

# Mass Dissent

Massachusetts Chapter

National Lawyers Guild

14 Beacon St., Boston, MA 02108

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## BOARD MEETING

**September 20, 6:00 pm**

14 Beacon St., 1st Fl.  
Boston

## The Supreme Court

Each September we review the prior term of the United States Supreme Court. Last term, as always, brought some interesting cases and even some surprises, though it was without blockbusters, like 2010's *Citizen's United* or next term's expected decision on the health care legislation. Next term, as the *New York Times* has pointed out, may include the most significant clash between the Supreme Court and a president since the New Deal.

This last term shows a Court where Justice Roberts has further consolidated his power and where business interests generally predominate. The *Wal-Mart* and *AT&T* cases, which we write about in this issue, significantly cut back class action relief and were sought and welcomed by business. The First Amendment - and we write about three First Amendment cases from last term - continues to trump virtually everything else for conservatives, who use it frequently to protect business interests.

Perhaps the surprise of this term was Justice Kennedy's joining the more liberal justices to require California to reduce its prison population, while the Court's civil rights and criminal docket otherwise continued to be a "mixed bag," see the articles below.

The Court for the first time has three women justices, with only the Chief Justice and Justice Alito in agreement more often (96% of the time) than newest Justices Kagan and Sotomayor. Justice Kennedy remains the swing vote, and he cast the decisive vote in all twelve of the closely-divided cases where the four more liberal justices were on one side and the conservatives on the other. Justice Kennedy voted with the majority most often, 94% of the time, with the consensus-building (and conservative) Chief Justice a close second at 91%. Justice Kennedy's votes, in particular, may be of momentous importance in the coming term.

- David Kelston -

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## *Join a Guild Committee*

**Street Law Clinic Project:** The Street Law Clinic project provides workshops for Massachusetts organizations that address legal needs of various communities. Legal education workshops on 4th Amendment Rights (Stop & Search), Landlord/Tenant Disputes, Workers' Rights, Civil Disobedience Defense, Bankruptcy Law, Foreclosure Prevention Law, and Immigration Law are held at community organizations, youth centers, labor unions, shelters, and pre-release centers. If you are a Guild attorney, law student, or legal worker interested in leading a workshop, please contact the project at 617-723-4330 or nlgmass-slc@igc.org.

**Lawyer Referral Service Panel (LRS):** Members of the panel provide legal services at reasonable rates. Referral Service Administrative/Oversight Committee members: Neil Berman, Neil Burns, Joshua Goldstein, Jeremy Robin, and Azizah Yasin. For more information, contact the Referral Service Coordinator at 617-227-7008 or nlgmass@igc.org.

**Foreclosure Prevention Task Force:** Created in June 2008, the Task Force's goal is threefold: (1) to draft and introduce policies that address issues that homeowners and tenants of foreclosed houses face, (2) to provide legal assistance to these homeowners and tenants, *and* (3) to conduct legal clinics for them. If you are interested in working with the Task Force, please call the office at 617-227-7335.

**Mass Defense Committee:** Consists of two sub-committees: (1) "Legal Observers" (students, lawyers, activists) who are trained to serve as legal observers at political demonstrations *and* (2) "Mass Defense Team" (criminal defense attorneys) who represent activists arrested for political activism. To get involved, please contact the office at 617-227-7335.

**Litigation Committee:** Established in 2010, the Committee brings civil lawsuits against large institutions (such as government agencies, law enforcement, banks, financial institutions, and/or large corporations) which engage in repressive or predatory actions that affect large numbers of people and that serve to perpetuate social, racial and/or economic injustice or inequality. To get involved, please contact the Guild office.

**NLG National Immigration Project:** Works to defend and extend the human and civil rights of all immigrants, both documented and undocumented. The Committee works in coalitions with community groups to organize support for immigrant rights in the face of right-wing political attacks. For more information contact the NLG National Immigration Project at 617-227-9727.

**NLG Military Law Task Force:** Provides legal advice and assistance to those in the military and to others, especially members of the GIRights Hotline, who are counseling military personnel on their rights. It also provides legal support and helps to find local legal referrals when needed. For advice and information, GI's can call 877-447-4487. To get involved, please contact Neil Berman (njberman2@juno.com) or Marguerite Helen (mugsm@mindspring.com).

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# GUILD NEWS

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## NLG HAPPY HOUR

The Massachusetts Chapter's **"NLG Presents..."** and **Happy Hour** takes place on the **2nd Wednesday of every month, 5:30-7:30pm**, at Kennedy's Midtown Pub, 44 Province St., 2nd Fl., Boston. This month's event will be held on Wednesday, September 14. Please join us! (*See below.*)

## DESIGNERS CIRCUS

You are invited to a special event for the NLG Massachusetts Chapter! **See page 11.**

## MEMBERSHIP MEETING

This year's NLG Membership meeting will be held on **Tuesday, October 4, 5:30pm, 14 Beacon St., Conference Rm, 1st Fl., Boston.** After a cheese & wine reception we will discuss resolutions and amendments submitted for a vote at the NLG Convention.

## NATIONAL CONVENTION

The 2011 NLG National Convention will take place in Philadelphia from October 12 to 16 at Crowne Plaza Hotel (1800 Market St., tel. 215-561-7500). To register: <https://www.nlg.org/members/convention/registration/>.

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## Street Law Clinic Report

*The following clinics and trainings were conducted for members of Boston area community organizations and agencies:*

**June 2:** *Legal Observer* training for law students at Roger Williams University Law School in Bristol, RI, by **Chris Williams.**

**June 24:** *Stop & Search* clinic for student activists in Providence Youth Student Movement, RI, by **Chris Williams.**

**August 9:** *Workers' Rights* clinic Chelsea Collaborative, by BU student **Brian Balduzzi** and attorney **Mark Stern.**

### WESTERN MASSACHUSETTS NLG HAPPY HOUR

Members from Western Massachusetts organized an NLG happy hour event on June 16 - the first general Guild gathering in recent memory. About 20 people attended from Western Massachusetts and Vermont, and since it was a beautiful evening and we were having fun on the outdoor deck, it went on for about 3 hours. It was a good mix of veteran and young lawyers, law professors, law students, legal workers, community friends and allies, and even a (former) jailhouse lawyer. Everyone in attendance was excited about Guild events and wanted more, and a follow-up event is being planned. Attendees also started talking about collaborating on substantive projects.

### Welcome Barbara Lee

In June, after 2.5 years of outstanding work, Sara DeConde left the Guild office. We are thrilled to welcome our new employee - Barbara Lee. Barbara is a recent graduate of Northeastern University and is planning to pursue a legal profession.

### NLG Presents...

### CAROL GRAY

***Tahrir Square and Its  
Aftermath***  
**Wednesday, September 14, 2011  
5:30 pm**

**Kennedy's Midtown Pub  
44 Province St., 2nd Fl., Boston**

NLG member Carol Gray was studying international human rights law in Egypt and doing an oral history of one of Egypt's leading human rights organizations when the Arab Spring started. Through slides and videos, Carol will relay accounts of demonstrations, crackdowns, and heroism.

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## ARTICLES FOR MASS DISSENT

The October issue of *Mass Dissent* will focus on prisoners' rights.

If you are interested in submitting an article, essay, analysis, or art work (cartoons, pictures) related to the topic, please e-mail the articles to **[nlgmass-director@igc.org](mailto:nlgmass-director@igc.org)**.

***The deadline for articles is September 15.***



## **“NLG Presents...”: A Lively Report Back from Chapter Members Just Returned from Cuba**

**Ben Evans, Judith Liben, and Judy Somberg**, having just returned from a ten day Guild trip to Cuba, lead a lively discussion about the current reality of life in Cuba. They showed photos, talked about the contradictions there, such as housing for all, but with a virtual inability to change location, and wondered about the impact of the new economic initiatives. Some non-Guild participants questioned whether the Cuban revolution had brought positive changes at all. The three travelers all

agreed that the trip was a fascinating experience and that the Guild needs to continue to work to end US hostilities to Cuba, including the US embargo, US travel restrictions, and imprisonment under harsh restrictions of the “Cuban Five”.



*(left):* Panelists Judith Liben, Judy Somberg, and Ben Evans lead a conversation on “Life in Cuba.”

*(above):* Happy Hour participants watch with excitement a wonderful slide show prepared by Ben.

*Photos by Sara DeConde and Urszula Masny-Latos*

## **NLG Summer Retreat**

On a hot (very hot!) and humid July day, over 20 Guild members converged in Cambridge for the Chapter’s annual Summer Retreat. At this half-a-

day event, we analyze the Guild’s current work and discuss future campaigns and programs. And, obviously, all discussions are accompanied by great food and beverages. Hope to see you next year!



*(above):* Laura Alfring shows in a cake that she brought to the Retreat how she appreciates the Guild. Laura Rocks!

*(right):* After dinner, the participants enjoyed the cake and continued with debating and strategizing.



*Photos by Jonathan Messinger & Urszula Masny-Latos*

# *Wal-Mart Stores, Inc. v. Dukes: A Loss for Group Justice*

by Meredith Carpenter

The Supreme Court's recent 5-4 decision to deny class certification in *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011) struck a blow to group justice. In the suit, the three named plaintiffs alleged that female employees at Wal-Mart stores were discriminated against in promotions and pay decisions as a result of the company's corporate practices, which include a policy of allowing managers to exercise discretion in employment matters. The Court (Chief Justice Roberts and Justices Scalia, Kennedy, Thomas and Alito) held that the plaintiffs did not establish commonality among the class—the expert testimony of a sociologist who determined that Wal-Mart's corporate culture was vulnerable to discrimination and evidence from approximately 120 women who experienced discrimination was not enough to convince the Court that gender discrimination is common to all Wal-Mart stores.

In so ruling, the Court failed to recognize the need for group justice, essentially insisting that discrimination only exists in relation to individuals in the absence of an explicit policy of discrimination. Although this decision is the latest and most jarring in the Court's discrimination jurisprudence, it is not an aberration. Protection against discrimination was at its peak after the Civil Rights Act of 1964, when the Supreme Court clearly was willing to scrutinize the record carefully to see if discrimination as alleged in a complaint existed in fact. Federal Rule of Civil Procedure 23(b)(2) was amended during this time, in part to protect certain classes from discrimi-

nation, since class actions were an effective way of attacking pervasive discrimination in society. However, beginning with *McCleskey v. Kemp* in 1987, the Court's rulings slowly stripped away this widespread protection. Now, the Court presumes that there is no discrimination when faced with a discrimination suit, and it imposes ever-more-stringent requirements for proof. Clearly these rulings reflect the Court's attitude that discrimination is no longer pervasive in our society, or that if it is, it no longer needs to be remedied in court.

It hardly needs to be said that these assumptions are incorrect. Although we have come quite a way as a society over the past 47 years, gender discrimination and its effects still exist. Women receive 77 cents to the male dollar, they are less often promoted, and only approximately 14% of executive officers at Fortune 500 companies are female. It is illuminating to note that all three of the female justices were in the dissent on the issue of class certification, acknowledging that an inherent bias against women is still present in society. Justice Ginsberg, dissenting, noted that “[m]anagers, like all humankind, may be prey to biases of which they are unaware. The risk of discrimination is heightened when those managers are predominantly of one sex, and are steeped in a corporate culture that perpetuates gender stereotypes.”

Perhaps the majority of males on the Court do not have the requisite experience to comprehend the continued existence of pervasive gender discrimination. In rejecting the notion that a policy of discretion is one of discrimination in such a large corpo-

ration, the majority seemed incredulous that widespread discrimination could exist. Justice Scalia asserted that it is “unlikely that all managers would exercise their discretion in a common way without some common direction.” The majority did not believe that discrimination could occur throughout such a large group, accepting Wal-Mart's argument that the class was too large to share a common issue. The proposed class included around 1.5 million women—those women who had been employed at a Wal-Mart store any time after December of 1998. Although 1.5 million is certainly a large number, it is undeniable that all these women come within the same ambit as Wal-Mart employees and that they were all subject to the same corporate culture and societal influences. Had the Court acknowledged the existence of pervasive discrimination and the idea of group justice, it likely would have found sufficient commonality in the class. Instead, by accepting Wal-Mart's arguments, the Court came close to creating a large-employer exception to justice.

A result of the *Wal-Mart* ruling is that plaintiffs will bring smaller class actions that are more focused on particular instances of discrimination. Instead of being able to attack broad-sweeping discrimination at its root, plaintiffs will be limited to challenging individual manifestations of the company's practices. Presumably the Court's ruling will also affect all other employment discrimination cases, not just those concerning gender. Class action suits brought for race, color, religion, and national origin will need to meet this higher burden of com-

*Continued on page 10*

# Supreme Court 2011 - Safeguarding Corporate Interests: from American's Citizentry One Terrible Decision at a Time

by Jeff Thorn

In an April 27, 2011 decision, *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011), the Supreme Court dutifully returned to its most pressing recent work: sticking it to the little guy. The Court “green lighted” corporate contracts which bar consumer class actions nationally, and tilted the legal playing field toward corporate giants, even in advance of its *Wal-Mart Stores, Inc. v. Dukes* decision.

## Background: *AT&T v. Concepcion*

*AT&T v. Concepcion* arose from AT&T's charging Vincent and Liza Concepcion \$30.22 in sales taxes for a phone the company advertised as free. The Conceptions alleged fraud and false advertising, bringing an eventual class action complaint in California federal court, rather than a bilateral arbitration as mandated in their AT&T sale and service contract. The Conceptions argued that California law barred such contract provisions as unconscionable.

Justice Antonin Scalia, writing for the five justice majority (the Chief Justice and Justices Kennedy, Thomas and Alito), opined that AT&T's bilateral arbitration provision was entirely legal. Lower courts, in both the Southern District of California and the Ninth Circuit, had previously recognized that California state law (set forth in the California Supreme Court's 2005 *Discover Bank* case) rejected, as unconscionable, contractual provisions barring class-wide arbitration in contracts of adhesion. The

Supreme Court majority, however, reasoned that the Federal Arbitration Act [“FAA”] §2 – with its “principal purpose” to “ensure that private arbitration agreements are enforced according to their terms” – preempted the California *Discover Bank* rule and allowed for exactly such contractual arbitration limitations.

## The Ugly Innards

The Court's majority lingered on the benefits of bilateral arbitration as an informal process, the danger of allowing consumers to demand class-wide arbitration *ex post*, and, tellingly, concerns that “class arbitration greatly increases risks to defendants.” The majority also made much of the “generous” benefits in AT&T's arbitration provision. Those benefits – including a \$7,500 premium for claimants winning an arbitration award greater than AT&T's last settlement offer—might, or might not, be generous to individuals depending on implementation. But such benefits certainly help the everyday unrepresented, non-filing consumer less than a class action – whether in *AT&T* or future conflicts (where less attractive arbitration prizes will surely exist).

The majority opinion also unflinchingly dismissed the fact that California had limited the *Discover Bank* rule specifically to provisions in contracts of adhesion. In brutal honesty, Scalia acknowledged “the times in which consumer contracts were anything other than adhesive are long past.” In short, the majority recognized that consumers had neither bargaining power to alter terms before entering contracts, nor the right to challenge, effec-

tively, those terms later by pooling resources.

The *AT&T* dissent, penned by Justice Stephen Breyer, emphasized that the California law “falls directly within the scope of the Act's exception permitting courts to refuse to enforce arbitration agreements on grounds that exist ‘for revocation of any contract.’” Advancing – somewhat amusingly – under a federalist banner, the dissent further noted “we have not ... applied the Act to strike down a state statute that treats arbitrations on par with judicial and administrative proceedings.” Pragmatically, the dissent also warned the decision would foster the abandonment of consumer claims, rather than supporting and streamlining generous corporate bilateral arbitration systems.

## Dismantling the Class Action Mechanism: What Next?

Before the end of the day, America's behemoth commercial law firms began publicly pushing clients to adopt *AT&T*-like arbitration provisions in consumer, employment, and other contracts.

In the meantime, just how far the *AT&T* decision reaches remains in question. Various commentators have declared the end of consumer class-action rights (or, precisely, class-action rights in consumer contract situations), and beyond. Other advocates have begun looking to other grounds (whether substantive federal laws, or other) for invalidating *AT&T*-esque class action waivers.

The *AT&T* decision in fact prompted immediate action by some members of Congress, who introduced The Arbitration

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## The Court's Civil Rights and Criminal Cases

by Noah Rosmarin

The Court again this term vindicated criminal defendants' rights under the Confrontation Clause, while also (again) creating significant obstacles to civil rights suits by those accused of crimes. Somewhat surprising was the Court's decision affirming a lower court Eighth Amendment decision requiring California significantly to reduce its prison population.

### The Confrontation Clause Case

The old adage that politics makes for strange bedfellows applies equally to constitutional law, as Justices Ginsburg, Sotomayor and Kagan teamed up with Justices Scalia and Thomas to extend Constitutional protections for criminal defendants. In its recent decision in *Bullcoming v. New Mexico*, 131 S.Ct. 2705 (2011), the United States Supreme Court applied its earlier holding in *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009) to reverse a DUI conviction from the State of New Mexico. In so doing, the Court rejected the prosecutor's attempt to admit a blood-alcohol concentration ("BAC") test result through a surrogate witness in lieu of testimony from the lab technician who performed the test and certified the lab report. The *Bullcoming* case involved a drunk-driving prosecution in which the prosecutor – at the eleventh hour – decided not to call the lab technician who performed the forensic blood alcohol test and certified the BAC report (the lab technician was put on unpaid leave shortly before trial).

The prosecution attempted to admit the lab report through a surrogate witness who purportedly was familiar with the testing process and lab procedures.

The US Supreme Court rejected the prosecutor's use of a surrogate witness and ruled that the admission of the lab report without testimony from the lab technician who performed the test and drafted/certified the BAC report violated the Confrontation Clause. In light of the *Melendez-Diaz* decision, which was decided while the *Bullcoming* case was pending before the New Mexico Supreme Court, the lab report was clearly testimonial in nature, "rendering the affiants 'witnesses' subject to the defendant's right of confrontation under the Sixth Amendment." *Bullcoming v. New Mexico*, 131 S.Ct. at 2712. In affirming the admission of the BAC report at trial, the New Mexico Supreme Court sought to distinguish this case from *Melendez-Diaz* by down playing the role of the lab analyst, essentially comparing his role to that of a scrivener. *Id.* at 2713. The New Mexico Supreme Court reasoned that the BAC report could be admitted through testimony from a surrogate witness from the lab who could provide "expert testimony" concerning lab procedures, the testing process, the machine used to test the blood-alcohol levels, and who would be subject to cross-examination. *Id.* This argument failed to pass constitutional scrutiny, according to the Supreme Court, for several reasons. First, the Court emphasized the important need for the lab analyst to testify about how the BAC test was performed, citing the legitimate concern for human error in performing the

tests and certifying the results. *Id.* at 2711, Fn. 1 (citing reports that 93% of errors in laboratory tests for BAC levels are human errors that occur either before or after machines analyze samples, with *Amici* citing that in Colorado alone there have been at least 206 flawed blood-alcohol readings over a three year span). In addition, the surrogate witness could not convey what the lab analyst who performed the test at issue "knew or observed about the events his certification concerned, *i.e.*, the particular test and testing process he employed", *id.* at 2715, nor did the State claim that the lab analyst was unavailable. *Id.* at 2716.

Finally, the Supreme Court ruled unequivocally that the BAC reports, like the lab reports in *Melendez-Diaz*, were testimonial and subject to the Confrontation Clause's protections. *Id.* 2716-17 (in "all material respects, the laboratory report in this case resembles those in *Melendez-Diaz*").

### A "Single" *Brady* Violation Will Not Support A Civil Rights Remedy

In *Connick v. Thompson*, 131 S.Ct. 1350 (2011), Justice Kennedy joined the reliable conservative bloc (the Chief Justice and Justices Scalia, Thomas and Alito) to hold that a "single" *Brady* violation, *see Brady v. Maryland*, 373 U.S. 83 (1963), apparently however egregious, is insufficient to support a civil damages remedy.

John Thompson spent 18 years in prison, 14 on death row, before his innocence - and prosecutorial misconduct - was established a month before he was to be executed. Thompson was convicted in 1987 of murder and

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## The Court's Civil Rights and Criminal Cases

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a later armed robbery. The prosecutors withheld both eyewitness description of the murderer that did not match Thompson and blood from the armed robbery assailant that was not Thompson's - in fact, the blood sample was removed from the police property room when Thompson's attorney inspected the physical evidence. Thompson, denied critical exculpatory evidence despite his *Brady* requests, was convicted of both crimes.

There were four prosecutors, working together, directly involved in Thompson's Louisiana convictions, and one actually confessed to another that he had intentionally suppressed the blood evidence. Despite the overwhelming evidence of prosecutorial misconduct, Louisiana retried Thompson for the murder. The jury, seeing the evidence withheld at Thompson's first trial, deliberated only 35 minutes before finding him not guilty. In Thompson's subsequent civil suit, the jury specifically found that the prosecutor's office withheld exculpatory evidence and that Thompson's rights were infringed by the office's deliberate indifference to establishing policies and procedures consistent with *Brady*. The jury awarded Thompson damages of \$14 million.

It is hard to imagine a case where the violation of the accused's rights was more pervasive or more was at stake - Thompson was saved from execution only by his own investigator's literal last-minute discovery of one part of the suppressed evidence. But Justice Thomas, writing for the five-member majority

(the Chief Justice and Justices Scalia, Kennedy and Alito), held that the prosecutor's office could not be liable without proof, in effect, of a pattern of similar constitutional violations by untrained employees. Moreover, the majority held, four reversals of convictions by the Louisiana courts for *Brady* violations in the ten years before Thompson's trials was insufficient to put the prosecutor's office on notice of the need for proper training. And *see Kyles v. Whitley*, 514 U.S. 419 (1995) (this same prosecutor's office failed to disclose various exculpatory evidence in another capital case).

The fact is that the *Brady* violations in Thompson's cases "were not singular and they were not aberrational," as Justice Ginsburg wrote, 131 S.Ct. at 1384, and this case would seem to demonstrate that this Court - unless Justice Kennedy changes his mind - is unwilling in the extreme to deter *Brady* violations, all too common as they are, by imposing real civil remedies.

### Prison Overcrowding

And in a refreshing development, Justice Kennedy, writing for himself and the more liberal bloc (Justices Ginsburg, Breyer, Sotomayor and Kagan), affirmed the judgment of the three-judge district court ordering a substantial reduction in the California prison population within two years. *Brown v. Plata*, 131 S.Ct. 1910 (2011). California, the majority found, had tolerated serious constitutional violations in its prison system for years, caused by substantial overcrowding, and the only feasible remedy left to remedy these Eighth Amendment violations was a court-ordered reduction of the prison population.

California's prisons were designed to house about 80,000 inmates, but the population was twice that size at the time of two class action lawsuits, one representing prisoners with serious mental illness not receiving minimal adequate care, and the other representing inmates with other serious medical problems. The three-judge district court found, and the majority affirmed, by clear and convincing evidence, *see* 18 U.S.C. sec. 3626(a)(3)(E) (the Prison Litigation Reform Act of 1995), that prison overcrowding was the primary cause of the deprivations of the prisoners' basic Eighth Amendment rights, and that the long-standing deprivations could only be redressed by a reduction of the prison population. Additionally, the Court found, California's prison population could be reduced by about 50,000 inmates without adversely affecting public safety by, for instance, diverting low-risk offenders to community programs.

Underlying the Court's affirmation of the three-judge district court was its clear recognition that, in light of California's massive fiscal problems, and the extraordinary time that had passed since the constitutional violations were first acknowledged (16 years in the case of the prisoners denied minimally adequate mental health services), there was no practical possibility that California could address the violations short of significantly reducing the prisoner population. Nor, the Court made clear, was there any reason to believe that California would or even could honor past promises, including, for instance, to build additional prison facilities.

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# The Court's First Amendment Cases

by David Kelston

The Court handed down three First Amendment decisions, each with a different majority, each appearing to vindicate First Amendment rights, and only one clearly unfortunate (the Arizona election case). But a consistent theme in the cases appears to be a mistrust of government that could augur poorly for preservation of the health care bill intact.

First, the unfortunate result - and one consistent with *Citizens United v. Federal Election Commission*, 130 S.Ct. 876 (2010), and the Court's clear unwillingness to tolerate attempts to control money in electoral politics. In *Arizona Free Enterprise Club's Freedom Club v. Bennett*, 131 S.Ct. 2806 (2011), the Court struck down Arizona's public financing law. Chief Justice Roberts wrote for the five-member majority, including Justices Scalia, Kennedy, Thomas and Alito.

Then-Senator Obama privately raised three-quarters of a billion dollars for his 2008 presidential race. Had he opted to stay within public financing guidelines, he would have received just over \$100 million in public funds. Clearly, optional public financing of elections, at least at current levels, will never replace private money in the most important elections. But public financing, which is aimed at limiting the corrosive effect of private campaign contributions, may still have a chance in local elections. (Currently, about one-third of the states have public financing election laws.) But this became an even slimmer possibility with this case.

*Buckley v. Valeo*, 424 U.S. 1 (1976), held that large political contributions may result in "politi-

cal quid pro quos" that undermine democracy, and it declared the presidential public financing system constitutional. Arizona's modest law gave public funds to candidates who opted into the system, and addressed public financing's main problem - how to set the subsidy at a realistic level - by augmenting the initial payment with additional payments based on the spending of the publicly financed candidate's opposition. Thus, a candidate for the Arizona senate who opted for public financing (and its limits), got an initial subsidy of \$21,479, and twice that amount more based on his/her opponent's spending, to a total subsidy of \$64,437. Yet, in reasoning that turns common sense on its head, the majority found that this subsidy impermissibly burdens the free speech of the privately funded opponent, in violation of the First Amendment. Thus, a subsidy that was intended to, and apparently did, create more speech and more debate, was struck down as supposedly doing the opposite.

Underlying *Free Enterprise Club*, like *Citizens*, is a single and disturbing fact: this Court has decided that attempts to "level the election playing field" are impermissible under the First Amendment and, even when the states provide other rationales - like fighting corruption in politics - their laws will nevertheless be subject to intrusive scrutiny that is highly suspicious of anything that attempts to limit private money in politics.

In *Brown v. Entertainment Merchants Association*, 131 S.Ct. 2729 (2011), Justice Scalia, writing for justices who often find themselves in disagreement (Kennedy, Ginsburg, Sotomayor and Kagan, Alito concurring),

engaged in what seemed to be a routine First Amendment analysis to strike down a California statute that prohibited sale of violent videos to minors without parental consent. Justice Scalia reasoned: 1) video games qualify for First Amendment protection; 2) government has no power to restrict expression because of its content, except in a few well-recognized areas, primarily obscenity; 3) new categories of speech may not be classified as "unprotected" by government; 4) because California's law imposes a restriction on the content of protected speech, it is invalid unless it passes strict scrutiny, that is, it is justified by a compelling government interest and is narrowly drawn to serve that interest; 5) the California statute does not meet that standard, and California cannot show even a "direct causal link between violent video games and harm to minors." *Id.* at 2738.

While the majority's analyses seems uncontroversial (and certainly more convincing than the Alito, Roberts concurrence on vagueness grounds), one cannot help but think that, at least in part, its outcome is motivated by a kind of anti-government animus, *see id.* at 2735 (rejecting "expansive view of government power") and that the Court, had it wanted to, could easily have found a way to justify California's modest controls on video games graphically depicting, for instance, decapitations and making players into "virtual"rapists, mass murderers, and the like. Justice Breyer's dissent found a compelling interest in California's need to protect parents' "authority in their own household to direct the rearing of their children," *id.* at 2767, and his opin-

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## Wal-Mart Stores, Inc. v. Dukes

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monality. Additionally, the ruling may affect class action suits involving other areas of law: any case where a pattern of a corporate culture is at issue will require more individualized allegations of unlawful practices.

And if plaintiffs are forced to bring individual suits, they will not bring the social change that is still greatly needed. The goal of class action litigation under Rule 23(2)(b) is often to obtain injunctive and declaratory relief to end a discriminatory or otherwise harmful practice—money damages may not be the primary goal. In individual

suits, plaintiffs will likely focus more on money damages rather than injunctive relief; and in fact, most aggrieved employees are unlikely to have the resources, financial or emotional, to bring individual suits. The Wal-Mart decision does not just affect the livelihood of class action attorneys, as some would have us believe; it also removes a crucial tool for remedying societal infirmities.

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## AT&T v. Concepcion

*Continued from page 6*

Fairness Act of 2011, broadly banning mandatory pre-dispute arbitration agreements in consumer, employment and civil rights matters, and specifically eliminating class action waivers. Finally, others have noted the Consumer Financial Protection Bureau, newly operating as of July 21, 2011, has also been empowered to take action against anti-consumer provisions, though Congress may, in turn, upend any such decisions.

At present though, there's just a tad less justice for the little guy.

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## Criminal Cases

*Continued from page 8*

*Brown v. Plata* is an important case, though perhaps the underlying situation there, and California's fiscal crisis, are extreme. But the fact is that many states are in fiscal extremis, this is unlikely to change soon, and fiscal considerations can motivate good criminal justice policy (consider the defeat of death penalty efforts in Massachusetts). This case, again showing the importance of one man - Justice Kennedy - is a weight on the right side of the scale.

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## First Amendment Cases

*Continued from page 9*

ion seems perfectly reasonable.

Like much this last term, this case may be a part of a preview to a showdown on the health care act.

Finally, there is *Snyder v. Phelps*, 131 S.Ct. 1207 (2011), likely not an opinion that breaks any new ground, but nevertheless interesting - and appreciated - as showing again how vigorous the First Amendment can be in serving its purpose of protecting unpopular speech. In *Snyder*, where only Justice Alito dissented, the "Westboro Baptist Church" - apparently little more than the Phelps family - had been held liable (to the tune of almost \$12 million) for intentional infliction of emotional distress upon the Snyder father by virtue of the church's picketing the funeral of Marine Lance Corporal Matthew Snyder, killed in Iraq. While the church's picketing did not directly disrupt the funeral, their activities -

including signs reflecting their belief that God hates the United States because of its tolerance of homosexuals and kills American soldiers as punishment - caused the Snyder father great distress.

But the Court rightfully found the church's activities protected, if unpopular speech that could not be abridged by civil tort remedies: "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable," *id.* at 1219, quoting *Texas v. Johnson*, 491 U.S. 397 (1989). It is good to be reminded that the core purpose of the First Amendment is other than promoting business interests and thwarting government attempts to, say, make elections more democratic.

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