

LOOKING BACK: WAR ON TERROR

“Executive Power in the War on Terror” p. 588
John O. McGinnis

“Justices Say Detainees Can Seek Release” p. 598
Robert Barnes

“For Justices, Another Day on Detainees” p. 601
Linda Greenhouse

“Due Process for Jihadists?” p. 604
Andrew McCarthy

“Shifting Power to a President” p. 607
Adam Liptak

“The Guantanamo Decision: High Court Rejects Bush’s Claim that He Alone Sets Detainee Rules” p. 610
David G. Savage

“Because I Say so” p. 615
Dahlia Lithwick

“Detention Cases Before Supreme Court Will Test Limits of Presidential Power” p. 618
Linda Greenhouse

“Invoking Secrets Privilege Becomes a More Popular Legal Tactic by U.S.” p. 621
Scott Shane

LOOKING BACK: PRO-BUSINESS COURT?

- “Bush’s Approval Rating Remains High with Court” p. 624
Michael Doyle
- “Trumping the States: Business Is Finding Success in Federal Pre-Emption Cases” p. 627
David G. Savage
- “Big Business’s Big Term” p. 630
Doug Kendall
- “Is the Supreme Court Biased in Favor of Business?” p. 633
Eric Posner

LOOKING BACK: LEDBETTER V. GOODYEAR TIRE AND RUBBER COMPNAY, INC.

- “Justices Restrict Pay Bias Lawsuits” p. 637
Robert Manor
- “Court Explores Complexities in Employment Discrimination Case” p. 639
Linda Greenhouse

LOOKING BACK: GONZALES V. CARHART

- “High Court Upholds Curb on Abortion” p. 641
Robert Barnes
- “Good May Yet Come” p. 644
Hadley Arkes
- “‘Partial-Birth’ Cases Test Abortion Rights’ Limits” p. 648
Joan Biskupic

LOOKING BACK: HEIN V. FREEDOM from RELIGION FOUNDATION

- “Justices Quash Suit over Funds for Faith Groups” p. 652
William Branigin
- “Court Hears Arguments Linking Right to Sue and Spending on Religion” p. 654
Linda Greenhouse
- “Bagel Breakfast” p. 657
Dahlia Lithwick

LOOKING BACK: RUMSFELD V. FAIR

“Court Upholds Military Recruiting Law” p. 660
Joan Biskupic

“Law Schools Battle U.S. in High Court Argument over Military Recruiters” p. 662
Allison Torres Burtka

“Wisdom of Solomon Redux” p. 665
New York Sun

“Solomon Amendment Likely to Survive” p. 666
Lyle Denniston

LOOKING BACK: CHENEY V. U.S. DISTRICT COURT

“Court Lets Cheney Avoid Disclosure” p. 668
David G. Savage

“High Court to Hear Cheney Secrecy Case” p. 671
Michael Kirkland

HOW THE BUSH ADMINISTRATION PROMOTED ITS AGENDA THROUGH JUDICIAL APPOINTMENTS

“Bush’s Conservatism to Live Long in the U.S. Courts” p. 674
Joan Biskupic

“Conservative Courts Likely Bush Legacy” p. 676
David Savage

“Roberts, Alito Help Define New Supreme Court” p. 679
Tom Curry

“The Difference Alito Makes” p. 682
Michael Dorf

“Conservatives Cheer Court Nominee” p. 684
Warren Vieth