RECENT DEVELOPMENTS IN APPELLATE LAW

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I. INTRODUCTION

Change in the area of appellate law tends to be glacial, and generally appellate practitioners are not inundated with new legal concepts to absorb. But this past year, appellate courts have issued a number of significant decisions announcing, refining, reiterating, or modifying key concepts re-

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lated to appellate jurisdictional statutes, court rules, and key common law principles.

In addition to these glacial changes, more dramatic change occurs from time to time, often due to changes in the makeup of a particular appellate court. This was certainly true during President Franklin Roosevelt's first term of office, when changes in the justices sitting on the U.S. Supreme Court altered its decisional framework dramatically. Such changes may mean changes to the substantive law. But appellate lawyers are equally focused on the less obvious changes that may take place as a court replaces one set of decisional tools with another.[1] An appellate court that has traditionally embraced a broad purposive approach to statutory interpretation may switch to become a textualist court. Or a court that has often looked to custom or history to limit key constitutional concepts may begin to focus on evolving standards and needs. These changes, although subtle, are of critical importance to the appellate advocate.

This year, appellate courts issued significant decisions involving jurisdiction, procedure, standards of review, judicial independence, class action appeals, and costs and sanctions. Of equal import, juridical changes in the U.S. Supreme Court will prompt appellate advocates to study the Court's decisions with renewed attention to its tools of decision and approach to substantive law.

II. OBSERVATIONS ON THE CHANGING LANDSCAPE OF THE U.S. SUPREME COURT

Until late 2005, the U.S. Supreme Court's membership had not changed for over a decade.[2] One scholar, writing for the American Judicature Society, characterized the Court as "a group consisting almost entirely of senior citizens, several of whom have battled serious health problems."[3] Critics of the Court have suggested imposing term limits or mandatory retirement at a specified age to ensure that its members do not remain on the Court when health issues impede their full participation.[4] Change to the Court is coming now despite the fact that none of these proposals has been adopted.

First, Justice O'Connor offered her resignation contingent on Senate approval of a replacement. Then, during the summer of 2005, Chief Justice Rehnquist died after a long battle with cancer and was replaced by a new

1. Mary Massaron Ross, *Reflections on the Craft of Judging and the Art of Advocacy*, 40 For the Def. 8 (1998).

2. Kevin T. McGuire, *An Assessment of Tenure on the U.S. Supreme Court*, Judicature, July-Aug. 2005, at 8.

3. *Id.*

4. *Id.* (citing articles that offer proposals to address the age and length of service of members of the U.S. Supreme Court).

chief justice, John Roberts. Given the stability of the Court's membership for the last decade, these two events are momentous. It has been said that with any replacement the Court as a whole changes. The absence of these two justices is likely to be a harbinger of dramatic change because of the critical position that each played on the Court.

A. *Chief Justice Rehnquist's Legacy*

Chief Justice Rehnquist was appointed to the Court in 1972 by President Nixon. He was appointed based on his conservative credentials, a recommendation from Barry Goldwater, and his legal knowledge and experience, which included graduating first in his class from Stanford Law School and serving as a law clerk for Justice Robert H. Jackson.[5] Rehnquist was confirmed as chief in 1986 when Warren Burger retired.[6] With his elevation to the position and the confirmation of Justice Scalia, some thought that a conservative revolution was in the making.[7] But in the 1990s, many scholars concluded that the conservative revolution had failed.[8] The revolution may not have ensued, but since 1972 when Rehnquist took office, four of the eight justices appointed, O'Connor, Kennedy, Scalia, and Thomas, "have provided him with a working majority on many issues."[9] An examination of the issues on which Rehnquist's majority held, and those on which he lost sway, may shed light on the kind of changes that we might anticipate from a new Court.

Chief Justice Rehnquist's focus on the structural boundaries of federal and state power and on the state's right to be free from federal legislation that impinges on state sovereignty were consistent themes throughout his tenure on the Court. In *National League of Cities v. Usery*,[10] the Court embraced a strong federalist approach.[11] *Garcia v. San Antonio Metropolitan Transit Authority*[12] overturned *National League of Cities*, prompting a strong dissent from Justice Rehnquist.[13] The tides turned again in *United States v. Morrison*[14]and *United States v. Lopez*.[15] The Rehnquist Court also embraced

5. *Id.* at 14.
6. *Id.* at 32.
7. Mark Tushnet, A Court Divided: The Rehnquist Court and the Future of Constitutional Law 36–37 (2005).
8. *See, e.g.*, James Simon, The Center Holds: The Power Struggle Inside the Rehnquist Court 11 (1995) (characterizing the late 1980s and early 1990s as the "story of a conservative judicial revolution that failed").
9. Linda Greenhouse, *The Last Days of the Rehnquist Court: The Rewards of Patience and Power*, 45 Ariz. L. Rev. 251, 267 (2003).
10. 426 U.S. 833 (1976).
11. *Id.*
12. 469 U.S. 528 (1985).
13. *Id.* at 580 (Rehnquist, J., dissenting).
14. 529 U.S. 598 (2000).
15. 514 U.S. 549 (1995).

strict limits on federal efforts to commandeer state officials. In *New York v. United States*,[16] the Court invalidated a federal law that required states to dispose of radioactive waste as dictated by Congress or to take title of and assume liability for the waste.[17] Even bolder, in *Printz v. United States*,[18] the Court struck down a congressional effort to require state and local law enforcement agencies to conduct background checks before gun purchases.

There is no doubt that by the end of his tenure on the Court, Chief Justice Rehnquist succeeded in altering the boundaries between state and federal authority in favor of the states.[19] He was able to do so with a working majority on most federalism issues that included Justices Scalia, Thomas, Kennedy, and O'Connor.[20] Because Rehnquist was among the strongest and most consistent voices in support of federalism, this will be an issue to watch on the new Court.

In addition, with Chief Justice Rehnquist's departure, the Court has lost a student of legal history. The historical method of legal reasoning looks to history as a guide for making present decisions.[21] Justices who employ this method "take precedent seriously, but look to external sources such as political, literary, or philosophical figures and arguments of yesterday for guidance in evaluating" issues presented for decision today. Justices adhering to this approach are "inclined to seek guidance in the actual practices of American communities."[22]

As author of several books of legal history, Chief Justice Rehnquist often turned to history to explain the Court's role in American life.[23] Although

16. 505 U.S. 144 (1992).

17. *Id.* at 174–75.

18. 521 U.S. 898 (1997).

19. *Compare* Martin Garbus, Courting Disaster: The Supreme Court and the Unmaking of American Law 121 (2002) (the result of the Court's use of federalism is to deprive people of rights); William P. Marshall, *Conservatives and the Seven Sins of Judicial Activism*, 73 U. Colo. L. Rev. 1217, 1244 (2002) (Rehnquist Court federalism amounts to "unbridled hypocrisy"); Ramesh Ponnuru, *The Court's Faux Federalism*, *in* A Year at the Supreme Court 131 (Neal Devins and Davison M. Douglas ed., Duke 2004) *with* Michael Keenan, *Is United States v. Morrison AntiDemocratic?: Political Safeguards, Deference, and the Countermajoritarian Difficulty*, 48 How. L.J. 267, 305–07 (2004); John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 Cal. L. Rev. 485, 487–99 (2002); John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. Cal. L. Rev. 1311, 1312–15 (1997).

20. Simon Lazarus, *Strategic Realignment on Sovereign Immunity and the Fourteenth Amendment?*, American Constitution Society for Law & Policy, *at* http://acslaw.org/views/lazarus.htm (last visited Nov. 19, 2005) (discussing "Federalism Five" giving Chief Justice Rehnquist a "bare majority" on these issues); *see also* Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. Chi. L. Rev. 429 (2002); Larry D. Kramer, *The Supreme Court 2000 Term: Forward: We the Court*, 115 Harv. L. Rev. 4 (2001).

21. Brian K. Pinaire, *Strange Brew: Method and Form in Electoral Speech Jurisprudence*, 14 S. Cal. Interdisc. L.J. 271, 274 (2005).

22. *Id.* at 276.

23. *See*, *e.g.*, William H. Rehnquist, All the Laws But One: Civil Liberties in Wartime (2000); William H. Rehnquist, Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Jackson (1992); *Remarks of the Chief Justice*

it is difficult to discern the extent to which this interest impacted the Court's decisions, Chief Justice Rehnquist regularly explored the historical origins and past treatment of legal concepts as part of his analysis. In *Dickerson v. United States*,[24] for example, Chief Justice Rehnquist authored a majority opinion upholding *Miranda*'s warning-based approach to determining the admissibility of a statement made by the accused during a custodial interrogation as constitutionally based by examining a "historical account of the law governing the admission of confessions" that extended back to Lord Mansfield's decision, a King's Bench decision from 1783.[25] Tracing the law in this manner, Chief Justice Rehnquist concluded that Congress could not legislatively overrule *Miranda* because it was constitutionally based.[26] In part, this conclusion was predicated on the observation that early precedent deemed the voluntariness of confessions to be constitutionally required. *Miranda* stemmed from the advent of "modern custodial police interrogation," which "brought with it an increased concern about confessions obtained by coercion."[27]

In *Lynch v. Donnelly*,[28] another opinion authored by Chief Justice Rehnquist, the Court traced the country's history of "official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders."[29] After looking at these proclamations and executive statements from the early colonial period through the time of President Reagan, the exhibits in art galleries supported by public revenues including the National Gallery, and other illustrations of past treatment, Chief Justice Rehnquist said, "This history may help explain why the Court consistently has declined to take a rigid, absolutist view of the Establishment Clause."[30] Based on history, Rehnquist was willing to reject an absolutist approach to the constitutional text.

Another aspect of Chief Justice Rehnquist's legacy on the Court was his skillful use of the limited powers of a chief justice. Chief Justice Rehnquist explained that a chief justice "takes his seat with eight Associate Justices who are there already, and who are in no way indebted to him."[31] Chief

of the United States, 47 Drake L. Rev. 201 (1999) (discussing civil liberty during the Civil War and World War II); *Remarks of Chief Justice William H. Rehnquist Notre Dame Law School September 13, 2002*, 78 Notre Dame L. Rev. 1 (2002) (discussing military tribunals in the United States during time of war).

24. 530 U.S. 428 (2000).
25. *Id.* at 432–33.
26. *Id.* at 436–44.
27. *Id.* at 434–35.
28. 465 U.S. 668 (1984).
29. *Id.* at 674.
30. *Id.* at 678.
31. *Id.* at 805.

Justice Rehnquist elaborated on this by explaining the structure of the Court and the chief's powers:

> By historic usage, he presides over the Court in open session, presides over the Court's conferences, and assigns the preparation of opinions in cases pending before the Court if he has voted in the majority. He also speaks on behalf of the federal judiciary in matters which pertain to it. . . . Perhaps the best description of the office is to say that the Chief Justice has placed in his hands some of the tools which will enable him to be primus among the pares but his stature will depend on how he uses them.[32]

Chief Justice Rehnquist's skillful use of the tools of office can be seen in the altered landscape of federalism, among other changes. One scholar characterized the federalism revival as an "incremental expansion, across a variety of fronts, of judicially enforced limitations on national authority."[33] Rehnquist garnered praise for keeping conferences short and maintaining peace on the Court.[34]

A full evaluation of Chief Justice Rehnquist's legacy must await the verdict of history. In the short run, it is safe to predict that his departure fundamentally altered the landscape of the Court. During his last month, when illness prevented him from being physically present at the Court, the outcome of several close cases may have differed due to his reduced participation.

David G. Savage observed that, during last term, the Court's "liberal faction, led by Justice John Paul Stevens, prevailed in nearly all major cases."[35] Savage pointed out that lawyers watching the Court saw "an unmistakable shift from prior years."[36] According to Pepperdine University law professor Douglas Kmiec, "Rehnquist's absence from the Court likely had an impact."[37] Kmiec explained, "When he is in the center chair asking questions, or when he is leading off the discussion at the conference, it has a way of shaping the dynamic. In a close case, it could make a difference."[38] Kmiec attributed the Court's retreat from positions that Rehnquist had advocated in the area of property rights in *Kelo v. City of New London* and federalism in *Gonzales v. Reich* in part to his lesser involvement when he was working from home.

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32. *Id.*
33. Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 Tex. L. Rev. 1, 2 (2004).
34. D. Wes Sullenger, *Burning the Flag: A Conservative Defense of Radical Speech and Why It Matters Now*, 43 Brandeis L.J. 597, 627 (2005).
35. David G. Savage, *Ascendant Stevens*, ABA J., Aug. 2005, at 52.
36. *Id.*
37. *Id.*
38. *Id.*

B. *Justice O'Connor's Voice*

Justice Sandra Day O'Connor has been called a centrist on the Court, a swing-voter, a strategist, and a pragmatist.[39] As the Court's first woman, and as the person whose vote most often tipped the balance in close cases, she has been called the most powerful member of the Court.[40] During this past year, Justice O'Connor was in the majority of a smaller percentage of the 5–4 cases.[41] Despite the apparent weakening of her position as the most critical justice to persuade in close cases, her absence is nevertheless likely to make a significant difference to advocacy before the Court.

Justice O'Connor has also been a voice for state and local governments largely because of her perspective as a former state legislator. In speaking to the Committee on the Judiciary prior to her confirmation, she explained her approach:

> My experience as a state court judge and as a state legislator has given me a greater appreciation of the important role the States play in our federal system, and also a greater appreciation of the separate and distinct roles of the three branches of government at the state and federal levels. Those experiences have strengthened my view that the proper role of the judiciary is one of interpreting and applying the law, not making it.[42]

Justice O'Connor also emphasized during her confirmation hearings that she believed in "the doctrine of judicial restraint" and "in the institutional restraints on the judiciary in particular."[43] Finally, she told the committee that "we have to approach each case on the basis of the facts of the case and the law applicable to it; and we consider the cases as judges in the context of the case which has come before us—the factual record—the briefs that have been filed, and the arguments of counsel."[44] The signals that O'Connor offered during her confirmation hearings proved to be strong

39. *See*, *e.g.*, Jeff Bleich, Anne Voigts, Michelle Friedland, *A Practical Era*, 65 Sep. Or. St. B. Bulletin 19 (2005) (questioning whether the Court's recent pragmatism would be short-lived because of O'Connor's impending departure); Neal Devins & Davison M. Douglas, A Year at the Supreme Court 7 (2004) (noting that the Rehnquist Court divided 5–4 more than any other U.S. Supreme Court in history and that O'Connor voted with the majority in twelve of fourteen cases decided by 5–4 votes, which was more than any other justice); *see also* Molly McDonough, *O'Connor: A Trailblazer Who Defies Labels*, ABA J. E-Report, July 8, 2005.

40. Devins & Douglas, *supra* note 39, at 7; *see also* Erwin Chimerinsky, *The O'Connor Legacy*, 41 Sep. Trial 68 (2005). For O'Connor's own views on women's rights and the evolution of the legal system's treatment of women, as litigants and as lawyers and judges, see Sandra Day O'Connor, *Portia's Progress*, 66 N.Y.U. L. Rev. 1546 (1991).

41. Bleich et al., *supra* note 39, at 20.

42. *The Nomination of Judge Sandra Day O'Connor of Arizona to Serve as an Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 97th Cong. 57 (1981).

43. *Id.* at 60, 65, 68.

44. *Id.* at 103.

markers for the parameters and approach of her jurisprudence throughout her career.

Justice O'Connor's judicial philosophy has been compared to that of her predecessor, Justice Lewis Powell, in that both "put a premium on staking out a middle-of-the-road position, both politically and on the Court."[45] Justice O'Connor applauded Justice Powell's focus on "the real people whose hardships or injuries sometimes recede from view in appellate litigation."[46] Justice O'Connor's recent book, *The Majesty of the Law*,[47] is as good as any place to study her values and her approach to the job of deciding cases. In it, she praised Justice Powell for doing "equity at the bottom line."[48] This attention to providing a just result to the litigants under the precise facts of the case distinguished O'Connor's jurisprudence from that of other conservatives on the Court.

Because she has been difficult to predict, and often the deciding vote in close cases, U.S. Supreme Court briefs were often written to appeal to her. She "decides cases as narrowly as possible, always leaving ample space in which to change her mind in the future."[49] Consistent with her desire to avoid broad sweeping rules and her sense that the judiciary should accommodate divergent interests, Justice O'Connor's decisions "frequently justify exceptions within rules, arrive at context-specific solutions, or articulate balancing tests for certain fact situations—all anti-bright-line analytic methods."[50] Her position as a swing-voter who advocated balancing or narrow tests often affected the outcome of close cases, narrowing or modifying the majority opinion. Thus, Justice O'Connor's absence may alter the analytic approach even in cases that reach the same outcome.

Her penchant for balancing tests has repeatedly drawn the ire of conservatives, both on and off the Court. Despite this criticism, the balancing tests proposed by O'Connor have regularly been adopted by the Court. In the area of affirmative action, O'Connor wrote several key decisions imposing strict scrutiny on affirmative action programs.[51] But she did not go beyond the facts of the cases to bar all use of affirmative action. Having left herself this opening, she later confounded conservatives by writing the

45. Dahlia Lithwick, *A High Court of One: The Role of the "Swing Voter" in the 2002 Term*, *in* A Year at the Supreme Court 12, 17 (Duke Univ. Press 2004).

46. Sandra Day O'Connor, *A Tribute to Justice Lewis F. Powell, Jr.*, 101 Harv. L. Rev. 395, 396 (1987).

47. Sandra Day O'Connor, The Majesty of the Law: Reflections of a Supreme Court Justice (2003).

48. *Id.* at 150.

49. Lithwick, *supra* note 45, at 30.

50. Nancy Maveety, Justice Sandra Day O'Connor: Strategist on the Supreme Court 31 (1996).

51. Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); City of Richmond v. J. A. Croson, Inc., 488 U.S. 469 (1989).

5–4 majority opinion in *Grutter v. Bollinger*.[52] *Grutter* upheld the use of race in university law school admissions to achieve the benefits of a diverse campus.[53] Justice O'Connor's approval of the plan at issue was based on the fact that "the law school's program promised individualized consideration to every applicant, while the undergraduate process was too rigid, giving too much obvious weight to an applicant's race."[54]

Likewise, she altered the law governing the abortion controversy by embracing a new test for government conduct. Justice O'Connor advocated analyzing whether the government action placed an undue burden on a woman's "right to choose abortion before heightened scrutiny would be employed by the reviewing court."[55] O'Connor's undue burden analysis was "clearly an effort to replace a bright-line, rule-driven approach with an anti-bright line, contextual standard."[56]

Justice O'Connor's balancing also found a place in the Court's decisions on church-state relations. The Court has increasingly given weight to a test that had its origins in her concurrence in *Lynch v. Donnelly*.[57] There, she sided with the majority to hold that a crèche could be displayed because its religious message was "effectively neutralized" by a display accompanied by secular holiday symbols.[58] Whether the display was permissible, in O'Connor's view, turned on whether it amounted to "government endorsement or disapproval of religion."[59] According to O'Connor, conduct amounts to endorsement when it "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[60] In her view, the meaning of a statement and whether it amounted to endorsement of religion "depends both on the intention of the speaker and on the 'objective' meaning of the statement in the community."[61] Thus, determining whether a display of a crèche is permissible under this approach requires a sensitive and highly fact-based inquiry.[62]

52. 39 U.S. 306 (2003).
53. *Id.*
54. Tushnet, *supra* note 7, at 235.
55. Maveety, *supra* note 50, at 32 (discussing *Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 461 (1983)).
56. *Id.*
57. 465 U.S. 668 (1984).
58. Maveety, *supra* note 50, at 34.
59. *Lynch*, 465 U.S. at 688.
60. *Id.*
61. *Id.* at 690.
62. *See also* Wallace v. Jaffree, 472 U.S. 38, 67 (1985) (O'Connor, J., concurring) (urging the Court not to abandon the *Lemon* test, but to refine its standards to include the endorsement test as part of the "*Lemon*-mandated inquiry into legislative purpose and effect").

Just this past term, she voted to strike down the posting of the Ten Commandments inside the Kentucky courthouses because by "enforcing the Clauses, we have kept religion a matter for the individual conscience, not for the prosecutor or bureaucrat."[63] Noting the "violent consequences of the assumption of religious authority by government" around the world, Justice O'Connor joined the majority opinion to strike down the posting of the Ten Commandments because the "history of this display" demonstrated that it conveyed "an unmistakable message of endorsement to the reasonable observer."[64]

Justice O'Connor's state legislative background and her commitment to the role that the states play in our federal system made her a strong proponent of federalism. When lecturing, she said that "the balancing inherent in a federal system is never a static one."[65] She emphasized the abstention doctrine's origins in "[r]espect for the integrity of state court proceedings."[66] She found the "same theme" in the "law of federal habeas corpus review of state criminal convictions."[67] She expressed concern about the "breathtaking expansion of the powers of Congress" in her dissenting opinion in *Garcia v. San Antonio Metropolitan Transit Authority*.[68] She said in one decision:

> State legislative and administrative bodies are not field offices of the national bureaucracy. Nor are they think tanks to which Congress may assign problems for extended study. Instead, each State is sovereign within its own domain, governing its citizens and providing for the general welfare. While the Constitution and federal statutes define the boundaries of that domain, they do not harness state power for national purposes.[69]

This sensitivity to the sphere of state autonomy was reflected in Justice O'Connor's approach to issues involving both legislative and judicial conduct.

Justice O'Connor's position as a swing-voter was of critical importance in numerous decisions. Her skill at garnering a majority by articulating a nuanced test, which balanced competing constitutional or legal principles, was at the root of her influence on the Court. Court watchers will certainly study the new Court's decisions to determine whether the Court shifts to

63. McCreary County, Kentucky v. Am. Civil Liberties Union of Kentucky, 125 S. Ct. 2722, 2746 (2005).

64. *Id.* at 2727.

65. Sandra Day O'Connor, *Our Judicial Federalism*, 35 Case Western Reserve L. Rev. 1, 2 (1984–85); s*ee also* Sandra Day O'Connor, *Keynote Address—Conference on Compelling Government Interests*, 55 Albany L. Rev. 535, 538 (1992).

66. Sandra Day O'Connor, *Our Judicial Federalism*, *supra* note 65, at 9.

67. *Id.*

68. 469 U.S. 528, 581 (1985).

69. F.E.R.C. v. Mississippi, 456 U.S. 742, 777 (1982).

more bright-line rules or embraces a less pragmatic or centrist approach as a result of the changes.

C. *Thoughts on Chief Justice Roberts*

John Roberts, a summa cum laude graduate of Harvard Law School, and by all accounts a brilliant lawyer, has been sworn in and now sits as Chief Justice of the U.S. Supreme Court. Predicting the impact of this change is fraught with uncertainty and so comments must be modest, limited to noting themes to be found in Roberts's testimony during his confirmation hearings and in his prior writings.

As chief justices go, Roberts is probably one of the best prepared to have ever been appointed to the Court. Given his clerkship for Judge Henry Friendly, and later for then-Associate Justice Rehnquist, his work in the Justice Department handling constitutional and law enforcement issues for the Attorney General, as Deputy Solicitor General of the United States, and as an appellate attorney, he is both knowledgeable and experienced in the legal issues that come before the Court. He is also familiar with the Court's traditions and mores because he clerked there and has appeared there to present oral argument in almost forty cases.

This background suggests that Chief Justice Roberts is likely to use the tools available to a chief justice with uncommon skill and impact. As he demonstrated before the U.S. Senate Committee on the Judiciary, his impressive knowledge, quick and precise thinking, humor, and affable demeanor are likely to make him highly effective on the Court. He has also suggested that he would like to reduce the number of writings per case so that, with fewer concurrences, the Court gives clearer guidance to the bench and bar. According to Roberts, "the Chief Justice has a particular obligation to try to achieve a consensus consistent with everyone's individual oath to uphold the Constitution, and that would certainly be a priority for me if I were confirmed."[70] He also observed that the Court might be able to handle more than the approximately eighty annual appeals that it has decided in recent years.[71]

In terms of his judicial approach, philosophy, and views on substantive law, some signals can readily be found. For example, when questioned about *Roe v. Wade*, Chief Justice Roberts observed that it was "settled as a precedent of the court, entitled to respect under principles of stare decisis."[72] Roberts also told the committee, when questioned about whether the president has the right to authorize or excuse the use of torture in

70. Tony Mauro, *Roberts Conveys Image of Litigator*, Nat'l L.J., Sept. 19, 2005, at 19 (quoting Roberts).
71. *Id.*
72. *Excerpts: Thrust and Parry in the Hearing Room*, Associated Press, Sept. 14, 2005, at A10 (quoting Roberts).

interrogation even though there may be domestic and international laws prohibiting the practice, "I believe that no one is above the law under our system, and that includes the president. The president is fully bound by the law, the constitution and statutes."[73]

Chief Justice Roberts's emphasis on the "law" as a guide, rather than his personal political or religious views, suggests a nuanced approach to decision making. He disagreed with a philosophy of originalism because the language of the Constitution is so often written in general terms. Roberts declined to embrace a particular label for his jurisprudential philosophy, but instead repeatedly fell back on values of the judging process.

D. *A Preview of the New Term and Cases that Will Offer Guidance Concerning the New Court*

As the new term begins, several cases set for oral argument are apt to offer insight into the approach of the new Court. One to watch is *Gonzales v. Oregon*,[74] which involves a federal effort to criminalize conduct that the state legislature permitted. The Oregon Death with Dignity Act allows doctor-assisted suicide by terminally ill patients.[75] The Ninth Circuit struck down an attorney general's directive declaring that physician-assisted suicide does not serve a "legitimate medical purpose" and thus a physician who prescribes drugs may be liable even though state law expressly allows the conduct.[76] This case raises federalism issues in the context of a hot-button social issue—assisted suicide.

Another appeal likely to offer insight into the approach of the new Court is *Ayotte v. Planned Parenthood of Northern New England*.[77] In *Ayotte*, the First Circuit held that a state abortion statute's parental notification provision lacks an explicit exception to protect a minor's health and includes a death exception that is written too narrowly.[78] The appeal raises issues involving federalism, appropriate deference to state courts, and the permissible reach of laws that attempt to restrict access to abortion.[79]

Another significant appeal pending before the Court is *Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegeta*.[80] This case presents the question of whether the federal government violated the Religious Freedom Restoration Act of 1993[81] when it seized a hallucinogenic controlled sub-

73. *Id.*
74. 125 S. Ct. 1299 (U.S. Feb. 22, 2005) (No. 04–623).
75. Oregon v. Ashcroft, 368 F.3d 1118, 1122 (9th Cir. 2004).
76. *Id.* at 1131.
77. 125 S. Ct. 2294 (U.S. May 23, 2005) (No. 04–1144).
78. Planned Parenthood of N. New England v. Heed, 390 F.3d 53 (1st Cir. 2004).
79. *Id.*
80. 125 S. Ct. 1846 (U.S. Apr. 18, 2005) (No. 04–1084).
81. 42 U.S.C. § 2000bb (2000).

stance from a group that uses it for religious tea ceremonies.[82] The Court also will decide this term whether abortion protesters can be sued under the Racketeering Influenced and Corrupt Organizations Act for a coordinated effort to close down or disrupt abortion clients with acts or threats of violence.[83]

A less emotional but important appeal has arisen in the context of arbitrations. In *Buckeye Check Cashing, Inc. v. Cardegna*,[84] the Court will decide whether the arbitration clause of a contract can be enforced when the validity of the entire contract is challenged. This appeal may offer insight into the new Court's views on the proper relationship between state and federal courts, as well as guidance on its approach to arbitration.

Other cases pending before the Court raise issues involving employment law, congressional power under Section 5 of the Fourteenth Amendment, the First Amendment, antitrust, and whether a cohabitant's permission for a search is valid when the other cohabitant is present and refuses to consent. Court watching will most certainly increase as lawyers (and the press and public) search for signals concerning what to expect from the new Court.

III. RECENT FEDERAL APPELLATE LAW

A. *Jurisdiction*

In *Exxon Mobil Corp. v. Allapattah Services*,[85] the U.S. Supreme Court held that a federal court may exercise supplemental jurisdiction over claims that do not meet jurisdictional requirements for the "amount in controversy" specified in 28 U.S.C. § 1332.[86] Even in a class action, the Court held, if at least one plaintiff meets the jurisdictional amount requirement, the court may exercise supplemental jurisdiction under 28 U.S.C. § 1367 over the claims of other plaintiffs in the same Article III controversy.[87] Supplemental jurisdiction was created in 1990, when Congress enacted the Judicial Improvements Act.[88] Section 1367 of the Act constitutes a broad grant of supplemental jurisdiction over other claims within the same case or controversy, as long as the action is one in which the district court would have original jurisdiction.[89] The last sentence of the statutory grant of authority

82. O Centro Espirita Beneficiente Uniao Do Vegeta v. Ashcroft, 389 F.3d 973 (10th Cir. 2004).
83. Scheidler v. Nat'l Org. for Women, 125 S. Ct. 2991 (U.S. June 28, 2005) (No. 04–1352).
84. 125 S. Ct. 2937 (U.S. June 20, 2005) (No. 04–1264).
85. 125 S. Ct. 2611 (2005).
86. *Id.* at 2615.
87. *Id.*
88. *Id.* at 2619.
89. *Id.* at 2620.

provides, "Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties."[90] Accordingly, the Court held, the statute unambiguously provides that if a federal court has original jurisdiction over one of the claims, it may exercise jurisdiction over any other claims within the same case or controversy, including claims of other parties.[91] The Court rejected the notion, argued by the dissent, that this interpretation was inconsistent with the exclusion in § 1367(b) of claims by "necessary" parties. Accordingly, the Court ruled that a federal court with original jurisdiction under § 1367 of one claim has supplemental jurisdiction over all remaining claims regardless of whether they meet amount-in-controversy requirements.[92]

In *DaWalt v. Purdue Pharma, LP*,[93] the Sixth Circuit held that the appellate court has no jurisdiction to review remand orders, even if the orders are based on post-removal events. In *DaWalt*, Kentucky residents brought a class action against the manufacturer of OxyContin, claiming negligence and fraud. They also asserted a claim for medical monitoring that would require defendant to notify drug users of potential harm, provide for regular medical exams, and fund studies of long-term effects of the drug.

After defendant removed the case to federal court, plaintiff moved to remand to state court because the amount claimed by each class member did not meet the $75,000 amount-in-controversy requirement for diversity jurisdiction. While the motion was pending, the Kentucky Supreme Court held in another case that the medical-monitoring statute was invalid. Based on that ruling, the federal district court dismissed plaintiff's medical-monitoring claim. The court then remanded the case, stating that it lacked subject matter jurisdiction because the claims did not meet the $75,000 jurisdictional minimum.[94] The court denied a motion to certify the order for immediate appeal based on its view that the appellate court lacked jurisdiction to review remand orders. Section 1447(4) provides that orders remanding cases to state court are not reviewable "on appeal or otherwise."[95]

Defendant appealed and argued that "post-removal events" gave the Sixth Circuit jurisdiction to review the remand order. The Sixth Circuit rejected this argument. It first noted that the ban on review had been narrowed over the years to two general categories: (i) orders "based on a substantive decision on the merits of a collateral issue as opposed to just matters of jurisdiction"; and (ii) orders in which "a district court has jurisdiction at the time of removal, but jurisdiction is subsequently destroyed

90. *Id.*
91. *Id.* at 2621.
92. *Id.* at 2615.
93. 397 F.3d 392 (6th Cir. 2005).
94. *Id.* at 396.
95. 28 U.S.C. § 1447(d) (1996).

by later events" (the "post-removal-event doctrine").[96] The court noted that the post-removal-event doctrine is implicated only when a district court makes a discretionary remand of pendent state law claims following the dismissal of a claim or a party.[97] The court went on to hold that the parties' briefing was not a "post-removal event" that allowed review of the remand order.[98] In addition, the court rejected the alternative argument that it could review the remand order because the district court had dismissed a party.[99] Ultimately, the Sixth Circuit held that it lacked subject matter jurisdiction to review the order. Ironically, the court held that it did have jurisdiction to review the trial court's order dismissing the medical-monitoring claim because it was distinct from the remand order, and it reversed and vacated the order on the grounds that the district court lacked subject matter jurisdiction to rule on the claim.[100]

In *Hart v. Sheahan*,[101] the court decided a jurisdictional question arising out of the calculation of when an appeal is due under Rule 4 of the Federal Rules of Appellate Procedure. Certain inmates of Cook County Jail had sued the jail's superintendent and the county alleging that the conditions of their confinement violated their Fourteenth Amendment rights. The court dismissed the case and entered judgment on December 19, 2003. Plaintiffs moved for reconsideration on January 7. The motion was denied, and they appealed. The Seventh Circuit was asked to decide whether the scope of its review included both denial of the motion for reconsideration and the judgment of dismissal.[102] The answer to that question depended on whether the plaintiffs had filed their motion within ten days after entry of the judgment. Rule 4(a)(4)(A)(iv) suspends the time to appeal from a judgment if a motion for reconsideration is filed within ten days of entry of the judgment.

The plaintiffs argued that they had indeed filed the motion within the required ten-day period because legal holidays and weekends are excluded from the ten-day period under Rule 6(a) of the Federal Rules of Civil Procedure. Their calculation, however, included the day after Christmas, which is not a legal holiday identified in Rule 6(a). Rule 6(a) states that the term "legal holiday" includes the enumerated holidays, plus "any other day appointed as a holiday by the President." The plaintiffs argued that that definition included December 26, 2003, because President Bush had issued an Executive Order stating, "Friday, December 26, 2003, shall be consid-

96. *DaWalt*, 397 F.3d at 399 (citations omitted).
97. *Id.* at 401.
98. *Id.* at 402.
99. *Id.* at 402–03.
100. *Id.* at 403–04.
101. 396 F.3d 887 (7th Cir. 2005).
102. *Id.* at 889.

ered as falling within the scope of Executive Order 11582 of February 11, 1971, and of U.S.C. § 5546(b)."[103] The Seventh Circuit agreed, finding that the president had declared December 26 a holiday.[104] Accordingly, the court undertook review of the dismissal of the complaint and reversed on the merits.[105]

In *Sorensen v. City of New York*,[106] the Second Circuit addressed whether a premature notice of appeal from a judgment favorable to the appellant can "serve as an appeal from a subsequent amended judgment, which vacated the prior favorable judgment on the claim, substituting an adverse judgment in its place."[107] The appellant and her husband had been arrested for recklessly endangering their child. They had left the child alone outside a restaurant while they dined, a practice they claimed was common in Denmark, where they lived.[108] After the prosecutor dropped the charges, appellant sued the City of New York and police and corrections officials pursuant to 42 U.S.C. § 1983. After a jury trial, the court entered judgment in favor of appellant on two of her claims and against her on the others. While the defendants' post-trial motion for judgment pursuant to Rule 50(b) of the Federal Rules of Civil Procedure was pending, appellant filed a notice of appeal. The district court then granted the defendant's Rule 50(b) motion on the § 1983 claims and ordered a new trial on two of her claims.[109] The defendant prevailed in the second trial and the court entered judgment. Appellant filed post-trial motions, but the district court dismissed them as untimely.[110] Appellant appealed the dismissal of her claims and sought to amend the previous notice of appeal. She also moved for reconsideration of the order dismissing her post-trial motions, which the court denied. Appellant then filed a third notice of appeal.

On appeal, the Second Circuit held that, notwithstanding her various notices of appeal, appellant's claims were not reviewable.[111] First, the court held that appellant's failure to timely file post-trial motions after the second trial made her second notice of appeal from the judgment in the second trial untimely.[112] Accordingly, the court indicated that the final two notices of appeal only preserved the denial of the post-trial motions themselves.[113]

103. *Id.* at 890.
104. *Id.* at 891.
105. *Id.* at 894.
106. 413 F.3d 292 (2d Cir. 2005).
107. *Id.* at 293.
108. *Id.* at 294.
109. *Id.*
110. *Id.* at 294–95.
111. *Id.* at 297.
112. *Id.* at 295.
113. *Id.*

Then, the court considered whether the notice of appeal filed before the court issued its order on the Rule 50 motion after the first trial preserved appellant's appeal from the court's order on that motion, which set aside the jury verdict with respect to the § 1983 claim. The court noted the ambiguity created by two provisions of Rule 4 of the Federal Rules of Appellate Procedure.[114] Rule 4(a)(4)(B)(i) states,

> If a party files a notice of appeal after the court announces or enters a judgment—but before it disposes of any motion listed in Rule 4(a)(4)(A), the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motions is entered.

Rule 4(a)(4)(B)(ii), however, provides,

> A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment altered or amended upon such a motion, must file a notice of appeal, or an amended notice of appeal . . . within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

Based on a review of the 1993 Advisory Committee Notes, the court concluded that a premature notice of appeal was sufficient to preserve issues in connection with the original judgment, as well as any orders specified in the original notice, but that a new notice of appeal must be filed "[i]f the judgment is altered upon disposition of a post-trial motion" and the party wishes to appeal the order on that motion.[115] Because appellant sought to appeal the order on the Rule 50 motion, which dramatically changed the judgment that was the subject of her premature appeal, appellant should have filed a new notice of appeal. Having failed to do so, those issues were not preserved for appeal.

In *Baker v. Kingsley*,[116] the Seventh Circuit outlined the limits of review of remand orders. In that action, the defendants removed an action where the plaintiffs had alleged a violation of Illinois law. Defendants argued that the action was preempted by the Labor Management Relations Act ("LMRA"). Eventually, the court held that the plaintiffs' state law claim was not preempted by LMRA and remanded the case to state court, declining to exercise supplemental jurisdiction under 28 U.S.C. § 1367. Defendants appealed the preemption ruling and remand. Although remand orders are not usually appealable, the court held that the bar on remands applies only to remands based on the grounds specified in 28 U.S.C. § 1447(c) that relate to defects in removal procedure and lack of subject

114. *Id.*
115. *Id.* at 296.
116. 387 F.3d 649 (7th Cir. 2004).

matter jurisdiction.[117] Where, as here, the remand is based on the exercise of discretionary power under § 1367 to decline supplemental jurisdiction, § 1447(d) does not limit the court's jurisdiction. Furthermore, the court held that its appellate jurisdiction extended not only to review of the decision to decline supplemental jurisdiction, but also to its preemption determination, because review of the supplemental jurisdiction decision necessarily entails review of the preemption decision.[118]

In *LNC Investments L.L.C. v. Republic of Nicaragua*,[119] plaintiff issued writs of attachment against Megatel and its two parent corporations seeking to garnish amounts allegedly owed by Megatel to Nicaragua. The district court quashed the writ against Megatel on the grounds that the attachment would not discharge Megatel's debt to Nicaragua under Nicaraguan law, and Megatel might be exposed to double liability. Plaintiff appealed, but the appeals court questioned whether the order quashing the writ was a final reviewable order given that attachments had also issued against the parent companies.[120] Although plaintiff dismissed those writs without prejudice to create jurisdiction for the appeal, the court concluded that the dismissals were insufficient to make the order quashing the writs a final order.[121] Relying on *Erie County Retirees Ass'n v. County of Erie, Pennsylvania*,[122] the court held that it did not have jurisdiction "when an appellant has asserted a claim in the district court which it has withdrawn or dismissed without prejudice."[123] Although there is an exception to that general rule where the dismissed claims are "effectively barred," the exception did not apply because plaintiff had not been barred from pursuing its attachments against the parent companies.[124] Consequently, the court held that it lacked jurisdiction to consider the appeal from the district court's order.[125]

In re North[126] involved the appeal of an attorney suspended from practice in Arizona. The U.S. district court in Arizona suspended him from practice before the federal court in light of his suspension from the Arizona bar. The lawyer appealed. The Ninth Circuit observed that the denial of a petition for admission to a district court bar is not appealable, either as a final order under 28 U.S.C. § 1291 or as an interlocutory order under 28 U.S.C. § 1292.[127] The district court, however, held that a different rule

117. *Id.* at 654.
118. *Id.*
119. 396 F.3d 342 (3d Cir. 2005).
120. *Id.* at 345.
121. *Id.*
122. 220 F.3d 193, 201 (3d Cir. 2000).
123. *LNC Invs. L.L.C.*, 396 F.3d at 346.
124. *Id.*
125. *Id.* at 343.
126. 383 F.3d 871 (9th Cir. 2004).
127. *Id.* at 874.

applies to an order suspending an attorney from practice because that order is a final decision that ends the matter on the merits.[128]

B. *Procedural Defects in Appellate Process*

In *ABF Capital Corp. v. Osley*,[129] the Ninth Circuit determined whether an appeal was timely when it was not filed within thirty days of a post-trial motion. In the case, the district court dismissed certain related actions on April 10 and April 11, 2003, but failed to enter the judgments in a separate document. Under Rule 58(a)(1) of the Federal Rules of Civil Procedure, a judgment not set forth in a separate document is deemed entered for purposes of appeal 150 days from its entry on the civil docket.[130] Rule 4 of the Federal Rules of Appellate Procedure requires a party to appeal within thirty days of entry of the judgment. The appellant, however, moved to amend the judgments on April 24, 2003. When such a motion is timely filed, the time to appeal from the judgment runs from entry of the order disposing of the motion.[131] The court denied appellant's motion on May 15, 2003. The appellant filed a notice of appeal on July 30, 2003, which was within 150 days of the order dismissing the actions, but more than thirty days after denial of the motion to amend. Nevertheless, the Ninth Circuit held that the appeal was timely because the motion to amend was "premature" in that it had been filed before judgment was entered on a separate document.[132] The court explained that the "purpose of the separate document requirement is that the parties will know precisely when judgment has been entered and when they must begin preparing post-verdict motions or an appeal."[133]

In *Southern Union Co. v. Irvin*,[134] the court held that the appeal was timely filed even though the applicable rule, read literally, would require the opposite result. In the case, the jury returned a verdict on December 18, 2002. The plaintiff moved for judgment notwithstanding the verdict or a new trial. The district court denied the motion on June 2, 2003, and again on July 28. On August 14, 2003, the court entered a final judgment. The notice of appeal was filed August 29, 2003, thirty-one days after the denial of the post-trial motion, but within thirty days of entry of judgment. The Ninth Circuit held that the appeal was timely, although it stated, "Read literally, [Fed. R. App. P. 4(a)(4)(A)(v)] applies."[135] The court explained that the rule was not intended to bar such an appeal: "On July 28, 2003, final judgment

128. *Id.* at 875.
129. 414 F.3d 1061 (9th Cir. 2005).
130. *See* Fed. R. Civ. P. 58(b)(2)(B); Fed. R. App. P. 4(a)(7)(A)(ii).
131. Fed. R. Civ. P. 4(a)(4)(A).
132. *ABF Capital Corp.*, 414 F.3d at 1065.
133. *Id.* at 1064.
134. 415 F.3d 1001 (9th Cir. 2005).
135. *Id.* at 1004.

including the damages had not yet been entered. What would [appellant] have appealed? In Alice in Wonderland, the rule is 'Sentence first—Verdict afterwards.' We could read our rule to mean Appeal first, Judgment afterwards. But we are not in Wonderland."[136]

In *Fogel v. Gordon & Glickson, P.C.*,[137] the Seventh Circuit decided that it lacked jurisdiction over an order issued after the appeal had been filed. In the proceedings below, the district court had dismissed a fraud claim while a motion to enjoin arbitration was pending. Appellant filed a notice of appeal from the fraud dismissal, and the Seventh Circuit stayed the appeal pending the ruling on the injunction motion. After the district court entered an order on the injunction, the Seventh Circuit set a briefing schedule for the appeal. Appellant did not, however, file a new notice of appeal from the injunction order. The Seventh Circuit held that it lacked jurisdiction to review the injunction order.[138] The court rejected appellant's argument that he had been confused by the stay, explaining that the rule requiring a new notice of appeal was unambiguous: "[W]hen a rule is unambiguous a litigant is not permitted to rely on erroneous advice, even by a court."[139] Because the court had jurisdiction over the order dismissing the fraud claim, the court addressed that claim on the merits.

In *Hilao v. Estate of Marcos*,[140] the Republic of the Philippines attempted to appeal a district court order regarding a settlement between the estate of its former president, Ferdinand Marcos, and victims of his human rights violations. The order enjoined foreign banks from transferring assets that could be used to fund the settlement. The Ninth Circuit held that the Republic lacked standing and dismissed its appeal.[141] Observing that the Republic was not a party to the action, the court applied the rule that a nonparty may appeal only in exceptional circumstances.[142] Those circumstances exist when, for example, the third party has been haled into court against his or her will.[143] The court determined that the Republic failed to meet the "exceptional circumstances" test, rejecting a series of arguments based on the facts and the court's interpretation of the order.[144] Interestingly, the court rejected one argument based on an admission in the Republic's brief and in oral argument. The court characterized such admissions as binding.[145] The court did acknowledge that the Republic had

136. *Id.*
137. 393 F.3d 727 (7th Cir. 2004).
138. *Id.* at 733.
139. *Id.* at 731.
140. 93 F.3d 987 (9th Cir. 2004).
141. *Id.* at 996.
142. *Id.* at 992.
143. *Id.*
144. *Id.* at 996.
145. *Id.* at 993.

shown that the injunction interfered with the Republic's efforts to collect $22 million from one of those banks. But the court deemed this an "inconvenience" and insufficient to confer standing on the Republic to bring the appeal.[146]

In *Dees v. Billy*,[147] the Ninth Circuit dismissed a party's appeal of an order compelling arbitration. The order stayed the action pending completion of arbitration. The trial court, however, directed that the court proceeding be "administratively closed."[148] The Ninth Circuit held that it did not have jurisdiction over the plaintiff's appeal.[149] An order compelling arbitration during a stay was not appealable because the stay prevents termination of the action, while an order compelling arbitration and dismissing the action was appealable because it ended the litigation on the merits.[150] The Ninth Circuit rejected the appellant's argument that the "administrative" closure of the case was the equivalent of a dismissal. The court held that "an order administratively closing a case is a docket management tool that has no jurisdictional effect."[151]

The Seventh Circuit came to a different conclusion in *Oblix, Inc. v. Winiecki*,[152] where it approved, based on a statute, an interlocutory appeal of an order denying a motion to compel arbitration.[153] The case also addressed a jurisdictional issue involving the appeal of an order denying a motion for reconsideration. In *Oblix*, after the district court entered its order denying the motion to compel arbitration, Oblix moved for reconsideration. The court denied the motion but reiterated its decision not to order arbitration.[154] The notice of appeal was filed more than thirty days after the entry of the court's initial order, but within thirty days of entry of an order on the motion for reconsideration.[155] The Seventh Circuit held that an appeal would properly lie from the second decision because a statute made both orders appealable on an interlocutory basis.[156] Since the appeal from the second order was timely, the court entertained the appeal on the merits.[157]

The lack of a statute authorizing an interlocutory appeal led to a different outcome in *Reid Products, Inc. v. West Insurance Corp.*[158] In *Reid*, the Ninth Circuit held that a motion for reconsideration of a decision does not extend

146. *Id.* at 994.
147. 394 F.3d 1290 (9th Cir. 2005).
148. *Id.* at 1293.
149. *Id.* at 1294.
150. *Id.* at 1292.
151. *Id.* at 1294.
152. 374 F.3d 488 (7th Cir. 2004).
153. *Id.* at 489.
154. *Id.* at 490.
155. *Id.*
156. *Id.*
157. *Id.*
158. 400 F.3d 1118 (9th Cir. 2005).

the time to appeal under Rule 4 of the Federal Rules of Appellate Procedure.[159] In *Reid*, the district court had granted summary judgment for the defendant. One month later, the plaintiff moved for reconsideration. Although the court granted the motion and considered additional evidence, it reaffirmed its original grant of summary judgment to the defendant, and thus it did not enter an amended or otherwise new judgment after reconsideration. When the plaintiff appealed, the Ninth Circuit dismissed the appeal as untimely.[160] The court noted that a reconsideration motion can toll the time for appeal under Rule. 4(a)(4)(A)(vi), but only if it is filed within ten days after entry of judgment.[161] Here, the motion for reconsideration was not filed within the required time limit.[162]

In *Ramos v. Ashcroft*,[163] the court held that an immigration proceeding is "completed" where the immigration court is located, rather than where the witnesses and attorneys appear via teleconference.[164] Under 8 U.S.C. § 1252(b), petitions for review of immigration decisions must be filed in the appeals court for the circuit "in which the immigration judge completed the proceedings."[165] In this case, the court was located in Chicago, but the Department of Justice argued that the hearing was "completed" in Iowa where the witnesses and attorneys appeared by teleconference and, therefore, the appeal had to be transferred to the Eighth Circuit.[166] The Seventh Circuit noted that this was a case of first impression and advised immigration officials to promulgate a regulation on the issue.[167] The court proceeded to hold that the appeal was properly filed in the Seventh rather than the Eighth Circuit. The court explained that the plain language of § 1252(b) focuses on the location of the immigration judge, not the lawyers, witnesses, or litigants.[168]

At the conclusion of the decision, the Seventh Circuit admonished the Department of Justice for apparently using the motion for the purpose of obtaining additional time to file its brief.[169] The Department of Justice had filed its transfer motion the day its brief was due, and asked for additional time to file its brief if the motion was denied. The Seventh Circuit explained that it disapproved of this type of "self-help extension," advising that a motion does not automatically extend the due date of a brief and

159. *Id.*
160. *Id.* at 1119.
161. *Id.*
162. *Id.*
163. 371 F.3d 948 (7th Cir. 2004).
164. *Id.* at 949.
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.* at 950.

warning that in the future it would deny such a motion on that ground alone.[170]

C. *Standards of Review*

In *United States v. Stevenson*,[171] the Fourth Circuit addressed the standard of review on appeal of a district court's factual findings involving documentary evidence. Ordinarily, the appellate court reviews a district court's factual findings under a "clearly erroneous" standard and reviews legal conclusions de novo.[172] The clearly erroneous standard permits reversal only when the court is left with the definite and firm conviction that a mistake has been made.[173] In *Stevenson*, the appellant argued that the court should apply the de novo standard to review factual findings that were based entirely upon examination of written documents because the appellate court had equal ability to read and draw inferences from the documents. The appellate court rejected the argument, observing that the rationale for the "clearly erroneous" standard reaches beyond the fact that the trial court has a better opportunity to judge the credibility of live witnesses.[174] First, the court noted, fact finding is committed to trial courts as a matter of efficient court organization.[175] The appellate courts' usurpation of that function would create disorder. Second, the court explained, trial courts are fact-finding "experts" to which appellate courts should defer. Finally, deference to the trial court represents efficient use of scarce judicial resources, avoiding duplication of effort.[176]

The Eighth Circuit's decision in *Regions Bank v. BMW North America*[177] suggests that it is risky to submit a general verdict to the jury. In that case, the appellant argued for reversal based on the improper admission of evidence. The Eighth Circuit held that reversal was not warranted because appellant failed to show that the outcome was prejudiced by the admission of the evidence.[178] The court observed that it could only speculate why the jury found against appellant because it had only a general verdict to review.[179] Because there were several theories of liability, appellant could not show that the jury based its decision on the improper evidence. Thus, it is apparent that an appellant will rarely, if ever, be able to show prejudicial

170. *Id.*
171. 396 F.3d 538 (4th Cir. 2005).
172. *Id.* at 541.
173. *Id.* at 542.
174. *Id.* at 542–43.
175. *Id.* at 543.
176. *Id.*
177. 406 F.3d 978 (8th Cir. 2005).
178. *Id.* at 980.
179. *Id.*

error in admission of evidence when evidence relates to one of several theories of recovery and the jury returns a general verdict.

In *Wiser v. Wayne Farms*,[180] the Eighth Circuit clarified an exception to the rule that an appellant may not raise an issue for the first time on appeal. In *Wiser*, the lower court held that an arbitration provision was unenforceable under Arkansas law. On appeal, appellant argued that the contract expressly called for application of Georgia law and that the provision was enforceable under that state's law. Appellant, however, had failed to argue for the application of Georgia law in the trial court. Two different standards potentially applied to the court's determination of whether an unpreserved error could be raised for the first time on appeal. In a criminal case, *United States v. Olano*,[181] the U.S. Supreme Court had held that obvious errors can only be raised for the first time on appeal if they "seriously affect the fairness, integrity, or public reputation of judicial proceedings."[182] A "plain error" standard had also been applied in the Eighth Circuit in the civil context.[183] In *Wiser*, the Eighth Circuit held that a civil litigant must meet the *Olano* standard.[184] On these facts, the appellant could not meet the *Olano* standard because the district court's reliance on Arkansas law, which both sides had cited, did not "seriously affect the fairness, integrity, or public reputation of judicial proceedings."[185] The Eighth Circuit also observed that the appellant would not have prevailed even under the other "plain error" test because it would not be a miscarriage of justice to require the parties to litigate in federal court, rather than arbitrate.[186]

D. *Judicial Independence*

In a decision of great importance for the process of selecting judges in Minnesota, with broad implications for other states, the Eighth Circuit in *Republican Party of Minnesota v. White*[187] held unconstitutional two ethics rules regulating judicial conduct in elections. The court relied on the U.S. Supreme Court's decision in an earlier appeal in the case.[188] This time, the court invalidated the ethics rules' prohibitions on a candidate identifying his or her political party affiliation, attending political gatherings, and seeking or using political endorsements.[189] The court also invalidated limits on a candidate's personal involvement in fund-raising.[190] The court's decision

180. 411 F.3d 923 (8th Cir. 2005).
181. 507 U.S. 725, 736–37 (1993).
182. *Wiser*, 411 F.3d at 927.
183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.* at 928.
187. 416 F.3d 738 (8th Cir. 2005) (en banc).
188. Republican Party of Minn. v. White, 536 U.S. 765 (2002) (invalidating the "announce" clause of the judicial canon).
189. *Republican Party of Minn.*, 416 F.3d at 755–56.
190. *Id.* at 765–66.

was based on its conclusion that the rules violated the First Amendment because they were not sufficiently tailored to the purpose of preserving impartiality.[191] Three dissenters criticized the majority's underinclusiveness analysis and argued that the case should be remanded to the district court for submission of evidence in light of the Minnesota Supreme Court's recent deliberations on the rules in question.[192]

In *Evans v. Stephens*,[193] the Eleventh Circuit held that the president had properly exercised his authority under the Recess Appointments Clause of the U.S. Constitution[194] to appoint Judge William H. Pryor to the Eleventh Circuit during a President's Day recess. The court held that recess appointments are permitted and observed that there had been more than 285 "intrasession" recess appointments to offices requiring the consent of the Senate, undermining the argument that the recess appointment power only applies to "intersession" appointments.[195] The court refused to consider the argument that the recess appointment was a tactic by the president to appoint a controversial nominee who had been blocked in the Senate. The court held that this was "a political question that moves beyond interpretation of the text of the Constitution."[196] In dissent, Judge Barkett argued that under the majority's reading of the law, if the Senate refuses to give consent to a nominee, the president can just wait until a recess before appointing the person through the recess appointment power.[197]

The U.S. Supreme Court denied certiorari to review the Eleventh Circuit's decision.[198] Justice Stevens, however, wrote an opinion regarding the denial of certiorari, indicating that the case "raises significant constitutional questions" regarding the appointment.[199] Stevens cautioned:

> [I]t would be a mistake to assume that our disposition of this petition constitutes a decision on the merits of whether the President has the constitutional authority to fill future Article III vacancies, such as vacancies on this Court, with appointments made absent consent of the Senate during short intrasession "recesses."[200]

In re Nettles[201] concerned an alleged attempt by Gale Nettles to bomb the federal courthouse in Chicago, Illinois. The courthouse contains both the U.S. District Court for the Northern District of Illinois and the Seventh Circuit. Nettles moved to recuse the assigned district judge and all

191. *Id.* at 755–56, 765–66.
192. *Id.* at 766.
193. 387 F.3d 1220 (11th Cir. 2004).
194. Art. XI, § 2, cl. 3.
195. *Evans*, 387 F.3d at 1226.
196. *Id.* at 1227.
197. *Id.* at 1234.
198. 125 S. Ct. 1640 (2005).
199. 125 S. Ct. 2244 (2005).
200. *Id.*
201. 394 F.3d 1001 (7th Cir. 2005).

other Northern District judges, because the bomb plot had posed a threat to the judges' safety, thus creating an appearance of bias.[202] The district court denied the motion and Nettles applied for a writ of mandamus. The Seventh Circuit granted the writ. The court held that a threat to a judge that appears genuine, and not merely the effort to obtain recusal, requires recusal.[203] Here, the court explained that a judge working in the courthouse might be inclined to favor conviction and a longer sentence.[204] The court also decided that the Seventh Circuit itself should be recused from further proceedings as it was in a similar position as the district court with respect to Nettles's proceedings.[205]

E. *Class Actions*

In *Chamberlan v. Ford Motor Co.*,[206] the Ninth Circuit formulated standards for the exercise of discretion to hear interlocutory appeals. Rule. 23(f) of the Federal Rules of Civil Procedure permits a discretionary interlocutory appeal from a district court order denying or granting class certification. Appeal must be sought pursuant to Rule 5(a)(1) of the Federal Rules of Appellate Procedure. The Ninth Circuit emphasized that interlocutory review should be the exception rather than the rule.[207] Because these appeals add to the heavy workload of the appellate courts, require consideration of issues that may become moot, and undermine the district court's ability to manage the class action, review "should be granted sparingly."[208] The court identified three situations when review is appropriate:

> (1) there is a death-knell situation for either the plaintiff or defendant that is independent of the merits of the underlying claims, coupled with a class certification decision by the district court that is questionable; (2) the certification decision presents an unsettled and fundamental issue of law relating to class actions, important both to the specific litigation and generally, that is likely to evade end-of-the-case review; or (3) the district court's class certification is manifestly erroneous.[209]

The court cautioned, however, that these factors are not an exhaustive list of factors and serve only as "guidelines, not a rigid test."[210] The Ninth Circuit went on to deny interlocutory appeal of the order in the case before it. The court pointed out that the district court's decision presented no

202. *Id.* at 1002.
203. *Id.*
204. *Id.* at 1003.
205. *Id.* at 1002.
206. 402 F.3d 952 (9th Cir. 2005).
207. *Id.* at 959.
208. *Id.*
209. *Id.*
210. *Id.* at 960.

error of law and was not manifestly erroneous, commenting that this will be typical in class action certification appeals.[211] The appellant would be required to show that the court applied an incorrect Rule 23 standard or ignored a controlling case. The court continued, "Class certification decisions rarely will involve legal errors" because they involve complex facts that are unlikely to be on all fours with existing precedent.[212]

F. *Costs and Sanctions*

In *Manion v. American Airlines, Inc.*,[213] the D.C. Circuit held that the district court may not award the cost of interlocutory appellate proceedings as part of an award for unreasonable and excessive multiplication of the proceedings under 28 U.S.C. § 1927.[214] In *Manion*, a passenger sued American Airlines seeking damages for injuries sustained during an international flight. American filed an interlocutory appeal during the course of the proceedings. After trial, the court sanctioned American's counsel and assessed costs, including those that the plaintiff incurred defending the interlocutory appeal. In its opinion reversing the sanction award, the court relied heavily on *Cooter & Gell v. Hartmarx Corp.*,[215] which held that a party is not entitled to sanctions on appeal pursuant to Rule 11 of the Federal Rules of Civil Procedure.[216] The court observed that *Cooter & Gell* rested on a concern that the district court should not sanction conduct that it did not observe and the appellate court itself had the authority to sanction conduct occurring in that court.[217] Perhaps most important, as a practical matter, the D.C. Circuit had previously denied the plaintiff's motion for Federal Rule of Appellate Procedure 38 sanctions on appeal. The court decided that allowing such sanctions would "chill" all but the bravest litigants from taking an appeal.[218]

In *Beam v. Bauer*,[219] the court sanctioned an attorney for filing an appeal of an action that itself had been dismissed as frivolous. Although the court recognized that a district court may occasionally err when it dismisses cases as "frivolous," it is the lawyer's duty to determine whether such an error exists.[220] In issuing the sanction, the court admonished counsel that an appeal is not an automatic step in the lawsuit.[221] Similarly, the court said,

211. *Id.* at 962.
212. *Id.*
213. 395 F.3d 428 (D.C. Cir. 2004).
214. *Id.* at 429.
215. 496 U.S. 384, 409 (1990).
216. *Manion*, 395 F.3d at 433.
217. *Id.*
218. *Id.*
219. 383 F.3d 106 (3d Cir. 2004).
220. *Id.* at 109.
221. *Id.* at 108.

the appeal is not an "opportunity for another 'bite of the apple,' nor a forum for a losing party to 'cry foul' without legal or factual foundation."[222] Because an appeal is an "attack" on the validity of a district court's order, it must be taken seriously.[223] Where the appeal lacks merit, sanctions will be imposed. Damages for a frivolous appeal are awarded under Rule 38 of the Federal Rules of Appellate Procedure, which allows the award of sanctions even if the attorney did not know that the appeal was frivolous and had no intent to burden the opposing party or the court. The court explained, "The rationale of Rule 38 is simply that when parties suffer pecuniary loss by paying attorney fees to defend a valid judgment against a frivolous appeal, they are entitled to be awarded damages."[224] This rule protects a party who is victimized by being required to spend money to protect a valid judgment from a baseless attack.[225]

G. *Practice Pointers: Oral Argument*

In *Pascack Valley Hospital, Inc. v. Local 464A UFCW Welfare Reimbursement Plan*,[226] an ERISA case, statements made in oral argument benefited the appellant on appeal. The hospital sued the ERISA plan, claiming that the plan had waived its right to discount charges made by a consultant because its payment was late. The plan removed the case to federal court and moved to dismiss on the grounds that the hospital's claim was preempted by ERISA. The district court granted the motion and dismissed the complaint without prejudice. The hospital appealed. Although the Third Circuit questioned appellate jurisdiction because a dismissal without prejudice is not an appealable order, the court held that the order became final and appealable when the hospital's counsel asserted at oral argument that the hospital stood on the complaint and did not intend to file an ERISA claim.[227]

H. *New Appellate Rules*

After more than four years of discussion and comment, the U.S. Judicial Conference endorsed a proposed rule that would allow lawyers and litigants to cite unpublished federal appellate court opinions.[228] The proposed

222. *Id.*
223. *Id.*
224. *Id.*
225. *Id.*
226. 388 F.3d 393 (3d Cir. 2004).
227. *Id.* at 398.
228. News Release, Administrative Office of the U.S. Courts, Conference Memorializes Late Chief Justice, Acts on Administrative, Legislative Matters (Sept. 20, 2005), *available at* http://www.uscourts.gov/Press_Releases/judconf092005print.html (last visited Jan. 28, 2006).

Federal Rule of Appellate Procedure 32.1[229] would apply only to unpublished opinions issued after the new rule takes effect.[230] In addition, the circuits would determine the precedential weight they will give to their unpublished opinions. The only remaining obstacle to adoption of the rule is U.S. Supreme Court approval. If approved, the rule will take effect on January 1, 2007.

All but four of the thirteen federal circuit courts already allow citation of unpublished opinions.[231] The Second, Seventh, Ninth, and Federal Circuits currently prohibit such citations.[232] Those who supported the new rule argue that the decisions are freely available online and lawyers should be able to cite them when they have cases that are similar.[233] According to Judge Samuel A. Alito, Jr., Chair of the Advisory Committee on Appellate Rules, in his report to Judge Anthony J. Scirica, Chair of the Standing Committee on Rules of Practice and Procedure, there were two primary reasons for the rule: (i) the rule would make uniform the treatment of unpublished decisions in the various circuits; currently, there is a wide variation in how such decisions are treated, and the conflicting rules "create a hardship for practitioners, especially those who practice in more than one circuit"; and (ii) as a policy matter, the committee believed that there should be no restriction on the citation of "unpublished" or "nonprecedential" opinions.[234] Proposed Rule 32.1 is "extremely limited" in that it does not take a position on the constitutionality of unpublished opinions, require courts either to issue or not to issue them, specify when a court should designate an opinion as unpublished, or ascribe any precedential weight to them.[235] Critics complain, however, that courts do not have time to write opinions in each case that would be useful as precedent.[236]

229. For the text of the rule, see Niketh Velamoor, *Recent Developments: Proposed Federal Rule of Appellate Procedure 32.1 to Require That Circuits Allow Citation to Unpublished Opinions*, 41 Harv. J. on Legis. 561, 567 & n.36 (2004), *available at* http://www.law.harvard.edu/students/orgs/jol/vol41_2/velamoor.php (last visited Jan. 28, 2006).

230. Recent Developments, LexisNexis for Litigators, Proposed New Federal Rule on Citation of Unpublished Federal Decisions Approved by Judicial Conference, *at* http://www.lexisnexis.com/litigation/developments4.asp (last visited Jan. 28, 2006).

231. Mark Hansen, *Citing of Unpublished Opinions Endorsed: Proposed Rule for Federal Circuits Needs Supreme Court OK Next*, ABA J. E-Report, Sept. 30, 2005, *at* http://www.abanet.org/journal/ereport/s30unpub.html (last visited Jan. 28, 2006).

232. *Id.*

233. *Id.*

234. Memorandum from Judge Samuel A. Alito, Jr., Chair of Advisory Comm. on Appellate Rules, to Judge Anthony J. Scirica, Chair of Standing Comm. on Rules of Practice and Procedure, *Report of Advisory Committee on Appellate Rules* 27–36 (May 22, 2003), *available at* http://www.uscourts.gov/rules/app0803.pdf (last visited Jan. 28, 2006).

235. *Id.* at 30.

236. Hansen, *supra* note 231.