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Supreme Court Opinions
October 1998 Term

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ABSTRACT

This report provides a reference guide for Supreme Court opinions issued during the Court's 1998-99 Term, which ended June 23, 1999. It contains brief summaries of all cases decided by signed opinion, and of a few additional *per curiam* decisions. Voting alignments of Justices are identified, and a subject index is appended.

Supreme Court Opinions: October 1998 Term

Summary

This report contains synopses of Supreme Court decisions issued from the beginning of the October 1998 Term through the end of the Term on June 23, 1999. The purpose is to provide a quick reference guide for identification of cases of interest. These synopses are created throughout the Term and entered into the CRS Home Page on the Internet, and into the *Scorpio* database. The report supersedes an earlier cumulation issued as a general distribution memorandum dated March 12, 1999. Included are all cases decided by signed opinion and selected cases decided *per curiam*. Not included are other cases receiving summary disposition and the many cases in which the Court denied review. Each synopsis contains a summary of the Court's holding, and most contain a brief statement of the Court's rationale. In addition, the date of decision is indicated, and cites to *United States Law Week* and West's *Supreme Court Reporter* are provided if available. Following each synopsis the vote on the Court's holding is indicated in bold typeface, and authors of the Court's opinion and of any concurring and dissenting opinions, along with the Justices who joined those opinions, are identified. Cases are listed alphabetically, and a subject index is appended.

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Albertson's Inc. v. Kirkingburg 119 S. Ct. 2162, 67 USLW 4560 (6-22-99)

ADA, waivable federal safety regulation: The Americans with Disabilities Act of 1990 (ADA) does not require an employer to justify dismissal of an employee for failure to meet an applicable federal safety regulation, even if the regulation may be waived in an individual case. In this case the petitioner supermarket chain fired the respondent, a truck driver with monocular vision who failed to meet basic DOT vision standards for commercial drivers. The driver had applied to DOT for a waiver, but was fired before the waiver was granted. Persons with monocular vision who wish to invoke the ADA must prove a "disability" by establishing that their vision impairment "substantially limits" a major life activity such as seeing or working. Mitigating measures must be taken into account, and there is no principled basis for distinguishing between measures undertaken with artificial aids and measures undertaken by the body's own systems. Existence of the DOT's waiver program does not alter an employer's ability to impose the safety standard as a job qualification without having to justify its application on a case-by-case basis. The waiver program did not purport to modify the substance of the safety standard, but instead was designed as an experiment to gather data for use in determining the feasibility of relaxing the standard. The ADA does not require an employer to justify *de novo* an applicable government safety regulation.

9-0. Opinion of Court by Souter, unanimous in part (as to employer's imposition of safety regulation), and joined by Rehnquist, O'Connor, Scalia, Kennedy, Thomas, and Ginsburg in separate part (relating to proof of disability). Concurring opinion by Thomas.

Alden v. Maine 119 S. Ct. 2240, 67 USLW 4601 (6-23-99)

Federalism, state sovereign immunity: Congress lacks the authority, in exercise of Article I powers, to subject non-consenting states to private suits for damages in state courts. The history and structure of the Constitution make clear that States retain a "residual and inviolable sovereignty" under the Constitution. Fair Labor Standards Amendments of 1974 violate this principle of sovereign immunity by subjecting non-consenting states to suits for damages brought by employees in state courts. "Behind the words of the constitutional provisions are postulates which limit and control." The original Constitution's silence about state immunity is explained by the fact that no one at the time suggested that "the document might strip the States of [sovereign] immunity." The Eleventh Amendment's narrow terms, applicable only to cases brought in federal courts, did not by implication eliminate state sovereign immunity in state courts; that immunity derives not from the Eleventh Amendment, but from the structure of the original Constitution itself. Neither the Supremacy Clause nor the Necessary and Proper Clause authorizes Congress to override state sovereign immunity in exercise of Article I powers. To recognize such an

Article I power would create an anomaly under which "the National Government would wield greater power in the state courts than in its own judicial instrumentalities."

5-4. Opinion of Court by Kennedy, joined by Rehnquist, O'Connor, Scalia, and Thomas. Dissenting opinion by Souter, joined by Stevens, Ginsburg, and Breyer.

American Manufacturers Mut. Ins. Co. v. Sullivan 119 S. Ct. 977, 67 USLW 4158 (3-3-99)

State action; Due Process, workers' compensation benefits: Private insurers who withhold payments under Pennsylvania's workers' compensation law while availing themselves of procedures for determining whether the underlying medical treatment was reasonable and necessary to treat the employee's condition are not state actors (persons acting "under color of" state law) subject to suit under 42 U.S.C. § 1983. The State authorizes but does not require insurers to withhold payments for disputed medical treatment. "Such permission of a private choice cannot support a finding of state action." The Due Process Clause of the Fourteenth Amendment does not require the insurers to pay the disputed bills prior to a determination that the medical treatment was reasonable and necessary. An employee obtains a protected property interest in the medical benefits only after two hurdles are met: the employer's initial liability must be established and any disputes over the reasonableness and necessity of particular treatment must be resolved. Only the first of these hurdles has been met in this case.

8-1. Opinion of Court by Rehnquist, joined in part by O'Connor, Scalia, Kennedy, Souter, Thomas, and Breyer; and joined in separate part by O'Connor, Kennedy, Thomas, and Ginsburg. Concurring opinions by Ginsburg and by Breyer, joined by Souter. Concurring and dissenting opinion by Stevens.

Amoco Production Co. v. Southern Ute Tribe 119 S. Ct. 1719, 67 USLW 4397 (6-7-99)

Public lands, patents, "coal" reservation: Reservation to the United States of "all coal" in lands patented pursuant to the Coal Lands Acts of 1909 and 1910 did not also reserve coalbed methane gas (CBM). Although CBM gas, generated during the formation of coal and retained in the coal, may be considered to be a constituent of coal, Congress did not so regard it in 1909 and 1910. Unless otherwise defined, statutory words are given their "ordinary, contemporary, common meaning." Dictionaries of the day defined coal as a solid rock substance, and "marsh gas" (one of the names by which CBM gas was known) as a distinct substance contained in or given off by coal. Congress viewed CBM gas not as a fuel resource, but as a dangerous waste product that necessitated ventilation safety standards for mines. Coal companies at that time made no effort to capture or preserve CBM gas. The limited nature of the reservation of "all coal" is confirmed by subsequent enactments containing broader reservations of "oil and gas" (1912) and of "coal and other minerals" (1916). The argument that Congress would not have intended to create such split estates, with coal and CBM gas in separate ownership, is unpersuasive; including coal and CBM gas under the same ownership would have led to a split gas estate "at least as difficult to administer," with ownership of CBM gas and "natural gas" being separated.

7-1. Opinion of Court by Kennedy, joined by Rehnquist, Stevens, O'Connor, Scalia, Souter, and Thomas. Dissenting opinion by Ginsburg. Breyer did not participate.

Arizona Dep't of Revenue v. Blaze Constr. Co. 119 S. Ct. 957, 67 USLW 4156 (3-2-99)

Taxation, State; federal contractors; Native Americans: The general rule announced in *United States v. New Mexico* (1982) that a state may impose a nondiscriminatory tax upon a private company's proceeds from a contract with the Federal Government applies when a private, non-Indian federal contractor has rendered its services on an Indian reservation. The Arizona Court of Appeals erred in applying a balancing test to conclude that federal laws regulating the welfare of Indians implicitly preempted the State's tax. "The need to avoid litigation and to ensure efficient tax administration counsels in favor of a bright-line standard for taxation of federal contracts, regardless of whether the contracted-for activity takes place on Indian reservations."

9-0. Opinion for unanimous Court by Thomas.

AT&T Corp. v. Iowa Utilities Bd. 119 S. Ct. 721, 67 USLW 4104 (1-25-99)

Telecommunications Act of 1996, regulation of local competition: The FCC has authority under section 201(b) of the Communications Act of 1934 to prescribe rules and regulations governing the restructuring of local telephone markets in accordance with the Telecommunications Act of 1996. The 1996 Act amends, and hence is part of, the 1934 Act; section 201(b) of the 1934 Act authorizes the Commission to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." Section 2(b) of the 1934 Act, which provides that "nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to . . . intrastate communication service," does not restrict the Commission's jurisdiction to make rules governing matters to which the 1996 Act applies. The Commission has jurisdiction to design a pricing methodology that states must use in setting rates, and to promulgate rules regarding state review of interconnection agreements, rural exemptions, and dialing parity. The Commission's "unbundling" rules reasonably apply the Act's "network element" definition, but do not adequately take into account the Act's requirement that, in determining which network elements an incumbent carrier must provide to a requesting carrier, the Commission consider whether access is "necessary" and whether failure to provide access would "impair" the requesting carrier's ability to provide service. Two other aspects of the "unbundling" rules are upheld. The "all elements" rule, which allows competitors to rely completely on elements in an incumbent's network without owning any facilities themselves, is not unreasonable. Rule 315(b), which prohibits an incumbent from separating already-combined network elements before leasing them to a competitor, is a reasonable interpretation of ambiguous statutory language. The FCC's "pick and choose" rule, which "tracks the pertinent statutory language almost exactly," is upheld.

5-3 (jurisdiction generally); **8-0** (network element definition, "all elements" rule, rule 315(b), "pick and choose" rule); **7-1** ("necessary and impair" standards). Opinion of Court by Scalia, joined in part by Rehnquist, Stevens, Kennedy, Souter, Thomas, Ginsburg, and Breyer; joined in separate part by all of the above except Souter; and joined in separate part by Stevens, Kennedy, Souter, and Ginsburg. Opinion by Souter, concurring in part and dissenting in part. Opinion by Thomas, concurring in part and dissenting in part, joined by Rehnquist and Breyer. Opinion by Breyer, concurring in part and dissenting in part. O'Connor did not participate.

Bank of America Nat'l Trust Ass'n v. 203 North Lasalle St. Partnership 119 S. Ct. 1411, 67 USLW 4275 (5-3-99)

Bankruptcy, reorganization, priorities: A reorganization plan under which a debtor's pre-bankruptcy equity holders are allowed the exclusive opportunity to contribute new capital and receive ownership interests in the reorganized entity is inconsistent with 11 U.S.C. § 1129(b)(2)(B)(ii), which provides that a plan is not fair and equitable if a junior claim holder receives any property "on account of such junior claim." In this case it is unnecessary to determine whether the "absolute priority rule" protected by the statutory language carries with it a "new value corollary." Under the new value corollary as it had developed prior to revision of the Bankruptcy Code, "old equity" holders who made a new contribution after reorganization could receive a participation reasonably equivalent to their contribution. Even assuming existence of this new value corollary, however, the current reorganization plan falls within the prohibition of § 1129(b)(2)(B)(ii) because it provides junior interest holders with "exclusive opportunities free from competition and without benefit of market valuation."

8-1. Opinion of Court by Souter, joined by Rehnquist, O'Connor, Kennedy, Ginsburg, and Breyer. Concurring opinion by Thomas. Dissenting opinion by Stevens.

Buckley v. American Constitutional Law Foundation 119 S. Ct. 636, 67 USLW 4043 (1-12-99)

First Amendment, conditions on ballot initiatives: Three conditions that Colorado placed on the petition process for ballot initiatives impermissibly restrict political speech in violation of the First and Fourteenth Amendments. The requirement that petition circulators be registered voters drastically reduces the number of persons available to circulate petitions, and is not warranted. Other requirements — that circulators be state residents and that they verify their addresses by affidavit — adequately protect the State's interest in insuring that circulators will be amenable to state process if they break the law. The requirement that petition circulators wear identification badges also restrains speech unnecessarily. By compelling identification "at the precise moment when the circulator's interest in anonymity is greatest," the requirement restrains speech more severely than did the prohibition on distribution of anonymous campaign literature struck down in *McIntyre v. Ohio Elections Comm'n* (1995). Here again, the affidavit requirement adequately serves the State's interest. Disclosure requirements are valid insofar as they require initiative sponsors to reveal the amount of money they have spent, but are invalid in requiring identification of paid circulators and the amounts paid to each.

9-0 (identification badges); **6-3** (registration and disclosure requirements). Opinion of Court by Ginsburg, joined by Stevens, Scalia, Kennedy, and Souter. Concurring opinion by Thomas. Opinion by O'Connor, joined by Souter, concurring in part and dissenting in part. Dissenting opinion by Rehnquist.

Calderon v. Coleman 119 S. Ct. 500, 67 USLW 3390 (12-14-98)

Death penalty, jury instruction: The Ninth Circuit erred in failing to apply the harmless error analysis of *Brecht v. Abrahamson* (1990) to determine whether to grant *habeas corpus* relief to a prisoner sentenced to death following an erroneous jury instruction about the power of California's governor to commute a sentence of life without possibility of parole. Under *Brecht*, relief may be granted only if the unconstitutional instruction had a "substantial and injurious

effect or influence on the jury's sentence of death." This requirement assures that a state will not be put to the "arduous task" of retrial "based on mere speculation that the defendant was prejudiced by trial error." Instead of pursuing the *Brecht* inquiry, the Ninth Circuit applied *Boyde v. California* (1990) to determine whether there was a "reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." This *Boyde* analysis "is not a harmless-error test at all," but merely asks whether constitutional error has occurred.

5-4. *Per curiam.* Dissenting opinion by Stevens, joined by Souter, Ginsburg, and Breyer.

California Dental Ass'n v. FTC 119 S. Ct. 1605, 67 USLW 4365 (5-25-99)

Federal Trade Commission, jurisdiction: The Federal Trade Commission has jurisdiction over the California Dental Association (CDA), a nonprofit association that provides substantial economic benefits to its for-profit members. The Federal Trade Commission Act gives the FTC jurisdiction over "corporations," and defines "corporation" to include an association organized to carry on business for profit of its members. The CDA contributes to the profits of its members in a variety of ways that are proximate and apparent. The "logic and purpose" of the FTC Act, as well as its legislative history, support the conclusion that the FTC has jurisdiction over such nonprofit entities. The Court of Appeals erred, however, when it concluded that "quick-look" analysis was an appropriate basis for concluding that the CDA's restrictions on price and quality advertising by its members were anticompetitive. "Quick-look" analysis under the rule of reason is appropriate only if the likelihood of anticompetitive effects is obvious. The CDA's advertising restrictions might plausibly be thought to have a pro-competitive rather than an anticompetitive effect. In any event, restrictions on professional advertising that arguably protect patients from misleading or irrelevant claims "call for more than cursory treatment."

9-0 (jurisdiction); **5-4** (merits). Opinion of Court by Souter, unanimous in part, and joined in separate part by Rehnquist, O'Connor, Scalia, and Thomas. Concurring and dissenting opinion by Breyer, joined by Stevens, Kennedy, and Ginsburg.

California Pub. Employees' Retirement Sys. v. Felzen 119 S. Ct. 720, 67 USLW 4090 (1-20-99)

Appeals, derivative shareholder action: The decision of the U.S. Court of Appeals for the Seventh Circuit, holding that shareholders who have appeared in response to a notice provided under Federal Rule of Civil Procedure 23.1 in order to provide objections to a proposed dismissal or settlement of a derivative action, but who have not formally intervened as parties, have no right to appeal an adverse decision, is affirmed by equally divided vote.

4-4. *Per curiam*. Justice O'Connor did not participate.

Cedar Rapids Community Sch. Dist. v. Garret F. 119 S. Ct. 992, 67 USLW 4165 (3-3-99)

IDEA, "related services" and "medical services": A state that accepts federal funding under the Individuals with Disabilities Education Act (IDEA) must provide continuous, one-on-one nursing care to a ventilator-dependent student. IDEA requires provision of a free appropriate public education and "related services," and defines "related services" to include various supportive services that enable a child to remain in school during the day, but to exclude "medical services" that are not diagnostic or evaluative. Continuous nursing care clearly falls within the general terms of "related services," and does not fit within the regulatory understanding of "medical services." In *Irving Indep. Sch. Dist. v. Tatro* (1984), the Court upheld as reasonable an administrative determination that "medical services" means services that must be performed by a physician, and does not apply to procedures such as catheterization that can performed by school health personnel. None of the services required by the respondent in this case need be performed by a physician, and consequently none are "medical." The combined and continuous character of the required care may make care more costly and may require additional school personnel, but does not transform the care into "medical services."

7-2. Opinion of Court by Stevens, joined by Rehnquist, O'Connor, Scalia, Souter, Ginsburg, and Breyer. Dissenting opinion by Thomas, joined by Kennedy.

Central State Univ. v. American Ass'n of Univ. Professors 119 S. Ct. 1162, (3-22-99)

Equal Protection, preclusion of collective bargaining: An Ohio law directing state universities to develop standards for faculty workloads to emphasize undergraduate instruction, and exempting such standards from collective bargaining, does not violate the Equal Protection Clause of the Fourteenth Amendment. Depriving state-employed professors of the right, otherwise available to public employees, to bargain collectively over their workload implicates neither fundamental rights nor suspect classifications, so the rational basis test applies. Imposition of the faculty workload policy was intended to increase the amount of time that professors spend in the classroom, and exempting the policy from collective bargaining was "an entirely rational step to accomplish this objective." The legislature rationally could have concluded that their objective "would have been undercut and likely varied if it were subject to collective bargaining."

8-1. *Per curiam.* Concurring opinion by Ginsburg, joined by Breyer. Dissenting opinion by Stevens.

City of Chicago v. Morales 119 S. Ct. 1849, 67 USLW 4415 (6-10-99)

Due Process, anti-loitering ordinance: Chicago's Gang Congregation Ordinance, which prohibits "criminal street gang members" from "loitering" with one another or with other persons in any public place after being ordered by a police officer to disperse, violates the Due Process Clause of the Fourteenth Amendment. "Loitering" is defined as "remain[ing] in any one place with no apparent purpose." The ordinance directs the police, if they reasonably believe that at least one of the congregating persons is a street gang member, to order "all" of the persons to disperse, without first making any inquiries about their possible purposes. The broad sweep of the ordinance violates the requirement that a legislature establish minimal guidelines for law enforcement. The ordinance reaches a substantial amount of innocent conduct. Also, the Court is

bound by the Illinois Supreme Court's interpretation of the ordinance as conferring "absolute discretion" on police officers to determine what activities constitute loitering. The ordinance requires no harmful purpose, and applies to non-gang members as well as to suspected gang members. The ordinance also excludes from coverage much of the intimidating conduct that motivated its enactment, since it has no application to loiterers whose purpose is apparent — even if that purpose is threatening or illicit.

6-3. Opinion of Court by Stevens, joined by O'Connor, Kennedy, Souter, Ginsburg, and Breyer. Separate part of Stevens opinion joined by Souter and Ginsburg. Concurring opinions by O'Connor, joined by Breyer; by Kennedy; and by Breyer. Dissenting opinions by Scalia; and by Thomas, joined by Rehnquist and Scalia.

City of Monterey v. Del Monte Dunes at Monterey, Ltd. 67 USLW 4345 (5-24-99)

Regulatory taking, § 1983 action, right to jury trial: Respondent's regulatory takings claim, brought under 42 U.S.C. § 1983, was properly submitted to the jury. Section 1983 does not itself confer a right to jury trial, but the Seventh Amendment does for such actions. The Seventh Amendment applies not only to "common law" causes of action, but also to statutory actions analogous to common law actions that in late 18th century England were tried in courts of law rather than in courts of equity or in admiralty courts. A section 1983 action seeking "legal relief" is an action at law within the meaning of the Seventh Amendment. Section 1983 actions "sound in tort," and a claim for just compensation seeks "legal relief," since as a general rule monetary relief is legal. The particular issue of liability presented in this case — whether a landowner has been deprived of all economically viable use of his property — was proper for determination by the jury. The "rough proportionality" test of *Dolan v. City of Tigard* (1994), previously applied only in the context of property exactions, is inappropriate for cases such as this.

5-4 (Seventh Amendment); **9-0** (proportionality) . Opinion of Court by Kennedy, unanimous in part, and joined in separate part by Rehnquist, Stevens, Scalia, and Thomas. Separate part of Kennedy opinion joined only by Rehnquist, Stevens, and Thomas. Concurring opinion by Scalia. Concurring and dissenting opinion by Souter, joined by O'Connor, Ginsburg, and Breyer.

City of West Covina v. Perkins 119 S. Ct. 678, 67 USLW 4058 (1-13-99)

Due Process, seizure of property, notice of remedies: The Due Process Clause of the Fourteenth Amendment does not require that police, when they have lawfully seized property, notify the property owners about state procedures for the return of the seized property. Law enforcement agents who seize property must take reasonable steps to notify the owner that the property has been taken, but need not provide the owner with additional information about state law remedies. In cases such as this, when the owner is not present when property is seized, notice of the seizure is necessary to inform the owner about what has happened to the missing property. No similar rationale requires notice of remedies; information about remedies is generally available in published form as state statutes and case law. The notice required by the appeals court in this case lacks support in Supreme Court precedent and "far exceeds that which the States and the Federal Government have traditionally required." The appeals court's analysis would render constitutionally inadequate, for example, the notice mandated by Federal Rule of Criminal Procedure 41(d), which requires that

agents seizing property give the dispossessed a copy of the warrant and a receipt for the property.

9-0. Opinion of Court by Kennedy, joined by Rehnquist, Stevens, O'Connor, Souter, Ginsburg, and Breyer. Concurring opinion by Thomas, joined by Scalia.

Cleveland v. Policy Management Systems Corp. 67 USLW 4375 (5-24-99)

SSDI, ADA, compatibility of claims: Pursuit and receipt of Social Security Disability Insurance (SSDI) benefits does not automatically estop the recipient from pursuing a claim under the Americans With Disabilities Act (ADA). Nor do the claims inherently conflict to the point where courts should apply a special negative presumption. There are many situations in which an SSDI claim and an ADA claim can coexist. While the ADA defines a "qualified individual" to include a disabled person who can perform the essential functions of her job "with reasonable accommodation," the total disability determination under SSDI takes no account of the possibility of a "reasonable accommodation." In other cases, however, an earlier SSDI claim may turn out to conflict with an ADA claim. For this reason, an ADA plaintiff may not simply ignore the apparent contradiction, but must explain her earlier SSDI claim. To defeat summary judgment, that explanation must be sufficient to warrant a reasonable juror's conclusion that, assuming the truth of, or the plaintiff's good-faith belief in, the earlier SSDI claim, the plaintiff could nonetheless perform the essential functions of her job, with or without accommodation.

9-0. Opinion for unanimous Court by Breyer.

Clinton v. Goldsmith 119 S. Ct. 1538, 67 USLW 4302 (5-17-99)

All Writs Act, Court of Appeals for the Armed Forces: The Court of Appeals for the Armed Forces (CAAF) lacked jurisdiction to enjoin the President and various military officers from dropping the respondent from the rolls of the Air Force. The respondent had been court-martialed, and his conviction became final after the Air Force Court of Criminal Appeals (AFCCA) affirmed and he sought no review in the CAAF. When the Air Force notified respondent that it was taking action to drop him from its rolls, he challenged that action in the AFCCA, and, following dismissal for lack of jurisdiction, appealed to the CAAF. The CAAF relied on the All Writs Act in enjoining the President and the Air Force officers from proceeding against the respondent. The All Writs Act authorizes issuance of extraordinary writs only "in aid of" the issuing court's jurisdiction. The CAAF's jurisdiction is limited to review of specified sentences imposed by courts-martial. The Air Force's action to drop the respondent was an executive action, not a finding or sentence that was or could have been imposed in a court-martial proceeding, so the action was beyond the CAAF's jurisdiction and hence also beyond the "aid" of the All Writs Act. Even if the CAAF had jurisdiction, resort to the All Writs Act would still have been unjustifiable because it was neither "necessary" nor "appropriate." Both the federal courts and various administrative bodies in the military would have authority to review the challenged action.

9-0. Opinion for unanimous Court by Souter.

College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd. 119 S. Ct. 2219, 67 USLW 4590 (6-23-99)

State sovereign immunity, abrogation by Congress, trademarks: The Trademark Remedy Clarification Act (TRCA), which amended the Lanham Act

to subject states to suits for false and misleading advertising, did not validly abrogate state sovereign immunity, and Florida in this case has not waived its immunity. Congress may abrogate state sovereign immunity in exercise of its power to enforce the Fourteenth Amendment, but the TRCA is not such an enforcement action. The assertion that the TRCA was enacted to remedy and prevent state deprivations of property rights is "without merit." Neither the right to be free from a business competitor's false advertising nor a more generalized right to be secure in one's business interests qualifies as a "property" right protected by the Due Process Clause. The essence of a property right is the right to exclude others, yet the Lanham Act's false advertising provisions bear no relationship to a right to exclude. Analogies to equity jurisdiction and to the common-law tort of unfair competition are unpersuasive. Business assets are property, but the activity of doing business — the only aspect of property impinged upon by a competitor's false advertising — is not property in the ordinary sense. Florida did not waive its immunity from Lanham Act suits by selling and advertising in interstate commerce a for-profit educational investment vehicle. *Parden v. Terminal Ry.* (1964), which recognized a constructive waiver of immunity, has been limited by subsequent decisions, and is now expressly overruled. *Parden* was premised on the now-discredited notion that state sovereign immunity is not constitutionally based.

5-4. Opinion of Court by Scalia, joined by Rehnquist, O'Connor, Kennedy, and Thomas. Dissenting opinions by Stevens; and by Breyer, joined by Stevens, Souter, and Ginsburg.

Conn v. Gabbert 119 S. Ct. 1292, 67 USLW 4219 (4-5-99)

Due Process, right to practice profession: An attorney's Fourteenth Amendment right to practice his profession is not impaired when the prosecutor requires that the attorney be searched at the same time that his client is testifying before a grand jury, even if the search was calculated to annoy or to prevent the attorney from consulting with his client. Cases in which the Court has recognized a right to choose and follow one's field of private employment have all dealt with a complete prohibition of that right, and not with the sort of brief interruption that occurred here. The attorney has no standing to allege infringement of his client's right to assistance of counsel during the grand jury proceeding. The attorney may challenge the reasonableness of the timing of the search, but this is a Fourth Amendment issue rather than a Due Process issue.

9-0. Opinion of Court by Rehnquist, joined by O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, and Breyer. Concurring opinion by Stevens.

Cunningham v. Hamilton County 119 S. Ct. 1915, 67 USLW 4458 (6-14-99)

Appeals, "final decision": An order imposing sanctions on an attorney pursuant to Federal Rule of Civil Procedure 37(a)(4) for failure to comply with discovery orders is not a "final decision" appealable under 28 U.S.C. § 1291 prior to final judgment in the underlying action. The Rule 37 sanction did not end the litigation or leave the district court with only the task of executing its judgment. Nor does the sanction fit within the small category of orders that are appealable even though they do not terminate litigation. The order was conclusive, but cannot be separated completely from the merits of the case. Also, the order is not effectively unreviewable on appeal from a final judgment on the merits. The congruence of interests between attorneys and clients "counsels against treating attorneys like other nonparties for purposes of appeal." To permit an immediate

appeal would undermine the purposes of Rule 37(a), which was designed to protect courts and opposing parties from delaying or harassing tactics during the discovery process. The same rule applies when the attorney no longer represents a party in the case. The efficiency interests served by limiting immediate appeals "far outweigh" any costs that sanctioned attorneys might bear in monitoring the progress of the litigation.

9-0. Opinion for unanimous Court by Thomas. Concurring opinion by Kennedy.

Davis v. Monroe County Bd. of Educ. 119 S. Ct. 1661, 67 USLW 4329 (5-24-99)

Title IX, "student-on-student" sexual harassment: A recipient of federal educational funds can be held liable under Title IX of the Education Amendments of 1972 in a private damages action arising from student-on-student sexual harassment. Funding recipients are properly held liable, however, only if they are "deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school." Earlier cases have established that private damages actions are available only if funding recipients had adequate notice that they can be held liable, and only if their own actions or indifference effectively caused the "discrimination" at issue and therefore constituted an intentional violation of Title IX. Such an intentional violation can occur even when the harasser is a student rather than a teacher, so long as the funding recipient "exercises substantial control over both the harasser and the context in which the known harassment occurs." This is the case when student-on-student sexual harassment occurs during school hours and on school grounds, and the alleged harasser is under the school's disciplinary authority. A further limitation is that funding recipients will be deemed to be "deliberately indifferent" only if their response or lack of response to alleged harassment "is clearly unreasonable in light of the known circumstances." And the recipient's indifference is actionable only when the alleged harassment is so severe, pervasive, and objectively offensive as to effectively deprive the victim of the educational opportunities provided by the school.

5-4. Opinion of Court by O'Connor, joined by Stevens, Souter, Ginsburg, and Breyer. Dissenting opinion by Kennedy, joined by Rehnquist, Scalia, and Thomas.

Department of Commerce v. United States House of Representatives
Clinton v. Glavin 119 S. Ct. 765, 67 USLW 4090 (1-25-99)

Standing to sue; Census Act: Plaintiffs in *Clinton v. Glavin*, consolidated with the House of Representative's suit for purposes of review, had standing to sue to challenge the use of statistical sampling in the Department's proposed Census 2000 plan. An Indiana citizen had standing because of the "virtual certainty" that Indiana would lose a seat in the House under the Department's plan, and citizens of several counties had standing by virtue of the likelihood that their counties would suffer vote dilution as a result of census-based redistricting for state, local, and congressional elections. The Census Act does not permit the use of statistical sampling in calculating the population for purposes of apportioning Representatives among the states. Section 195 of the Act, as amended in 1976, provides that, "except for the determination of population for purposes of apportionment of Representatives . . . , the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as `sampling.'" General language added in 1976 authorizes the Secretary to take the decennial

census "in such form and content as he may determine, including the use of sampling procedures." The broad grant of authority in section 141 is limited "by the narrower and more specific §195," and section 195 must be interpreted in the broader context of a 200-year-long prohibition on the use of statistical sampling. Because the Census Act prohibits the use of sampling in calculating population for purposes of apportionment, it is unnecessary to consider the constitutionality of sampling. Because the disposition of *Clinton v. Glavin* also resolves the substantive issues presented in the House of Representatives' action, that case (98-404) is dismissed as no longer presenting a substantial federal question.

9-0 (standing); **5-4** (Census Act). Opinion of Court by O'Connor, joined in part by Rehnquist, Scalia, Kennedy, Thomas, and Breyer, and joined in separate part by Rehnquist, Scalia, Kennedy, and Thomas. Separate part of O'Connor opinion joined only by Rehnquist and Kennedy. Opinion by Scalia, joined by Thomas, and joined in part by Rehnquist and Kennedy, concurring in part. Opinion by Breyer, concurring in part and dissenting in part. Dissenting opinion by Stevens, joined in part by Souter and Ginsburg, and joined in separate part by Breyer. Dissenting opinion by Ginsburg, joined by Souter.

Department of the Army v. Blue Fox, Inc. 119 S. Ct. 687, 67 USLW 4073 (1-20-99)

Sovereign immunity: Section 10(a) of the Administrative Procedure Act, 5 U.S.C. § 702, does not nullify the long-settled rule that sovereign immunity bars creditors from enforcing liens on Government property. In this case, a subcontractor on a Government contract, unable to recover from the contractor, sought an "equitable lien" on any Government funds still available for payment to the contractor or for completion of the project. Section 702 waives sovereign immunity for certain claims "seeking relief other than money damages." In this context, "money damages" means compensatory or substitute relief, and "other than money damages" refers to specific relief, e.g., enforcement of a statutory mandate. The goal of the equitable lien sought by the subcontractor in this case is to attach money held by the Government in order to compensate for the loss resulting from the default of the contractor. This is a claim for "substitute" rather than "specific" relief, and therefore amounts to a claim for "money damages" within the meaning of the APA. The action therefore falls outside of section 702's waiver of sovereign immunity.

9-0. Opinion for unanimous Court by Rehnquist.

Dickinson v. Zurko 119 S. Ct. 1816, 67 USLW 4445 (6-10-99)

Patents and trademarks, standard of review: The Federal Circuit, when it reviews findings of fact made by the Patent and Trademark Office (PTO), must apply the "arbitrary, capricious, [or] abuse of discretion [or] unsupported by substantial evidence" standards set forth in section 706 of the Administrative Procedure Act (APA), and not the "clearly erroneous" standard set forth in Federal Rule of Civil Procedure 52(a) for appellate court review of lower court decisions. A reviewing court must apply the APA standard in the absence of an exception authorized by section 559, which provides that the APA does "not limit or repeal additional requirements . . . recognized by law." The "clearly erroneous" standard was not "recognized by law" when the APA was enacted in 1946. The 89 pre-APA cases involving judicial review of a PTO administrative decision do not reflect a well-established "court/court" standard of judicial review. Use of such terms as "clear case of error" or "manifest error" is not conclusive, since the "relevant linguistic conventions were less firmly established before adoption of the APA." The Supreme Court's 1884 decision

in *Morgan v. Daniels* does not support application of the court/court standard. Rather, the Court, in determining the appropriate standard for review of Patent Office decisions, rejected reliance on the then-governing standard for an appellate court's review of a lower court's factual findings.

6-3. Opinion of Court by Breyer, joined by Stevens, O'Connor, Scalia, Souter, and Thomas. Dissenting opinion by Rehnquist, joined by Kennedy and Ginsburg.

El Al Israel Airlines v. Tsui Yuan Tseng 119 S. Ct. 662, 67 USLW 4036 (1-12-99)

Warsaw Convention, preemption: The Warsaw Convention precludes a passenger from maintaining an action for personal injury damages under local law when her claim does not satisfy the conditions for liability under the Convention. The plaintiff in this action alleged that she suffered emotional distress, but no bodily injury, from an intrusive airport security search conducted before she boarded an El Al flight. The Convention does not permit recovery for emotional distress unaccompanied by bodily injury. Article 24 of the Convention provides that "cases covered by Article 17" may only be brought subject to the conditions and limits set out by the Convention. Article 17 creates a cause of action for personal injuries suffered as a result of an "accident . . . in the course of any of the operations of embarking or disembarking." Although the security search was not an "accident" within the meaning of Article 17, Article 24's reference to "cases covered by Article 17" applies generically to all personal injury cases stemming from occurrences on board an aircraft or in embarking or disembarking. The "cardinal purpose" of the Convention was "to achieve uniformity of rules governing claims arising from international air transportation." Decisions of the courts of other signatory nations support a broad reading of the Convention's preemptive effect.

8-1. Opinion of Court by Ginsburg, joined by Rehnquist, O'Connor, Scalia, Kennedy, Souter, Thomas, and Breyer. Dissenting opinion by Stevens.

El Paso Natural Gas Co. v. Neztsosie 119 S. Ct. 1430, 67 USLW 4286 (5-3-99)

Price-Anderson Act, preemption, tribal court exhaustion: The doctrine of tribal court exhaustion, under which federal district courts abstain from deciding issues of tribal court jurisdiction until the tribal courts themselves have addressed them, is inapplicable to suits involving claims under the Price-Anderson Act. In this case the district court should have decided whether the claims at issue were Price-Anderson claims. The Act's "unusual preemption provision," which gives federal courts jurisdiction over "any public liability action arising out of . . . a nuclear incident, provides for removal to federal court if a putative Price-Anderson action is brought in state court, but is silent about actions brought in tribal courts. It seems most likely that congressional silence on tribal courts is due to "inadvertence." Because there were no nuclear testing labs or reactors on reservation lands, Congress probably did not foresee the possibility that a nuclear incident might occur on tribal lands. There is no reason to believe, however, that Congress would have favored tribal exhaustion in Price-Anderson suits. The Act, amended in the aftermath of the Three-Mile Island accident, sought speed and efficiency in managing claims, and authorized a special caseload management panel to consolidate and expedite claims. The panel, explained a Senate report, would help avoid inefficiencies resulting from "duplicative determinations . . . in multiple jurisdictions." Application of tribal exhaustion would defeat these purposes.

9-0. Opinion for unanimous Court by Souter.

Federal Republic of Germany v. United States 119 S. Ct. 1016, 67 USLW 3559 (3-3-99)

International Court of Justice, enforcement of order: The Federal Republic of Germany's motions for leave to file a complaint, and for issuance of a preliminary injunction, are denied. Germany sought enforcement of an *ex parte* order issued by the International Court of Justice directing the United States to prevent the execution of Walter LaGrand, a German citizen, by the State of Arizona. See also *Stewart v. LaGrand* (1999). The United States has not waived its sovereign immunity, and it is "doubtful" that Article III, § 2, cl. 2, which extends jurisdiction to cases affecting ambassadors and consuls, "provides an anchor" for the action. The Federal Republic's suit against the State of Arizona, as was Paraguay's suit against Virginia in *Breard v. Greene* (1998), "is without evident support in the Vienna Convention and in probable contravention of the Eleventh Amendment."

7-2. *Per curiam.* Concurring opinion by Souter, joined by Ginsburg. Dissenting opinion by Breyer, joined by Stevens.

Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank 119 S. Ct. 2199, 67 USLW 4580 (6-23-99)

State sovereign immunity, abrogation by Congress, patents: The Patent and Plant Variety Protection Remedy Clarification Act's amendment of the patent laws to expressly abrogate states' sovereign immunity from patent infringement suits cannot be upheld as an exercise of congressional power to enforce the Fourteenth Amendment's Due Process Clause. While Congress in exercise of its enforcement power may abrogate state sovereign immunity, it must do so through legislation that is "appropriate" within the meaning of § 5 of the 14th Amendment. The Court's decision in *City of Boerne v. Flores* (1997) established that "appropriate" legislation must be "remedial": Congress must identify conduct that violates the Fourteenth Amendment and must tailor its legislation to remedying or preventing such conduct. In enacting the Patent Remedy Act, however, Congress identified no pattern of patent infringement by states. Moreover, Congress barely considered the availability of state remedies for patent infringement. Patent infringement alone does not constitute a due process violation; "only where the State provides no remedy, or only inadequate remedies . . . could a deprivation of property without due process occur." The legislative record thus "at best offers scant support" for a conclusion that states were engaging in due process violations. Consequently, the provisions of the Act are "so out of proportion to a supposed remedial or preventive object" that they cannot be upheld as an exercise of Fourteenth Amendment enforcement power.

5-4. Opinion of Court by Rehnquist, joined by O'Connor, Scalia, Kennedy, and Thomas. Dissenting opinion by Stevens, joined by Souter, Ginsburg, and Breyer.

Florida v. White 119 S. Ct. 1555, 67 USLW 4311 (5-17-99)

Fourth Amendment, seizure of automobile, contraband forfeiture: The Fourth Amendment does not require the police to obtain a warrant before seizing an automobile from a public place when they have probable cause to believe that the automobile itself is forfeitable contraband. The Court has long recognized that when law enforcement officers have probable cause to believe than an automobile contains contraband, the Fourth Amendment does not require them to obtain a warrant prior to searching the car and seizing the contraband. This

principle derives from laws and cases involving customs inspections of vessels, and reflects the need to seize "readily movable contraband before it is spirited away." The same principle applies if it is the vehicle itself that is the contraband. The Court also recognizes that law enforcement officers have "greater latitude in exercising their duties in public places" than they have when searching private premises. In this case police officers had observed the respondent using his car to transport illegal drugs. Several months later, after arresting the respondent on unrelated charges, the officers, acting under authority of the Florida Contraband Forfeiture Act, seized respondent's car from his employer's parking lot. No warrant was required under these circumstances.

7-2. Opinion of Court by Thomas, joined by O'Connor, Scalia, Kennedy, Souter, and Breyer. Concurring opinion by Souter, joined by Breyer. Dissenting opinion by Stevens, joined by Ginsburg.

Greater New Orleans Broadcasting Ass'n v. United States 119 S. Ct. 1923, 67 USLW 4451 (6-14-99)

First Amendment, commercial speech: 18 U.S.C. § 1304, which prohibits radio and television broadcasters from carrying advertisements for privately operated casino gambling regardless of the station's or casino's location, may not constitutionally be applied to prohibit advertising of private casino gambling broadcast by stations located within a state where such gambling is legal. The provision fails to satisfy the *Central Hudson* test for restrictions on commercial speech. If the commercial speech relates to lawful activity and is not misleading, restrictions must directly advance a substantial governmental interest and must not be more extensive than necessary to serve that interest. The government has identified substantial interests that are served by the prohibition on ads for casino gambling, but the underlying policy "is now decidedly equivocal." When section 1304 was enacted in 1934, the federal anti-gambling policy was uniform. Now, however, with various exemptions for gambling conducted by Indian tribes and state governments, federal statutes promote both pro-gambling and anti-gambling policies. "The operation of § 1304 and its attendant regulatory regime is so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it." Moreover, while there may be valid reasons for regulating tribal casino gambling more closely than non-tribal casino gambling, there is "no convincing reason" for restricting the speech of non-tribal owners more than that of tribal owners.

9-0. Opinion of Court by Stevens, joined by Rehnquist, O'Connor, Scalia, Kennedy, Souter, Ginsburg, and Breyer. Concurring opinions by Rehnquist and Thomas.

Grupo Mexicano de Desarollo v. Alliance Bond Fund 119 S. Ct. 1961, 67 USLW 4490
(6-17-99)

Federal courts, injunctive powers; mootness: A federal district court lacks the authority, in an action for money damages, to issue a preliminary injunction preventing the defendant from transferring assets in which no lien or equitable interest is claimed. The relief sought has no basis in the traditional powers of the equity courts. It is well established that a general creditor (one without a judgment) has no cognizable interest, at law or in equity, in the property of his debtor. There is no analogy to the equitable action known as a "creditor's bill," since that action could be brought only by a creditor who had already obtained a judgment establishing the debt. The merger of law and equity did not alter

substantive rights. While policy arguments may be made for and against creating the preliminary injunctive remedy to freeze a debtor's assets pending adjudication, the Court lacks authority under the Judiciary Act of 1789 to create remedies previously unknown to equity jurisprudence. Congress is the appropriate forum for deciding whether "this formidable power over debtors" should be created. Appeal of the preliminary injunction in this case was not rendered moot by decision on the merits and issuance of a permanent injunction. The basis for arguing that the preliminary injunction was wrongfully issued — that the court lacked power to restrain use of assets pending a money judgment — was independent of the breach of contract claim adjudicated on the merits.

5-4 (authority to issue preliminary injunction); **9-0** (mootness). Opinion of Court by Scalia, unanimous in part, and joined by Rehnquist, O'Connor, Kennedy, and Thomas in separate part. Dissenting opinion by Ginsburg, joined by Stevens, Souter, and Breyer.

Haddle v. Garrison 119 S. Ct. 489, 67 USLW 4029 (12-14-98)

Civil rights, conspiracy to deter testimony: Termination of at-will employment as part of a conspiracy to deter testimony before a federal grand jury is actionable under 42 U.S.C. § 1985(2) as injuring a citizen "in his person or property." The Eleventh Circuit was mistaken that a citizen must suffer an injury to a constitutionally protected interest in order to recover damages under § 1985(2). The case is not resolved, therefore, by the fact that loss of at-will employment is not "property" for purposes of the Due Process Clause. The "gist of the wrong" at which the provision is directed is not deprivation of property, but intimidation of witnesses. For this purpose, it is sufficient that interference with at-will employment has long been compensable under tort law.

9-0. Opinion for unanimous Court by Rehnquist.

Hanlon v. Berger 119 S. Ct. 1706, 67 USLW 4329 (5-24-99)

Fourth Amendment, media "ride-along", qualified immunity: Fish and Wildlife Service agents violated the Fourth Amendment when they allowed a media camera crew to accompany them in executing a warrant to search respondents' ranch for evidence of illegal taking of wildlife. The principles announced in *Wilson v. Layne* control. The agents are entitled to the defense of qualified immunity since the right to be free of media intrusion during a search was not clearly established in 1993 when this search occurred.

9-0. Per curiam.

Holloway v. United States 119 S. Ct. 966, 67 USLW 4148 (3-2-99)

Carjacking, intent: The federal carjacking statute, 18 U.S.C. § 2119, which prohibits carjacking "with the intent to cause death or serious bodily harm," applies to someone who seizes a car with the intent to kill or harm only if necessary to accomplish the carjacking. The statute applies to both conditional and unconditional intent to harm the victim, so the trial court did not err in instructing the jury to find requisite intent upon concluding that the defendant had intended to cause death or serious bodily harm if the victims had refused to turn over their cars. A "commonsense" reading of the statute counsels that Congress intended to criminalize carjacking generally, and did not intend to enact a "truncated" law applicable only to a limited subset of carjackings in which the offender intends to harm or kill the driver regardless of whether the driver surrenders his car. The statute as a whole reflects a deterrent purpose,

and that purpose is better served by construing the statute to cover both conditional and unconditional intent. Also, it is reasonable to presume that Congress was aware of state court decisions recognizing that specific intent to commit a crime may be conditional.

7-2. Opinion of Court by Stevens, joined by Rehnquist, O'Connor, Kennedy, Souter, Ginsburg, and Breyer. Dissenting opinions by Scalia and Thomas.

Hughes Aircraft Co. v. Jacobson 119 S. Ct. 755, 67 USLW 4122 (1-25-99)

ERISA, amendment of defined benefit plan: Hughes did not violate ERISA by suspending its own contributions to a retirement plan with a large surplus and by amending the plan to provide for an early retirement program and a noncontributory benefit structure applicable to new employees and optional for existing plan members. The existing plan members had no vested interest in the plan's surplus. The plan was a "defined benefit plan" under which qualified employees are entitled to a fixed periodic payment and the employer was obligated to cover any underfunding. Hughes did not violate ERISA's anti-inurement provision; amending the plan did not create a second plan, and fund assets were being used to pay benefits to plan participants, not for the benefit of the employer. ERISA's fiduciary provisions are inapplicable to plan amendments; this principle, already applied to welfare benefit plans, applies as well to pension benefit plans. The plan amendments did not work an effective termination based on the common-law theory of a wasting trust. ERISA's enormously complex and detailed text should not be supplemented by common-law remedies, and, in any event, the doctrine is inapplicable by its own terms.

9-0. Opinion for unanimous Court by Thomas.

Humana Inc. v. Forsyth 119 S. Ct. 710, 67 USLW 4085 (1-20-99)

Insurance; RICO compatibility with McCarran-Ferguson: The McCarran-Ferguson Act does not bar recourse to RICO in a treble damages action for health insurance fraud in Nevada. In this action beneficiaries of group health insurance policies alleged that their insurance company and a hospital committed fraud by agreeing to discounts on the insurance company's 80% share of hospital charges, thereby increasing the beneficiaries' share above the 20% agreed to in the insurance contract. Section 2(b) of the McCarran-Ferguson Act permits application of general federal legislation not specifically directed at insurance regulation if the law does not "invalidate, impair, or supersede" state laws regulating insurance. RICO is not a law that specifically relates to the business of insurance, and it does not "invalidate" or "supersede" Nevada law. The principal issue is whether RICO "impairs" Nevada law, and this issue depends on whether application of RICO would "frustrate any declared State policy or interfere with [the] State's administrative regime." There is no frustration of state policy or interference with state administration in this case. Instead, RICO "appears to complement" Nevada's provision of relief. Nevada allows insured parties to sue for insurance fraud and to obtain punitive damages that may exceed the treble damages obtainable under RICO.

9-0. Opinion for unanimous Court by Ginsburg.

Hunt v. Cromartie 119 S. Ct. 1545, 67 USLW 4306 (5-17-99)

Congressional districting, summary judgment, proof of racial motivation: The three-judge district court should not have granted a summary judgment to the appellees on their claim that North Carolina’s Twelfth Congressional

District, as redrawn in 1997, constituted an unconstitutional racial gerrymander in violation of the Equal Protection Clause. A redistricting law, facially neutral as to race, warrants strict scrutiny only if it can be proved to have been motivated by a racial purpose or object. Assessing a jurisdiction's motivation is an "inherently complex endeavor," requiring a "sensitive inquiry" by the trial court. In this case there was evidence supporting conflicting inferences — one that the legislature was primarily motivated by race, the other that the principal motivation was partisan politics. Summary judgment is appropriate only if there is no genuine issue of material fact. Because the legislature's motivation was in dispute, summary judgment on that issue was inappropriate.

9-0. Opinion of Court by Thomas, joined by Rehnquist, O'Connor, Scalia, and Kennedy. Concurring opinion by Stevens, joined by Souter, Ginsburg, and Breyer.

INS v. Aguirre-Aguirre 119 S. Ct. 1439, 67 USLW 4270 (5-3-99)

Deportation, political persecution: The Court of Appeals for the Ninth Circuit failed to accord appropriate deference to the determination of the Board of Immigration Appeals that a person who committed a serious nonpolitical crime before entering the United States, and whose political opinions would subject him to persecution in his country of origin, is not entitled to withholding of deportation. The court should have applied principles announced in *Chevron v. NRDC* (1984), and should have deferred to the Board's interpretation of the exception for serious nonpolitical crimes. Deference is "especially appropriate in the immigration context where officials `exercise especially sensitive political functions that implicate questions of foreign relations.'" The provision in question, 8 U.S.C. § 1253(h)(2)(C), directs that withholding of deportation does not apply if the Attorney General finds "serious reasons for considering that the alien has committed a serious nonpolitical crime . . . prior to [his] arrival." In finding that the respondent's actions in burning buses and vandalizing stores in Guatemala were "nonpolitical," the Board (to which the Attorney General had delegated her authority) determined that the criminal nature of the respondent's actions outweighed their political motivation. The Board did not, however, balance the criminal nature of the respondent's actions against the persecution that he would face if he were forced to return to Guatemala. The Board's interpretation is a reasonable one that comports with the plain language of the statute. The fact that this interpretation conflicts with that set forth in a United Nations handbook that was prepared as guidance for interpreting the treaty that the statute implements is not dispositive: the handbook "is not binding on the Attorney General, the [Board], or United States courts."

9-0. Opinion for unanimous Court by Kennedy.

Jefferson County v. Acker 119 S. Ct. 2069, 67 USLW 4521 (6-21-99)

County occupational tax, application to federal judges: An occupational tax imposed by Jefferson County, Alabama, on persons working within the county is not invalid as applied to federal judges. The case was properly removed to federal court under the federal officer removal statute. The judges made an "adequate threshold showing that the suit is `for an act under color of office,'" since the act requires payment of a fee before they engage in their occupation. The Tax Injunction Act does not bar federal court adjudication of the case. The Act does not bar collection suits, nor does it prevent taxpayer-defendants in collection suits from challenging the validity of the tax. The occupation tax operates as a non-discriminatory tax on judges' salaries to which the Public Salary Tax Act of 1939 consents. That Act applies the intergovernmental tax immunity doctrine, now interpreted to allow one sovereign to tax the salaries of another sovereign's employees as long as the tax is not discriminatory. The tax is a tax on "pay or compensation" within the meaning of the Act, and is not an invalid licensing measure. Because the tax does not discriminate against federal judges in particular, or federal officeholders in general, based on the federal source of their compensation, and the record shows no discrimination between similarly situated federal and state judges, the tax does not discriminate in violation of the Act.

5-4 (removal); **9-0** (Tax Injunction Act); **7-2** (intergovernmental immunity). Opinion of Court by Ginsburg, unanimous in part; joined in part by Stevens, O'Connor, Kennedy, and Breyer; and joined in separate part by Rehnquist, Stevens, Scalia, Kennedy, Souter, and Thomas. Opinion by Scalia, concurring in

part and dissenting in part, joined by Rehnquist, Souter, and Thomas. Opinion by Breyer, concurring in part and dissenting in part, joined by O'Connor.

Jones v. United States 119 S. Ct. 1215, 67 USLW 4204 (3-24-99)

Carjacking, elements of offense: The federal carjacking statute, 18 U.S.C. § 2119, establishes three separate offenses rather than a single offense with a choice of three maximum penalties. The section provides that whoever takes a motor vehicle by force and violence "shall — (1) be fined . . . or imprisoned not more than 15 years, . . . (2) if serious bodily injury results, be . . . imprisoned not more than 25 years, and (3) if death results, be . . . imprisoned for any number of years up to life . . . ." The additional elements added by subsections (2) and (3) must be charged in the indictment, submitted to a jury, and proven beyond a reasonable doubt. At first glance, the section's structure suggests that the numbered subsections are only sentencing provisions. It is "questionable," however, whether specification of facts sufficient to drastically increase a penalty range was intended to carry none of the safeguards associated with elements of an offense. Moreover, the first paragraph of the section does not "stand on [its] own grammatical feet," as most offense-defining provisions do, because there is no language such as "shall be guilty of" that completes the sentence. Use of the word "shall" does not resolve the issue, because the word is not "invariably" used to separate offense-defining clauses from sentencing provisions. Also, the provision was enacted against the backdrop of many federal and state criminal statutes that identify serious bodily injury as an offense element. Most important, the statute would be open to constitutional doubt if the subsections were interpreted as sentencing provisions. Precedent under both the Due Process Clause and the Sixth Amendment can be read as imposing limits on a legislature's ability to omit traditional elements from the definition of crimes and to diminish the jury's role in making factual determinations on which sentencing limits are based. The decision last Term in *Almendarez-Torres v. United States*, holding that recidivism increasing the maximum penalty need not be charged in the indictment, is distinguished. Recidivism has traditionally been regarded as a sentencing factor, whereas infliction of serious bodily injury has not been.

5-4. Opinion of Court by Souter, joined by Stevens, Scalia, Thomas, and Ginsburg. Concurring opinions by Stevens and Scalia. Dissenting opinion by Kennedy, joined by Rehnquist, O'Connor, and Breyer.

Jones v. United States 119 S. Ct. 2090, 67 USLW 4508 (6-21-99)

Death penalty, jury instructions on consequences of deadlock: In a sentencing hearing conducted under the Federal Death Penalty Act of 1994, the court's refusal to instruct the jury that the court would impose a sentence of life imprisonment without possibility of parole if the jury was unable to reach unanimous agreement on a sentence did not violate the Eighth Amendment. The Supreme Court declines to exercise its supervisory power to require that an instruction on the consequences of deadlock be given in every capital case. In this case the court gave the jury three options: it could by unanimous vote recommend the death penalty, life imprisonment without possibility of parole, "or . . . some other lesser sentence." If the jury recommended "some other lesser sentence," the instruction explained, "the court is required to impose a sentence that is authorized by law." The instruction did not constitute "plain error," even though a "lesser sentence" was not authorized in this case. There is "no reasonable likelihood that the jury applied the instructions incorrectly." The instructions, read in their entirety, were not misleading as to the

consequences of the jury's failure to reach a unanimous verdict. Any confusion over the effect of a lesser sentence recommendation was allayed by the court's instruction that the jury should not concern itself with such matters. Loose drafting of "nonstatutory" aggravating factors was harmless error if it constituted error at all.

5-4. Opinion of Court by Thomas, joined in part by Rehnquist, O'Connor, Scalia, and Kennedy, and in separate part by Rehnquist, O'Connor, and Kennedy. Dissenting opinion by Ginsburg, joined by Stevens and Souter, and joined in part by Breyer.

Knowles v. Iowa 119 S. Ct. 484, 67 USLW 4027 (12-8-98)

Fourth Amendment, search incident to traffic citation: A search authorized by an Iowa statute permitting officers to conduct a full-blown search of an automobile when issuing a traffic citation violates the Fourth Amendment. Neither of the rationales that justifies a search incident to arrest justifies a full search of an automobile incident to a traffic citation. The threat to officer safety is "a good deal less" in the case of a routine traffic stop than it is in the case of a custodial arrest. The "relatively brief encounter" of a traffic stop contrasts with an officer's "extended exposure" to a suspect who is placed in custody and transported to the police station. Officers conducting a routine traffic stop may order driver and passengers out of the car and may even conduct a patdown search if there is reasonable suspicion that the driver or any passengers may be armed and dangerous, but there is no such justification for a full search of the car. The second justification for a search incident to arrest — the need to preserve evidence — is "not present at all" in a routine traffic stop.

9-0. Opinion for unanimous Court by Rehnquist.

Kolstad v. American Dental Ass'n 119 S. Ct. 2118, 67 USLW 4552 (6-22-99)

Punitive damages, Title VII of Civil Rights Act: A plaintiff in an action brought under Title VII of the Civil Rights Act need not show "egregious" misconduct in order to recover punitive damages. 1991 amendments to Title VII authorized awards of compensatory and punitive damages in cases of "intentional misconduct," and further limited punitive awards to acts undertaken "with malice or with reckless indifference to . . . federally protected rights." The terms "malice" and "reckless" focus on the actor's state of mind. There is no additional requirement of egregiousness, although egregious misconduct is often associated with the award of punitive damages, and may serve as evidence supporting an inference of the requisite evil motive. Agency principles place limits on recovery of punitive damages from employers for the acts of employees. While the Restatement (Second) of Agency provides "a useful starting point," its principles must be modified so that an employer may not be held vicariously liable for discriminatory employment decisions of managerial agents when those decisions are contrary to the employer's good-faith efforts to comply with Title VII.

7-2 ("egregious" standard); **5-4** (agency). Opinion of Court by O'Connor, joined in part by Stevens, Scalia, Kennedy, Souter, Ginsburg, and Breyer; and joined in separate part by Rehnquist, Scalia, Kennedy, and Thomas. Opinion concurring in part and dissenting in part by Rehnquist, joined by Thomas. Opinion concurring in part and dissenting in part by Stevens, joined by Souter, Ginsburg, and Breyer.

Kumho Tire Co. v. Carmichael 119 S. Ct. 1167, 67 USLW 4179 (3-23-99)

Evidence, expert testimony: The standards announced in *Daubert v. Merrell Dow Pharmaceuticals* (1993) for admissibility of opinion testimony by qualified scientific experts apply as well to testimony based on technical and other specialized knowledge that is not "scientific." Federal Rule of Evidence 702, which allows admission of expert testimony "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact," affords no basis for distinguishing between admissibility of "scientific" knowledge and "technical" or "other specialized" knowledge. Whatever the specialized discipline, the trial judge must determine whether the testimony has "a reliable basis in the knowledge and experience of [the] discipline." Trial judges need considerable leeway in making this determination. The *Daubert* standards are "flexible,"and do not constitute a mandatory checklist. Whether or not the expert is applying scientific principles, the trial judge may, if appropriate, consider any of the specific factors identified in *Daubert* as possibly bearing on reliability. In this case, the district court's decision not to admit the testimony of an expert in motor vehicle tire failure analysis was reasonable. The court did not question the expert's qualifications, but instead found his methodology unreliable as applied to the facts of this case.

> **9-0** (general principles); **8-1** (disposition of case). Opinion of Court by Breyer, joined by Rehnquist, O'Connor, Scalia, Kennedy, Souter, Thomas, and Ginsburg, and joined in part by Stevens. Concurring opinion by Scalia, joined by O'Connor and Thomas. Concurring and dissenting opinion by Stevens.

Lilly v. Virginia 119 S. Ct. 1887, 67 USLW 4435 (6-10-99)

Confrontation Clause: The defendant's Sixth Amendment right to be confronted with the witnesses against him was violated by admission into evidence at his trial of a confession made by a non-testifying accomplice. The accomplice confessed to participating in a burglary, but stated that the defendant was the one who shot and killed a person whose car they had stolen during their crime spree. The fact that portions of the confession were "against penal interest" does not place the non-self-inculpatory portions incriminating the defendant within a firmly rooted exception to the hearsay rule; the latter portions are presumptively unreliable. The case is remanded to Virginia courts to determine whether the violation of the defendant's Confrontation Clause rights was harmless beyond a reasonable doubt.

> **9-0**. Opinion of Court by Stevens, one part of which was joined by Scalia, Souter, Thomas, Ginsburg, and Breyer, and a separate part of which was joined by Scalia, Souter, Ginsburg, and Breyer. Separate part of Stevens opinion joined by only by Souter, Ginsburg, and Breyer. Concurring opinions by Rehnquist, joined by O'Connor and Kennedy; by Scalia; by Thomas; and by Breyer.

Lopez v. Monterey County 119 S. Ct. 693, 67 USLW 4076 (1-20-99)

Voting Rights Act, preclearance: A political subdivision covered by the Voting Rights Act must seek preclearance before giving effect to voting changes required by state law, even if the state is not covered by the Act. The Act's plain meaning and its history of interpretation support this conclusion. Section 5 of the Voting Rights Act requires preclearance "whenever a [covered] State or political subdivision . . . shall enact or seek to administer any voting [change]." The phrase "seek to administer" does not limit preclearance obligations to discretionary acts of a covered jurisdiction. "Administer" comprehends non-discretionary acts, and the word "seek" is used merely to make a "temporal

distinction" between enactment and implementation of legislation: preclearance need not be obtained before enactment, but must be before implementation. The Attorney General's interpretation to the same effect is entitled to deference. Although the Act intrudes on state sovereignty by requiring federal approval of state enactments, "the Fifteenth Amendment permits this intrusion."

8-1. Opinion of Court by O'Connor, joined by Stevens, Scalia, Souter, Ginsburg, and Breyer. Concurring opinion by Kennedy, joined by Rehnquist. Dissenting opinion by Thomas.

Marquez v. Screen Actors Guild 119 S. Ct. 292, 67 USLW 4001 (11-3-98)

Labor, union security clause: A union does not breach its duty of fair representation by negotiating a union security clause that uses the language of § 8(a)(3) of the National Labor Relations Act without explaining in the agreement itself the Supreme Court's interpretation of that language. Section 8(a)(3) permits unions to negotiate collective bargaining agreements that require union "membership" for all employees on or after the 30th day following the beginning of "such employment." The Court has interpreted this language to mean merely that the union may require the payment of core fees and dues necessary to support the union's representational activities. There is no requirement that these qualifications be spelled out in the security clause; the clause is enforceable as written because the statutory provisions have become terms of art that incorporate case law interpretations. The union did not breach its duty of fair representation; there was no claim of discriminatory conduct in this case, and the union's negotiation of the security clause was neither arbitrary nor in bad faith. The District Court lacked jurisdiction over the petitioner's second claim. That claim, that the security clause violates § 8(a)(3) by providing that the 30-day grace period begins to run with any employment in the industry rather than with the particular employment at issue, is at base a statutory issue within the NLRB's primary jurisdiction.

9-0. Opinion for unanimous Court by O'Connor. Concurring opinion by Kennedy, joined by Thomas.

Martin v. Hadix 119 S. Ct. 1998, 67 USLW 4500 (6-21-99)

Retroactivity, Prison Litigation Reform Act, attorney's fees: Section 803(d) of the Prison Litigation Reform Act (PLRA), which limits the fees that may be awarded to attorneys who litigate prisoner lawsuits, applies to services that were performed after the PLRA's effective date, but not to services performed prior to that date. Principles announced in *Landgraf v. USI Film Products* (1994) govern the retroactivity issue. The statute does not address "the temporal reach" of the provision. The language of the provision sets substantive limits, and "falls short of demonstrating a `clear congressional intent' favoring retroactive application of the fees limitations." The structure and history of the PLRA should not be read to mean that the fees limitations are inapplicable to pending cases. Section 802, governing "appropriate remedies" in prison litigation, explicitly provides that it applies to pending cases, while section 803 is silent in this regard. Because, however, sections 802 and 803 "address wholly distinct subject matters," no negative inference should be made about section 803's application to pending cases. The fact that the fees limitations were moved out of section 802 and placed in section 803 during congressional consideration does not mean that Congress intended the provisions to apply to pending cases, since there could have been "a variety of other reasons" for the move. In the absence

of congressional guidance on the retroactivity issue, the next question in this case is whether application to fees for postjudgment monitoring would be "inconsistent with the usual rule that legislation is deemed to be prospective." Application to monitoring performed before the effective date would be contrary to the rule, since it would "attach new legal consequences to completed conduct." Application to monitoring performed after the PLRA's effective date creates no such retroactivity problem, because enactment of the PLRA put attorneys on notice that their hourly rate had been adjusted.

7-2. Opinion of Court by O'Connor, joined by Rehnquist, Kennedy, Souter, Thomas, and Breyer; joined in part by Scalia; and joined in separate part by Stevens and Ginsburg. Concurring opinion by Scalia. Opinion by Ginsburg, joined by Stevens, concurring in part and dissenting in part.

Maryland v. Dyson 119 S. Ct. 2013, 67 USLW 3770 (6-21-99)

Fourth Amendment, automobile search: The Fourth Amendment does not require police to obtain a search warrant before searching a vehicle that they have probable cause to believe contains illegal drugs. Under established precedent, the "automobile exception" to the warrant requirement has no separate exigency requirement. The Court held in *United States v. Ross* (1982) that a search of an automobile is not unreasonable, even though a warrant has not been obtained, if the search is based on facts that would support a warrant.

Per curiam. Dissenting opinion by Breyer, joined by Stevens.

Minnesota v. Carter 119 S. Ct. 469, 67 USLW 4017 (12-1-98)

Fourth Amendment, persons protected in home: A person present in someone else's apartment for a few hours for the purpose of bagging cocaine for later sale is not entitled to Fourth Amendment protection. In some circumstances a person in someone else's house has a legitimate expectation of privacy, and hence is entitled to Fourth Amendment protection. The Court has extended protection, for example, to overnight guests. At the other extreme, persons who are merely "legitimately on the premises" are not entitled to protection. The purely commercial nature of the transaction here, the relatively brief period of time on the premises, and the lack of any previous connection with the householder make the respondent's situation in this case closer to that of one simply permitted on the premises. Because the respondent had no legitimate expectation of privacy in the apartment, there is no need to decide whether a police officer's observations through a window constituted a "search."

5-4 (Fourth Amendment protection); **6-3** (result). Opinion of Court by Rehnquist, joined by O'Connor, Scalia, Kennedy, and Thomas. Concurring opinions by Scalia, joined by Thomas; by Kennedy; and by Breyer (concurring in result, but agreeing with dissent on Fourth Amendment coverage). Dissenting opinion by Ginsburg, joined by Stevens and Souter.

Minnesota v. Mille Lacs Band of Chippewa Indians 119 S. Ct. 1187, 67 USLW 4189 (3-24-99)

Native Americans, treaty rights: Several Bands of Chippewa Indians retain rights guaranteed by an 1837 Treaty "during the pleasure of the President" to hunt, fish, and gather rice on lands ceded to the United States. These usufructuary rights were not eliminated by an 1850 Executive Order, by an 1855 Treaty, or by admission of Minnesota into the Union in 1858. The 1850 Executive Order purported to revoke these hunting, fishing, and gathering "privileges granted temporarily to the Chippewa Indians," but the Order was

understood as a "removal" order requiring relocation of the Indians, and as such exceeded the President's authority. Neither the Removal Act nor the Treaty itself authorized the President to order removal of the Indians. The portion of the Executive Order revoking the usufructuary rights is not severable from the invalid removal order because "it is clear that President Taylor intended the 1850 order to stand or fall as a whole." The 1855 Treaty, by which the Indians "relinquish[ed] and convey[ed] . . . any and all right, title, and interest [in] lands," relinquished lands, not usufructuary rights. Minnesota's enabling act does not abrogate the 1837 Treaty, nor does the "equal footing doctrine." Statehood by itself is insufficient to extinguish Indian treaty rights to hunt, fish, and gather, because such treaty rights are still subject to reasonable and non-discriminatory state conservation regulations. The contrary interpretation of the equal footing doctrine in *Ward v. Race Horse* (1896) is rejected.

5-4. Opinion of Court by O'Connor, joined by Stevens, Souter, Ginsburg, and Breyer. Dissenting opinions by Rehnquist, joined by Scalia, Kennedy, and Thomas; and by Thomas.

Mitchell v. United States 119 S. Ct. 1307, 67 USLW 4230 (4-5-99)

Self-incrimination: A guilty plea does not waive the privilege against self-incrimination at the sentencing phase of a federal trial. Incrimination is not complete once guilt has been adjudicated. Rather, a defendant may have a legitimate fear of adverse consequences from testimony at sentencing. The Court has already held that the privilege against self-incrimination applies in a capital sentencing hearing, and there is no reason not to apply the principle to non-capital sentencing hearings as well. A district court's explanation, pursuant to Rule 11, that a defendant who pleads guilty will lose the right to remain silent at trial, does not suggest to a defendant that he could also lose the right to remain silent at sentencing. The rule applicable at trial that no negative inference may be drawn from the defendant's failure to testify applies with equal force at sentencing. The district court may not make an adverse inference, based on the defendant's silence at sentencing, about circumstances and details of the crime that bear on sentencing — in this case the amount of drugs sold by the defendant. The Government retains the burden at the sentencing phase of proving facts relevant to the crime, and may not "enlist the defendant in this process at the expense of the self-incrimination privilege."

9-0 (effect of guilty plea); **5-4** (adverse inference). Opinion of Court by Kennedy, joined by Stevens, Souter, Ginsburg, and Breyer. Opinions concurring in part and dissenting in part by Scalia, joined by Rehnquist, O'Connor, and Thomas; and by Thomas.

Murphy Bros. v. Michetti Pipe Stringing, Inc. 119 S. Ct. 1322, 67 USLW 4238 (4-5-99)

Removal, timing, service of process: The 30-day period established by 28 U.S.C. § 1446(b) for removal of actions from state to federal court does not begin to run until formal service of process, even if the defendant has already received a copy of the complaint. Section 1446(b) provides that notice of removal "shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading." In this case the plaintiff filed a complaint in an Alabama court and 3 days later faxed a file-stamped copy of the complaint to the defendant; the defendant was not formally served until two weeks later. The defendant's notice of removal, filed 30 days after service of process and 44 days after receipt of the complaint, complied with

section 1446(b). Historically, service of process has been the official trigger for responsive action by the party named as a defendant. Nothing in the legislative history of enactment of the modern version of the section indicates that Congress intended to dispense with this historic function. Rather, the accompanying Senate report explained that the measure was intended to correct a problem that could occur in New York and other states, in which the period for removal might end before the defendant obtained access to the complaint. Similar language in Federal Rule of Civil Procedure 81, governing the time allowed a defendant to answer a complaint, has been interpreted to afford the defendant the specified number of days after service of process.

6-3. Opinion of Court by Ginsburg, joined by Stevens, O'Connor, Kennedy, Souter, and Breyer. Dissenting opinion by Rehnquist, joined by Scalia and Thomas.

Murphy v. United Parcel Service 119 S. Ct. 2133, 67 USLW 4549 (6-22-99)

ADA, "regarded as" disabled: An individual fired from his job as a mechanic because of high blood pressure that prevented him from receiving DOT certification to drive a commercial vehicle – an essential function of this particular mechanic's job – is not "regarded as" disabled within the meaning of the ADA definition of "disability." As the Court determined in *Sutton v. United Airlines*, the initial issue of whether the petitioner was "disabled" should be determined with reference to the mitigating measures he employs. A person is "regarded as" disabled if a covered employer believes that the person's actual, nonlimiting impairment substantially limits one or more major life activities. No such showing was made in this case. The petitioner established that he is regarded as unable to perform the job of mechanic only when that job requires driving a commercial motor vehicle, but it is undisputed that he is generally employable as a mechanic. At most, the petitioner is regarded as unable to perform only a particular job – not an entire class or broad range of jobs.

7-2. Opinion of Court by O'Connor, joined by Rehnquist, Scalia, Kennedy, Souter, Thomas, and Ginsburg. Dissenting opinion by Stevens, joined by Breyer.

NASA v. FLRA 119 S. Ct. 1979, 67 USLW 4468 (6-17-99)

Inspector General Act, employee examinations, FSLMRS: An investigator employed in NASA's Office of Inspector General can be considered a "representative" of NASA when examining a NASA employee, and consequently the right to union representation guaranteed by the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7114(a)(2)(B), applies. By its terms, the provision is not limited to agency investigators representing an "entity" within the agency that collectively bargains with the employee's union. Neither the fact that the relevant language is contained in a larger section addressing collective bargaining rights, nor the fact that the phrase "representative of the agency" is used elsewhere in the statute to refer to management representatives responsible for collective bargaining requires a different reading. Moreover, there is no basis in the history and purpose of the FSLMRS to give § 7114(a)(2)(B) a narrow construction that covers some, but not all, interviews by agency representatives. Nor does the Inspector General Act (IGA) require a limiting construction. Rather, the IGA provides that Inspectors General "shall report to and be under the general supervision of the head of the establishment involved," and also refers to the agency "within which [an IG's] Office is established." Although enforcing § 7114(a)(2)(B) may lessen an Inspector General's ability to maintain the confidentiality of its investigations, the provision "vindicates obvious countervailing federal policies" favoring fair treatment of employees under investigation.

5-4. Opinion of Court by Stevens, joined by Kennedy, Souter, Ginsburg, and Breyer. Dissenting opinion by Thomas, joined by Rehnquist, O'Connor, and Scalia.

National Fed'n of Fed. Employees v. Department of the Interior 119 S. Ct. 1003, 67 USLW 4170 (3-3-99)

Labor, federal employees, midterm bargaining: The Federal Service Labor-Management Relations Statute is ambiguous as to the duty of federal employers to bargain midterm (*i.e.*, while the basic collective bargaining agreement is in effect) over matters not included in the basic agreement. The statute, 5 U.S.C. § 7114(a)(4), simply provides that the federal agency employer and the union representative "shall meet and negotiate in good faith for the purposes of arriving at a collective bargaining agreement." The "arriving at" language is not dispositive, because there is nothing in the circular definition of "collective bargaining agreement" to exclude a midterm agreement. The statutory ambiguity is consistent with the conclusion that Congress delegated to the Federal Labor Relations Authority the power to determine whether, where, and when midterm bargaining is required. The statute also grants the Authority power to determine whether an agency must bargain "endterm" over including in the basic collective bargaining agreement a clause requiring midterm bargaining.

5-4. Opinion of Court by Breyer, joined by Stevens, Kennedy, Souter, and Ginsburg. Dissenting opinion by O'Connor, joined by Rehnquist, and joined in part by Scalia and Thomas.

NCAA v. Smith 119 S. Ct. 924, 67 USLW 4130 (2-23-99)

Sex discrimination, Title IX, scope of coverage: Receipt of dues from member colleges and universities that receive federal funds does not bring the National Collegiate Athletic Association (NCAA) within the scope of Title IX of the Education Amendments of 1972. A private action based on this theory, and challenging application of NCAA rules governing postgraduate eligibility for participation in intercollegiate athletics, cannot be maintained. Title IX prohibits sex discrimination in "any education program or activity receiving Federal financial assistance," and a regulation defines a "recipient" of such assistance as any entity "to whom Federal financial assistance is extended directly or through another recipient." Federal assistance is received "through another recipient" if it is earmarked for such payments, as is the case with a college that enrolls students who receive federal funds earmarked for college expenses. There is no allegation, however, that NCAA member institutions pay their dues with federal funds earmarked for the purpose of paying NCAA dues. Entities such as the NCAA that merely benefit economically from federal assistance are not "recipients" covered by Title IX.

9-0. Opinion for unanimous Court by Ginsburg.

Neder v. United States 119 S. Ct. 1827, 67 USLW 4404 (6-10-99)

Harmless error; fraud statutes, materiality: The district court's error in failing to submit to the jury the issue of materiality in a tax fraud case was "harmless error." The error at issue — a jury instruction that omits an element of the offense — differs markedly from the constitutional violations that have been held to defy harmless-error review. Errors that require reversal affect the framework in which the trial proceeds, and "necessarily render a trial fundamentally unfair." An instruction that omits an element of an offense does not *necessarily* render a criminal trial fundamentally unfair or unreliable. In this case, in which the defendant failed to report over $5 million in income and filed false returns, the evidence supporting materiality was "overwhelming," and the court's failure to submit the materiality issue to the jury was harmless error. Materiality of falsehood is an element of a "scheme or artifice to defraud" under the federal mail fraud, wire fraud, and bank fraud statutes. Under a natural reading of the statutory text itself, materiality would not be an element of the fraud statutes. However, where Congress uses terms that have accumulated a settled meaning under the common law, a court must infer, unless the statute dictates otherwise, that Congress intended to incorporate the established meaning. The well-settled meaning of "fraud" required a misrepresentation or concealment of a material fact. Nothing in the fraud statutes dictates a different conclusion, so it is presumed that Congress intended to incorporate materiality.

6-3 (harmless error); **9-0** (materiality). Opinion of Court by Rehnquist, unanimous on materiality issue, and joined by O'Connor, Kennedy, Thomas, and Breyer on harmless error issue. Concurring opinion by Stevens. Opinion by Scalia, concurring in part and dissenting in part, joined by Souter and Ginsburg.

Nynex Corp. v. Discon, Inc. 119 S. Ct. 493, 67 USLW 4031 (12-14-98)

Antitrust, group boycotts: The rule that group boycotts are illegal *per se* does not apply to a buyer's decision to buy from one seller instead of another, whenever that decision cannot be justified in terms of ordinary competitive objectives. In this case, a purchaser of telephone removal services allegedly switched purchases from the respondent to a competitor because the respondent

refused to participate in a scheme to defraud phone service customers. The group boycott *per se* rule is limited to cases involving horizontal agreements among direct competitors. This case does not involve any horizontal agreement, but instead involves a "vertical" agreement between supplier and customer. There is no special feature of this case to distinguish it from precedents limiting the *per se* rule.

9-0. Opinion for unanimous Court by Breyer.

Olmstead v. L.C. 119 S. Ct. 2176, 67 USLW 4567 (6-22-99)

ADA, mentally disabled, community placement: The ADA's general prohibition on discrimination against disabled persons in the provision of public services requires placement of persons with mental disabilities in community settings rather than institutions if the state's treatment professionals have determined that community placement is appropriate, if the transfer is not opposed by the affected individual, and if the placement can be reasonably accommodated, taking into account the resources available to the state. Unjustified institutionalization is properly regarded as discrimination by reason of disability. The Department of Justice regulations requiring public entities to administer services in "the most integrated setting appropriate" are entitled to deference under *Chevron v. NRDC* (1984). Moreover, congressional findings in the ADA explicitly identify unjustified "segregation" of disabled persons as a form of "discrimination."

6-3. Opinion of Court by Ginsburg, joined by Stevens, O'Connor, Souter, and Breyer. Separate part of Ginsburg opinion joined by O'Connor, Souter, and Breyer. Concurring opinions by Stevens; and by Kennedy, joined in part by Breyer. Dissenting opinion by Thomas, joined by Rehnquist and Scalia.

Ortiz v. Fibreboard Corp. 119 S. Ct. 2295, 67 USLW 4632 (6-23-99)

Class actions, asbestos settlement: Applicants for certification of a mandatory settlement class on a limited fund theory under Federal Rule of Civil Procedure 23(b)(1)(B) must show that the settlement fund is limited by more than the agreement of the parties, and will be allocated to claimants belonging within the class by a process addressing any conflicting interests of class members. The record on which the district court in this case rested its class certification did not support these essential premises of mandatory limited fund actions. There is good reason to treat these limited fund characteristics as "presumptively necessary," since the Advisory Committee that developed Rule 23 did not contemplate that the mandatory class action codified in subdivision (b)(1)(B) would be used to aggregate unliquidated tort claims on a limited fund rationale, and since serious constitutional concerns (jury trial and due process rights of absent class members) are implicated. There was no evaluation of the amount of insurance money that would be available to pay claims, and consequently there was no adequate demonstration of the fund's upper limit. There was also inadequate consideration of the inclusiveness of the class and of equity among class members. Several groups, including persons who had previously settled but retained the right to sue again upon development of asbestos-related malignancy, plaintiffs with claims pending at the time of an initial settlement agreement, and "inventory" plaintiffs, were excluded from the class. There was no division of plaintiffs between holders of present and future claims, and thus there was inadequate protection against conflicting interests of counsel. The class also did not accommodate the different interests of plaintiffs whose claims

arose while Fibreboard maintained insurance, and those whose claims arose after the insurance was discontinued. Another departure from "limited fund antecedents" is that Fibreboard's net worth was not taken into account in determining the size of the fund.

7-2. Opinion of Court by Souter, joined by Rehnquist, O'Connor, Scalia, Kennedy, Thomas, and Ginsburg. Concurring opinion by Rehnquist, joined by Scalia and Kennedy. Dissenting opinion by Breyer, joined by Stevens.

O'Sullivan v. Boerckel 119 S. Ct. 1728, 67 USLW 4389 (6-7-99)

Habeas corpus, exhaustion of state remedies: Before a federal court may grant habeas relief to a state prisoner, that prisoner must exhaust his remedies in state court, and this required exhaustion includes petitioning a state court of last resort that has discretionary control over its docket. The governing statute, 28 U.S.C. § 2254(c), provides that a habeas petitioner shall not be deemed to have exhausted his state remedies "if he has the right under [state law] to raise, by any available procedure, the question presented." This does not require state prisoners to invoke every possible avenue of state review, but it does require that prisoners give state courts "one full opportunity to resolve any constitutional issues by invoking one complete round of the State's appellate review process." Because the respondent raised three issues in his federal habeas petition that he had not raised in his petition for leave to appeal to the Illinois Supreme Court, and because the time for filing in Illinois had long passed, he procedurally defaulted on those claims.

6-3. Opinion of Court by O'Connor, joined by Rehnquist, Scalia, Kennedy, Souter, and Thomas. Concurring opinion by Souter. Dissenting opinions by Stevens, joined by Ginsburg and Breyer; and by Breyer, joined by Stevens and Ginsburg.

Peguero v. United States 119 S. Ct. 961, 67 USLW 4154 (3-2-99)

***Habeas corpus*, harmless error**: A district court's failure to advise a defendant of his right to appeal his sentence, as required by Federal Rule of Criminal Procedure 32(a)(2), does not provide a basis for *habeas corpus* relief if the defendant was aware of his right to appeal when the trial court failed to give the advice. Because the defendant was aware of his right to appeal, he suffered no prejudice from the trial court's omission.

9-0. Opinion for unanimous Court by Kennedy. Concurring opinion by O'Connor, joined by Stevens, Ginsburg, and Breyer.

Pfaff v. Wells Electronics, Inc. 119 S. Ct. 304, 67 USLW 4009 (11-10-98)

Patents, invention "on sale" more that a year: A product can be "on sale" within the meaning of section 102(b) of the Patent Act of 1952, 35 U.S.C. § 102 (b), if it has been offered for sale, even if it has not yet been reduced to practice. Section 102(b) provides that an "invention" may not be patented if it has been "on sale" for more than one year before the patent application was filed. An "invention" is an inventor's conception rather than a physical embodiment of that idea. It is well settled that an invention may be patented before it is reduced to practice. Two conditions must be satisfied before an invention is "on sale." First, the product must be the subject of a commercial sale. In this case, the product had been offered for sale more than a year prior to patent application. Second, the invention must be ready for patenting. This latter condition may be satisfied in at least two ways — by proof of reduction to practice, or by proof

that the inventor had prepared drawings or other descriptions of the invention that were sufficiently specific to enable a person skilled in the art to practice the invention. Here, the second condition was satisfied by drawings that the inventor had provided to a manufacturer before the critical date.

9-0. Opinion for unanimous Court by Stevens.

Reno v. American-Arab Anti-Discrimination Comm. 119 S. Ct. 936, 67 USLW 4133 (2-24-99)

Immigration, deportation, judicial review, selective enforcement: Provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) limiting judicial review apply to certain types of challenges to deportation proceedings that were ongoing at the time of enactment of IIRIRA. The "supposed tension" between 8 U.S.C. § 309(c)(1), which sets a general rule of inapplicability to pending cases, and § 306(c)(1), which provides that §1252(g) applies to pending cases, is resolved by a "narrow reading" of the latter provision. 8 U.S.C. §1252(g) should be read as barring judicial review, prior to a final deportation order, of a limited subset of claims challenging three discrete types of actions by the Attorney General — commencing proceedings, adjudicating cases, or executing removal orders. The instant case, involving a claim that respondents were targeted for deportation because of their affiliation with a politically unpopular group, fits squarely within the first category as a challenge to the commencement of proceedings. The three categories should not be treated as all-encompassing. Nowhere in the U.S. Code is precise and narrow language of this nature used as a shorthand means of imposing a general jurisdictional limitation. Also, there is "good reason" for Congress to insulate these particular actions from judicial review, since each involves a stage at which the Attorney General may exercise nonreviewable discretion to abandon deportation proceedings. The doctrine of constitutional doubt is inapplicable because there is no constitutional right implicated. "As a general matter . . . an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation."

8-1. Opinion of Court by Scalia, joined by Rehnquist, O'Connor, Kennedy, and Thomas, and joined in part by Ginsburg and Breyer. Concurring opinion by Ginsburg, joined in part by Breyer. Concurring opinion by Stevens. Dissenting opinion by Souter.

Richardson v. United States 67 USLW 4381 (6-1-99)

Jury unanimity, "continuing criminal enterprise": A jury in a case brought under 18 U.S.C. § 848, which forbids any person from engaging in a "continuing criminal enterprise," must unanimously agree not only that the defendant committed some "continuing series of violations," but also which specific violations make up that continuing series. It is well settled that a federal jury may convict only if it finds unanimously that the Government has proved each element of an offense. A jury may, however, disagree as to which of several possible means the defendant used to commit an element of the crime. For purposes of section 848, each violation making up a "series of violations" should be considered to be a separate "element" of the offense, and not merely the possible "means" by which the offense was committed. The statute provides that a person is engaged in a continuing criminal enterprise if he violates any provision of the federal drug laws, and if "such violation is a part of a continuing series of violations." Use of the word "violation" suggests that each "violation"

amounts to a separate element of the offense that requires jury unanimity. Also, the breadth of possible drug law violations that could comprise a "series" means that, absent a unanimity requirement, there could be wide disagreement among jurors as to just what the defendant did or did not do. Finally, the statute should be construed so as to avoid possible constitutional issues that could be raised under the alternative construction.

6-3. Opinion of Court by Breyer, joined by Rehnquist, Stevens, Scalia, Souter, and Thomas. Dissenting opinion by Kennedy, joined by O'Connor and Ginsburg.

Roberts v. Galen of Virginia, Inc. 119 S. Ct. 685, 67 USLW 4062 (1-13-99)

Emergency Medical Treatment and Active Labor Act: Recovery in an action brought under the Emergency Medical Treatment and Active Labor Act for a hospital's failure to provide necessary stabilizing treatment for an emergency medical condition is not contingent upon proof of improper motive. Section 1395dd(b) of the Act requires hospitals to provide "for such further medical examination and such treatment as may be required to stabilize the medical condition." The provision is not qualified by a requirement of "appropriateness," and cannot "reasonably be read to require an improper motive."

9-0. *Per curiam.*

Ruhrgas AG v. Marathon Oil Co. 119 S. Ct. 1563, 67 USLW 4315 (5-17-99)

Federal courts, priority of jurisdictional issues: There is "no unyielding jurisdictional hierarchy" in cases removed from state to federal court, or in cases originating in federal court. Federal district courts have discretion to dismiss a removed case for lack of personal jurisdiction without reaching the issue of subject matter jurisdiction. The principles that require a court to find subject matter jurisdiction before proceeding to the merits do not necessarily require a set sequencing of jurisdictional issues. The possibility of issue preclusion in subsequent state-court litigation merits consideration, but is not dispositive. In most instances, "both expedition and sensitivity to state courts' coequal stature" should impel the federal court to consider subject matter jurisdiction before personal jurisdiction. However, if the court has a "straightforward" issue of personal jurisdiction that presents "no complex question of state law," and if the alleged defect in subject matter jurisdiction raises a "difficult and novel question," the court does not abuse its discretion by first addressing personal jurisdiction.

9-0. Opinion for unanimous Court by Ginsburg.

Saenz v. Roe 119 S. Ct. 1518, 67 USLW 4291 (5-17-99)

Right to travel, durational residency requirement for welfare: A provision of the California Welfare and Institutions Code limiting new residents, for the first year they live in California, to the level of welfare benefits that they would have received in the state of their prior residence, abridges the right to travel in violation of the Fourteenth Amendment. The right to travel is "firmly embedded in our jurisprudence." A component of the right to travel is the right of a newly arrived citizen to the same privileges and immunities enjoyed by other citizens of that state. Privileges and immunities of citizenship are protected under Article IV by virtue of the new arrival's status as a state citizen, and under the Fourteenth Amendment by virtue of her status as a citizen of the United States. The Court recognized in the *Slaughter-House Cases* in 1873 that the Fourteenth Amendment's Privileges or Immunities Clause guarantees that United States

citizens who establish *bona fide* residence in a state are entitled to the same rights as other citizens of that state. Classification based upon the period of residency in California and the location of prior residence penalizes the citizen's right to be treated equally in her new state of residence. Such penalties may not be judged by mere rationality or by an "intermediate" standard of review; instead, the standard must be "no less strict" than the compelling governmental interest test applied in *Shapiro v. Thompson* (1969). The Court in *Shapiro* held that the purpose of deterring welfare applicants from migrating into a state is impermissible. Here, California's professed purpose of saving money is legitimate, but cannot justify its discrimination among equally eligible citizens. Federal approval of such durational residency requirements in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 cannot resuscitate the constitutionality of California's law. Congress may not authorize the states to violate the Fourteenth Amendment. Article I powers may not be exercised in a manner that violates other specific provisions of the Constitution, and congressional enforcement power under section 5 of the Fourteenth Amendment encompasses no power to restrict, abrogate, or dilute the Amendment's guarantees.

7-2. Opinion of Court by Stevens, joined by O'Connor, Scalia, Kennedy, Souter, Ginsburg, and Breyer. Dissenting opinions by Rehnquist, joined by Thomas; and by Thomas, joined by Rehnquist.

South Central Bell Tel. Co. v. Alabama 119 S. Ct. 1180, 67 USLW 4186 (3-23-99)

Commerce Clause; Taxation, State: Alabama's franchise tax law discriminates against foreign corporations in violation of the Commerce Clause. The law establishes a domestic corporation's tax base as the par value of its capital stock, a value that the corporation may set at whatever level it chooses. The tax base of a foreign corporation, on the other hand, contains balance sheet items that the corporation cannot so manipulate. Denial to foreign corporations of the ability afforded domestic corporations to reduce their tax liability constitutes facial discrimination against interstate commerce and can be upheld only if the State offers sufficient justification. Alabama has not justified the discrimination. The tax is not a "compensatory" tax that offsets the tax burden imposed on domestic corporations. The burdens on foreign and domestic corporations are neither "roughly approximate" nor similar in substance, the one being a tax on the decision to do business in the state, the other being a tax on ownership of a certain form of property. The Eleventh Amendment does not deprive the Supreme Court of appellate jurisdiction over cases such as this arising from state courts. Nor may Alabama apply "*res judicata*" principles to deny relief simply because the same issue had been decided by the Alabama Supreme Court in an earlier case involving different parties.

9-0. Opinion for unanimous Court by Breyer. Concurring opinions by O'Connor and Thomas.

Stewart v. LaGrand 119 S. Ct. 1018, 67 USLW 3557 (3-3-99)

***Habeas corpus*, waiver of challenge to execution by lethal gas**: A convicted murderer who was sentenced to death and who exercised his option under Arizona law to be executed by lethal gas rather than by lethal injection has waived any objection he might have had to the constitutionality of execution by gas. The prisoner in this case also procedurally defaulted by failing to raise this claim on direct appeal after having been sentenced to death by lethal gas prior

to the State's adoption of the lethal injection alternative. At the time of the prisoner's direct appeal (1987) there had been sufficient debate about the constitutionality of lethal gas executions that he cannot show cause for his failure to raise the issue on appeal.

8-1. *Per curiam.* Concurring opinion by Souter, joined by Ginsburg and Breyer. Dissenting opinion by Stevens.

Strickler v. Greene 119 S. Ct. 1936, 67 USLW 4477 (6-17-99)

Prosecutorial misconduct; habeas corpus, procedural default: Virginia did not violate the rule derived from *Brady v. Maryland* (1963) that suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is material either to guilt or to punishment. In this case the prosecution withheld an initial statement made to police by a prosecution witness. The statement, much less definite about the defendant's role in the crime than her later testimony, could have been used by the defendant to impeach her credibility. Petitioner's procedural default in not raising this *Brady* claim in state courts is excused by an adequate showing of cause and prejudice; the petitioner had relied on the prosecution's "open file" policy and on assurances that "everything known to the government" had been disclosed. Petitioner could not, however, establish the underlying *Brady* violation. Two of the three components of a violation were established: the evidence was favorable to the accused and was suppressed by the State. The petitioner failed, however, to demonstrate the prejudice necessary to establish "materiality" because he failed to show that there is a reasonable probability that his conviction or sentence would have been different if the materials had been disclosed. Even if the one witness had been "severely impeached," there was other evidence in the record lending "strong support" for the conclusion that the petitioner still would have been convicted and sentenced to death. Moreover, the testimony in question did not relate to the petitioner's eligibility for the death sentence, and was not relied upon by the prosecution in its closing argument during the penalty phase of the trial.

7-2 (*Brady* violation); **9-0** (excusal of procedural default). Opinion of Court by Stevens, joined by Rehnquist, O'Connor, Scalia, Ginsburg, and Breyer, and joined in part by Kennedy, Souter, and Thomas. Opinion by Souter, joined by Kennedy, concurring in part and dissenting in part.

Sutton v. United Airlines 119 S. Ct. 2139, 67 USLW 4537 (6-22-99)

ADA, definition of "disability": The determination of whether an individual is "disabled" for purposes of the Americans with Disabilities Act of 1990 (ADA) should be made with reference to corrective measures that mitigate the individual's impairment, including, for instance, eyeglasses and contact lenses. The ADA defines "disability" as "a physical or mental impairment that substantially limits one or more of [that individual's] major life activities." No agency has been delegated the authority to interpret the term "disability." EEOC guidelines, however, define "major life activities" to include "working," and also provide that individuals are to be evaluated in their hypothetical uncorrected state. This latter EEOC interpretation is "impermissible." The present indicative verb form of the statutory definition ("substantially limits") requires that the individual be presently – not potentially – limited by an impairment. The evaluation as to disability must be individualized, but focus on an uncorrected impairment would require instead that persons be judged as members of a group

with similar impairments. Finally, congressional "findings" written into the ADA declare that "some 43,000,000 Americans have one or more physical or mental disabilities." This figure is inconsistent with a definition of disability that would treat all impairments in their uncorrected form; estimates available in 1990 produced a significantly larger number (approximately 160 million) for a nonfunctional "health conditions" approach to defining disability. Because it is included in the ADA's text, the congressional finding "gives content to the ADA's terms, specifically the definition of disability." A second aspect of the statutory definition includes individuals who are "regarded as" having a disability. The petitioners in this case, individuals whose corrected vision was 20/20 or better, were rejected for employment as airline pilots because their uncorrected vision did not meet the airline's minimum requirement of 20/100 uncorrected vision. The ADA allows employers to establish physical criteria for jobs. The fact that petitioners were rejected for employment in one particular job does not establish that the employer regarded them as having an impairment "substantially limiting" their ability to work. The definition requires an allegation that an individual's impairment makes her unable to work in a "broad class of jobs." There are a number of other positions – such as regional pilot and pilot instructor – utilizing petitioners' skills.

7-2. Opinion of Court by O'Connor, joined by Rehnquist, Scalia, Kennedy, Souter, Thomas, and Ginsburg. Concurring opinion by Ginsburg. Dissenting opinions by Stevens, joined by Breyer; and by Breyer.

United States v. Haggar Apparel Co. 119 S. Ct. 1392, 67 USLW 4249 (4-21-99)

Administrative law, deference to agency interpretation: A Customs Service regulation is subject to analysis under principles set forth in *Chevron v. NRDC* (1984). The statute grants importers a partial exemption from customs duties for manufactured articles that are assembled abroad and that have not been enhanced in value "except by being assembled and except by operations incidental to the assembly process." The regulation deems permapressing operations to be an additional step in manufacturing of textiles, and not an incidental part of the assembly process. The regulation is not limited in application to customs officers who classify imported merchandise, but applies to refund suits in the Court of International Trade. "The tariffs do not mean one thing for customs officers and another for importers." Statutes authorizing the Court of International Trade to conduct *de novo* review do not displace the customary *Chevron* deference to agency interpretations. "*De novo* proceedings presume a foundation of law," and deference may be given to the regulations without impairing the court's authority to make factual determinations *de novo* or to apply the regulations to those determinations. The case is remanded for determination of whether the regulation is entitled to deference under application of *Chevron* principles.

9-0; **7-2**. Opinion of Court by Kennedy, unanimous with respect to whether *Chevron* principles apply, and joined by Rehnquist, O'Connor, Scalia, Souter, Thomas, and Breyer on the remand issue. Opinion by Stevens, joined by Ginsburg, concurring in part and dissenting in part.

United States v. Rodriguez-Moreno 119 S. Ct. 1239, 67 USLW 4219 (3-30-99)

Venue, using firearm during crime of violence: Venue in a prosecution for using or carrying a firearm "during and in relation to any crime of violence," in violation of 18 U.S.C. § 924(c)(1), is proper in any district where the crime of violence was committed, even if the firearm was used or carried only in one

district. In this case the defendant participated in a kidnaping that began in Texas and continued with transportation of the victim to New Jersey and then to Maryland; in Maryland the defendant used a gun to threaten the victim. Venue was proper in New Jersey even though there was no evidence that the defendant used a gun in New Jersey. Section 924(c)(1) is not a point-in-time offense that can only be committed in the place where the underlying violent crime and the gun use coincide. Rather, where a crime consists of distinct parts that have different localities, the whole may be tried where any part can be proved to have been done. Venue is appropriate for the section 924(c)(1) offense wherever venue is appropriate for the underlying crime of violence.

7-2. Opinion of Court by Thomas, joined by Rehnquist, O'Connor, Kennedy, Souter, Ginsburg, and Breyer. Dissenting opinion by Scalia, joined by Stevens.

United States v. Sun-Diamond Growers 119 S. Ct. 1402, 67 USLW 4265 (4-27-99)

Illegal gratuity statute: The illegal gratuity statute, 18 U.S.C. § 201(c)(1)(A), which prohibits giving "anything of value" to a public official "for or because of any official act performed or to be performed by such public official," requires a showing beyond the mere fact that a gratuity was given because of the recipient's official position. Under the "more natural reading" of this language, an indictment is defective if it does not allege a specific connection between the gratuities and some official act. The provision could have been worded more simply and directly if the aim had been to proscribe all gifts for or because of official position. Broad prohibitions on gift giving found elsewhere in the Code are "more precise and more administrable." Moreover, the Government's position could produce "peculiar results," such as prohibiting a sports team visiting the White House from giving the President a replica jersey, or prohibiting a farmers group before whom the Secretary of Agriculture is speaking from offering him a complimentary lunch in connection with his speech. The illegal gratuity statute is but "one strand of an intricate web of regulations" that includes many "precisely targeted prohibitions." Given this statutory context, the Court will not "expand . . . one piece of the regulatory puzzle so dramatically as to make many other pieces misfits."

9-0. Opinion for unanimous Court by Scalia.

Unum Life Ins. Co. v. Ward 119 S. Ct. 1380, 67 USLW 4243 (4-20-99)

ERISA, preemption: California's "notice-prejudice" rule, under which an insurer may avoid liability for an untimely claim only by establishing that a claimant's delay in filing was prejudicial, is a "law . . . which regulates insurance" within the meaning of ERISA's saving clause, and therefore is not preempted as a law that "relate[s] to any employee benefit plan." The notice-prejudice rule fits a common-sense understanding of insurance regulation. The rule applies to insurance contracts, and is not a general principle applicable outside the insurance context. Moreover, the rule is grounded in policy concerns specific to the insurance industry. Two of the three criteria used to determine whether a state law regulates "the business of insurance" within the meaning of the McCarran-Ferguson Act are also met — the rule serves as "an integral part of the policy relationship between the insurer and the insured," and it is "limited to entities within the insurance industry." California's *Elfstrom* rule, under which the employer could be deemed to be the agent of the insurer (and by application of which the notice in this case would have been timely), is preempted as a law

that "relate[s] to [an] employee benefit plan." Deeming the policyholder-employer the agent of the insurer "would have a marked effect on plan administration."

9-0. Opinion for unanimous Court by Ginsburg.

West v. Gibson 119 S. Ct. 1906, 67 USLW 4462 (6-14-99)

Title VII, compensatory damages in administrative proceedings: The Equal Employment Opportunity Commission (EEOC) possesses the authority to require federal agencies to pay compensatory damages when they discriminate in employment in violation of Title VII of the Civil Rights Act of 1964. Section 717(b), added in 1972, grants the EEOC authority to enforce the Act "through appropriate remedies, including reinstatement or hiring of employees with or without back pay." Section 717(c) authorizes an employee or job applicant to "file a civil action." A Compensatory Damages Amendment (CDA) enacted in 1991 authorized award of compensatory damages "[i]n an action brought under section . . . 717." "Read literally," the language of the statutes is consistent with a grant of authority to the EEOC to award compensatory damages. After enactment of the CDA in 1991, award of compensatory damages is a remedy that is "appropriate." The meaning of "appropriate" was not frozen as of 1972; rather, the meaning of the word permits its scope to expand or contract to reflect later changes in the law. Recognizing this authority in the EEOC is consistent with the purposes of the 1972 amendments to encourage administrative resolution of discrimination complaints. While the CDA made no mention of the EEOC, and use of the word "action" often refers to judicial cases and not to administrative proceedings, Congress could have referenced section 717(c) had it desired to limit the remedy to court actions. Conferral of a right to a jury trial (unavailable in an EEOC proceeding) if a complaining party seeks compensatory damages does not preclude a holding that the EEOC may award compensatory damages; the provision merely makes a jury trial available if a complaining party brings a court action under § 717(c). Finally, the provision meets the standard for waiver of sovereign immunity. "[T]he statutory language, taken together with statutory purposes, history, and the absence of any convincing reason for denying the EEOC the relevant power, produce evidence of a waiver that satisfies the [appropriate] standard."

5-4. Opinion of Court by Breyer, joined by Stevens, O'Connor, Souter, and Ginsburg. Dissenting opinion by Kennedy, joined by Rehnquist, Scalia, and Thomas.

Wilson v. Layne 67 USLW 4322 (5-24-99)

Fourth Amendment, media "ride-along", qualified immunity: Police officers violate the Fourth Amendment by bringing members of the media or other third parties into a home during the execution of a warrant if the presence of the third parties in the home was not in aid of the execution of the warrant. Respect for privacy of the home lies at the "core" of the Fourth Amendment; absent exigent circumstances, a warrant is required before officers may enter a home to search or to make an arrest. Moreover, police actions in execution of a warrant must be related to the objectives of the authorized intrusion. In this case the reporters were not present to identify stolen property or otherwise to assist in execution of the warrant, and consequently their presence in the home was not related to the objectives of the authorized intrusion. Generalized interests in furthering law enforcement objectives and publicizing crime-fighting efforts do not suffice to

override the right of residential privacy. However, because this right to be free from media intrusion during a search of the home was not "clearly established" at the time of the search in this case, the law enforcement officers (deputy federal marshals and local sheriff's deputies) are entitled to "qualified immunity." A reasonable officer could have believed that it was legal to bring media observers along during the execution of an arrest warrant in the home. At that time (1992) media "ride-alongs" were common, and there were no court decisions holding the practice unlawful. Also, the policy of the U.S. Marshal's Service explicitly contemplated the practice.

9-0 (Fourth Amendment); **8-1** (qualified immunity). Opinion of Court by Rehnquist, unanimous in part, and joined in separate part by O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, and Breyer. Opinion by Stevens concurring in part and dissenting in part.

Wright v. Universal Maritime Service Corp. 119 S. Ct. 391, 67 USLW 4009 (11-16-98)

Labor, arbitration clause, ADA: A generally worded arbitration clause in a collective bargaining agreement, providing only for arbitration of "matters under dispute," does not require a covered employee to use the arbitration procedure for an alleged violation of the Americans with Disabilities Act. The presumption of arbitrability derived from section 301 of the Labor Management Relations Act is inapplicable; that presumption applies only to disputes about the applicability or interpretation of a collective bargaining agreement, and the underlying dispute here involves interpretation of the ADA. A union's waiver of the rights of represented employees to a judicial forum for claims of employment discrimination must be "clear and unmistakable." The collective bargaining agreement in this case does not meet that standard. The arbitration clause is "very general," and the agreement contains no antidiscrimination language, statutory or otherwise. General language to the effect that no provision shall be violative of federal or state law is inadequate to constitute a clear waiver of ADA rights, especially when contrasted with specific language stating that OSHA requirements "shall be binding on both Parties."

9-0. Opinion for unanimous Court by Scalia.

Wyoming v. Houghton 119 S. Ct. 1297, 67 USLW 4225 (4-5-99)

Fourth Amendment, search of auto passenger's belongings: Police officers with probable cause to search a car may search a passenger's personal belongings inside the car if those belongings are capable of concealing the object of the search, even if it is the driver and not the passenger who is under suspicion. The initial step in evaluating the constitutionality of a search is to determine whether the search would have been regarded as unlawful under the common law at the time the Fourth Amendment was adopted. There is a long history that allows officers with probable cause but without a warrant to search for contraband in a vessel, and the same principle has been applied to allow search of containers within motor vehicles. Cases allowing such searches have expressed no qualification based on ownership of the containers. A second inquiry is the reasonableness of the search, and this is determined by balancing the intrusion on individual privacy against the governmental interests at stake. This balancing "must be conducted with an eye to the generality of cases." Passengers "possess a reduced expectation of privacy with regard to the property that they transport in cars," and a search of such property is far less

intrusive than a search of the person. On the other hand, the governmental interest in effective law enforcement is "substantial," and the "ready mobility" of cars often makes obtaining a warrant impractical. Also impractical is requiring police officers to determine whether property belongs to the driver or to a passenger, whether the driver and passenger are confederates in crime, and whether the driver may have hidden contraband among a passenger's possessions without the passenger's knowledge.

6-3. Opinion of Court by Scalia, joined by Rehnquist, O'Connor, Kennedy, Thomas, and Breyer. Concurring opinion by Breyer. Dissenting opinion by Stevens, joined by Souter and Ginsburg.

Your Home Visiting Nurse Servs. v. Shalala 119 S. Ct. 930, 67 USLW 4127 (2-23-99)

Medicare Act; Administrative law, judicial review of agency action: A provider of Medicare services has no right to judicial review of a fiscal intermediary's refusal to reopen an annual determination of the amount of reimbursement to which the provider is entitled. The Medicare Act gives a provider the right to an administrative appeal within 180 days of the intermediary's original determination, and the Provider Reimbursement Review Board's decision is subject to review in federal district court. The provider may also, within three years, request the intermediary to reopen the reimbursement determination, and any new decision is subject to review. The regulation says nothing, however, about a refusal to reopen. The Medicare Act authorizes a hearing before the Board if the provider is dissatisfied with an intermediary's "final determination . . . as to the amount" of reimbursement. The Secretary's interpretation of this language to mean that a refusal to reopen is not a "final determination . . . as to the amount," but rather a refusal to make such a determination, is a reasonable interpretation entitled to deference under *Chevron v. NRDC* (1984). These review provisions, authorizing direct appeal and a request for reopening, are not inconsistent with a separate statutory directive that regulations provide for making "suitable" retroactive corrective adjustments.

9-0. Opinion for unanimous Court by Scalia.

Index